TESTIMONY

The New York City Board of Correction

Public Hearing on Proposed Rule to

Amend the Minimum Standards

Creating Enhanced Supervision Housing

and

Limiting the Use of Punitive Segregation

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New York, New York

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Introduction

Thank you for the opportunity to offer this testimony today. We make these statements in opposition to the Proposed Enhanced Supervision Housing (ESH) Rule. We submit this testimony on behalf of The Legal Aid Society, and thank Chair Gordon J. Campbell and the Members of the Board of Correction for this opportunity to be heard.

We think the proposed amendments should be voted down for the reasons stated below. But if the Board is not prepared to do that, then we think the Board must look carefully at the proposals, item by item, and assess both the necessity and the completeness of each. In particular, we think that the approach of the proposals simply to exempt Enhanced Security Housing from various of the Minimum Standards is dead wrong, and the Board should not allow blanket exceptions to those Standards. For example, the proposed amendment to Standard 1-06, Recreation, threatens to extend to ESH the recreation program of the Central Punitive Segregation Program, which the Board's own report has demonstrated is a complete failure, with a usage rate less than 10%.

The Board must incorporate into any Standards amendments the necessary safeguards for incarcerated persons. DOC has belatedly put forward several such safeguards, such as screening out from ESH persons with serious mental illness and retaining DOHMH's authority to place persons in appropriate mental health housing. These protections and others that serve to protect incarcerated individuals must be in the Standards and not just in DOC policy. DOC policy is subject to change and not subject to enforcement. Further, we encourage the Board to amend the Minimum Standards by implementing necessary reforms to the use of punitive segregation and the disciplinary process in the City Jails so that they do not continue to cause harm.

The Prisoners' Rights Project

The Prisoners' Rights Project ("PRP") of The Legal Aid Society has addressed problems in the New York City jails for more than 40 years. Through advocacy with the Department of Correction ("DOC") and the Department of Health and Mental Hygiene ("DOHMH"), individual and class action lawsuits, PRP works to improve conditions of confinement in New York City jails including reform to the use of punitive segregation, increased access to medical and mental health care and to reform the systems for oversight of the use of force and reduce violence in the jails. Each week PRP receives and investigates numerous requests for assistance from individuals incarcerated in the City jails. Years of experience, including daily contact with inmates and their families, gives The Legal Aid Society a firsthand view of problems in the New York City jails. It is on this basis that we offer these comments on the proposed amendments to the Board Minimum Standards.

Role of the New York City Board of Correction

It is the role of the Board of Correction to set Minimum Standards for conditions in the City jails. It is not the Board's role to remove all standards, to relinquish its independent authority over jail conditions or to provide carte blanche for the Department of Correction, the Mayor and/or the Correction Officer's Benevolent Association to do as it will.[1] Yet the ESH Rule Proposal removes or significantly reduces many significant protections in the Board

[1] Michael Schwirtz and Michael Winerip, *At Rikers, a Roadblock to Reform*, The New York Times, December 14, 2014, available at: http://www.nytimes.com/2014/12/15/nyregion/at-rikers-a-roadblock-to-reform.html?_r=0.

standards from an undetermined number of people without providing any meaningful safeguards. The ESH Proposal contains no exceptions for vulnerable individuals, no requirement of treatment, no requirement for evidence-based "best practices," no data collection requirement, and no reporting or accountability requirement. The ESH Proposal contains no *adoption* of *standards* in any form. It is a proposal to end standards.

The ESH Rule Proposal simply does not represent evolving standards of decency in jail management. Evolving principles of restorative justice and evidence-based best practices include positive reinforcement, and the implementation of individualized plans that permit individuals to gain privileges and incentives for good behavior. The proposed ESH is a punitive, non-therapeutic, highly secure housing area. It does not incorporate standards that provide for humane treatment, accountability, or due process. An appropriate Board standard would, *at a minimum*, incorporate limitations on the proposed criteria for placement in the ESH, provide due process protections, exclude vulnerable populations, require data collection and dissemination of information to the Board (and to the public), require training and competency levels for staff, and incorporate treatment, programming and individualized plans for inmates that would permit them to earn incentives and move to general population. Aspects of DOC policy that may seem to mitigate problems with the ESH Rule Proposal are not a sufficient substitution for Board standards that are able to require necessary protections.

The Board must not eviscerate its standards or its role as an independent agency by adopting the Proposed ESH Rule.

Lack of Factual Basis for the ESH Rule Proposal

The ESH Rule Proposal was originally presented as a request for a variance to the Jail Minimum Standards. The variance request was announced little more than two weeks prior to the proposed November 18, 2014 vote. The Legal Aid Society opposed the variance request in part because of the failure to consider the proposal as an amendment to the Minimum Standards. We said that the Board should conduct the same kind of careful examination and consultation with stakeholders that characterized the then on-going rulemaking process concerning amendments to punitive segregation and discipline, which commenced in September 2013. We also strongly objected to the failure to provide the data relied upon—the alleged factual basis—for the proposed ESH.

In part, our request was granted. The ESH proposal was not considered as a variance. Instead, on November 19, the current Rule Proposal was promulgated for consideration by the Board with public hearings set for December 19, 2014.

In substance, however, the Board has not engaged in the careful examination and consultation with stakeholders that is warranted when considering serious limitations and restrictions on the liberty and dignity of incarcerated persons. The thirty days allowed before the hearing is the minimum time permitted by the City Administrative Procedures Act (CAPA). Moreover, the Board included *only* the ESH proposal, and failed to include limitations on the use of punitive segregation and improvements to the disciplinary process, although those topics were subject of Board consideration and deliberation for more than a year.

Most disconcerting for this hearing is the failure of the Board or the City to provide the data alleged to support the creation of new highly restrictive housing units in our jails. After the Board voted on November 18 to proceed with rulemaking on the ESH Rule Proposal, Legal Aid

requested the underlying data in an email to Amanda Masters, Acting Executive Director of the Board, and followed up with a detailed FOIL request sent to the Board and to the City.[2] Given that the ESH Rule Proposal was already issued, and the hearing was set for 30 days from the issue, the response should have been immediate. The FOIL request specifically identified the data and materials requested as the information asserted in the DOC letters to the Board, letter to SCOC, and in the "statement of basis and purpose" in the Rule Proposal. We requested "all of the information [ ] used as the basis for the Rule Proposal from DOC and BOC, please provide the material immediately." All of the information requested should have been turned over, yet none of the information was provided. We did receive, from the Board, copies of the two PowerPoints presented by DOC at the September and November Board meetings.[3] The City did nothing other than inform us that they received the FOIL request. The delay raises serious questions whether the data does not exist or does not justify the creation of ESH.

Based on the number and validity of recent reports and The Legal Aid Society's contact with thousands of individuals incarcerated in the City jails, we do not believe that the City has based its request for ESH on accurate information, or on *any* valid root cause analysis of violence in our City jails.[4]

DOC has a long-standing, fundamentally punitive attitude towards incarcerated individuals and a deep reluctance to address their conduct with anything but punishment. This attitude is well known to the Board and to anyone familiar with the agency—as is its reluctance to act to require reduction in the use of force by staff. This ongoing predilection to heap on punitive measures and restrict privileges must be recognized as failed policy lacking evidentiary basis.[5] The Board must recognize modern evidence-based best practices in jail management that increase safety in the jails, *and* benefit incarcerated individuals and the community to which they will be released. Although implementing programs in jail is not simple, there is research that supports practices and policies that can reduce recidivism by designing and delivering services in ways that engage incarcerated individuals, and help them to learn and change. The Board Standards should require that DOC develop programs using risk and needs assessments to prioritize resources for those who are at higher risk of continued contact with the criminal justice system. The Standards should require that DOC establish desired outcomes and ensure means for

[2] The FOIL request is attached as Appendix 1.

[3] The PowerPoint presentations purport to provide statistical data but the underlying information relied upon is lacking. Many of the slides are misleading or self-serving without providing the basis for the claims that are touted. For example, a slide entitled "Overview of Major Violence Indicators" compares just two years of numbers (FY 2010 to FY 2014) without including any other years. Whether those years were picked to create the highest percent increase cannot be discerned because additional years are not included. Moreover, percent increase, as a measure, is itself misleading when looking at small numbers. One incident in one year and five incidents in another is a whopping 500% increase but five remains a low number for a population over 10,000. That said, we do not disagree that violence in the jails is too high and requires significant reform within the jails. See, discussion herein at pp. 4-7.

[4] See discussion *infra* at pp. 4-7. See also Legal Aid Society testimony to the New York City Council from October 8, 2014 (Oversight: Examining the Treatment of Adolescents in New York City Jails and Reviewing the United States Department of Justice's Report on Violence on Rikers Island) attached as Appendix 2, June 12, 2014 (Oversight: Examination of Violence and the Provision of Mental Health and Medical Services in New York City Jails) attached as Appendix 3, and April 4, 2013 (Examining Violence in New York City Jails) attached as Appendix 4.

[5] See discussion *infra* at pp. 4-7 and attached Testimony of The Legal Aid Society Appendices 2, 3, and 4.

measuring progress through quality assurance assessments and evaluations that are publicly reported.

The ESH Rule Proposal is inapposite to modern evidence-based jail management principles. Instead, the ESH Rule Proposal seeks permission to identify a group of allegedly high risk individuals and *deprive them* of the pro-social, capacity building, therapeutic and balanced integrated approach to sanctions and interventions, which could be effective in improving behavior. The punitive and non-therapeutic nature of the ESH will increase resentment, defiance, hostility and violence. The failure to include protections in the Board Standards, and the relinquishment of the right by the Board to set standards on the ESH, will add to these poor outcomes and make the Board part of "the mutually self-defeating vicious cycle that develops between inmates and correction officers, in which the more violently an inmate behaves, the more seriously he is punished, and the more seriously he is punished, the more violent he becomes."[6]

CAPA does not require that the Board adopt the ESH Rule Proposal in its current form. Section 1043d states that the "final rule may include revisions to the proposed rule, and such adoption of revisions based on the consideration of relevant agency or public comments shall not require further notice and comment pursuant to this section." We encourage the Board to reject or dramatically change the current ESH Rule Proposal. In addition we encourage the Board to reform the Minimum Standards by implementing necessary reforms to the use of punitive segregation and the disciplinary process in the City Jails. To those ends, the Board should not proceed to a final decision based on this hearing, but should give notice of its tentative conclusions and allow time for further public comment (and preferably for consultation with stakeholders and experts as well) on those proposals before reaching its final conclusions.

Violence in the City Jails

The statement of basis and purpose for the Proposed ESH Rule asserts that "the purpose of the proposed revisions is to address the dramatic increase in serious inmate violence in New York City Jails." It asserts that the violence "has many root causes" and that the DOC has specifically identified "gang-related activity and the ready availability of small concealable blades." In Paragraph 1 of the FOIL request to the Board and the City, we requested: "a. [e]vidence of an increase in gang-related activity, b. [e]vidence of increased prevalence of scalpels/small concealable blades," including "the asserted evidence and/or information relied upon, the time frame for the information and any other details including but not limited to facility location, type of housing area, and number of individuals involved." *No* information was provided in response. Moreover, these assertions by DOC completely ignore the other side of the violence problem: the history of the brutal and unchecked use of force by DOC staff against individuals in their care, reported in the August 4, 2014, Department of Justice Civil Right of Institutionalized Persons Act Investigation (DOJ 8/4/2014 Report), in reports completed by Board experts, as well as in decades of litigation by The Legal Aid Society.[7]

The DOJ demanded that the DOC address a culture of violence in its facilities housing adolescents aged 16 to 18 and the excessive use of isolated confinement—while cautioning that

[6] Gilligan, Lee, *Report to the New York Board of Correction (Sept. 2013)* at p. 6. Report is available at: http://www.nycjac.org/storage/Gilligan%20Lee%20Report%20%20Final.pdf.

[7] See attached Testimony of The Legal Aid Society Appendices 2, 3, and 4.

its "focus on the adolescent population should not be interpreted as an exoneration of DOC practices in the jails housing adult inmates. Indeed, … our investigation suggests the systemic deficiencies identified in this report may exist in equal measure at the other jails on Rikers." (DOJ 8/4/2014 Report, p. 3.) The DOJ further noted that:

> In 2004, Steve Martin, the consultant retained in [*Ingles* (Legal Aid's first system-wide lawsuit about brutality)] issued a scathing report decrying the frequency with which DOC staff punched inmates in the face. Mr. Martin wrote that 'there is utterly no question that the Department, by tolerating the routine use of blunt force headstrikes by staff, experiences a significantly greater number of injuries to inmates than the other metropolitan jail systems with which I am familiar.' It is troubling that, ten years later, this practice continues.

(DOJ 8/4/2014 Report, p. 13.) The evidence The Legal Aid Society has gathered in our *current* pending class action lawsuit alleging system-wide, unconstitutional use of force by staff against inmates is entirely consistent with the DOJ Report findings. *Nunez v. City of New York,* S.D.N.Y., 11 Civ. 5845 (LTS).[8]

Excessive force by correction staff is tolerated, and indeed encouraged, in the City jails. DOC staff frequently inflict serious injury on prisoners, and force is often used in response to perceived disrespect or other minor misconduct. This misuse of force includes horrifying examples of force used by uniform staff when interacting with individuals who are exhibiting serious mental health needs, such as the death of Mr. Horsone Moore.

Mr. Moore suffered from serious mental illness. He was arrested by his parole officer and taken to the Bronx Court pens and placed in DOC custody. Mr. Moore tried to kill himself at the

[8] Through a series of consent decrees and settlements, the Department knows of steps that work to curb violence in the jails and yet has refused to implement or sustain them system-wide. Staff screening measures that used staff discipline records reduced complaints of excessive force, showing that active supervision of staff, and careful screening and assignments to marginalize those officers whose conduct is more suspect than others, yields results. *Reynolds v. Sielaff,* 81 Civ. 101 (PNL), Order and Consent Judgment Approving Class Settlement at ¶¶ 43-48 (S.D.N.Y., Oct. 1, 1990). In *Fisher v. Koehler,* 692 F. Supp. 1519, 1538 (S.D.N.Y. 1988), *aff'd*, 902 F.2d 2 (2d Cir. 1990), the court found that DOC's "failure to monitor, investigate and discipline misuse of force has allowed—*indeed even made inevitable*—an unacceptably high risk of misuse of force by staff on inmates." *Id.* at 1558 (emphasis supplied). After the court ordered significant changes in the investigation of use of force and discipline of staff members, the use of force in that jail declined precipitously. In *Sheppard v. Phoenix,* the City and The Legal Aid Society negotiated a comprehensive settlement addressing brutality in the CPSU. Two expert joint consultants in security, including a former head of the Federal Bureau of Prisons, provided technical assistance in transforming the "culture of violence" in the CPSU, with remarkable success. Even though these remedies proved that DOC *could* reduce the injuries suffered by inmates if it chose to do so, those reforms were not rolled out system-wide. Instead, the excessive force against inmates continued unabated in the other City jails. Legal Aid then filed its first system-wide brutality case, *Ingles v. Toro*, to address excessive force in all of the jails. *Ingles* settled in 2006. Central to the settlement were requirements for significantly more camera coverage in the jails, and the development and promulgation of new procedures to govern the Investigation Division, which had a history of merely whitewashing investigations of use of force incidents, rather than functioning as a genuinely investigative body. That settlement agreement terminated on November 1, 2009. While the *Ingles* settlement was in effect there were some significant improvements in the Department's management of use of force. However, the Department did not maintain its efforts once the spotlight was off, and the number of complaints of serious, injurious, and unjustified use of force again began to increase. See also Testimony of The Legal Aid Society Appendices 3 and 4.

Bronx Court pens on October 11, 2013. This suicide attempt was thwarted by DOC staff through the use of force. Mr. Moore was sprayed with chemical agents and DOC staff removed the string that he was tying to the bars of the cell. On October 13, during medical intake, he was placed on suicide watch. This order, which stated that Mr. Moore was actively suicidal and required a suicide watch, was never implemented. Mr. Moore was taken back to the clinic for a psychiatric evaluation. He became disruptive, was cuffed and forcibly removed from the mental health clinic by a DOC probe team and taken to a decontamination room. While in the decontamination room, Mr. Moore attempted suicide again. The videotape of the decontamination room reveals that Mr. Moore was rear cuffed when he was left in the room. When he tried to leave the room, a DOC Captain grabbed his arms and flung him into the room, causing him to fall. This use of force was not reported. Mr. Moore successfully hanged himself from the shower frame on October 14 after spending 15 hours isolated alone in the decontamination room with no one watching.

Such violent responses to the actions of individuals with mental illness are all too frequent. In September 2013, the report to this Board by their mental health experts, Drs. James Gilligan and Bandy Lee, chillingly detailed the violent culture in the NYC jails: "[a]ll too many of the officers that we observed appeared to us to make it clear that they were quite willing to accept an invitation to a fight, or to regard it as a normal response within the cultural norms of the jail."[9] During their investigation they witnessed an adolescent in the RHU [Restricted Housing Unit] becoming increasingly agitated in his cell – first banging his arms and legs on his cell door then his whole body, ripping up a sheet, wrapping his arms, legs and then neck as if preparing to hang himself. No NYC DOC staff responded until Drs. Gilligan and Lee intervened. Shockingly (since the RHU is supposed to be a therapeutic alternative to solitary confinement for individuals with mental illness), the officer staff's first response was to pull out a can of chemical agent (mace). The doctors had to intervene and insist that this was not necessary and that mental health staff should be notified.[10] The violent response of staff to the individuals in their care, followed by severe punishment with solitary confinement, was identified by Drs. Gilligan and Lee as "the mutually self-defeating vicious cycle" mentioned earlier in which more violent behavior leads to more serious punishment, which in turn leads to increasingly violent behavior.[11] This is the cycle that fuels continued violent conduct. In the face of overwhelming lack of appropriate care and treatment, the doctors' report calls for significant changes in policy, culture and training of staff.

These repeated warnings about the culture of violence by staff *must* be heeded by the Board. Violence in the City jails is at an unacceptable level. The failure to address violence by staff in the proposed changes in the Board Standards is equally unacceptable. The history of an unchecked culture of staff violence in the DOC is too long to be ignored. Significantly, from fiscal year 2010 to fiscal year 2013, uses of force reportedly increased by 59 percent (1,871 to 2,977).[12].

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[9] Gilligan, Lee, *Report to the New York Board of Correction (Sept. 2013).*at p. 16. Report is available at: http://www.nycjac.org/storage/Gilligan%20Lee%20Report%20%20Final.pdf.

[10] *Id.* at p. 11.

[11] *Id*. at p. 6.

[12] Statement of Joseph Ponte, Commissioner, NYC Department of Correction to New York City Council Committee on Fire and Criminal Justice Services, June 2, 2014, p. 1. The purported basis for the ESH is the increase in inmate

Evidence-Based Best Practices

Current evidence-based best practices in jail and prison management focus on the risk-need-responsivity model of rehabilitation – the identification of criminogenic risks and needs that must be targeted to improve behaviors and reduce recidivism.[13] Research has shown that concentrating programming on the individuals who may be most difficult to manage (and most likely to reoffend) have the greatest impact.[14] The ESH Rule Proposal suggests the precise opposite: implementation of control and a punitive response to individuals who require more targeted services. Increasing authority and control is counter-productive; such "[p]unitive methods of controlling behavior all too often reinforce modes of thinking that were responsible for the initial anti-social behavior."[15]

If jail programs are to be successful, they require qualified and involved leadership who understand the program objectives, use of standardized and objective assessments of risk and need factors to make appropriate plans for individuals, program delivery that is consistent with the ability and learning style of the individual being treated, well-trained staff who deliver programming as designed, and quality assurance. Effective interventions target criminogenic risk, address cognitive/behavioral nature of risks and incorporate social-learning practice techniques. Interventions incorporate a balanced integrated approach to sanctions and interventions and are therapeutic in nature. Designing and implementing such a program in New York City jails will require cooperation between DOC, the Department of Health and Mental Health (DOHMH) and community stakeholders. Guidance and support is available from the Council of State Governments, the Vera Institute and others.

Based on current understanding of best-practices and based on the history of violence and culture of violence in DOC, the ESH Rule Proposal is seriously flawed. The ESH Rule Proposal simply does not represent evolving standards of decency in jail management. Evolving principles of restorative justice and evidence-based best practices include positive reinforcement, and the implementation of individualized plans that permit individuals to gain privileges and incentives for good behavior. The proposed ESH is a punitive, non-therapeutic, highly secure housing area.

The question for the Board should be what the BOC Standards must include so that the ESH (if permitted), and other jail restrictive housing settings, are humane and incorporate evolving standards of decency in jail management. We believe that the following are essential elements of Board Standards for placement into ESH and other restrictive and punitive housing settings:

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violence over the same period, slashing and stabbing incidents increased by 100% (34 to 68) and assaults on staff increased by 30% (500 to 646).

[13] See, e.g., Justice Center, Council of State Governments, *Reducing Recidivism,* (2014); Justice Center, Council of State Governments, *The National Summit on Justice Reinvestment and Public Safety*, (2012); Polaschek, *An Appraisal of the Risk-Need-Responsivity (RNR) Model of Offender Rehabilitation and Its Application in Correctional Treatment,* Legal and Criminological Psychology (2012), 17, 1-17; Gornik, *Moving from Correctional Program to Correctional Strategy: Using Proven Practices to Change Criminal Behavior,* ICCA Journal on Community Corrections, 24 (2002).

[14] See, e.g., *Reducing Recidivism, Id.* at p. 4.

[15] Gornik, cited in footnote 13 at p. 6.

- Limitations on criteria for placement into restrictive housing;
- Limitations on time in restrictive housing;
- Strong due process protections;
- Exclusion of vulnerable populations;
- Data collection and publication of data;
- Training and competency levels for staff;
- Staffing ratios that are in accordance with identified standards for staffing levels;
- Treatment, programming and individualized plans that include positive responses, earned incentives, and enumerated benchmarks for movement to less restrictive housing;
- Minimum hours for clinical staffing on the unit and appropriate space for confidential clinical meetings with individuals;

The Board should incorporate recommendations made in the DOJ 8/4/2014 Report. The DOJ recommendations included competency based training for DOC staff and changes to the inmate discipline process. The Board Standards should incorporate DOC training in alternatives to violence and standards that will improve the fairness, reasonableness and due process protections in the inmate discipline process as recommended by the DOJ.

These safeguards should be included in the Board Standards, and not left to the discretion of DOC, given DOC's long-standing punitive approach to jail management.

Rule Proposal for Enhanced Supervision Housing

The proposed ESH would indefinitely house individuals who are not serving a disciplinary sanction under highly restrictive conditions including:

- Reduction in Out of Cell Time from 14 hours to 7 - an amendment to Section 1-05 (2)(b);
- Restrictions on Recreation to One Hour per Day - an amendment to Section 1-06 (g);
- No Congregate Religious Services Outside the ESH – an amendment to Section 1-07 (h);
- No Physical Access to the Law Library - an amendment to Section 1-08 (6)(f);
- No Contact Visits and Approved List of Visitors – an amendment to Section 1-09-(e)(1) and (f)
- Open and Read All Incoming and Outgoing Non-Privileged Mail- an amendment to Section 1-11 (1)(6)(c)(ii)& (iii) and (2)(1)(a)(ii)&(iii);
- Packages from Approved Vendors Only – incarcerated individuals and their families must purchase new items and pay for shipping – an amendment to Section 1-12 (a);
- Publications from Approved Sources Only – incarcerated individuals and their families must purchase new approved publications and pay for shipping – an amendment to Section 1-13.

A new Section 1-16 called Enhanced Supervision Housing provides for the sole definition of criteria for assignment to ESH.

Based on the Draft ESH Directive received on December 17, 2014, it is apparent that the ESH will utilize additional punitive measures such as strip searches and use of mechanical restraints each time an individual is taken out of the ESH. (Even if such measures are defended as security measures, they are experienced as punitive and humiliating by those subjected to them, and their use multiplies the occasions for friction between staff and incarcerated individuals. Such extreme measures should not be standard practice indefinitely without individualized justification.) ESH is currently planned for 250 beds, an alarming and substantial number of individuals to place into indefinite high security housing where Board standards will not apply. Moreover, when requesting ESH as a variance, DOC relied on the 2015 Budget to state that ESH will be limited to 250 beds. Indeed, it claimed that this number is a "procedural protection" for incarcerated individuals because it makes ESH a "scarce resource." (Variance request, 10/22/14 at p. 4.) There is nothing to maintain any limit on the number of ESH beds. DOC can reallocate its resources or procure more money to impose ESH restrictions on as many persons as it wishes, as it did with punitive segregation.

The current Standards include a limitation on denial of minimum standards: "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." Section 1-02 (e)(2)(v). This admonition to provide the minimum requirement of the Standards appears to be rendered meaningless by the ESH Rule Proposal, since it simply eliminates most of the Minimum Standards outright for individuals housed in the ESH.

Criteria for Placement in ESH Are Overbroad

The ESH Rule Proposal contains extremely broad criteria for placement into ESH. Section 1-16. While some of the criteria may make sense for a level of high security classification (slashing, stabbing, causing serious injury), other criteria are vague, overbroad, and capable of abuse. Notably, only one of the criteria must be met to land someone in ESH—permanently, it appears, since there is no provision for release from ESH. Moreover, the basis for finding that a person meets ESH criteria is vague and extremely broad. Included in the criteria are broad references that do not include any definitions of their terms: "identified as a leader of, organizer of or participant in a gang or substantially similar entity," "instigated or participated in a riot," and "otherwise presents a significant threat to the safety and security of the facility if housed in general population housing." The Standard does not supply clarity: there are no definitions, training for staff or accountability measures to assure that the criteria are applied in an appropriately limited number of cases rather than at the whim of DOC staff.[16] Moreover, there is no temporal limitation on the use of past behavior to justify placement in ESH (the criteria could be established by conduct engaged in during a long-past prior DOC incarceration).

The concerns raised by permitting overbroad and ill-defined criteria to be the basis of a Board Standard are legitimate. As described herein, the violence in the City jail system is frequently instigated or invited by DOC staff. Multiple reports, including the recent DOJ

[16] For example: what is a riot? If half the residents of a cellblock refuse to lock in because a meal or sick call has not been provided and they want to see a supervisor, is that a riot, and does everyone who didn't lock in go to ESH?

8/4/2014 Report, cite a culture of brutality by staff and violence encouraged by staff. The DOJ uncovered a pervasive pattern of false and inaccurate reporting about uses of force and questioned the overall reliability of data being used to justify the expansion of segregation (DOJ 8/4/2014 Report, p. 25). Reliance on data collected by DOC staff including past disciplinary records is troubling considering the identified prevalence of false and inaccurate reporting.[17] Moreover, the DOJ identified the dangerous over-utilization of punitive segregation, stating that "the DOC relies far too heavily on punitive segregation as a disciplinary measure, placing adolescent inmates – many of whom are mentally ill – in what amounts to solitary confinement at an alarming rate and for excessive periods of time." (DOJ 8/4/2014 Report , p. 3).[18] Thus the inappropriate use of segregation on a person who acted out because of mental illness begets the inappropriate use of ESH based on the past disciplinary record.

The Board must acknowledge that this pattern and practice of violence, false reporting, lack of integrity and over-utilization of restrictive housing must be taken into consideration before relying on DOC data and/or discretion concerning alleged past violence, gang affiliations and other conduct to create yet another restrictive housing setting. Regrettably, the ESH Rule Proposal wholly fails to address implementation of the DOJ recommendations that are clearly needed before the integrity of DOC staff and DOC data to implement such criteria may be relied upon.

The Proposed Restrictions in ESH are Extreme and Indiscriminate

The draft ESH Directive received on December 17, 2014 nominally provides for review of ESH placement. It specifies a review of ESH status every 60 days and an appeal process, and indicates that "the suggested steps necessary for an inmate's release from ESH [will be explained]; [and] the Unit Captain will also provide a written record to the inmate of the suggested steps necessary for release." (ESH Directive 12/17/14 Section III. F.) This vague assertion is not the necessary individualized plan, treatment and services necessary to succeed in accomplishing the suggested steps to earn release from ESH. The Board standards must ensure that individuals placed in ESH are afforded a process to earn a less restrictive housing placement. Otherwise the periodic review is meaningless. The Board must adopt a relevant time frame for prior conduct or other information/criteria for placement into ESH, requirements for productive activity and set incentives for good behavior in the ESH. Although DOC claims that this is not punitive segregation, the inability to change the maximum level of restrictions imposed simulates the punishing aspects of punitive segregation by imposing extreme restrictions without the possibility of abatement. This is contrary to modern recommended principles of jail management that recognize that positive incentives for good behavior, including the periodic review of an individual's classification, help jails reduce negative, destructive and dangerous behaviors. The Commissioner's claim in the November 4 "supplemental information" letter to the Board (p. 4)

[17] While it did not focus on the inmate disciplinary system, the DOJ noted that "based on the volume of infractions, the pattern and practice of false use of force reporting, and inmate reports of staff pressuring them not to report incidents, we believe the Department should take steps to ensure the integrity of the disciplinary process." (DOJ 8/4/2014 Report at 49 n. 45.) Yet, these are the information sources that will be relied on to place persons in the restrictive ESH units apparently for the entirety of their incarceration.

[18] The DOJ cautioned that its "focus on the adolescent population should not be interpreted as an exoneration of DOC practices in the jails housing adult inmates. Indeed, while we did not specifically investigate the use of force against the adult inmate population, our investigation suggests that the systemic deficiencies identified in this report may exist in equal measure at the other jails on Rikers." (DOJ 8/4/2014 Report, p. 3.).

that the design of the ESH reflects "best practices" is clearly incorrect. Indeed, unless the periodic review of the continuing need for confinement is meaningful and substantive, it appears to be unconstitutional.[19]

The proposed ESH restrictions are extreme, cumulative, and inflexible: reduction in out of cell time from 14 hours per day to 7 hours per day, inability to use the jail law library (replacing it with the in cell law library service that has proven inadequate in the jails' punitive segregation housing areas), inability to attend congregate religious services outside the ESH, no contact visits, packages limited to approved vendors and a "permissible items list" (this restricts receipt of all packages visitors or mail from individuals unless it is clothing for on-trial court appearances), strip searches and mechanical restraints every time the person leaves the housing unit, and opening and reading all incoming and outgoing non-privileged mail. These multiple restrictions, imposed without limit, are punitive, harsh and ill considered, and we believe without basis in fact.

- Restrictions on Visiting

Of these restrictions, deprivation of contact visits may be the most serious. The American Bar Association has written:[20]

> Maintaining personal connections through contact visits improves the lives of incarcerated individuals, their families, and the community in three important ways. First, people who receive visits from and maintain relationships with friends and family while incarcerated have improved behavior during their time in custody,[21] contributing both to a safe and more rehabilitative atmosphere in the facility. Second, individuals who maintain relationships have more successful transitions back to society than those who do not.[22] For example, the Minnesota Department of Corrections found that prisoners who were visited were 13 percent less likely to be reconvicted of a felony and 25 percent less likely

[19] See discussion *infra* at pp.16-18.

[20] Letter, American Bar Ass'n Governmental Affairs Office to Chairperson, Committee on the Judiciary and Public Safety, Council of the District of Columbia (June 19, 2013), pp. 2-3, available at: http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013june19_dcvisitation_l.authcheckdam.pdf . This letter was written in support of allowing contact visits in the District of Columbia jails in addition to video contact.

[21] *See* ABA Standards for Criminal Justice: Treatment of Prisoners, Standard 23-8.5 cmt. at 260. *See also* Virginia Hutchinson et al, U.S. Dep't of Justice, Nat'l Inst. of Corr., *Inmate Behavior Management: The Keys to a Safe and Secure Jail,* 8 (August 2009) (noting that maintaining contact with family and friends (including visitation) is integral to behavior management in the jail setting and that a failure to meet this important social need can lead to depression and inappropriate behavior in the under-custody population); Karen Casey-Acevedo & Tim Bakken, *The Effects of Visitation on Women in Prison*, 25 Int'l J. Comp. & App. Crim. Just. 48 (2001); Richard Tewksbury & Matthew DeMichele, *Going to Prison: A Prison Visitation Program*, 85 Prison J. 292 (2005); John D. Wooldredge, *Inmate Experiences and Psychological Well-Being*, 26 Crim. J. & Behav. 235 (1999).

[22] *See* Jeremy Travis et al, Urban Institute, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry* 39 (June 2001) ("Studies comparing the outcomes of prisoners who maintained family connections during prison through letters and personal visits with those who did not suggest that maintaining family ties reduces recidivism rates.") (internal citation omitted).

> to return to prison on parole violation.[23] Third, families and children that are able to visit their relatives in jail benefit greatly from maintaining family ties during a time that can often cause family trauma.[24]

The ABA's conclusions are consistent with those of other research finding that people who maintain family ties during incarceration and benefit from the support of family after release have better reentry outcomes than those who are unable to do so,[25] and that maintaining family ties with an incarcerated parent also has significant, salutary effects on the child's well-being, including possibly improving the child's chances of staying out of the criminal justice system.[26]

Against this background, and with specific reference to contact visits, the ABA has stated in its Criminal Justice Standards for Treatment of Prisoners (emphasis supplied):

> For prisoners whose confinement extends more than [30 days], correctional authorities should allow contact visits between prisoners and their visitors, especially minor children, absent an *individualized determination* that a contact visit between a *particular prisoner and a particular visitor* poses a danger to a criminal investigation or trial, institutional security, or the safety of any person.[27]

The provision of contact visits absent an *individualized* determination is also required by the state Constitution. The New York Court of Appeals has held that pre-trial detainees have a state constitutional right to contact visits, subject to reasonable security precautions, and that any denial of contact visits must be done based on individualized consideration, not meted out in wholesale lots. *Cooper v. Morin*, 49 N.Y.2d 69, 81 n.6 (1979).[28] This right is embodied in the

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[23] *See* Minnesota Dept. of Corr., *The Effects of Prison Visitation on Offender Recidivism* (Nov. 2011), pp. 18-21.

[24] *See* Hairston, C.F. *Family Ties During Imprisonment: Important to Whom and for What?* 18 Journal of Sociology and Social Welfare 87-104 (Mar. 1991) (literature review of research showing maintenance of family ties improves mental health of inmates' children and increases likelihood of family reunification after release).

[25] Travis et. al., *Families Left Behind: The Hidden Costs of Incarceration and Reentry*, 6 (Urban Institute 2005) (""Studies comparing the outcomes of prisoners who maintained family connections during prison through letters and personal visits with those who did not suggest that maintaining family ties reduces recidivism rates") (internal citation omitted).

[26] *See* Allard & Greene, *Justice Strategies: Children on the Outside*, 22-23 (Justice Strategies 2012) (noting that self-worth and connectedness impact risk of criminal justice involvement and recommends facilitating prison visits to boost those feelings); Nickel et. al., *Children of Incarcerated Parents: An Action Plan for Federal Policy Makers*, 13 (Council of State Governments 2011) ("Strong parent-child relationships may aid in children's adjustment to their parents' incarceration and help to mitigate many of the negative outcomes for children that are associated with parental incarceration") (citation omitted).

[27] ABA, Criminal Justice Standards for Treatment of Prisoners, Standard 23-8.5(e) (Visiting) http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf, p. 259.

[28] *Cooper* held *inter alia* that incarcerated persons could not be deprived of contact visits based on the number of days they had been incarcerated, but it stated its holding broadly: "The point is that the detainees and their families are individuals whose cases must be individually considered. There may be reason in an individual case for not permitting contact for a short period, but any rule that fixes an arbitrary number of days during which contact

State Commission of Correction Minimum Standards at 9 NYCRR § 7008.6 (a) ("Physical contact shall be permitted between a prisoner and his visitors.").The Draft ESH Directive received on December 17, 2014, permits contact visits as an incentive for positive behavior. Such a provision is inadequate to guarantee City jail inmates their right to contact visits and is *not* a substitute for a Board Standard protecting those rights.

- Restrictions on Receipt of Packages and Publications

The limitation of packages to those received from an "approved vendor" is a substantial deprivation to incarcerated persons and their families. Most individuals incarcerated in City jails are indigent and most of their families are poor. Under the ESH Rule Proposal, incarcerated persons or their families must purchase items new (and often pay for delivery) even if they own perfectly serviceable items at home, or if family members are able to obtain them cheaper at local vendors. For people living on the economic edge—or over it, as are incarcerated persons without family support—this is an unnecessary and onerous economic barrier.

In support, the basis is stated to "decrease the opportunity for contraband to be introduced into the facilities." In its request for a variance requiring this same restriction, the DOC asserted that "It simply is not realistic to expect that the Department can detect *every* miniscule scalpel which may be secreted within a hard-cover book, every strip of suboxone which may be inserted into a magazine, or every small parcel of cocaine which can be hidden within a pair of sneakers." (Variance request, 10/22/14 at p. 3)(emphasis supplied)).

No human activity can be 100% successful, without exception. However, the careful searching of items both visually and with a metal detector should uncover contraband with very few exceptions. DOC must assign and supervise sufficient staff to complete careful searches. We note that recently the Department of Investigation issued a report demonstrating a massive failure by jail staff to perform proper searches of staff entering the jails, one of whom—actually a DOI investigator—had his pants stuffed full of contraband drugs and weapons.[29] It appears that the solution to contraband in the jails is not to oppressively restrict the prisoners, it is to require staff to do their jobs properly.[30]

The restriction on publications is unwarranted. The right to obtain and read published material is protected by the First Amendment. And the right to receive printed material that is available to the public from "any source, including but not limited to family, friends or publishers" is embodied in the State Commission of Correction Minimum Standards at 9 NYCRR § 7026.1 (a). Individuals in our jails who will be restricted from receiving written

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visitation can be proscribed solely on the ground of administrative convenience is in our view arbitrary and, therefore, unconstitutional." *Cooper*, *id.*

[29] This incident was reported by the *New York Times* on November 6, 2014. A newly released Department of Investigations report indicated that visitors to city jails may be the source of some contraband, but that a large proportion of the illegal trafficking *is carried out by uniformed staff* and civilian employees: "'Given the extent of smuggling that we know goes on and given what we know about what's coming in from visitors, a lot of stuff has to be coming in from guards and employees because this stuff doesn't magically appear,' said Mark Peters, the Department of Investigation commissioner." The article is available at: http://www.nytimes.com/2014/11/07/nyregion/rikers-island-undercover-investigator-contraband-inquiry.html?hp&action=click&pgtype=Homepage&module=second-column-region&region=top-news&WT.nav=top-news.

[30] Our FOIL request included a request for evidence of the need to restrict packages. No material was provided.

material from their families and friends will often not be able to afford to buy them from "approved vendors" and *the City jails do not have libraries other than the law libraries.*[31] Individuals in our jails should have access to reading material and any Board Standard on this issue should encourage rather than restrict such access. One of the biggest problems of correctional management is mitigating idleness and its consequences—especially in jails, which have many fewer programs and activities than do prisons. It is a terrible mistake to limit reading, the cheapest and most cost-effective means of giving people in jail something worthwhile to do.

DOC may make adjustments to the property regime. For example, if it is the practice that families and friends bring in very large stacks of books and magazines, a reasonable limit on the number that could be delivered at one time may be appropriate. But this Board should not be adopting as a minimum standard an across-the-board denial of the only access to reading matter that some people can afford. The Board should not amend Section 1-13 and should put DOC on notice that its expressed intent to impose this restriction in the future not only to ESH residents, but to the entire jail population regardless of any actual risk, will not be countenanced. (Variance letter, 10/22/14 at p. 3).

- Restrictions on Recreation

The proposed amendment to the Recreation Standard is grossly excessive and over-restrictive as drafted. The Board should reject it altogether or significantly limit it.

The amendment provides that prisoners in enhanced supervision housing "shall be permitted recreation only in accordance with the provisions of subdivision (c)" of § 1-06 of the Standards.[32] In other words, persons who are not serving time for an infraction are to be treated in the same way as those who are subject to such punishment. That is, they will be subject to the same recreation regime that Board staff found only a few months ago was used by less than 10% of the population![33] It makes no sense at all to replicate such an ineffectual system, and makes a mockery of the premise of the Board recreation standard: "Recreation is essential to good health and contributes to reducing tensions within a facility." Standard § 1-06(a).

Further, restricting ESH residents' recreation rights to those found in subdivision (c) would disentitle them to an outdoor recreation area that allows for direct access to sunlight and air (as required by § 1-06(b)), or to a yard and gym areas sufficiently large for exercise (as required by § 1-06(b)), or to recreation equipment or appropriate outerwear during cold or wet weather (as required by § 1-06(d)). All these exclusions will be disincentives for ESH individuals to go to the yard even during their lock-in periods. Also, persons in ESH will not have access during lock-out to recreation/exercise within the housing unit in the form of access to cell corridors (and adjacent service and supply areas), or to exercise programs and recreational items in the dayroom (as required by § 1-06(e)).

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[31] Even the Supreme Court decision that upheld a "publisher only" rule—which restricted only hardcover books, not softcover books and magazines—did so for a jail that was conceded to have a "relatively large" library for its population. *Bell v. Wolfish*, 441 U.S. 520, 552 & n.33 (1979).

[32] Subdivision (c) provides only that "Recreation periods shall be at least one hour; only time spent at the recreation area shall count toward the hour. Recreation shall be available seven days per week in the outdoor recreation area, except in inclement weather when the indoor recreation area shall be used."

[33] Board of Correction Staff Report, *Barriers to Recreation at Rikers Island's Central Punitive Segregation Unit* (July 2014), pp. 3, 9-10.

In fact, without the right to "engage in recreation activities within cell corridors and tiers, dayrooms and individual housing units," as provided by § 1-06(e), people in ESH will have no Standards right to be in a dayroom and therefore will be subject to exclusion from them if future DOC Commissioners alter the ESH plan to offer dayroom access during lock-out periods.

Amending § 1-06, combined with the current ESH plan, will mean that DOC will offer individuals a choice either to go to the dayroom during lock-out periods or to remain in their cells. Some individuals may consider being confined in the dayroom dangerous or threatening, so by default, may spend most of their time locked in their cell because they will not be permitted to move freely on the unit during lock-out periods. This change to the Standard will result in individuals housed in ESH having to gain a touring officer's attention to ask permission to come out of their cell during lock-out to use sites such as the shower, phone area, or wash room. Without the right to dayroom access, all individuals in ESH may be mandated to eat in their cells, even during their lock-out period. The amount of actual or potential lock-out time will be significantly reduced, as well as access to essential exercise, fresh air, and sunlight, if the proposed amendment is adopted.

The foregoing may or may not be what the proposed amendment actually means. But it is, in effect, what it says. This part of the proposed amendment should be rejected. If it is not rejected outright, the Board must spell out exactly which of the above deprivations it intends, and which it does not and should adopt a positive statement of what must be provided in the ESH. The disaster of punitive segregation recreation, as documented in the Board's own report, must not be expanded.

- Restrictions on Law Library Access

The Rule Proposal permits law library in ESH to be reduced or eliminated, "provided that an alternative method of access to legal materials is instituted to permit effective legal research." DOC reported in its variance request that: "As our experience with inmates in segregation has demonstrated that adequate services can be provided to inmates within their cells, that same policy should be followed here." (Variance letter, 10/22/14 at p. 2) The people in punitive segregation trying to use law library services would beg leave to differ, as one of them told the Board only a few months ago: "there is almost no access to the law library. We get copied papers out of the books but this is distributed at random. A guy comes around and distributes copies of pages of books. I think that the law library access should be taken a lot more seriously."[34] The system in punitive segregation provides law library and court access in name only and does not "permit effective legal research." It is not an acceptable substitute for physical access to the library. (It is already the case that people who actually engage in misconduct in the law library *can* be denied access.) We note that the proposed Directive (¶ III.F.l) says: "Mandatory law library programs: Inmates will be provided two hours of law library time per day, five days per week, within the housing area." There is no further explanation, and that characterization is at odds with the variance request's statement that the ineffective program used in punitive segregation, consisting of delivery of copies of book pages, will be used in ESH. The Board should not reduce its standard and limit physical access to the law library.

[34] Statement of Michael Ellison, Appendix A to Minutes of Board of Correction Meeting of March 14, 2014, available at http://www.nyc.gov/html/boc/downloads/pdf/Minutes/BOCMinutes_20140311.pdf .

- Restrictions on Religious Services

The Rule Proposal concerning religious services is similarly deficient. The variance request is completely unclear as to what is proposed, and the draft Directive says only: "Mandatory ministerial programs: Congregate services to be held in housing unit." There are to be five separate ESH units; further, in each unit, only half the population is to be out of cell at any time. So there would need to be ten different congregate services in these units, in addition to the congregate services for general population. That would make for extremely busy Sabbaths and Jumu'ah days. It strains credulity to claim that DOC is logistically capable of carrying out such a program, and DOC says nothing about how it could possibly make this proposal work for Muslims, Protestants, and Catholics, and any other groups for whom services are held. Realistically, what this proposal means is "no congregate services" for many prisoners. The Board should not reduce its standard and limit access to religious services.

- Restrictions on Correspondence

The proposal to read the incoming and outgoing mail of every ESH prisoner is grossly intrusive and overbroad. The present Standards require some individualized basis for reading the mail. The Proposed ESH Rule applies a blanket elimination of the Board standard for anyone housed in an ESH. Since under the very broad criteria for placement, ESH may sweep in persons as diverse as highly placed gang leaders and drug dealers *and* people who simply have a habit of getting into fist fights, this approach is seriously overbroad. The current standard suffices to safeguard any actual need, based on individualized suspicion, to read personal mail.

The Procedural Protections Are Inadequate

The overbreadth of the criteria for placement in ESH, discussed above at pp 10-11, is compounded by the requirement that the affected person initiate a request for a hearing. Board standards for placement into such a highly restrictive unit should include an automatic hearing with due process protections *and* require that any claim that a person refused the hearing should be verified in person by a superior officer. Requiring individuals to initiate their own hearings presents a large risk that the right to due process will be illusory. The disciplinary process and the grievance process within our jails already fail to provide the procedural protections that are supposed to be available. Individuals incarcerated in our jails regularly report not being called to their disciplinary hearings and then being informed later (falsely) that they refused to attend. Grievances are frequently unanswered and we receive many complaints that hearings on grievances are not permitted despite the terms of the Directive governing grievances. The Draft ESH Directive received on December 17, 2014 does include an automatic hearing. The Board must incorporate this protection into the Minimum Standards.

The Proposed ESH Rule contains no standard for the periodic review of placement in ESH. The failure to provide such periodic review for placement into a restrictive housing area is facially unconstitutional. ESH is a variety of administrative segregation, and one of the basic due process rights for persons in such segregation[35] is "some sort of periodic review" to determine if

[35] In cases involving convicts in state prison systems, the need for procedural due process depends on whether administrative confinement is onerous enough to be "atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). That analysis is not applicable to pre-trial detainees in jails. *Bistrian v. Levi*, 696 F.3d 352, 373 (3d Cir. 2012); *Iqbal v. Hasty*, 490 F.3d 143, 162-63 (2d Cir. 2007), *aff'd in part, rev'd in part, and remanded on other grounds sub nom. Ashcroft v. Iqbal*, 556 U.S. 662 (2009);

there is a continuing need for segregation. *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983).[36] Such review must be meaningful and not perfunctory and cannot simply repeat stale justifications.[37] Meaningful periodic review must be tailored to the justification for segregation. Thus, if segregation is imposed to encourage a prisoner to improve his behavior, "the review should provide a statement of reasons [for retention], which will often serve as a guide for future behavior (*i.e.*, by giving the prisoner some idea of how he might progress toward a more favorable placement)." *Toevs v. Reid*, 685 F.3d 903, 913 (10th Cir. 2012); *accord*, *Anderson v. Colorado*, 887 F.Supp.2d 1133, 1152-53 (D.Colo. 2012) (holding reviews did not "provide meaningful input to Mr. Anderson as to what he needs to do to make progress").

The United States Supreme Court has held that past behavior is not sufficient on its own to justify administrative segregation without some connection to safety and security; otherwise, it would violate the Court's holding that "administrative segregation may not be used as a pretext for indefinite confinement of an inmate." *Hewitt v. Helms*, 459 U.S. at 477 n. 9; *see Williams v. Hobbs*, 662 F.3d 994, 1008 (8th Cir. 2011) (prisoner who had previously murdered another prisoner was denied meaningful review of administrative segregation when the institution "failed to explain to [the prisoner], with any reasonable specificity, why he constituted a *continuing* threat to the security and good order of the institution" (emphasis supplied)). The Board must adopt a standard that mandates this procedural requirement that jail officials periodically provide a valid current justification for ongoing restrictive confinement that is not just based on past behavior. The proposal at present indicates that once a justification for placement is found, the person is in ESH perpetually, with no way out no matter how flawless his behavior. The proposal is not constitutionally acceptable.

The new Draft ESH Directive received on December 17, 2014 nominally provides for review of ESH placement. It indicates a review of ESH status every 60 days, an appeal process and indicates that "the suggested steps necessary for an inmate's release from ESH [will be explained]; [and] the Unit Captain will also provide a written record to the inmate of the suggested steps necessary for release." (ESH Directive 12/17/14 Section III. F.) This DOC policy assertion is insufficient to assure that the review is meaningful and substantive. The Board should include steps necessary for an individual to achieve the "suggested steps" for release. Standards should require that DOC create an individualized plan, and provide treatment and programming in the ESH necessary to accomplish the suggested steps and earn release from ESH.

Surprenant v. Rivas, 424 F.3d 5, 17 (1st Cir. 2005); *Benjamin v. Fraser*, 264 F.3d 175, 188-89 (2d Cir. 2001); *Mitchell v. Dupnik*, 75 F.3d 517, 523-24 (9th Cir. 1995); *Zarnes v. Rhodes*, 64 F.3d 285, 292 (7th Cir. 1995).

[36] *See Gittens v. LeFevre*, 891 F.2d 38 (2d Cir. 1989) (requiring periodic review or opportunity to be heard on initial or continued placement in segregation); *Ramsey v. Squires*, 879 F. Supp. 270, 283 (W.D.N.Y.) *aff'd*, 71 F.3d 405 (2d Cir. 1995) ("[i]f the state regulations do not provide for this minimal opportunity to be heard, they are unconstitutional on their face."); *cf. Torres v. Stewart*, 263 F. Supp. 2d 463, 469 (D.Conn. 2003) (finding no due process violation where pretrial detainee was put into close custody because of SRG status but was given opportunity, through periodic review, to return to general population).

[37] *Smart v. Goord*, 441 F. Supp. 2d 631, 642 (S.D.N.Y. 2006) (allegation that review hearings were a "hollow formality" and officials did not actually consider releasing plaintiff stated a due process claim); *McClary v. Kelly*, 87 F. Supp. 2d 205, 214 (W.D.N.Y. 2000) (upholding damage verdict for sham review), *aff'd*, 237 F.3d 185 (2d Cir. 2001); *Giano v. Kelly*, 869 F. Supp. 143, 150 (W.D.N.Y. 1994); *see also Sourbeer v. Robinson*, 791 F.2d 1094, 1101 (3d Cir. 1986); *Anderson v. Colorado*, 887 F.Supp.2d 1133, 1152-53 (D. Colo. 2012) (boilerplate reasons and check marks in boxes did not constitute meaningful review).

The Board Standards must ensure that individuals placed in ESH are afforded a process to earn less restrictive housing placement. Otherwise the periodic review will be meaningless.

Failure to Exclude Vulnerable Populations from ESH

Failure to Exclude Individuals with Mental Illness

The damaging effects of isolated confinement on persons with mental illness are by now too well known to require further elaboration here. Housing individuals with mental illness and serious trauma histories in a setting as restrictive as the ESH is contrary to an ever increasing body of knowledge demonstrating that restrictive, punitive and isolating conditions are non-therapeutic and result in increased incidents of suicide, self-harm, acting out, violence, impulsivity, depression and despair. Yet the Proposal includes no provisions for mental health screening, mental health treatment, therapeutic programming, presence of clinical staff, ability to meet with clinical staff in a confidential setting, or any other indication that individuals with mental illness will be accommodated with necessary individualized treatment modalities when housed in ESH.

DOC's last-minute revision of its proposed Directive governing ESH, for the first time, makes provision for the exclusion from ESH of persons with serious mental illness. It also provides that DOHMH has authority to "effect the placement of inmates in special medical and mental health housing areas." These provisions should be made explicit in the Standards amendment if the Board elects to authorize creation of ESH, to ensure that they are implemented and that they cannot be eliminated merely by modifying the Directive. We note that in its letter to the State Commission of Correction, DOC asserted that it would eliminate the DOHMH clearance requirement for placement in punitive segregation. (DOC letter to State Commission of Correction, 10/24/14 at p. 2.) We think that proposal gives fair warning to the Board that its imprimatur, as well as language in a DOC directive, is necessary to ensure the authority of the mental health authorities to protect persons with mental illness from any variety of protracted lock-in.

Given that the current Draft ESH Directive does not identify mental health treatment needs as a priority for the restrictive ESH, and excludes only those with "serious mental illness," the DOC appears to be *abandoning* its efforts to place infracted prisoners with mental illness into therapeutic environments and proposing to place them in high security instead. The Board must implement appropriate Standards to protect *all* individuals with mental disabilities in the City jails.

Failure to Exclude Young Persons other than 16 and 17 Year Olds

The ESH Rule Proposal does exclude 16 and 17 year olds from placement into the restrictive ESH. However, that restriction does not go far enough to protect young people in the City jails from confinement that is too restrictive and too punitive. ESH confinement, with its multiple cumulative restrictions and lack of time limitation, represents a serious threat to the physical and psychological health of young adults. Brain development does not stop at age 18;[38] "there is considerable evidence that the second decade of life is a period of great activity with

[38] Laurence Steinberg, *Cognitive and affective development in adolescence*, 2 TRENDS IN COGNITIVE SCIENCES 69 (2005), *available at* http://www.temple.edu/psychology/lds/documents/cognitiveandaffectivedevelopmenttics.pdf.

respect to changes in brain structure and function."[39] Subjecting young people to the restrictions imposed in the ESH while such development is underway places them at great risk for psychological damage.[40] The mandated one hour of outdoor recreation is inadequate to meet the need for aerobic and muscle-strengthening activity that young adults require for healthy development, and absent Board standards, this recreation may resemble the recreation in punitive segregation which occurs in a cell alone without exercise equipment.[41] The New York Advisory Committee to the United States Commission on Civil Rights has just issued *The Solitary Confinement of Youth in New York: a Civil Rights Violation*. The report calls for the elimination of solitary confinement of individuals under 25 years old.[42]

Failure to Exclude Individuals with Physical Disabilities and Serious Physical Injuries

Incarcerated individuals with physical disabilities and those with temporary disabilities due to serious injury should also be excluded from ESH. The need for ready access to medical professionals and the ability to communicate that need should not be hindered by the restrictions in ESH housing and the lack of provision for medical and mental health staff and treatment space. ESH status and its regime of strip searches and mechanical restraints is far too likely to result in DOC staff failing to provide, or inhibiting access to, reasonable accommodations and/or reluctance, on the part of disabled and injured individuals, to request needed treatment that will be unpleasant to access.

People with physical disabilities and who suffer temporary disability because of serious injury face the same difficulties with daily functioning and require the same intensive medical attention. The Board should exclude people with physical disabilities and serious injuries from ESH to protect them from the serious health risks and humiliations that they would otherwise suffer.

New Section 1-17: Limitations on Punitive Segregation

The ESH Rule Proposal creates a new Board Standard, Section 1-17. Section 1-17 proposes limited reform to the use of punitive segregation. Similar to the limited restriction on ESH, 16 and 17 year olds are excluded from punitive segregation. It also eliminates "time owed" in punitive segregation from a separate and previous incarceration. We have no objection to these changes, but they are too limited and do not provide necessary reforms to punitive segregation. Nor does the Proposed Rule explain what alternatives will be implemented for the 16 and 17 year olds.

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[39] *Id.* at 69.

[40] The DOC originally designed the Restrictive Housing Unit (RHU) to address the high rate of juveniles engaging in suicidal gestures and suicide attempts while in punitive segregation. Implementation of the RHU did not, however, provide any respite from the harmful isolation of punitive segregation. DOC has not provided any data suggesting that implementation of the ESH will succeed where RHU has already failed.

[41] The Board's recent report demonstrates that DOC staff fail to provide real access to the limited recreation permitted in punitive segregation, finding that 4 out of 5 individuals housed in the CPSU are not given a meaningful opportunity to "sign up" for recreation. Board of Correction, *Barriers to Recreation at Rikers Island's Central Punitive Segregation Unit* (June 2014) at p. 10.

[42] The New York Advisory Committee to the United States Commission on Civil Rights, *The Solitary Confinement of Youth in New York: a Civil Rights Violation*, (Dec. 2014) p. 68.

Although Section 1-17 purports to exclude 16 and 17 year olds from punitive segregation, the ESH Rule Proposal does not include any defined alternative sanction or program for 16 and 17 year olds who break jail rules. It is our understanding that there is a new unit at the Robert N. Davoren Center (RNDC) called the "adolescent transitional repair unit." There is no DOC policy directive for this unit that currently houses six adolescents who had been housed in punitive segregation or in the RHU. Adolescents in the unit are offered two hours lock out in the morning and an additional two hours in the evening tour. Some mental health services are offered on the unit and there is a ratio of one officer to two inmates, with a maximum capacity of ten inmates for the unit. We understand that the intent is also to use the unit for 24-hour cell confinement of adolescents from general population "when needed." The program is being developed jointly by several agencies including DOC, DOHMH, Corizon, and the Department of Education (DOE). The program is designed for adolescents who are determined by DOC to be too dangerous to be in general population and need structure and programming in order to be re-integrated into general population. The model is reportedly one of positive behavioral change with rewards for good behavior. While this design appears to be more in line with evidence-based best-practices discussed *infra* at pp 7-8. it is punitive segregation as the adolescents are locked in 20 hours a day, *or* it is a violation of the Board standards that require 14 hours of lock-out per day. Section 1-05(b).

In addition to the exclusion of 16 and 17 year olds and the elimination of "owed time," the Proposed Rule provides for a one-time report. The DOC will report on "its efforts to reduce the maximum punitive segregation sentence from ninety days to thirty days" and on the status of "efforts to revise policy so that an inmate must be out of punitive segregation for a minimum of seven days before he or she could be returned to punitive segregation." This reporting provision also states that the DOC will "submit to the Board a plan and timeline detailing the steps it will take to reduce punitive segregation sentences from ninety to thirty days" and that they will "report every forty-five days thereafter on its progress toward the goals set forth in its plan." Neither the report nor the plan and time line are "standards" and the Board should not include such vague promises of reform in its Standards. If this is meant to be meaningful, the Standards should affirmatively include the 30-day limit on punitive segregation and the seven-day period between segregation terms. However, we do not believe that the thirty day limit on punitive segregation is sufficient. Punitive segregation should be limited to 15 days per incident, with no more than 15 days in isolation in any 60 day period, and at least four hours out of cell daily so that it does not cause harm to individuals incarcerated in our City jails.

The Board Must Reform Punitive Segregation Through the Adoption of Standards

As indicated above, the ESH Rule Proposal inclusion of a reporting requirement concerning an as yet undisclosed, plan to reduce punitive segregation is *not* a standard. The Board should, finally,[43] incorporate needed reforms to the use of punitive segregation in the NYC Jails into Board Standards. It should do so in this proceeding and should not grant any amendments allowing ESH without simultaneously addressing punitive segregation reform.

[43] On April 9, 2013, the NYC Jails Action Coalition petitioned the City Board of Correction to implement new rules regarding solitary confinement to be made part of the jail Minimum Standards. The Board of Correction, its experts and its staff investigated and on September 9, 2013. the Board agreed to initiate rule-making to address the use of solitary confinement in the jails.

Evidence of needed reform is overwhelming. Approximately 40% of the individuals incarcerated in the City jails are reported to have a psychiatric diagnosis with many of that number suffering from major mental illness.[44] According to information gathered by DOHMH, incarcerated individuals with mental illness are more likely than others to be injured while in custody and are more likely to end up in punitive segregation.[45]

In September 2013, a report to the New York City Board of Correction by their mental health experts, Drs. James Gilligan and Bandy Lee, reported on the large numbers of individuals with mental illness in solitary confinement in the City jails and the failure to provide treatment in accordance with the current Minimum Standards.[46] Based on what they observed in the jails, Drs. Gilligan and Lee recommended that no individuals with mental illness should be placed in solitary confinement, that *no individuals at all* should be subjected to the prolonged solitary confinement in use in the City jails because *"it is inherently pathogenic – it is a form of causing mental illness*."[47] They reported negatively on the reforms implemented by NYC DOC: the creation of a Clinical Alternative to Punitive Segregation (CAPS) unit for individuals with serious mental illness and the Restricted Housing Units (RHU) for individuals with "non-serious" mental illness. The doctors reported that CAPS was far too small for the population that would need a therapeutic alternative placement and should be expanded, and that the RHU was a complete failure and non-therapeutic. The report recommended elimination of the RHU model because it remains punitive in nature and does not grant any relief from the use of solitary confinement.[48] The report detailed the lack of access to treatment (even in the purportedly therapeutic RHU), the lack of an appropriate range of available treatment modalities, and the utter lack of a physical environment conducive to providing confidential treatment in a clean and private space.[49]

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[44] Andrea Lewis to Homer Venters, Memorandum, March 14, 2012, "Medical Informatics, New York City Department of Health and Mental Hygiene and Correctional Health Services."

[45] *Id*.

[46] Gilligan, Lee, *supra* footnote 9.

[47] *Id.* at p. 6. Similar observations made in New York include comments by Judge Lynch when he approved the *DAI v. OMH,* 02 CIV 4002 (S.D.N.Y.), Private Settlement Agreement which created alternatives to solitary confinement for individuals with serious mental illness in New York state prisons:

> [G]reater attention should probably be paid to the problem of extremely lengthy SHU confinement even to those who are not mentally ill. As we learned during the trial, New York does not have a formal Supermax prison, but when numerous lengthy disciplinary sanctions of SHU confinement are made to run consecutively, prisoners in effect are kept in conditions at least as rigorous and perhaps even more so than in any official Supermax facility perhaps without as carefully thought about consequences as would exist in more official decision to relegate a prisoner to a formal Supermax institution.

Tr. p. 9, 4/27/07.

[48] Clearly if ESH is the proposed alternative to RHU, the City is abandoning its efforts to place infracted prisoners with mental illness into therapeutic environments and proposing to place them in high security instead. (DOC letter to State Commission of Correction, 10/24/14 at p. 2).

[49] Two additional reports prepared by and for the Board of Correction concern the adolescent population of the New York City jails. *Three Adolescents with Mental Illness in Punitive Segregation at Rikers Island,* written by Board staff, details the poor quality of mental health treatment and delivery of treatment services for three young people

Solitary Confinement and Risk of Self-Harm Among Jail Inmates reports on a study conducted by employees of NYC DOHMH.[50] The report makes numerous findings that illustrate that solitary confinement is a dangerous and self-defeating practice:

- The risk of self-harm and potentially fatal self-harm in solitary confinement was higher than outside solitary, independent of prisoners' mental illness status and age group.
- Self-harm is used as a means to avoid the rigors of solitary confinement – inmates reported a willingness to do anything to escape solitary confinement.
- Patients with mental illness become trapped in solitary confinement, earning new infractions resulting in more time in solitary.[51]

The report indicates a need to reconsider the use of solitary confinement as punishment in jails "especially for those with SMI [serious mental illness] and for adolescents," and cites the American Psychiatric Association and American Academy of Child Adolescent Psychiatry as professional societies that recommend against the use of solitary confinement for adolescents and individuals with serious mental illness.[52] It then goes on to describe the creation of CAPS and RHU as reforms that will "provide an opportunity to evaluate the effect of increased clinical management and decreased reliance on solitary confinement as a means to reduce self-harm and other behaviors among inmates with mental illness."

As noted above, the DOJ identified and reported on the dangerous over-utilization of punitive segregation in the City jails stating that "the DOC relies far too heavily on punitive segregation as a disciplinary measure, placing adolescent inmates – many of whom are mentally ill – in what amounts to solitary confinement at an alarming rate and for excessive periods of time." (DOJ 8/4/2014 Report, p. 3.) The DOJ cautioned that its "focus on the adolescent population should not be interpreted as an exoneration of DOC practices in the jails housing adult inmates. Indeed, while we did not specifically investigate the use of force against the adult

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with mental illness while held in solitary confinement settings in the NYC jails. The report is available at http://www.nyc.gov/html/boc/downloads/pdf/reports/ Three_Adolescents_BOC_staff_report.pdf. *Rethinking Rikers: Moving from a Correctional to a Therapeutic Model for Youth,* prepared by Professor Yaroshefsky and students at Cardozo Law School, provides examples from New York State and other states to use as a basis for eliminating the use of solitary confinement for youth. The report is available at https://cardozo.yu.edu/sites/default/files/YJFeb2_2.

pdf. Like the findings in the report of Drs. Gilligan and Lee, *Rethinking Rikers* reports on the failed policy and over-utilization of solitary confinement and calls for a "much-needed cultural transformation on Rikers Island." *Id.* at p. 48.

[50] See Kaba, Lewis, Glowa-Kollisch, Hadler, Lee, Alper, Selling, MacDonald, Solimo, Parsons & Venters, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 Am.J. Public Health 442, 445 (2014). Isolated confinement housing is a well-known suicide risk factor in New York DOCCS and elsewhere. Way B, Sawyer D, Barboza S, Nash R: Inmate Suicide and Time Spent in Special Disciplinary Housing in New York State Prison, Psychiatric Services, 2007; Way B, Miraglia R, Sawyer D, Beer R, Eddy J: Factors Related to Suicide in New York State Prisons, International Journal of Law and Psychiatry, 2005; Miraglia R, Beer R: Quality Assurance Review of Suicides in New York State Correctional Facilities. Albany, NY, New York State Office of Mental Health, 2002.

[51] The study includes the "extreme" example of a patient breaking a sprinkler head to use to self-harm and receiving an institutional infraction as well as a new criminal charge for the destruction of government property. *Id.* at p. 446.

[52] *Id.* at p. 447.

inmate population, our investigation suggests that the systemic deficiencies identified in this report may exist in equal measure at the other jails on Rikers." (DOJ 8/4/2014 Report, p. 3.).

Conclusion and Recommendations

The Board should use this rulemaking process to strengthen the Minimum Standards with requirements that protect vulnerable populations, limit the use of restricted housing, provide for adequate due process and implement needed treatment, education and anti-violence programs in the jails including:

- Time Limits on Punitive Segregation Sentences and Cell Confinement – punitive segregation sentences should be short in duration, no longer than 15 days per incident, no more than 15 days in any 60 day period, and at least four hours out of cell daily;[53] ESH placement should also be time limited.
- Exclude Vulnerable Populations from Punitive Segregation and from the Proposed ESH – individuals who are under 25 years old, and individuals with mental illness, physical disabilities and physical injuries should be excluded from harsh confinement settings.
- Limit Placement in Punitive Segregation and the Proposed ESH To Serious Misconduct – harsh isolation and restrictions should only be used in response to incidents of violence;
- Provide Inmates with Improved Due Process Protections including Representation by Counsel – the current system of discipline and the proposed ESH hearing and criteria lack necessary due process protections;[54]
- Provide Inmates the Opportunity to Abate Restrictions and Exit ESH – ESH must include individualized "step" responses so that individuals may earn less restrictive housing placement and other incentives through good behavior;
- Provide Programming Including Treatment, Education and Anti-Violence Programs – for individuals in restricted housing settings, treatment and programming must include individualized plans that include positive responses, earned incentives, and enumerated benchmarks for movement to less restrictive housing;
- Provide Communication, Anti-Violence and Mental Health Training to DOC Staff – All DOC staff must receive training in dispute resolution, communication skills, and alternatives to force. DOC staff must also be trained to recognize signs of mental illness,

[53] The U.N. Special Rapporteur on Torture has defined any use of solitary beyond 15 days to amount to torture or cruel, inhuman or degrading treatment. See Interim report prepared by the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E.Méndez, available at: http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf.

[54] There are models for including mental health as an issue in disciplinary proceedings. In the case *Anderson v. Goord*, 87 CV 141 (N.D.N.Y.), claims included the failure to provide adequate mental health care to prisoners housed in the SHUs and the failure to appropriately consider mental illness during disciplinary hearings at two prisons. In 2003, a settlement of the *Anderson* due process claims about disciplinary hearings resulted in state-wide regulations that require that clinical testimony is provided when the mental health of the prisoner is at issue during the hearing process and expanded the use of JCMCs. 7 N.Y.C.R.R. §§ 251.2, 254.6, 254.7 and 310. The regulations authorize the hearing officer to use evidence of mental illness to mitigate the penalty or dismiss the charges, and determine an appropriate penalty. See also, *D.M. v. Terhune*, 67 F. Supp. 2d 401, 403 (D.N.J. 1999) (requiring that prison hearing officers are informed whether inmates are receiving mental health treatment, and requiring removal from disciplinary isolated confinement if mental health status deteriorates).

psychiatric deterioration, and the emotional/behavioral manifestations of trauma. Staff assigned to work with youth should likewise have specialized training to ensure competence and reduction in violence in our jails.

- Minimum hours for clinical staffing on the unit and appropriate space for confidential clinical meetings with individuals;
- Periodic Confidential Mental Health Assessments (of all prisoners housed in solitary confinement) by Qualified Clinical Staff – Humans, whether diagnosed with a serious mental illness or not, fare poorly in solitary confinement. "Walking rounds" of restrictive housing are wholly inadequate to enable clinical staff to identify and intervene when individuals deteriorate due to the conditions of isolation. It is simply not enough to walk through a restrictive housing area glancing into cells or briefly speaking with the individuals. The need for vigilance to detect signs of distress for individuals housed in restrictive settings requires periodic mental health assessments by qualified clinical staff in a confidential setting, if tragic consequences are to be prevented.
- Qualified Staff and Periodic Training. Effective treatment with positive outcomes requires qualified, experienced, trained clinical staff. The requirement of qualified and licensed clinical staff is extremely important in the closed setting of a jail where there is no choice of treatment, where access to advocates and family is limited, and where the population is often extremely impaired.
- Staffing Ratios that are in Accordance with Identified Standards for Staffing Levels;
- Data Collection, Publication of Data and Quality Assurance – Require a quality assurance system that collects data, measures effectiveness of treatment and provides evidence-based outcome measures to improve clinical and jail management practices.

In addition, the Board should review each of the proposed exemptions of ESH from the Minimum Standards governing, e.g., recreation, packages, law library services, visiting, correspondence, etc., and either reject them out of hand, or allow only the minimal necessary modification of the Standard, as argued above in the sections on each of the proposed restrictions.

We strongly suggest that when the Board has considered all these matters, that it allow an opportunity for further public comment on a tentative set of amendments rather than proceed directly to a final decision. We say this based both on the complexity of the proposed changes and the alternative suggested by us and other members of the public, and also the fact that the target has changed significantly during this comment period, with DOC's most recent major revisions to its proposed Directive coming only a few days before the hearing. The Board's responsibility to the public calls for no less.

Attachment 1

THE LEGAL AID SOCIETY

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November 25, 2014

BY EMAIL

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Freedom of Information Law request re: Enhanced Supervision Housing and the November, 18, 2014 BOC Rule Proposal

Dear Ms. Mello and Ms. Masters:

This is a request for information regarding the Board of Correction (BOC) Rule Proposal to create Enhanced Supervision Housing (ESH) in New York City Department of Correction (DOC) jails and to change some other provisions of the BOC Minimum Standards. This request is made pursuant to the New York Freedom of Information Law (FOIL). Because the hearing is scheduled for December 19, 2014 (less than a month away) and because all of the information requested must already be readily available as it was used as the basis for the Rule Proposal from DOC and BOC, please provide the material immediately.

We have not included a time frame for most of the materials because we are looking for the materials that were used to support the requested changes to the BOC Minimum Standards. The relevant time frame, unless stated, is the time frame used by DOC and BOC in reference to their basis for the Rule Proposal (as contained in the DOC variance request letters, the letter from DOC to the State Commission of Correction and as stated by BOC pursuant to Section 1043 of the New York City Charter). In addition, because of the limited time frame, we are sending one consolidated request to BOC and DOC in order to expedite the process as much as possible.

Please provide the Legal Aid Society, Prisoners' Rights Project all documentation of facts relied on to support the creation of the Enhanced Supervision Housing Units including but not limited to the following:

1. The variance letters to the BOC and the letter to the New York State Commission on Correction from DOC assert the following:

    a. Evidence of an increase in gang-related activity.
    b. Evidence of increased prevalence of scalpels/small concealable blades.
    c. Evidence that contraband is introduced through contact visits.
    d. Evidence of gang activity in the law library.
    e. Evidence of predatory behavior in the law library.

    In each of the above a. through e., please provide the asserted evidence and/or information relied upon, the time frame for the information and any other details including but not limited to facility location, type of housing area, and number of individuals involved.

2. Provide all data, data compilations, analyses and reports related to Security Risk Groups including criteria for identification as SRG, and the total population identified as SRG, the population of each group identified as SRG on or about October 22, 2014 (the time of the variance letter) and the total population of the City jails on that date.

3. Provide documents/underlying data/evidence or any other analyses supporting or otherwise relevant to the claim that gang-related activity is a root cause of violence in the jails. (Statement of Basis and Purpose at p. 2).

4. Provide documents/underlying data/evidence of any root cause or other analyses conducted to determine root causes of or significant contributing factors to violence in the jails.

5. Provide documentary evidence that supports or is otherwise relevant to the statement that release from punitive segregation to general population "clearly isn't working." (October 22, 2014 Variance Letter at p. 2.) Supply supportive documentation and/or data relied upon for making this assertion including the number of individuals this references and the time frame under consideration for this assertion.

6. Provide documentary evidence of the total number of persons released from punitive segregation to the general population for the time frame referenced in number 5 above.

7. Provide criteria that were utilized to determine whether punitive segregation was or was not working as described in number 5 above. Please provide the total number of persons who fell into each of the utilized criteria and the total number of persons identified through use of this criteria.

8. Provide documentation and explanation of the verification of and reliability of data relied upon to support the Proposed ESH. If it was verified, please provide the supporting documentation of this verification process. [Explanation: The DOJ CRIPA Report identified a consistent pattern of falsified reports by staff (CRIPA report p. 25) and recommended clarification about categories of institutional violence data and implementation of an adequate institutional data tracking system (CRIPA report p. 55). How was data being used to justify the creation of ESH verified?]

9. Provide all documentation supporting or otherwise relevant to the determination of 250 as the number of ESH beds needed.

10. Provide documentation concerning criteria for placement into an ESH including any proposed classification tools and screening instruments, and documentation of the validation of these tools and screens for the New York City jails and/or any other jail system.

11. Provide documentation of definitions and requirements for findings of criteria that will result in ESH placement including but not limited to acceptable "other sources" of information, proposed time limits on evidence from "past history," definition of "disturbances," and of "serious and persistent violence."

12. Provide documentation of any reasons and/or justification for imposing no limits on time in the ESH, no restrictions on the placement of individuals with disabilities into the ESH, and limitation of the exclusion of youth to only 16 and 17 year olds.

13. Provide documentation/underlying data/evidence of the "ready availability of small, concealable blades." (Statement of Basis and Purpose at p. 2)

14. Provide the comparative information from other jail systems referenced in the Variance Letter dated October 22, 2014, including information on comparative lock-out periods and other proposed ESH restrictions, and information relied upon to support that the proposed ESH "will follow accepted practices of humane treatment routinely applied in jails throughout the country." (October 22, 2014 Variance Letter (quote at p. 5).)

15. Provide documents describing where the Enhanced Supervision Housing unit(s) will be located, what housing areas they displace, their planned configuration and capacity (including space and capacity for recreation and other programming), their proximity to medical and mental health staff, and staffing plans for each ESH unit.

16. Provide documents demonstrating how programs will be provided within the ESH including but not limited to scheduling all programs within the proposed 7 hour time period.

17. Provide information about present law library services in punitive segregation housing including but not limited to usage, grievances about law library from the past year, and grievances about access to notary services from the past year.

18. Provide evidence relied upon to assert that ESH restrictions on services (law library, religious services, visits, phone calls, mail, packages, commissary, correspondence) are necessary and/or will reduce violence. Please include the following:

    a. Evidence of the need to restrict packages
    b. Evidence that the BOC standard on mail is inadequate and that the current written notice requirement is burdensome.

c. Information from other jails that is the basis of the statement that "most American jails can monitor all incoming and outgoing mail." (October 22, 2014 Variance Letter at p. 2).
d. Evidence that phone monitoring has resulted in a "treasure trove of important information." (October 22, 2014 Variance Letter at p. 4.)
e. Evidence that current mail monitoring has failed.

19. Provide information on provision of medical and mental health screening and services to individuals considered for admission to, and/or housed in the ESH. Including but not limited to plans for medical and mental health rounds in the ESH, access to private medical and mental health clinical contact, and plans or proposals for the coordination between medical and security staff in the ESH.

20. Provide any proposed exclusion criteria for individuals with mental and physical disabilities from ESH and any documentation of the evidentiary basis for these criteria.

21. Provide information on how necessary accommodations for individuals with disabilities will be afforded to individuals housed in the ESH.

22. Provide the PowerPoint slides and any other documentation provided to the Board that were used by the Department of Correction at each of the past two Board of Correction meetings: November, 2014 and September, 2014.

As stated above, we are requesting that the materials be provided now as the public hearing is scheduled for December 19, 2014, and the materials should be readily available. In addition, we request that responsive material be provided as soon as it is located (rather than waiting to gather everything at once).

Thank you for your immediate attention to this important matter. Please respond as soon as possible and please contact me if there are any questions concerning this request.

Sincerely,

Sarah Kerr
Staff Attorney
The Legal Aid Society
Prisoners' Rights Project
199 Water Street
New York, NY 10038
(212) 577-3530

Attachment 2

TESTIMONY

The Council of the City of New York

Committee on Fire and Criminal Justice Services and
Committee on Juvenile Justice

Oversight: Examining the Treatment of Adolescents in New York City Jails
and Reviewing the United States Department of Justice's
Report on Violence at Rikers Island

October 8, 2014
New York, New York

The Legal Aid Society
199 Water Street
New York, NY 10038

Good morning. I am Nancy Ginsburg, Director of the Legal Aid Society's Adolescent Intervention and Diversion Project in the Criminal Practice, a specialized unit dedicated to the representation of adolescents aged 13 to 18 who are prosecuted in the adult criminal courts, and I am joined by William Gibney, the Director of the Criminal Practice Special Litigation and Law Reform Unit. We submit this testimony on behalf of the Legal Aid Society, and thank Chairpersons Crowley and Cabrera and the Committees on Fire and Criminal Justice Services and Juvenile Justice for inviting our thoughts on the issue of conditions of incarceration for our teenage clients held on Rikers Island.

The Legal Aid Society is the nation's oldest and largest provider of legal services to low-income families and individuals. As you know, from offices in all five boroughs, the Society annually provides legal assistance to low-income families and individuals in more than 300,000 legal matters involving civil, criminal, and juvenile rights issues. During the last year, our Criminal Practice handled nearly 230,000 trial, appellate, and post-conviction cases for clients accused of criminal conduct. Many thousands of our clients with criminal cases in Criminal Court and Supreme Court are teenagers who are treated as if they are adults. The Criminal Practice has a specialized unit of lawyers and social workers dedicated to representing many of our youngest clients prosecuted in the criminal system. The Adolescent Intervention and Diversion Project provides enhanced representation for our most vulnerable clients who are often involved in many systems in addition to being court-involved: foster care, special education, mental health, substance abuse. Our Criminal Practice also provides services for clients challenging punitive segregation sentences while in City custody.

Our Juvenile Rights Practice provides comprehensive representation as attorneys for children who appear before the New York City Family Court in abuse, neglect, juvenile delinquency, and other proceedings affecting children's rights and welfare. Last year, our Juvenile Rights staff represented more than 34,000 children, including approximately 4,000 who were charged in Family Court with juvenile delinquency. In addition to representing these children each year in trial and appellate courts as well as school suspension hearings, we also pursue impact litigation and other law reform initiatives on behalf of our clients.

The Prisoners' Rights Project ("PRP") of The Legal Aid Society has addressed problems in the New York City jails for more than 40 years. Through advocacy with the Department of Correction ("DOC") and the Department of Health and Mental Hygiene ("DOHMH") as well as individual and class action lawsuits, PRP has sought to improve medical and mental health care and to reform the systems for oversight of the use of force and violence in the jails. Each week PRP receives and investigates numerous requests for assistance from individuals incarcerated in the City jails. Years of experience, including daily contact with inmates and their families, has given The Legal Aid Society a firsthand view of problems in the New York City jails.

Our perspective comes from our daily contacts with adolescents and their families, and also from our frequent interactions with the courts, social service

providers, and City agencies, including the New York Police Department, the Department of Education, the Department of Youth and Family Justice, the Department of Correction, the Department of Health and Mental Hygiene, the Department of Probation as well as the Administration for Children's Services.

Because of the breadth of The Legal Aid Society's representation, we are uniquely positioned to address the issue before you today. We currently represent the vast majority of teenagers prosecuted in the Family, Criminal and Supreme Courts in New York City. We have more than 50 years of experience assessing the cases of teenagers, identifying diversion programs, and advocating for alternatives to incarceration. We have developed effective advocacy relationships in the courts, with prosecutors, and with City and State agencies, which have resulted in connecting our teenage clients with the services that best meet their needs as well as those of the community.

Our extensive experience indicates that community safety is best protected when appropriate services are identified and accessed for court-involved teenagers so that they are treated safely and humanely while in the system and less likely to be entangled again in the criminal or juvenile justice systems. The Legal Aid Society strongly supports the call to improve conditions for incarcerated teenagers, including moving these adolescents off of Rikers Island and significantly improving conditions in the facilities which house our youth.

Introduction

New York State is one of two remaining states in America to prosecute all 16 and 17 year olds as adults for all crimes. Almost all of the 16 and 17 year olds, like those younger and older in New York City, who are prosecuted for the commission of crimes are African-American or Latino, poor, and living in underserved neighborhoods. When a Court orders that a 16 and 17 year old adolescent is to be incarcerated in a local jail, that teenager is placed on a bus to Rikers Island, ripped away from their community, services and family. They are housed in a facility ill equipped to provide proper services, health care and safety. The US Department of Justice recently issued a report concluding that "there is a pattern and practice of conduct at Rikers that violates the constitutional rights of adolescent inmates. In particular, we find that adolescent inmates at Rikers are not adequately protected from harm, including serious physical harm from the rampant use of unnecessary and excessive force by DOC staff."

The time has come to implement significant changes in the way we treat our youth. Sixteen and seventeen year olds do not transform into adults merely by calling them such. They are not adults under New York State law for any purpose except criminal prosecution. Nevertheless, the City incarcerates 16 and 17 year olds in buildings designed for adults, with programming designed for adults, where they are brutally beaten *by adult staff or under the watch of complicit adult staff.* The Legal Aid Society has been ringing this clarion for decades. Now the federal government has joined the chorus. We ask that the City Council demand that New York City remove

teenagers and young adults from Rikers Island to a site where they can be treated humanely and consistently with constitutional standards.

A Brief Historical Perspective Of The Prosecution Of Teenagers

New York State first grouped 16 and 17 year olds with adults for purposes of criminal prosecution in the late 1800s. During the first 25 years of the 20th century, great reform took place throughout the country. Embracing social work and child psychology findings, States recognized that children were different than adults, and juvenile courts were established to address the needs of children and teenagers. Despite the fact that almost every State set the age of adult criminal prosecution at 18, New York maintained that 16 and 17 year olds were adults for purposes of criminal prosecution. A 1931 report of the New York State Crime Commission criticized drawing the jurisdictional line of demarcation for criminal prosecution at 16, but no corrective action was taken. The age of criminal responsibility was again discussed in detail at the 1961 Constitutional Convention, which established the New York State Family Court. The Convention deferred a decision to raise the age from 16, but no further action was ever taken.[1] As a result, for over 100 years New York State has set its jurisdictional age as low as 16. There is no evidence whatsoever that this outdated policy has led to lower rates of crime or recidivism by adolescents. Given recent social science and neuroscience findings, the time is ripe for reconsideration of this issue.

In 2011, Chief Judge Lippman first called for New York State to raise the age of criminal jurisdiction, introducing legislative language to facilitate that process.[2] In April of this year, Governor Cuomo convened a Commission to examine raising the age of criminal jurisdiction, stating "It's time to improve New York's outdated juvenile justice laws and raise the age at which our children can be tried and charged as adults. New York is one of only two states that charges 16 and 17 year olds as adults. It's not right and it's not fair."[3] The Commission is expected to issue a report at the end of 2014.

While we hope that the Commission on Raise the Age will bring New York State in line with the rest of the country, we believe New York City must finally take swift action to protect this young and vulnerable population.

Most Adolescent Offenders Do Not Continue Their Behaviors Into Adulthood

In 2008, the United States Department of Justice's Office of Juvenile Justice and Delinquency Prevention published a report that analyzed the most comprehensive data set currently available about serious adolescent offenders and their lives in late adolescence and early adulthood. The most significant finding of the study is that *"[m]ost youth who commit felonies greatly reduce their offending over time, regardless of the intervention. Approximately 91.5 percent of youth in the study [aged 14-18]*

[1] Merrill Sobie, *Pity the Child: The Age of Delinquency in New York,* 30 Pace L. Rev. 1061 (2010).

[2] See also, https://www.nycourts.gov/ctapps/news/SOJ-2013.pdf

[3] https://www.governor.ny.gov/press/04092014-commission-ypsj

reported decreased or limited illegal activity during the first 3 years following their court involvement."[4] Additionally, the study found that "longer stays in juvenile facilities did not reduce reoffending; institutional placement even raised offending levels in those with the lowest level of offending. The DOJ report concluded that the "practice of transferring juveniles for trial and sentencing in adult criminal court has produced the unintended effect of increasing recidivism, particularly in violent offenders, and thereby of promoting life-course criminality".[5]

Issues Facing the Young People Jailed as Adults

Young people incarcerated in our City jails have profound needs and are in desperate need of therapeutic interventions. Social scientists posit that young people who are criminal court involved are not on a trajectory to become lifelong criminals, but incarceration can push them in that direction. Adolescence is a critical developmental stage. Placement in a correctional setting can disrupt educational and social development. These disruptions, in turn, can undermine prospects for pursuing an academic path, finding a job and rejoining or creating their own families. Studies show that successful programs follow the lessons of developmental psychology by providing young offenders with supportive social contexts, authoritative adult figures and help to acquire the skills necessary to change problem behavior and to become psychologically mature.[6]

Prior Neglect and Abuse

We have found that close to one third of our clients in the delinquency and criminal system are, or have been, in foster care. Many of these youth have been in multiple foster care placements by the time they reach their mid-teens. Some feel disconnected from a system which has not met their needs. The transitional planning services often fall short of ensuring a stable entry into adulthood. Some have emotional disabilities stemming from neglect or abuse which are not identified or addressed. Many youngsters who were victims of sexual abuse suffer from mental illness or low self-esteem and can turn to substance abuse to dull the memories and the resulting pain. A percentage of these youngsters turn to prostitution to support themselves. This further exposes them to trauma and violence.

Mental Health Needs

Many incarcerated youth suffer from mental illness. The most prevalent diagnoses of court-involved youth are attention deficit disorder, post-traumatic stress disorder, depression and bipolar disorder. Teenagers with these diagnoses may respond disproportionately to actions that they perceive as aggressive. Their symptomatic behavior, which seems justifiable to them, is often solely interpreted as

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[4] Edward P. Mulvey, *Highlights From Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders,* U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, March 2011..

[5] *Id.*

[6] Elizabeth S. Scott and Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime,*18 Future of Children, Juvenile Justice 25-27, (Fall 2008) (available at www.futureofchildren.org.)

hostile or aggressive. Their conditions are further exacerbated by punishments meted out which place them in punitive segregation where they are locked alone in a cell for up to twenty-three hours a day. Without consistent treatment, structure and services, these teens cannot complete their education or hold meaningful jobs. Additional treatment resources in the community, including residential beds will reduce the number of incarcerated youth.

Trauma

According to a study conducted by the VERA Institute, "[approximately 85 percent of young people assessed in secure detention reported at intake at least one traumatic event, including sexual and physical abuse, and domestic or intimate partner violence. Furthermore, one in three young people screened positive for Post-Traumatic Stress Disorder (PTSD) and/or depression."[7] ACS reports that 48% of youth in detention were referred for mental health services.[8] OCFS reports a similar number in the population admitted in 2004-2013, noting that 42% of admitted youth had mental health service needs.[9]

A history of trauma can also affect brain development and increase the harm to youth from isolated confinement. Exposure to trauma can create a near-constant state of fight-or-flight mode for anyone. For traumatized youth, this survival mode supersedes typical brain development. These traumatized youth are thus even less able to control their mood swings and impulses.[10]

In 2013, the New York City Board of Correction (BOC) commissioned a report by outside experts, two clinical professors of psychiatry, to assess whether the City is in compliance with the current Mental Health Minimum Standards. The report is extremely critical of the DOC's policies and practices, particularly those with a psychiatric diagnosis and juveniles.[11] Drs. Gilligan and Lee chillingly detailed the violent culture in the NYC jails: "[a]ll too many of the officers that we observed appeared to us to make it

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[7] Innovations in NYC Health and Human Services Policy: Juvenile Detention Reform, Vera Institute of Justice, January 2014. available at http://www.vera.org/sites/default/files/transition-brief-juvenile-detention-reform.pdf.

[8] 2013 Mayor's Management Report, Administration for Children's Services, p. 165.

[9] NYS Office of Children and Family Services, Division of Juvenile Justice and Opportunities for Youth,2013 Annual Report.

[10] American Academy of Pediatrics, Policy Statement: Health Care for Youth in the Juvenile Justice System, 128 PEDIATRICS 1219, 1223-24 (2011),available at http://pediatrics.aappublications.org/content/early/2011/11/22/peds.2011-1757.full.pdf (reviewing the literature on the prevalence of mental health problems among incarcerated youth); OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, NATURE AND RISK OF VICTIMIZATION: FINDINGS FROM THE SURVEY OF YOUTH IN RESIDENTIAL PLACEMENT 4 (June 2013), available at http://www.ojjdp.gov/pubs/240703.pdf (finding that 56 percent of youth in custody experience one or more types of victimization while in custody, including sexual assault, theft, robbery, and physical assault).

[11] Gilligan, James, Dr., Lee, Bandy, Dr., *Report to the New York City Board of Correction*, September 5, 2013. available at http://www.nycjac.org/storage/Gilligan%20Lee%20Report%20%20Final.pdf.

clear that they were quite willing to accept an invitation to a fight, or to regard it as a normal response within the cultural norms of the jail."[12] During their investigation they witnessed an adolescent in the RHU becoming increasingly agitated in his cell – first banging his arms and legs on his cell door then his whole body, ripping up a sheet, wrapping his arms, legs and then neck as if preparing to hang himself. No NYC DOC staff responded until Drs. Gilligan and Lee intervened. Shockingly (since the RHU is supposed to be a therapeutic alternative to solitary confinement for individuals with mental illness), the officer staff's first response was to pull out a can of chemical agent (mace). The doctors had to intervene and insist that this was not necessary and that mental health staff should be notified. The violent response of staff to the individuals in their care, followed by severe punishment with solitary confinement, was identified by Drs. Gilligan and Lee as "the mutually self-defeating vicious cycle that develops between inmates and correction officers, in which the more violently an inmate behaves, the more seriously he is punished, and the more seriously he is punished, the more violent he becomes." It is a perpetual vicious cycle that fuels continued violent conduct. In the face of overwhelming lack of appropriate care and treatment, the doctors' report calls for significant changes in policy, culture and training of staff.

Poor Family Support

Often lack of family support is caused by parents who are seriously mentally ill, suffering from addiction or are incarcerated. These young people really have no support system to turn to and once they become court-involved, can show no stability in the community and often face incarceration as a result. Over the past few years, we have seen an increasing number of parents filing charges against their children for various reasons and the adolescents are rendered homeless due to a court ordered order of protection keeping them from living with their parents.

LGBTQ Youth

Teenagers who identify as lesbian, gay, bisexual, transgender or questioning are often disproportionately harassed or attacked in jail. Many of these young people have been rejected by their families based on their sexual orientation and have been pushed out of their homes—some, at a very early age. Unfortunately, many of these youth experience their first contact with the court system on charges of prostitution, trespass and loitering. Lack of family support and insufficient residential options results in needless incarceration.

Education

Many youth arrive in adult jails with severe educational deficits: about 40-50% are classified as in need of special education services, and large numbers have reading and math proficiency four or five grades below grade level. Education in jail is of paramount importance not only to ensure their successful reintegration to the community upon release, but also to provide them with rehabilitative activities while in custody. Idleness breeds violence, and leaving adolescents to languish in housing areas rather than engage in productive school activities is a recipe for trouble.

[12] *Id.* at p. 16.

The Department of Education provides high school education on Rikers Island to youth who are under 21 and do not have a diploma or GED. In 2000, in a lawsuit brought by the Legal Aid Society, a federal court found that these programs were so deficient that they violated the Constitution and federal laws. A monitor, appointed over the City's vigorous opposition, issued highly critical reports detailing serious failures in the Rikers schools, and the federal court again in 2002 ordered the City to come into compliance. After an appeal to the Second Circuit, which did not disturb the findings that education is constitutionally deficient, the case is now back in the federal courts to determine what relief will be imposed on the City finally to bring the education on Rikers Island up to the legal minimum. The court has appointed a nationally-recognized expert in correctional education. Dr. Peter Leone, who is currently visiting the Rikers schools, and will make recommendations to the Court. Dr. Leone's expertise could provide the City with an excellent resource for improving the Rikers schools.

While the City has made numerous changes to the schools on Rikers Island in response to our lawsuit, some of the most glaring problems identified by the Court and monitor remain unchanged. Although youth in need of special education are vastly over-represented in jail, the Rikers schools largely ignore their individual needs – not to mention the federal laws governing special education -- and instead provide a "one size fits all" approach that is the antithesis of special education.

Placement in an isolated or segregated housing unit essentially cuts off all education. Many of these students have very low literacy rates, and the monitor found that 65% of those in punitive segregation were classified as needing special education. The City claims to provide "cell study" to these students, but that consists at best of a generic, mimeographed packet of written material, and an occasional phone call (that a student must initiate) to a teacher. This is not education, and it is shocking that the New York City Department of Education takes the litigation position that it is. Moreover, we have been informed that even these minimal services are offered intermittently at best, as there are not always telephones nor teachers to provide them.

Challenges Facing Girls in Adult Jails

Although this hearing focuses on the conditions in RNDC where boys are housed, it is important to remember that teenaged girls also are held on Rikers Island at the Rose M. Singer Center. While girls charged with crimes or delinquency face many of the same issues as boys, several areas of concern affect girls in particular. Most of the girls who enter the criminal justice system have experienced sexual, emotional and/or physical abuse in their past, suffer from mental health problems, and/or are substance abusers. One or any combination of these factors can contribute to the conduct resulting in criminal or delinquency proceedings. Indeed, research indicates that abuse (sexual, emotional and/or physical) may be the most significant underlying cause of such high-risk behaviors for girls.[13] Victimization can lead to an increase in violent

[13] *Adolescent Girls with Co-Occurring Disorders in the Juvenile Justice System*, at 3, The National GAINS Center for People with Co-Occurring Disorders in the Justice System, December 1997.

behavior, substance abuse and other self-harming behaviors, poor self esteem, early sexual activity and prostitution.[14]

In fact, the National Mental Health Association estimates that more than 70% of incarcerated girls nationwide report sexual and physical abuse. Due to repeated exposure to trauma and violence, up to 50% of incarcerated girls fit the criteria for a diagnosis of post traumatic stress disorder (PTSD) as well.[15] The extent of mental health problems among these girls is staggering. Almost 70% of girls in the juvenile justice system have histories of physical abuse, compared to a rate of about 20% for teenage females in the general population.[16] A 1997 study of boys and girls in juvenile justice facilities found that 84% of girls needed mental health assistance, compared to 27% of boys.[17] It is certain that many of these mental health issues stem from histories of abuse so many of the girls have endured. Yet the juvenile and criminal justice systems traditionally focus on the girls' actions instead of the trauma they have endured and how that trauma might be related to the behavior for which they are charged.

Environment of Violence and Decades of No Remedies

The Legal Aid Society has sat before this Council many times before detailing much of what has been set forth in the August 4, 2014 U.S. Department of Justice (DOJ) letter pursuant to its powers under the Civil Right of Institutionalized Persons Act (CRIPA) demanding that the NYC DOC address a culture of violence in its facilities housing adolescents 16-18 and the excessive use of isolated confinement. While our testimony today and the DOJ report focuses on the issue of violence against incarcerated teenagers, the problem is not so limited. The DOJ report stated that their "investigation suggests that the systemic deficiencies identified in this report may exist in equal measure at the other jails on Rikers".[18] The evidence we have gathered in our pending class action addressing staff violence and excessive force throughout the Department, *Nunez v. City of New York,* S.D.N.Y., 11 Civ. 5485 (LTS). is entirely consistent with the DOJ's findings. We encourage the Council to continue ongoing oversight of the conditions for all individuals incarcerated on Rikers Island regardless of age.

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[14] *Id*.

[15] *Mental Health and Adolescent Girls in the Justice System*, National Mental Health Association (1999).

[16] Laurie Schaffner, *Female Juvenile Delinquency: Sexual Solutions, Gender Bias, and Juvenile Justice,* 9 Hastings Womens L.J., 4 (1998)

[17] *Adolescent Girls with Co-Occurring Disorders in the Juvenile Justice System*, at 5, The National GAINS Center for People with Co-Occurring Disorders in the Justice System, December 1997. In New York City Fiscal Year 2006, the NYC Department of Juvenile Justice reports that 68% of children admitted to DJJ facilities required mental health services. Mayor's Management Report.

[18] The Department is currently the subject of a class action lawsuit brought by current and former inmates at Rikers alleging system-wide, unconstitutional use of force by staff against inmates. *See Nunez v. City of New York, 11 Civ. 5845.*

The New York City jails have long been tremendously violent. Inmates, staff, and sometimes visitors are seriously injured—and some have died--as a result. This past summer we settled our lawsuit on behalf of the family of a man who was beaten to death by NYC DOC staff at the North Infirmary Command, for which the City paid $2.75 million in compensation. (*Daniels v, New York*, S,D,N,Y,, 13 Civ. 6286 (PKC). We also recently settled a lawsuit on behalf of a teenager assaulted by several officers in the visit search area of RNDC, from which he suffered a skull fracture and multiple lacerations. (*Stanford v. City of New York,* S.D.N.Y., 13 Civ. 01736 (ALC). In the last few years we have represented numerous other individual victims of staff brutality. These clients suffered a constellation of severe injuries such as a fractured orbital wall; facial bruising; severe bruising all over the body; a facial laceration requiring many sutures; a broken nose; and a skull laceration requiring many staples.

These assaults by Department staff cost the City tremendous amounts of money. Because such judgments are paid by the City, and not out of the DOC budget, the DOC is effectively outsourcing the costs of its failure—or unwillingness—to rein in its rogue staff.

In 2013 through mid-2014, the Prisoners' Rights Project interviewed and wrote to DOC seeking investigations on behalf of 25 adolescent inmates injured in incidents in RNDC in violent, and often unprovoked, encounters with uniformed staff. The frequency and severity of injuries, confirmed by medical records, was astounding, with the prevalence of injuries to inmates' faces and heads being most disturbing and notable. **Notably, 5 of the 25 or 20% of the staff inflicted injuries upon youth occurred in the school area.** For example, the injuries which we confirmed in use of force incidents with DOC uniformed staff, include:

- **M.M., RNDC**, fractured nose, laceration over lip. M.M. was denied permission to call his family and held his hand in the slot of his door saying he would keep it there until he was allowed to call his father. A probe team was called and pushed him on his bed where his hands were held behind his back and his was punched, kicked and kneed by the officers on his body and face.
- **S.C., RNDC**, head injury-contusions to face and loss of consciousness, ankle swelling and pain, elbow swelling, rib and jaw pain. S.C. fell and went to the medical clinic where COs wanted him to wait until morning for treatment. He was placed in a pen and punched by the CO and then taken to Bellevue for facial injuries.
- **S.C., RNDC**, Hit in forehead with handcuffs, 7mm laceration on forehead closed with dermabond, abrasion and numbness in wrist due to tight cuffing. S.C. threw water at a CO who responded by hitting him in the head with handcuffs. The probe team entered the cell, handcuffed SC with

metal cuffs, bending his wrists to an extreme angle and banged his head against the wall. [19]

- **E.O., RNDC**, wrist pain and swelling. While being escorted down the hall, the CO bent his wrist and ordered him to kneel where he continued to bend his wrist so much it popped. E.O. was not taken to see medical staff until the following day despite complaining of pain.
- **S.C., RNDC**, hit by a CO with a chair in the face. Jaw fracture. Oral surgery at Bellevue placing plate and 6 screws. Eye hemorrhage 5mm diameter. Mild deviated septum. SC was attacked by 4 or 5 C0s after he was believed to have taken a pen from school. He returned the pen and the C0s brought him into the classroom and punched him multiple times in the face, kicked and maced him. He was not taken to the clinic until 6 hours later and not taken to Bellevue for another 5 hours.
- **S.B., RNDC**, wrist fracture, swelling and tenderness.
- **E.O., RNDC**, wrist pain, swelling and tenderness.
- **E.A., RNDC**, nasal fracture, facial and chest abrasions, ear canal filled with blood, abrasion across mid-thoracic spine.
- **N.W., RNDC**, contusions to eye, legs and arms and swollen knee. N.W. had a verbal altercation with a CO a few days before a family visit. On the way to the family visit, the CO did not allow NW to walk through the magnetometer, bringing him to a side room where he put on his gloves and punched him in the face. Three other C0s entered the room and began punching and kicking him before he was maced and briefly lost consciousness.
- **M.D., RNDC**, contusion to wrist, bruises and abrasions on arm. M.D. had been beaten by 2 inmates and requested that he be moved. He was taken to a holding pen, but then returned to his cell. He asked not to be left there and would not let the officers close the door, so they rear cuffed him and hit in the back with a stick and his arms were twisted and bent all the way back.
- J**.G., RNDC**, wrist contusions from handcuffing. He was handcuffed extremely tightly after a food fight among many youth at lunch and one of the of Officers instructed the crew to leave the cuffs on because his hand wasn't "blue enough".
- **M.M., RNDC**, scalp and lip contusions. M.M. was sitting with 2 boys at lunch in school. One boy threw food and one threw ice. The C0s came over saying that they were only going to hit the other two youth because they threw the food. A short while later, they were all instructed to stand in front of their classroom, where MM was punched in his head by multiple officers who claimed that MM was the aggressor..

[19] DOJ found that "probe team members too often quickly resort to the use of significant levels of force. (DOJ 8/4/2014 Report, p. p. 19.)

- **E.S., RNDC**, multiple contusions jaw, face and ribcage. During a strip search conducted in the school, E.S. asked an officer if he had to take off all his clothes. He was then slapped and punched in the head and asked if he was ready to cooperate.
- **D.P., RNDC**, head injury-bruises and swelling to back of head on both sides, contusion/hemorrhage to eye, bruises and swelling to eye and lips, lower back pain. After an incident where another student took a book out of a teacher's bag in school, a CO came into the room and threatened to take money out of the student's commissary if they did not say who took the book. D.P. began to argue with the C0 who slapped and punched him in the head. Other C0s entered the room, the other students were escorted out and after placing paper on the room window, one C0 maced DP whereupon he was punched by other officers.
- **T.J., RNDC**, 1 cm abrasion on cheek. Neck abrasion, chest bruising. In a classroom, a C0 asked the students to pick up a book from the floor. When they failed to do so, the officer closed the windows and he and other C0s sprayed the room with chemical spray and held the door closed. In a second incident, the students were instructed to strip search and when TJ looked to the side, he was slapped and hit in the head and chest and kicked in the back. He was then instructed to "hold it down" and did not go to the clinic until 2 weeks later.[20]
- **J.G., RNDC**, 1 cm laceration to lip—sutured. Bruises to face and head. Chipped tooth and cuffmarks on wrist. JG did not immediately get out of bed and after getting dressed, he was flex cuffed, taken to intake and punched in the face, head and body.
- **M.W., RNDC**, Tenderness and swelling to orbital bones, tenderness to jaw, contusions shoulder and arm. MW was searched prior to court during which his commissary bag of food was taken to be searched. When he did not receive the bag of food after the search, the C0 told him to go back to the search room where the C0 pushed him and instructed him to "come off camera". MW moved into another stall without a camera hoping to get his food back and instead was punched and kicked by multiple officers. The attack stopped when one of the C0s said a captain was coming. MW was then told to "hold it down" before the Captain came in.
- **E.H., RNDC**, scalp laceration, laceration over eyebrow dermabonded. E.H. was groggy waking up for school because of sleep medication and after moving too slowly for the C0, his face was pushed against the wall

[20] The DOJ report notes that "[i]n interviews with dozens of adolescent inmates, our consultant found that violence ranging from casual and spontaneous to premeditated and severe is often accompanied by the officers warning inmates to "hold it down". According to our consultant, this phrase was familiar to almost every inmate he interviewed, as well as inmates he spoke with informally as he toured the jails. The warning may come from officers immediately following a beating, or sometimes day or weeks after an incident. Officers may even delay taking inmates to clinics for medical attention as they try to convince them to "hold it down." If the inmate indeed "holds it down" and declines to report a use of force, the staff also then do not report it. (DOJ 8/4/2014 Report, p. 23.)

and then he was punched in the forehead. A teacher brought EH to a CO saying he needed medical attention and CO said he needed a tissue. EH then told another C0, after which he was brought to an empty classroom where he was asked what he would say at the clinic. At first he said he would tell the truth. The C0 closed the door and asked again. EH agreed to say he fell.

- **T.W., RNDC**, nasal bone fracture, hemorrhage in left eye, face abrasions and swelling. TW went to take his own radio on his way into his cell after taking his medication and the CO locked him out of his cell and punched him in his face. Other COs came and punched and kicked him. The COs then discussed how they would report the incident and warned TW that they would tell other inmates he was a snitch if he complained about the incident.
- **E.A., RNDC**, nasal fracture, deviated nasal septum, abrasion across mid-thoracic spine.
- **D.J., RNDC**, multiple swelling on skull and forehead, left knee bruises, arm swollen and tender.
- **J.C., RNDC**, multiple swelling and bruises on scalp, bruises on arm, hand swelling.
- **K.G., RNDC**, multiple facial contusions, rib tenderness and back tenderness with thoracic region swelling.
- **C.D., RNDC,** left side of face swollen and tender. During a room search, CD was instructed to drop to his bed and he complied. A C0 then pinned his hands on his bed against the box springs. He asked that they stop but he was told to shut up. He was then sprayed with pepper spray, he was escorted out of the room to a hallway outside the housing area where there are no cameras. He was once again sprayed with pepper spray and punched by multiple C0s on his body, arms, back, stomach and face. He was charged with threatening staff, disorderly conduct and not following directions and placed in punitive segregation.
- **A.S., RNDC**, hand laceration. AS was cut by a C0 by what looked like a metal blade removed from a razor. He waited for 3-4 hours until he was taken to the clinic despite the fact that his hand was bleeding freely.

This is not even a comprehensive list—but reflects merely injuries suffered by those individuals who were brave or scared enough to reach out to our office for assistance, and for whom we have obtained medical records. Our findings are consistent with those in the DOJ investigation, which noted that "[h]eadshots are commonplace at Rikers. We have identified numerous incidents where correction officers struck adolescents repeatedly in the head or face, often causing significant injuries … Our consultant reported that headshots are far more common at Rikers than at any other correctional institution he has observed. In many instances, correction officers readily admit hitting inmates but claim they acted in self-defense after being punched first by the inmate. As a threshold matter, even when an inmate strikes an officer, an immediate retaliatory strike to the head or face is inappropriate. Moreover,

there is often reason to question the credibility of the officer's account." (DOJ 8/4/2014 Report, p. 12.)

Because so many detainees and sentenced inmates are suffering needless injury at the hands of uniformed staff, and because the problem of uniformed staff brutality is widespread throughout the system, we believe a systemwide reform of policy and practice is necessary to bring an end to this reign of violence. To achieve that end, on May 24, 2012, the Prisoners' Rights Project, together with the law firms of Ropes & Gray and Emery Celli Brinckerhoff and Abady, filed a class action lawsuit, *Nunez v. City of New York,* S.D.N.Y., 11 Civ. 5485 (LTS), on behalf of all New York City inmates held in commands not subject to court orders. The lawsuit seeks to end the pattern and practice of unnecessary and excessive force in the City jails.

In a challenge to excessive force in the prison wards of New York City hospitals, a consent judgment provided for, *inter alia,* screening measures for correction officers to ensure that those with disciplinary records connected to use of force were assigned elsewhere. *Reynolds v. Sielaff,* 81 Civ. 101 (PNL), Order and Consent Judgment Approving Class Settlement at ¶¶ 43-48 (S.D.N.Y., Oct. 1, 1990). Complaints of use of force dropped significantly, providing an important lesson: active supervision of staff, and careful screening and assignments to marginalize those officers whose conduct is more suspect than others, will yield results. The DOC central office must exercise leadership in staff assignments and promotions, and send the message that an officers' *entire* use of force history will be scrutinized in all promotion decisions.

Later litigation challenged excessive force and inmate on inmate violence at the jail for sentenced misdemeanants on Rikers Island. The court found that DOC uniformed staff engaged in a pattern that sounds familiar today: "1) use of force out of frustration in response to offensive but non-dangerous inmate goading; 2) officers' use of excessive force as a means of obtaining obedience and keeping order; 3) force as a *first* resort in reaction to any inmate behavior that might possibly be interpreted as aggressive; and 4) serious examples of excessive force by emergency response teams." *Fisher v. Koehler,* 692 F. Supp. 1519, 1538 (S.D.N.Y. 1988), *aff'd*, 902 F.2d 2 (2d Cir. 1990). The court found that DOC's "failure to monitor, investigate and discipline misuse of force has allowed—*indeed even made inevitable*—an unacceptably high risk of misuse of force by staff on inmates." *Id.* at 1558 (emphasis supplied). After the court ordered significant changes in the investigation of use of force and discipline of staff members, the use of force in that jail declined precipitously.

In 1998, in *Sheppard v. Phoenix,* the City and Legal Aid negotiated a comprehensive settlement addressing the horrific brutality by uniformed staff at the CPSU, which houses teenagers and adults who have committed disciplinary offenses. The warden of the CPSU testified at his deposition that brutality was "ingrained in the culture" of the Department. *Sheppard,* Declaration of Plaintiffs' Counsel, June 26, 1998. To address this culture at its core, the City agreed to blanket the CPSU with recording videocameras, and to weed out the "bad apples," or officers whose use of force histories were troublesome. Two expert joint consultants in security, including a former head of the Federal Bureau of Prisons, provided technical assistance in transforming

the “culture of violence” in the CPSU, with remarkable success. For example, from 1997 (the last year before the settlement) to 2001, the number of serious and injurious use of force incidents in the CPSU dropped from 177 to 15—an over 90% decline.

Even though these remedies proved that DOC *could* reduce the injuries suffered by inmates if it chose to do so, those reforms were not rolled out systemwide. Instead, the excessive force against inmates continued unabated in the other City jails. Legal Aid then filed its first system-wide brutality case, *Ingles v. Toro*, to address excessive force in all of the remaining jails which had not been under Court order. *Ingles* settled in 2006. Central to the settlement were requirements for significantly more camera coverage in the jails, and the development and promulgation of new procedures to govern the Investigation Division, which had a history of merely whitewashing investigations of use of force incidents, rather than functioning as a genuinely investigative body. That settlement agreement terminated on November 1, 2009.

The DOJ noted that “In 2004, Steve Martin, the consultant retained in [Ingles]..issued a scathing report decrying the frequency with which DOC staff punched inmates in the face. Mr. Martin wrote that ‘there is utterly no question that the Department, by tolerating the routine use of blunt force headstrikes by staff, experiences a significantly greater number of injuries to inmates than the other metropolitan jail systems with which I am familiar’. It is troubling that, ten years later, this practice continues.” ((DOJ 8/4/2014 Report, p. 13.)

We observed some significant improvements in the Department’s management of use of force while the *Ingles* settlement was in effect and permitted us to monitor systematically. However, the Department did not maintain its efforts once the spotlight was off, and the number of complaints of serious, injurious, and unjustified use of force again began to increase. We saw that we had to renew our systemic litigation efforts.

When we filed the *Nunez* class action, we were thus not writing on a blank slate. The Department knew steps that could work to curb violence in the jails, and refused to implement or sustain them system-wide. The incidents that have occurred within the last year—both the circumstances in which they have occurred (i.e., staff retaliation for inmate complaints or verbal annoyance) and the highly injurious nature of force used—are simply inexcusable in a system that has had ample opportunities to reform.

Recommendations:

I. Remove Youth from Rikers Island and other Adult City Jails

The New York Sentencing Commission recommended that "No youth shall be detained in any prison, jail lockup, or other place used for adults convicted of crime or under arrest…" Alternatives to detention, alternatives to incarceration, pre-trial community supervision and presumptive release bail policies for our youth should be utilized in all but the rarest of circumstances. However, if pretrial detention or jail as a sentence is the only option, youth must be in a safe, well-maintained facility which provides ample space for: separate housing for youth with special needs, classrooms conducive to learning, private treatment areas for medical and mental health care, space for additional agency contact, programming space, large indoor and outdoor recreation areas for congregate activity and housing areas with individual rooms. We believe this cannot be achieved in any facility on Rikers Island and requires the City to relocate the detention of these adolescents to another location.

Until such time as New York State implements any recommendation of the Commission on Raise the Age, The Legal Aid Society joins the following DOJ recommendation that the:

> "Department should develop a plan to house adolescents at a DOC jail not located on Rikers Island that will be staffed by experienced, competent officers and supervisors who will receive specialized training in managing youth with behavioral problems and mental health needs … The Department should employ a "direct supervision" management style in the adolescent facility. Direct supervision refers to an inmate management strategy in which, among other things, staff continuously interact with and actively supervise inmates from posts within housing areas, as opposed to being stationed in isolated offices. Direct supervision has been shown to reduce rates of violence, lead to better inmate behavior, lower operating costs, and improve staff confidence and morale. Frontline housing officers and first line supervisors are afforded substantial decision-making authority so they fell empowered and responsible for the effective management and supervision of the unit. To effectively employ the direct supervision approach, the jail should be designed to reduce the physical barriers between inmates and staff, and ensure clear sightlines to all housing areas. *It would be difficult to implement direct supervision at RNDC due to its linear design and layout. Housing adolescent inmates at an alternative facility located off Rikers Island will put DOC in a better position to develop a new paradigm for effectively managing the adolescent inmate population."*

(DOJ 8/4/2014 Report, p. 52.)

The Department of Correction should consider keeping 18 year olds in the same facility as 16 and 17 years olds, but in a separate housing area. Certainly, no young person doing well in the youth facility should be transferred on their 18th birthday.

II. Increase the placement of cameras

The DOJ investigation specifically noted that "[t]he most egregious inmate beatings frequently occur in locations without video surveillance…a number of areas with no video surveillance still remain. A disproportionate number of the most disturbing use of force incidents occur in these areas…**In particular, an astonishing number of incidents take place in the RNDC school areas, including classrooms and hallways.** It is unclear why the Department has not installed additional cameras in these areas. Other locations that did not have security cameras during the time period of our investigation include some search locations, the clinics, intake holding pens, and individual cells." (DOJ 8/4/2014 Report, p. 20.)

For any facility housing these adolescents, it is imperative that cameras be placed and maintained in school areas, classrooms[21], hallways, search locations, clinics, intake holding pens and individual cells. Cameras on should have recording capacity, and the recordings shall be kept for 90 days in order to facilitate investigations of allegations of incidents which may not have been reported initially. Any tape which does record a fight, staff use of force or staff misconduct, including officers off-post, should be preserved for three years.

III. Immediately End the Use of Punitive Segregation and Implement an Appropriate Disciplinary Process

We agree with the DOJ that "DOC relies far too heavily on punitive segregation as a disciplinary measure, placing adolescent inmates – many of whom are mentally ill – in what amounts to solitary confinement at an alarming rate and for excessive periods of time." (DOJ 8/4/2014 Report, p. 3.) According to the DOJ, in one 21 month period 3,158 adolescents received a total of 8,130 infractions, resulting in a total of 143,823 punitive segregation days with the most common infractions for non-violent conduct. (DOJ 8/4/2014, p. 49.) We also agree that "based on the volume of infractions, the pattern of false use of force reporting, and inmate reports of staff pressuring them not to report incidents, … the Department should take steps to ensure the integrity of the disciplinary process." (DOJ 8/4/2014 Report, p. 49 fn. 45.). As stated by the DOJ, DOC

[21] Images of students captured on security videotapes that are maintained by the school's law enforcement unit are not considered education records and therefore not considered confidential under the Federal privacy laws applicable to schools (FERPA). US Department of Education, Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Elementary and Secondary Schools. October 2007, available at http://www2.ed.gov/policy/gen/guid/fpco/ brochures/ elsec.html.

must "[d]evelop and implement an adequate continuum of alternative disciplinary sanctions for rule violations that do not involve lengthy isolation, as well as systems to reward and incentivize good behavior." (DOJ 8/4/2014, p. 62)

In the wake of the DOJ report the DOC announced the decision to eliminate punitive segregation for 16 and 17 year-olds by the end of the year.[22] **There is no reason to wait. There is simply no excuse for continuing to harm youth in custody through the use of punitive segregation.** The harmful use of isolation in punitive segregation should be ended now for all 16 and 17 year-olds and that reform should be extended beyond 16 and 17 year-olds to include other youth and other vulnerable populations in our jails. Moreover, while we welcome the proposed change, we are concerned with the lack of detail about how DOC will implement alternative disciplinary measures and create a fair and impartial disciplinary process.

In addition, consideration should be given to the NYC Jails Action Coalition Petition for Rule-Making for reforms of the disciplinary system and additional limitations on harmful long-term isolation including for individuals aged 18-25.[23] The NYC Board of Correction is currently in the midst of a rule-making initiative on punitive segregation which should be informed and supported by Council. In addition, we urge a close watch on any reforms that are instituted to ensure that they are operating as planned and are not undermined by old bureaucratic habits and staff resistance to change.

To further make the point, it should be noted that New York State does not use punitive segregation for juveniles who are charged with violent felonies and many of whom are the same age as youth on Rikers

IV. Services, Family Engagement and Agency Integration

Social services to incarcerated teenagers must be increased, both to protect them during their incarceration and facilitate their re-entry to society upon release. The DOJ report specifically recommended that adolescents should be offered "enhanced programming and activities, especially in the evenings and on weekends, to engage them and reduce idleness." ((DOJ 8/4/2014 Report, p. 58.) The period of incarceration for a teenager presents an opportunity to teach social skills, enhance academic skills, to

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[22] Michael Schwirtz, *Solitary confinement to End for Youngest at Rikers Island,* The New York Times, September 28 2014. http://www.nytimes.com/2014/09/29/nyregion/solitary-confinement-to-end-for-youngest-at-rikers-island.html?_r=0.

[23] The JAC Petition proposes significant limits on the use of solitary confinement (limited to incidents of serious violence), places a 15 day limit on each sentence with no more than 60 consecutive days permitted, provides for 4 hours out-of-cell in solitary confinement, excludes vulnerable populations (under 25 years old, and individuals with mental, physical or medical disabilities), provides for alternative safety restrictions for vulnerable populations which require 8 hours out-of-cell daily and a program of positive incentives, enhanced due process requirements at disciplinary and other hearings, and public reporting on the use of solitary confinement and alternative safety restrictions. The JAC Petition specifically requires that all youth are permitted to attend school regardless of restrictions and that due process protections at disciplinary hearings will include the assistance of counsel or other trained and competent advocate who is not employed by DOC. The JAC Petition for Rule-Making is available at: http://www.nycjac.org/storage/JAC%20Petition %20to%20BOC.pdf.

expose youth to new possibilities for their future. We should seize this opportunity rather than continuing to keep violence as the only option on the menu.

Sports, both indoors and outdoors, tutoring, vocational training, homework help, counseling, yoga, music, dance and theater are among the many types of programming that have been used with success throughout New York City and State and elsewhere with incarcerated teenagers.

Most incarcerated teenagers return home within a matter of weeks or months. It is critical that they have the opportunity to maintain their relationships with family members to aid their community re-entry. Families should feel welcome to visit their children while incarcerated and encouraged to do so.

Additionally, the Office of Mental Health should provide liaisons to facilitate assessment and treatment of youth with mental illness and the Administration for Children's Services should enhance its capacity to identify youth in foster care who are incarcerated and develop protocols for planning for release and ideally, diversion.

V. Education

The Department of Education and Department of Correction should implement reforms to the education system so that teenagers can consistently attend school in a safe environment, appropriate for learning regardless of classification or housing unit.

VI. Training and Staff Ratio

Train all DOC, DOHMH and DOE in Think Trauma, a program in use in the juvenile secure facilities in NYC and available from the National Child Traumatic Stress Network. Over the last year, mental health professionals from Bellevue Hospital have trained staff and youth in the juvenile secure detention facilities run by ACS/DYFJ in a curriculum entitled "Think Trauma". This training provides an overview for juvenile justice staff of how to work towards creating a trauma-informed juvenile justice residential setting. Creating a trauma-informed setting is a process that requires not only knowledge acquisition and behavioral modification, but also cultural and organizational paradigm shifts, and ultimately policy and procedural change at every level of the facility.[24] This curriculum, paid for by SAMSHA funding, helped the staff to better relate to the youth, and helped to identify a greater number of youth in need of mental health services.

Our treatment of adolescents in our justice system should reflect our understanding of these differences and the ways they affect an adolescent's behavior and well-being. For example, because of the impulsivity of youth, the threat of punishment will not have the same deterrent effect on a young person as it would on an adult. Thus, the extent of punishment should be limited in recognition of an adolescent's limited ability to make decisions that accurately calculate consequences and reasonably respond to the threat of punishment.

[24] http://www.nctsnet.org/products/think-trauma-training-staff-juvenile-justice-residential-settings

It is critical that the correction officers who have daily contact with incarcerated young people understand adolescent development and behavior and have the tools to interact with teenagers in a constructive way. Jail is an inherently stressful environment. Exposure to overly punitive conditions while incarcerated can exacerbate teenagers' prior life experiences. We believe that if the staff is better trained and given the tools to understand the context of the teenagers' behavior, their behavior would improve and the remedies would be less punitive and more effective.

Improve the quality of identification and treatment available to youth with mental illness.

Train department staff to recognize and accommodate mental illness so as to reduce the number of violent encounters with mentally ill inmates. The Department of Correction and relevant other agencies should provide enhanced training focusing on adolescent development, mental health and educational issues for officers working with adolescents.

The Annie E. Casey Foundation launched a multi-year, multi-site project known as the Juvenile Detention Alternatives Initiative (JDAI). JDAI's purpose was to demonstrate that jurisdictions can establish more effective and efficient systems to accomplish the purposes of juvenile detention. The initiative had four objectives and the last was to improve conditions in secure detention facilities. Many of the findings and recommendations in that part of the study can be used in formulating policy for juvenile correctional facilities. The findings of this study are encapsulated in a report, "Improving Conditions of Confinement in Secure Juvenile Detention Centers" and is available at http://www.aecf.org/upload/publicationfiles/improving%20conditions.pdf. The JDAI materials also recommend staff to inmate ratios of 1:8 while the youth are awake.

This is the ratio that exists in the secure juvenile detention facilities in NYC.

VII. Meaningful Investigation, Supervision and Discipline

The Department already has extensive written policies governing use of force; an Investigation Division tasked with investigating and reporting on staff misconduct; overlapping systems for tracking which officers have been involved in use of force incidents; and a disciplinary system leading to formal charges against officers who break the rules. But these systems serve only to whitewash misconduct if they lack integrity, and if there is no ongoing vigilance by correctional leadership to ensure integrity.

In our experience, the Investigation Division of the Department has not been held accountable for its longstanding failures to conduct unbiased, even-handed investigations of use of force incidents. The default mode seems to be that the task of the investigation is to exonerate staff of wrongdoing, unless there is video evidence that precludes such a finding. This should not be, as ID has an excellent manual, created by the Department itself pursuant to the *Ingles* settlement, that, if followed, would guide investigations and evaluation of conflicting testimony and evidence. But in our

experience, these requirements are not being followed in many cases. Key eyewitnesses are not interviewed; critical forensic medical evidence is not, as required, discussed with the Office of the Medical Examiner, but rather is examined simply by jail clinicians not trained in the interpretation of such evidence; and inmate accounts are more or less automatically dismissed when they conflict with officers' accounts of disputed facts. It is imperative that the Investigation Division conduct its investigations meaningfully, thoroughly, and even-handedly if staff misconduct is truly to be discovered and addressed, and that end can only be accomplished through strong leadership and supervision from above in order to overcome an entrenched culture of bias and lack of thoroughness and professionalism.

There must also be an effective staff disciplinary system to enforce compliance with Departmental policies and ensure staff professionalism. The Department's disciplinary system necessarily depends on the investigative system to identify cases calling for disciplinary prosecution, and the above described deficiencies in the investigative system severely compromise internal staff discipline. Even in those cases that are identified for prosecution, the disciplinary system seems to move extraordinarily slowly in use of force incidents, and thus the deterrent value—or message sent—by discipline is so temporally removed from the misconduct itself that it is often meaningless. We encourage the Department to identify the obstacles to speedy yet just resolution of the charges it brings against officers it believes have violated the rules.

Even effective investigative and disciplinary systems cannot by themselves create a culture of professionalism in the jails. Active and effective daily supervision of staff is also essential. Departmental managers—especially wardens and supervisors in specific jails—can and should learn their staff's use of force histories, *not* to impose discipline, but rather to assess whether a staff member is properly assigned; whether he or she has repeatedly been involved in the same questionable scenarios; and whether his or her involvements with inmates should be more actively supervised. In our experience, the identity of the "head beaters" or "bad apples" in a jail is usually an open secret. Providing staff with impunity for their misconduct not only perpetuates the occurrence of serious injury, but also encourages other staff, such as new recruits, to join the company of rogue actors. The leadership from top to bottom must make clear that use of force histories will not be swept under the rug, but rather staff will be held accountable.

VIII. Oversight and Reporting

Exercise municipal and correctional leadership, and hold staff members who misuse force accountable for their misconduct through meaningful discipline.

Revise the Department of Correction's management and promotion policies so that staff members' use of force is addressed in assignment and promotion of staff.

Overhaul the Department's Investigation Division to ensure that it complies with the Investigation Manual and conducts bona fide, competent investigations.

Review the Department of Correction's systems for maintaining and utilizing information about violence against inmates, and for holding accountable staff who foster inmate violence.

Conclusion

We thank the Committee for this public forum. The City Council plays and must continue to play an important role in understanding, monitoring and tracking the conditions of confinement for individuals incarcerated in the City jail system. We encourage the Council to use its powers of oversight to regularly visit Rikers Island and hold the Department of Correction to the reforms that are necessary to safeguard incarcerated teenagers.

Dated: October 8, 2014

Attachment 3

TESTIMONY

The Council of the City of New York

Committee on Fire and Criminal Justice Services
Jointly with the Committee on Health and the Committee on Mental Health, Developmental Disability, Alcoholism, Substance Abuse and Disability Services

Oversight: Examination of Violence and the Provision of Mental Health and Medical Services in New York City Jails.

AND

Int 0292-2014 A Local Law to amend the administrative code of the city of New York in relation to requiring the commissioner of the department of correction to post a monthly report on its website regarding punitive segregation statistics for city jails, including the use of solitary confinement.

June 12, 2014
New York, New York

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Testimony of the Legal Aid Society

Before The New York City Council
Committee on Fire and Criminal Justice Services Jointly with the Committee on Health and the Committee on Mental Health, Developmental Disability, Alcoholism, Substance Abuse and Disability Services

June 12, 2014

Thank you for the opportunity to testify today concerning the serious risk to New Yorkers posed by inadequate medical and mental health care and violence in the New York City jails. In addition, we testify in support of the pending legislation to amend the administrative code of the City of New York in relation to requiring the Commissioner of the Department Of Correction ("DOC") to post a monthly report on its website regarding punitive segregation statistics for city jails, including the use of solitary confinement. We submit this testimony on behalf of The Legal Aid Society, and thank Chairs Elizabeth S. Crowley, Corey D. Johnson and Andrew Cohen, and the Committee on Fire and Criminal Justice Services, Committee on Health, and the Committee on Mental Health, Developmental Disability, Alcoholism, Substance Abuse and Disability Services for inviting our thoughts on the subject. We applaud the Council for tackling these important topics and considering this legislation, which will increase accountability and transparency in the City Jails.

Since its inception over 40 years ago, the Prisoners' Rights Project of the Legal Aid Society has addressed the problems of inadequate medical and mental health services and of violence in the New York City jails. Through advocacy with the Department of Correction ("DOC") and individual and class action lawsuits, we have sought to improve medical and mental health care and to reform the systems for oversight of the use of force and violence in the jails. Each week we receive and investigate numerous requests for assistance from individuals incarcerated in the City jails who are not receiving adequate medical and mental health care and from others who are victims of violence in the jails. We interview inmates and carefully review their medical records. Years of experience, including daily contact with inmates and their families, has given our office a firsthand view of the problems with the delivery of medical and mental health services and the effects of jail violence. It is on this basis that we offer these comments to legislators and all New Yorkers.

Tragic Consequences: Neglect and the Lack of Mental Health Treatment in the NYC Jails

The death of Bradley Ballard: Bradley Ballard, a Legal Aid Society client, died on September 11, 2013 at Elmhurst Hospital when clinical and uniformed staff at the AMKC Mental Health Center on Rikers Island left him locked in a cell and did nothing as they watched him deteriorate. Mr. Ballard was remanded to jail as a parole violator, where he died, for *failing to report a change of address.*

Clinical staff neglected Mr. Ballard despite knowledge of his serious mental health needs and ignored his clearly evident psychiatric deterioration over his last week. Mr. Ballard came to AMKC from the Bellevue Hospital prison psychiatric ward. He was hospitalized on July 1, 2013, in a psychotic and uncooperative state. He remained on the Bellevue prison ward until he was discharged on July 31. Mr. Ballard had scarred wrists from prior suicide attempts. He had a

known and reported history of schizoaffective disorder, including prior hospitalizations. He was placed into the AMKC Mental Health Center, the Unit on Rikers Island that is for individuals identified as needing enhanced mental health treatment services while in the jails.

On September 4, after it was reported that he made a lewd gesture to a female correction officer, he was locked in his cell for seven days and not let out at all. During this period he was not provided prescribed medication and was not always provided food; he clogged his toilet so that it overflowed, stripped off his clothes, and tied a rubber band around his genitals. This prolonged in-cell confinement was a direct violation of the NYC Board of Correction Minimum Standards, which require 14 hours a day out-of-cell time for everyone but prisoners in punitive segregation or medical isolation (quarantine). Mr. Ballard was not locked in his cell based on any disciplinary process – no procedural protections of the disciplinary process were afforded to him – yet he was isolated and ignored in his cell by DOC and clinical staff. His deteriorated condition was obvious: a video from September 10, shows an inmate on the unit delivering a food tray to the cell, and covering his nose with his shirt because of the smell emanating from the cell.

After seven days of unauthorized isolation, lack of medications and complete neglect, Mr. Ballard was found naked and unresponsive in the cell. He was covered in feces, his genitals swollen and badly infected. On his last day alive, no clinical staff conducted the required twice daily rounds of the specialized mental health unit. He was taken by ambulance to Elmhurst Hospital, where he was pronounced dead shortly after he arrived.

The failure to provide treatment for Mr. Ballard, when his need for it was well known, rises to criminal neglect and amply demonstrates the abysmal lack of mental health treatment services in our City Jails. A state investigation found clinical staff missed multiple opportunities to treat Mr. Ballard; as a result, a unit chief was transferred to another facility and mental staff were re-trained on how to conduct rounds and other required procedures. But this is not enough because, unfortunately, his is not the only appalling and tragic example of neglect.

The death of Horsone Moore: The Division of Parole and DOC knew that Mr. Moore suffered from serious mental illness. When he missed two parole appointments he was arrested by his parole officer and taken to the Bronx Court pens and placed in DOC custody. Horsone Moore tried to kill himself at the Bronx Court pens on October 11, 2013. This suicide attempt was thwarted by DOC staff through force. Mr. Moore was sprayed with chemical agents and DOC staff removed the string that he was tying to the bars of the cell. There was a suicide screen filled out by DOC staff including notations that he was thinking about killing himself, was incoherent and believed that others were trying to kill him. Yet, no suicide watch was ordered or begun.

Although screening was done and notations made by correctional staff, Mr. Moore was not actually seen by mental health staff until a day and a half later. On October 13, during medical intake, clinical staff did order that he was to be placed on suicide watch. This order, which stated that Mr. Moore was actively suicidal and required a suicide watch, was never implemented. Mr. Moore was placed into the decontamination room of the AMKC receiving room. He was taken back to the clinic for a psychiatric evaluation. While waiting for the evaluation he ran out of the holding area and engaged in disruptive behavior including aiming a fire extinguisher at an officer and then banging it on the fire door to get out, and attempting to call 911 from the phone at the nurse's station stating "help" repeatedly into the phone. He was

cuffed and removed from the mental health clinic by a DOC probe team and was taken back to the decontamination room.

While in the decontamination room, Mr. Moore attempted suicide again. The video tape of the decontamination room reveals that Mr. Moore was rear cuffed when he was left in the room. When he tried to leave the room, a DOC Captain grabbed his arms and flung him into the room causing him to fall. This use of force was not reported. Mr. Moore was able to bring his cuffs to the front and then spent much of the afternoon preparing a ligature out of his shirt. He tied it around his neck and tied it to the shower pipe. At this point, DOC staff entered the room and stopped him. This second suicide attempt was not reported by DOC staff as required by regulations. Nor was Mr. Moore taken to medical or mental health staff for treatment after the attempt. Mr. Moore then removed his underwear and began to rip it up to fashion another ligature. Mr. Moore successfully hanged himself from the shower frame on October 14 after spending 15 hours alone in the decontamination room with no one watching. Why was an actively suicidal Mr. Moore left by himself for 15 hours? To date there is no answer.

The death of Gilbert Pagan: On September 29, 2013, Gilbert Pagan hanged himself by a ligature attached to his bed frame in a protective custody housing area in GMDC. Mr. Pagan was discovered hanging after correction staff noticed a sheet covering his cell window and opened his cell when he did not respond to the staff. Mr. Pagan had placed his bed in an upright position in order to provide something from which to hang himself. Due to a prior suicide at GMDC in May of 2012 using a bed frame in that manner, DOC responded with a plan to weld all unattached bed frames in all facilities to the floor, but it did not follow through. After the suicide of Mr. Pagan, the NYC Board of Correction learned that 14 out of 32 housing areas in GMDC (where both deaths occurred) remained with unbolted beds and with no timeline for completion of the welding project.

The death of Jerome Murdough: On February 15, 2014, Mr. Murdough, a 56-year-old homeless veteran who suffered from bipolar disorder and schizophrenia, was left alone in a mental health observation area in AMKC when he was supposed to be on a constant suicide watch. At Mr. Murdough's intake on February 8, the screening for suicide prevention found that he was on psychotropic medications, feeling hopeless, and was depressed and suicidal. A supervisor was notified and "constant supervision" should have been ordered as is required by regulations. On February 9, Mr. Murdough's mental health intake was completed and his expression of suicidal ideation was noted along with the fact that he had previously attempted suicide. No enhanced supervision was ever instituted for Mr. Murdough.[1]

Mr. Murdough was housed in mental observation housing – like Mr. Ballard's placement – a housing assignment that demonstrates knowledge of his serious mental health treatment needs. On February 15, DOC staff left Mr. Murdough alone in his cell in an area of the jail that had a malfunctioning heater. DOC logbooks falsely claim that there were tours of the area at thirty minute intervals. The DOC staff member responsible for the area abandoned her post in the mental health observation unit and Mr. Murdough was left alone for at least four hours. The homeless ex-Marine, taking psychotropic medications that can make one more vulnerable to heat-related illness, died alone and neglected in his overheated cell.

[1] Reply Declaration to Plaintiffs' Motion for Enforcement, Exhibit 29, e-mail from Office of Compliance Consultants to Department of Correction, Benjamin v. Ponte, 75 Civ. 3073 (S.D.N.Y., April 14, 2014).

The Scope of the Problem and Use of Isolated Confinement in City Jails

The prior City administration was aware that even as crime in NYC had declined, individuals with mental illness comprised an increasing percentage of the City's jail population. In March 2011, NYC sought assistance for a study concerning individuals with mental illness in the NYC jails from The Justice Center of The Council of State Governments (CSG). The report, *Improving Outcomes for People with Mental Illnesses Involved with New York City's Criminal Court and Correction Systems*, was completed in December 2012.[2] The CSG Report findings included that individuals with mental illness stayed in jail roughly twice as long and were less likely to make bail than individuals with no mental illness. It identified 1300 individuals who were in jail even though they were eligible for community based treatment and supervision and had a low risk of failure to appear for their court dates. It identified failures in linking individuals with mental illness to alternatives to incarceration, and a lack of sufficient community alternatives willing to serve people involved in the criminal justice system.

Information gathered by DOHMH at the time of the CSG report demonstrated that incarcerated individuals with mental illness were more likely than others to be injured while in custody and were more likely to end up in punitive segregation.[3] Yet, in total disregard of reforms implemented in the New York State prisons for individuals with serious mental illness, as well as reforms around the country reducing reliance on isolated confinement, under the Bloomberg Administration, the NYC DOC increased its use of isolated confinement (punitive segregation). The percentage of the New York City jail population in punitive segregation increased from 2.7% in 2004 to 7.5% in 2013. The number of solitary confinement beds increased in number from 614 in 2007 to 998 in 2013.[4] At the same time, approximately 40% of the individuals incarcerated in the City jails were reported to have a psychiatric diagnosis with many of that number suffering from major mental illness.[5]

Not surprisingly, the prior City Administration failed to solve, or even make progress towards solving, the long-standing problem of inhumanely housing individuals with mental illness in punitive solitary confinement settings in the City jails. Instead, DOC increased reliance on solitary confinement.[6] In response, on April 9, 2013, the NYC Jails Action Coalition petitioned[7] the City Board of Correction to implement new rules regarding solitary confinement to be made part of the jail Minimum Standards.[8] After the JAC petition was filed, the NYC DOC took some minimal steps towards reform, discussed below; the Board of Correction, its experts

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[2] The report is available at: http://www.nyc.gov/html/doc/html/events/FINAL_NYC_Report_12_22_2012.pdf.

[3] Andrea Lewis to Homer Venters, Memorandum, March 14, 2012, "Medical Informatics, New York City Department of Health and Mental Hygiene and Correctional Health Services." This independent analysis conducted by DOHMH is cited in endnote 9 of the CSG Report.

[4] Gilligan, Lee, *Report to the New York Board of Correction* (Sept. 2013) at p. 3.

[5] *Id*.

[6] Because of this failure advocates in New York including the Prisoners' Rights Project of The Legal Aid Society formed a community organization/umbrella group called the NYC Jails Action Coalition (JAC).

[7] The JAC Petition for Rule-Making is available at: http://www.nycjac.org/storage/JAC%20Petition%20to%20BOC.pdf.

[8] The Board of Correction establishes and ensures compliance with minimum standards regulating conditions of confinement and correctional health and mental health care in all City correctional facilities.

and its staff have investigated and agreed to initiate rule-making to address harmful, dangerous, and abusive use of solitary confinement in the jails; and a study of solitary confinement and the risk of self-harm was conducted and published by employees of NYC DOHMH.[9] All of the investigations, reports and studies identify alarming failures by the prior Bloomberg Administration to end abusive and dangerous conditions in the City jails.

In September 2013, a report to the New York City Board of Correction by their mental health experts, Drs. James Gilligan and Bandy Lee, reported on the large numbers of individuals with mental illness in solitary confinement in the City jails and the failure to provide treatment in accordance with the current Minimum Standards.[10] Based on what they observed in the jails, Drs. Gilligan and Lee recommended that no individuals with mental illness should be placed in solitary confinement, that no individuals *at all* should be subjected to the prolonged solitary confinement in use in the City jails because *"it is inherently pathogenic – it is a form of causing mental illness*."[11] They reported negatively on the reforms implemented by NYC DOC: the creation of a Clinical Alternative to Punitive Segregation (CAPS) unit for individuals with serious mental illness and the Restricted Housing Units (RHU) for individuals with "non-serious" mental illness. The doctors reported that CAPS was far too small for the population that would need a therapeutic alternative placement and should be expanded, and that the RHU was a complete failure and non-therapeutic. The report recommended elimination of the RHU model because it remains punitive in nature and does not grant any relief from the use of solitary confinement. The report detailed the lack of access to treatment (even in the purportedly therapeutic RHU), the lack of an appropriate range of available treatment modalities, and the utter lack of a physical environment conducive to providing confidential treatment in a clean and private space.

Drs. Gilligan and Lee chillingly detailed the violent culture in the NYC jails: "[a]ll too many of the officers that we observed appeared to us to make it clear that they were quite willing to accept an invitation to a fight, or to regard it as a normal response within the cultural norms of the jail."[12] During their investigation they witnessed an adolescent in the RHU becoming increasingly agitated in his cell – first banging his arms and legs on his cell door then his whole body, ripping up a sheet, wrapping his arms, legs and then neck as if preparing to hang himself. No NYC DOC staff responded until Drs. Gilligan and Lee intervened. Shockingly (since the RHU is supposed to be a therapeutic alternative to solitary confinement for individuals with mental illness), the officer staff's first response was to pull out a can of chemical agent (mace). The doctors had to intervene and insist that this was not necessary and that mental health staff should be notified. The violent response of staff to the individuals in their care, followed by severe punishment with solitary confinement, was identified by Drs. Gilligan and Lee as "the mutually self-defeating vicious cycle that develops between inmates and correction officers, in which the more violently an inmate behaves, the more seriously he is punished, and the more seriously he is punished, the more violent he becomes." It is a perpetual vicious cycle that fuels

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[9] Kaba, Lewis, Glowa-Kollisch, Hadler, Lee, Alper, Selling, MacDonald, Solimo, Parsons and Venters, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM.J. PUBLIC HEALTH 442, 445 (2014) available at: http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301742.

[10] Gilligan, Lee, *supra* note 3.

[11] *Id.* at p. 6.

[12] *Id.* at p. 16.

continued violent conduct. In the face of overwhelming lack of appropriate care and treatment, the doctors' report calls for significant changes in policy, culture and training of staff.

Two additional reports prepared by and for the Board of Correction concern the adolescent population of the New York City jails.[13] *Three Adolescents with Mental Illness in Punitive Segregation at Rikers Island* was written by members of the Board of Correction staff and details the poor quality of mental health treatment and delivery of treatment services for three young people with mental illness while held in solitary confinement settings in the NYC jails.[14] *Rethinking Rikers: Moving from a Correctional to a Therapeutic Model for Youth* was prepared by Professor Ellen Yaroshefsky with assistance from students at Cardozo Law School and provides examples from New York State and other states to use as a basis for eliminating the use of solitary confinement for youth and to shift to a therapeutic approach with practices that are specialized for and dedicated to youth rehabilitation.[15] Like the findings in the report of Drs. Gilligan and Lee, *Rethinking Rikers* reports on the failed policy and over-utilization of solitary confinement and calls for a "much-needed cultural transformation on Rikers Island."[16]

Solitary Confinement and Risk of Self-Harm Among Jail Inmates reports on a study conducted by employees of NYC DOHMH.[17] The report makes numerous findings that illustrate that solitary confinement is a dangerous and self-defeating practice:

- The risk of self-harm and potentially fatal self-harm in solitary confinement was higher than outside solitary, independent of prisoners' mental illness status and age group.
- Self-harm is used as a means to avoid the rigors of solitary confinement – inmates reported a willingness to do anything to escape solitary confinement.
- Patients with mental illness become trapped in solitary confinement, earning new infractions resulting in more time in solitary.[18]

The report indicates a need to reconsider the use of solitary confinement as punishment in jails "especially for those with SMI [serious mental illness] and for adolescents," and cites the American Psychiatric Association and American Academy of Child Adolescent Psychiatry as professional societies that recommend against the use of solitary confinement for adolescents and individuals with serious mental illness.[19] It then goes on to describe the creation of CAPS and RHU as reforms that will "provide an opportunity to evaluate the effect of increased clinical

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[13] New York is one of only two states in the country to treat 16 and 17-year olds as adults in its courts.

[14] *Staff Report: Three Adolescents with Mental Illness in Punitive Segregation at Rikers Island,* CITY OF NEW YORK BD. OF CORRECTION (Oct. 2013), available at http://www.nyc.gov/html/boc/downloads/pdf/reports/Three_Adolescents_BOC_staff_report.pdf.

[15] *See* Yaroshefsky, *Rethinking Rikers*, *supra* note 3.

[16] *Id.* at p. 48.

[17] See Kaba, Lewis, et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, *supra* note 3.

[18] The study includes the "extreme" example of a patient breaking a sprinkler head to use to self-harm and receiving an institutional infraction as well as a new criminal charge for the destruction of government property. *Id.* at p. 446.

[19] *Id.* at p. 447.

management and decreased reliance on solitary confinement as a means to reduce self-harm and other behaviors among inmates with mental illness."

Ongoing Problems with Medical Care in the City Jails

In addition to the problems with the care and treatment of individuals with mental illness in the jails, the Prisoners' Rights Project regularly receives complaints about medical care. Many categories of medical complaints are received with alarming frequency: DOC staff interfere with medical orders such as by confiscating medically authorized therapeutic adjuncts, orthopedic shoes and supportive footwear, canes, walkers, wheelchairs and braces. We receive many complaints that medical staff fail to dispense or fill orders for medication and fail to provide medically ordered special diets (*e.g.*, diets for heart problems, diabetes, and allergies). Medications are reported discontinued without reason or explanation, including medications for pain, psychiatric treatment, diabetes, seizures, and HIV disease. Individuals complain of retaliation through discharge from medical housing for making complaints. There are also reports of verbal abuse from PHS health care workers. There are regular problems reported due to the lack of accessible facilities for individuals with disabilities, including the lack of adequate wheelchairs and/or needed assistance with daily living activities. There are reported long waits at the clinic to be seen and even longer delays to receive specialty care after it is ordered including lack of access to hospital care, especially for surgical procedures and follow-up. The Doctors Council reported to the Board of Correction that a lack of escort officers causes long wait times for patients to see medical staff – sometimes resulting in loss of patience followed by a refusal to see medical staff. The Doctors Council also reported that follow-up medical appointments are not attended due to the lack of available escorts.[20]

Violence Against Inmates in the City Jails

Excessive force by correction staff is tolerated, and indeed encouraged, in the City jails. DOC staff frequently inflict serious injury on prisoners, and force is often used in response to perceived disrespect or other minor misconduct. And, as described above in the death of Mr. Horsone Moore and by Drs. Gilligan and Lee, who had to intervene to stop the use of chemical agents against a young person, force is used by uniformed staff when interacting with individuals who are exhibiting serious mental health needs. Commissioner Ponte reported at the beginning of this month that from fiscal year 2010 to fiscal year 2013, uses of force increased by 59 percent (1,871 to 2,977).[21]

The deficiencies in use of force investigations, discipline, monitoring and supervision, and the practice of ignoring staff members' use of force history in making promotions are all issues raised in Legal Aid's pending class action *Nunez v. City of New York, No.* 11-cv-5845 (S.D.N.Y. 2012). Since *Nunez* was filed in May of 2012, events continue to validate its charges. Last summer, ten correction staff, including a former assistant chief for security and two

[20] See New York City Board of Correction Minutes, September 9, 2013.

[21] Statement of Joseph Ponte, Commissioner, NYC Department of Correction to New York City Council Committee on Fire and Criminal Justice Services, June 2, 2014. Commissioner Ponte reported on other increases over the same time period: slashing and stabbing incidents increased by 30% (34 to 68), assaults on staff increased by 30% (500 to 646).

captains, were indicted for savagely beating an incarcerated person.[22] In late November the correctional staff conducted an illegal job action that stopped individuals incarcerated at Rikers from attending their court appearances. The bus stoppage was intended to disrupt – and did disrupt – the prosecution of two correction officers who allegedly attacked an incarcerated person and attempted to cover up their brutality.[23]

The New York City jails have long been tremendously violent. Incarcerated individuals, staff and sometimes visitors are often seriously injured as a result. The misuse of force by uniformed staff in the City jails has been the subject of a series of class action lawsuits brought by our office. In each case reforms were implemented that reduced the incidence of use of force and the severity of resulting injuries. Yet the progress achieved has not been sustained. Proven reforms are abandoned when the pressure and spotlight of plaintiff and expert monitoring of the settlement agreements end. We testified about the persistent brutality and history of past litigation before the Committee on Fire and Criminal Justice Services on April 4, 2013. We have attached a copy of that testimony for your information and provide a 2013/2014 update herein.

In 2013 and 2014, the Prisoners' Rights Project interviewed, and wrote to DOC seeking investigations, on behalf of over 300 incarcerated individuals injured in violent, and often unprovoked, encounters with uniform staff. The frequency and severity of injuries confirmed by medical records continues to be astounding and inexcusable. Prevalence of injuries to faces and heads continues unabated, indicating that the practice of using blows to the face and head as a first resort by staff, persists even though it is contrary to DOC's own written policy. Examples of injuries confirmed in 2013 and the first few months of 2014 in use of force incidents with DOC uniformed staff are set out in the Table below.

Table: Examples of confirmed injuries in 2013 and first four months of 2014

Initials	Location	Injury after Use of Force by DOC Staff
A.J.	Intake pen	Injury face/orbital area/jaw/nose, nasal bone tenderness, right zygoma- tender to touch, overlying soft tissue contusion, right mandible-tenderness, soft tissue contusion over right jaw, injury to both elbows. Dermabond on face.
C.J.	Main Clinic inside pen	Contusion of eyelids. Elbow, forearm, wrist injury (no fracture). Superficial abrasion, left periorbital ecchymosis (ruptured blood vessels) with mild subconjunctival hemorrhage, redness of skin under eye, left cheek abrasions.
W.R.	Queens Supreme Court	Back pain, blood in urine, spinal tenderness.
D.R.	OBCC	Multiple abrasions of head and face, swelling over left eye, multiple contusions of face, head, arm, shoulder. Injury of shoulder and upper arm and lower arm. Arm put in sling, rotator cuff sprain.
R.D.	Bronx Hall of	Nasal cavity, x-ray shows minimal displaced bone fracture. Back muscle spasm.

[22] See "Rikers Island Security Chief Is Charged with Ordering Brutal Assault on Inmate," *New York Times*, June 26, 2013.

[23] See "Bus Stoppage Said to Target Rikers Inmate," *New York Times*, November 20, 2013.

Table: Examples of confirmed injuries in 2013 and first four months of 2014		
Initials	**Location**	**Injury after Use of Force by DOC Staff**
	Justice	Right wrist tender to palpation, decreased ROM. Right knee tender to palpation.
H.A.	GMDC	Closed head injury with concussion. Contusion to forehead, abrasion to knee, small hematoma on forehead. Swelling, redness, tenderness right forehead.
J.M.	OBCC Annex	Bruise on forehead, left jaw swelling.
P.C.	MHAUII	CAT scan for head injury. 6 staples right posterior scalp laceration, scalp swelling, mild levoscoliosis of upper dorsal spine. Scalp profusely bleeding from lacerations.
T.L.	OBCC	Lip laceration, left facial bruises, right shoulder tenderness with limited ROM, right knee tenderness, right hip tenderness. Sling ordered for right shoulder.
A.J.	GRVC	Minor abrasions and contusion to right side of face. Right scalp laceration.
F.R.	GMDC	Laceration left temple treated with dermabond. Contusion left face. Closed fracture of zygoma.
T.J.	AMKC	Left eye subconjuntival hemorrhage, contusions - multiple sites. Large frontal scalp hematoma, rib and spine tenderness. Laceration left side of mouth.
R.K.	OBCC	Closed fracture of mandible, jaw tenderness bloodied lower frontal gums.
G.T.	AMKC	Right wrist injury of left ulnar styloid, forearm splint, no fracture or dislocation.
S.E.	RNDC	Multiple contusions left lower jaw, left facial area, left ribcage.
P.D.	RNDC	Right scalp swelling, right eyebrow swelling and bleeding. Unable to open right eye fully. Ambulance report: bruises and swelling to back of head on both sides, bruises and swelling to right eye and left side of lips, lower back pain.
R.L.	GRVC	Left mandible fracture. Blood in left ear. Facial swelling. Multiple abrasions/contusions to face, closed fracture zygoma. Surgery to wire jaw.
M.T.	GMDC	Laceration left scalp, multiple hematomas and erythema over multiple surfaces of scalp. Hematoma forehead. Swelling left elbow. Swelling both ankles.
W.M.	RNDC	Multiple bruises and swelling to forehead. Facial contusions. Swelling to left eye and right ankle. Injury to neck and right knee.
H.R.	GMDC	Fracture right nasal bone. Right periorbital and facial soft tissue swelling. Multiple contusions and edema to face, head, orbital area, scalp, mandible, left shoulder, left upper arm, left rib, lower back. Right eye swollen shut with ecchymosis. Left eye subconjunctival hemmorrhage. Superficial cut to inner right upper lip.
G.J.	RNDC	1 cm laceration to upper lip. Sutured. Bruises left face and right side of head. Chipped upper incisor tooth. Cuffmarks on wrists.

Table: Examples of confirmed injuries in 2013 and first four months of 2014		
Initials	**Location**	**Injury after Use of Force by DOC Staff**
Z.R.	RNDC	Nasal fracture, superficial bruising to bilateral shoulder. Abrasion and tenderness left orbital. Ear redness and tenderness.
F.A.	GMDC	Nasal fracture, back contusion and abrasions.
H.E.	RNDC	Scalp laceration, dermabonded.
A.P.	EMTC	Deviated nasal septum, redness over nasal bridge. Lacerations on upper and lower lip, sutures.
C.V.	GRVC	Contusion face/scalp/neck. Contusion mandibular joint. Broken tooth. Back contusion and contusion chest wall. Fracture confirmed. Hematuria.
M.C.	AMKC	Swelling, contusion, and laceration above left eyebrow. Left shoulder swelling and contusion.
B.J.	OBCC	Right forehead laceration, abrasion and swelling of posterior head, abrasion left upper back.
E.V.	AMKC	Ankle sprain. Back contusion. Scalp contusion. Spinal tenderness.
D.K.	OBCC	Closed nasal fracture. Laceration on left eyebrow. Sutures.
B.D.	GMDC	Deep laceration below chin. Sutures. Contusion right eyelid.
W.N.	OBCC	Laceration to right frontal scalp, mild redness over left knee with tenderness. Redness and hematoma to left lower frontal area of head, tenderness c-spine area.
M.B.	AMKC	Fracture left maxilla. Fracture medial orbital wall. Edema of eyelid, contusion of eyeball. Sub-cutaneous emphysema from trauma.
G.C.	OBCC	Right scalp swelling, facial swelling. Multiple facial abrasions/ecchymoses, abrasion over bridge of nose. Right upper lip swollen with hematoma. Abrasion inner left lower lip. Left forearm tenderness and ecchymosis.
M.A.	GMDC	Upper lip contusion. Bilateral wrist contusion. Fracture navicular bone.
B.A.	GRVC	Swelling of nose, contusion of eyelids and periocular area. Contusion of face, scalp, neck. Closed fracture nasal bone. Two chipped teeth.
R.A.	MDC	Closed fracture orbital bone. Closed fracture nasal bone. Closed fracture of navicular bone of wrist. Laceration left upper lip.
G.S.	AMKC	Orbital fracture. Persistent vision impairment reported 3 weeks later. Left periorbital swelling/tenderness with 1 cm laceration. Right eye mild swelling and tenderness.
C.A.	RNDC	Mild infraorbital swelling. 8-9 cm superficial laceration left side of face. 6-7 cm deep laceration right side of face. 1.5 cm thumb laceration. Abrasion of right

Table: Examples of confirmed injuries in 2013 and first four months of 2014		
Initials	**Location**	**Injury after Use of Force by DOC Staff**
		hand. Tenderness right wrist and forearm. Ecchymosis, bruises, tenderness on back of both shoulders.
P.V.	GRVC	Laceration right eyebrow, repaired with sutures. Laceration left eyebrow, repaired with 1 suture. Right shoulder, right forearm, wrist, hand, ankle tenderness.
R.A.	Bronx Central Booking	Abrasion, contusion to face. Left tympanic membrane perforated. Acute left-sided hearing loss.
F.J.	OBCC	Multiple head and scalp contusions/abrasions. Lip laceration.
W.A.	OBCC	2 cm eyebrow laceration, abrasion right temporal area of head.
B.E.	OBCC	Slightly deviated nasal septum with large right-sided nasal septal spur contacting the inferior turbinate. Bruises on face, diffuse facial tenderness.
B.T.	Bronx Central Booking	Perforation of tympanic membrane. Facial and scalp contusions.
R.I.	GMDC	Left periborital ecchymosis. Zygoma fracture. Rib tenderness. Chest and back bruises.
A.J.	GMDC	Laceration right eyebrow. Dermabonded. Nasal bleeding.
R.C.	Bronx Court Pens	Nasal fracture. Maxillary sinus posterior fracture. Tenderness and swelling left side of face/jaw. Tenderness left side of ribs and chest. Tranfer to Hospital.
W.T.	GRVC	Swelling right forehead with erythematous bruises, right suborbital and intraorbital ecchymosis with swelling and tenderness, right eye subconjunctival hemorrhage, periocular eccyhymosis and swelling, photosensitivity, dried blood at left ear from small laceration at left ear lobe, lower lip swelling. Nasal fracture.
L.K.	MDC	Periorbital soft tissue swelling around the left eye, subjunctival hemorrhage lateral to left cornea.
H.T.	AMKC	Fractures of 6th, 7th, and 8th ribs.
R.J.	Queens County Criminal Court	Forehead contusion, two broken incisors, abrasion lower lip, neck scratches.
L.R.	NIC	Profuse bleeding from nose. Swollen and tender right side of face. Bruise on lower lip.
G.C.	AMKC	Closed head injury. Perforation left tympanic membrane. Back and chest pain.
C.R.	OBCC	Subconjunctival hemmorhage left eye.

Table: Examples of confirmed injuries in 2013 and first four months of 2014		
Initials	**Location**	**Injury after Use of Force by DOC Staff**
A.E.	RNDC	Positive for right nasal bone fracture. Facial ecchymosis, swelling across nasal bridge. Abrasion across mid-thoracic spine.
J.D.	RNDC	Multiple swelling on skull and forehead. Left knee bruises, right arm swollen and tender.
C.J.	RNDC	Abrasions to face and upper body. Facial swelling. Cannot flex left elbow.
G.K.	RNDC	Multiple facial contusions with tenderness. Rib and chest tenderness. Tenderness, palpable spasm, thoracic region with swelling.
R.S.	Queens Court pens	Bruising noted under right eye, on scalp and behind right ear.
V.L.	GRVC	8 inch laceration to forehead, swelling left upper eyelid, abrasion on lip.
T.A.	GRVC	Left eye suborbital swelling. Bilateral nasal bridge swelling and tenderness. Left nasal bleeding.
M.M.	GRVC	Bilateral eyebrow tenderness, mild contusion. Right zygomatic process contusion tender, erythema, ecchymosis. Right nostril with dry blood. Right ankle, right foot tenderness. Left shoulder tenderness, mild swelling, ecchymosis. Left arm large ecchymosis, very tender. Bilateral upper ribs, erythema, ecchymosis, tenderness. Multiple abrasions to temporal area, small bruises to both rib cages. Contusion chest all, multiple sites shoulder and upper arm, knee, wrist. Abrasion to right eyelid, Closed head injury, Shoulder pain. Swelling, abrasions to right periorbital area, ecchymosis left arm.
W.M.	GRVC	Scalp laceration. 3 staples placed in scalp. 2-3 cm superficial abrasions noted on left deltoid.
P.T.	GMDC	Large hematoma on left forehead above left eyebrow, positive tenderness in left jaw unable to open mouth and bite. Tenderness on nose and swelling on bridge deviated septum, no active bleeding.
B.S	RNDC 2013	Closed fracture of left wrist.
B.L.	EMTC	Left eye infraorbital swelling, notable swelling of left side of face, one cm laceration, dermabond.
M.R.	GRVC 2013	Contusion face/scalp/neck, gross swelling of upper and lower lip. Fractured jaw requiring surgery.
S.N.	GMDC	1.5 cm and 1 cm laceration right eyelid, infraorbital swelling & facial erythema and swelling at left zygomatic region. Swelling and tenderness at right nasal bridge. Facial lacerations sutured.
K.C.	OBCC	Left jaw swelling, severe tenderness, unable to open mouth.
R.F.	OBCC 2013	Fractured finger, refused surgery.

Table: Examples of confirmed injuries in 2013 and first four months of 2014		
Initials	**Location**	**Injury after Use of Force by DOC Staff**
B.A.	GMDC	Swelling and erythema in outer left ear, nose deviation to the right, swelling of left side of face.
A.C.	RNDC	Left orbit fracture, bilateral jaw fracture, surgical intervention.
E.V.	GMDC	Multiple kicks to face and head, laceration to face, left jaw pain, multiple bruises on chest, shoulder and upper back.
D.K.	OBCC	3.5 cm laceration to face, swelling to scalp and face, dermabond.
R.Q.	Judicial Center	Multiple facial bruises, head injury.
F.E.	GRVC	Right elbow dislocation. Reduced under procedural sedation with orthopedics and splinted.
M.M.	GRVC	Left scalp area with bleeding. Right cheek swollen, Fracture of C6 spinous process.
M.P.	GRVC	Patient hospitalized at Elmhurst with 'Blunt trauma to abdomen." Underwent surgery. Grade 4 liver laceration, multiple rib fractures.
R.J.	EMTC	Several facial bruises to forehead, cheeks, right orbit. Right orbital bruising/swelling. Tender to palpation. Dried blood in nose; tenderness to palpation of bridge/tip of nose, swelling. Pain/swelling of lips on right with abrasions. Pain with opening of jaw on right.
T.W.	GMDC	Left frontal scalp laceration and hematoma. No skull fracture. 3-4 cm V-shaped laceration over left eye. Repaired with 7 sutures.
S.R.	Judicial Center	Nasal bone fracture, nose bridge swollen, tender.

Because so many individuals in our jails continue to suffer needless injury at the hands of uniformed staff, and because the problem of uniformed staff brutality is widespread throughout the system, we believe a system-wide reform of policy and practice is necessary to bring an end to this violence. Our litigation, *Nunez v. City of New York*, S.D.N.Y., 11 Civ. 5485 (LTS), seeks to stop the systemic excessive use of force by corrections staff against individuals in our jails.

Past litigation experience demonstrates that controlling violence in the jails is a function of municipal leadership. Only when top officials actively intervene to make clear to correction staff that violence will not be tolerated, does brutality cease. We now have a new City administration including a new Commissioner of Correction. The administration and Commissioner Ponte must not disregard or condone misconduct. Supervision must include oversight of those involved in questionable incidents and discipline for those involved in misuse of force. Staff must be held accountable for excessive force, and investigations must be thorough and speedy. It must be made clear to line staff that brutality will not be tolerated.

The Need for Increased Transparency, Communication and Reporting

Int 0292-2014 A Local Law to amend the administrative code of the city of New York in relation to requiring the commissioner of the department of correction to post a monthly report on its website regarding punitive segregation statistics for city jails, including the use of solitary confinement.

This legislation should not be controversial. It proposes that DOC should be responsible for collecting vital data about solitary confinement in our jails and should post that information publicly on its website. Collecting and sharing the information will permit the community to understand the utilization and consequences of use of punitive segregation in our jails. The collection and dissemination of the proposed data on the use of punitive segregation will provide essential information on the lengths of stays in solitary and their human and fiscal costs. This data must be collected by DOC in order to inform itself regarding the consequences and effects of its policies. The data should be public so that the proposals made by DOC can be subject to rational and informed input from the community. Valid data about lengths of stay, transfers from mental observation housing, uses of force, self-harm and suicide will enhance the development of appropriate reforms and policy initiatives for safe management of the incarcerated population. The disaggregation of data by facility and program will assist the DOC in identifying specific programs or jails where there are training needs, additional staffing needs or needs for other remedies for identified problems. The legislation should be passed.

Additional data points could be added to the legislation to further improve the collection and dissemination of information. For example, data about the new alternatives to solitary confinement – RHU and CAPS – are appropriate. DOHMH staff described CAPS and RHU as reforms that will "provide an opportunity to evaluate the effect of increased clinical management and decreased reliance on solitary confinement as a means to reduce self-harm and other behaviors among inmates with mental illness."[24] We have shown above and below that their implementation is inadequate. Data collection about self-harm and other behaviors is essential to ensure that valid evidence-based rehabilitation programs are identified and may then be replicated. The addition of such outcome data from correction policies that limit the use of solitary confinement will assist in encouraging rule changes that will create humane, safe and cost-effective corrections policies.

Separate from the need for passage of Int 0292-2014, there may be a need for additional legislation that requires across-the-board collection and publication of information about the City jails. Unfortunately, the NYC DOC has *decreased* the statistical information on its website instead of improving its accountability to the public by posting the information that it collects about our jails. When we began to draft this testimony we discovered that the statistical reports about uses of force that *used to* be reported on the DOC website are no longer available on line. In fact there is no longer any statistical or demographic information available on the DOC website. This lack of transparency should not be tolerated and appears to be contrary to the intent of the City's Open Data Law passed in March of 2012.

Next Steps

NYC DOC has taken some minimal steps toward reform of isolated confinement and Commissioner Ponte, the new Commissioner, has expressed his support for additional reform

[24] See Kaba, Lewis, et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates* at 445.

and for increased training of DOC staff.[25] At least one prior reform, the CAPS unit, does provide a therapeutic setting far different than punitive segregation for individuals with serious mental illness. However, admissions to the CAPS unit remain extremely low despite the large population of individuals with mental illness in need of its therapeutic programming and relief from the harmful environment in punitive segregation. In contrast, the RHUs continue to be extremely punitive in nature and are not providing a treatment or respite from isolation for the individuals with mental illness housed in them. In conjunction with implementation of the RHUs, changes were made to the sentence structure for disciplinary sentences. Although there was a brief period of reduced sentences, those changes were short-lived; sentences are increasing and very harsh sentences continue to be meted out. Thus, reforms that were presented as highly significant by the previous administration have proven much less significant in their actual implementation, most likely because elements of the staff do not fully support the reforms and seek to continue old practices.

Further, even these limited reforms can be defeated when they are not supported by other elements of the system. For example, one of our clients with mental illness was recently transferred repeatedly between jails and programs. Finally, he was placed into CAPS, where he reported doing well despite the runaround (that included several lengthy stays in intake areas) that preceded his CAPS placement. But he was then removed from CAPS because it was found that he owed "old bing time" from a prior incarceration. This old punitive segregation time should not have impacted his CAPS placement – no one is in CAPS who is not serving punitive segregation time. Yet he was transferred to the GRVC RHU, which did not provide sufficient clinical interventions for his mental health treatment needs. Our attempts to get him back into the CAPS program were not heeded despite our expressed concerns about prior acts of self-harm. Our concerns were well placed: at this time, this client remains hospitalized in the Bellevue Hospital Prison Ward after committing another act of self-harm while in the RHU. When an individual is determined to be clinically appropriate for placement in CAPS, he should stay there. Other agendas within the agency should not be allowed to interfere with that placement.

The implementation of CAPS and RHU and the changes to disciplinary sentencing simply do not comprise the needed comprehensive reforms that address the root problems of far too many individuals with mental illness ending up in the criminal justice system or the failure to respond to their needs in the jails in a non-punitive manner. The existing reforms also do not reflect the substantial and comprehensive reform to the use of solitary confinement needed in the NYC jails and now repeatedly identified in the described reports and studies. In his testimony on June 2, Commissioner Ponte acknowledged that the tactics of the prior administration "ultimately failed to make a significant impact because they failed to address the underlying problems;"[26] he also acknowledged an inadequate staff training program, the need to provide treatment to individuals with mental illness *before* they break prison rules, and the need for a comprehensive approach to the management of young people "while tending to their necessary developmental and educational needs."[27] Commissioner Ponte appropriately emphasized the

[25] Statement of Joseph Ponte, Commissioner, NYC Department of Correction to New York City Council Committee on Fire and Criminal Justice Services, June 2, 2014.

[26] Statement of Joseph Ponte, Commissioner, NYC Department of Correction to New York City Council Committee on Fire and Criminal Justice Services, June 2, 2014, at p. 2.

[27] *Id*. at p. 3.

need to reduce violence in the City Jails, and indicated that "[s]uccess will come with collaboration – and not just with DOHMH and our union partners."[28]

We are in agreement that necessary reforms include training DOC staff to work with individuals with mental illness in an appropriate and humane manner rather than in a punitive (and all too commonly violent) manner; changing police and bail policies to reduce the number of individuals with mental illness committed to the City jails; and sufficient alternatives to incarceration to move individuals with mental health needs out of the criminal justice system, since the need is for medical and social service interventions. We also agree that the improved treatment and education of young people and individuals with mental illness in our jails must be a priority. Likewise, DOC must prioritize reducing violence in our jails, including the all too frequent staff brutality. Stories like those of the tragic deaths by suicide and neglect by clinical and security staff, set out at the outset of this testimony, must end.

We urge Commissioner Ponte, and the newly formed Task Force on Behavioral Health and the Criminal Justice System (The Task Force), to include in their collaborative efforts advice and comment from advocates, formerly incarcerated individuals and family members of incarcerated individuals. We urge the Commissioner to consider the NYC Jails Action Coalition Petition for Rule-Making as a model for comprehensive reform of prison and jail policies and elimination of harmful long-term isolation[29] and to work with the NYC Board of Correction's current rule-making initiative on punitive segregation. Most of all, we urge the Commissioner to keep a close watch on all the reforms that are instituted to ensure that they are operating as planned and are not undermined by old bureaucratic habits and staff resistance to change.

Conclusion and Recommendations

We are hopeful that Commissioner Ponte and The Task Force will institute substantial and comprehensive reforms of the failed policies of the prior Bloomberg Administration and that they will have the support of City Council in those endeavors. We are hopeful that part of that process will include supporting the rule-making initiative of the Board of Correction and will result in implementation of reforms recommended in the JAC Petition: putting an end to the overly punitive response to *all* individuals in the NYC Jails, and ending the use of isolated confinement for individuals with disabilities and for individuals under the age of 25. Improved medical care and mental health care in our jails must also be a priority. Improved medical and mental health care in the City jails creates better public health throughout the City. The opportunities and services available in jail directly affect the skills, problems and needs prisoners will have at the time of their release. For individuals with medical or mental health needs, this includes their willingness to accept and participate in treatment; if medical or mental health programs are unavailable, ineffective or unpleasant in jail, the individual may be less likely to seek and participate in necessary treatment after release. The City must also change police and bail policies to reduce the number of individuals with mental illness who are relegated to the City

[28] *Id*. at p. 3.

[29] The JAC Petition proposes significant limits on the use of solitary confinement, places a 15 day limit on each sentence with no more than 60 consecutive days permitted, provides for 4 hours out-of-cell in solitary confinement, excludes vulnerable populations (under 25 years old, and individuals with mental, physical or medical disabilities), provides for alternative safety restrictions for vulnerable populations which require 8 hours out-of-cell daily and a program of positive incentives, enhanced due process requirements at disciplinary and other hearings, and public reporting on the use of solitary confinement and alternative safety restrictions. The JAC Petition for Rule-Making is available at: http://www.nycjac.org/storage/JAC%20Petition %20to%20BOC.pdf.

jails. In addition, the City must provide sufficient alternatives to incarceration to move individuals with mental health needs out of the criminal justice system and provide the medical and social service interventions that they need and that will better serve society than locking them up in institutions that are not designed to address their problems.

The reduction of violence in our jails must be a priority. The City Council can play an essential role in that process by continuing to monitor violence in the jails, insist that the facts be publicized, and provide oversight and support so that Commissioner Ponte is able to implement long-lasting reforms and end the inappropriately high level of violence in the jails.

The collection and dissemination of data on the use of solitary confinement will provide essential information on the harmful lengths of stays in solitary and their human and fiscal costs; data collection on alternatives to solitary confinement will ensure that valid evidence-based rehabilitation programs are identified and may then be replicated; and outcome data from correction policies that limit the use of solitary confinement will assist in encouraging rule changes that will create humane, safe and cost-effective corrections policies. The NYC DOC should be encouraged to collect and analyze, *and make public* data on additional areas of concern as well. For example, the formerly available data on uses of force should be publicly available. Additional data should be available on demographics of the jail population, transfers to medical and psychiatric hospitals, transfers from isolated confinement to the street. The Council should consider whether additional legislation is needed or whether the need is simply to push DOC for compliance with the Open Data Law.

We thank the Committees for this public forum to discuss vital areas of concern about the management of our City jails. The City Council should continue to provide public forums so that the important issues of medical and mental health care and violence in the City jails continue to be the subject of informed public discourse. The City Council plays and must continue to play an important role in understanding, monitoring and tracking the conditions of confinement for individuals incarcerated in the City jail system.

We appreciate the opportunity to provide this testimony.

Dated: June, 12, 2014

Attachment 4

TESTIMONY

The Council of the City of New York

Committee on Fire and Criminal Justice Services
Elizabeth S. Crowley, Chair

Examining Violence in New York City Jails

April 4, 2013
New York, New York

Prepared by
The Legal Aid Society
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199 Water Street
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Presented by:

Mary Lynne Werlwas
Jonathan Chasan
Prisoners' Rights Project

Thank you for the opportunity to testify concerning the serious risk to New Yorkers posed by violence in the New York City jails. We submit this testimony on behalf of The Legal Aid Society, and thank Chair Crowley and the Committee on Fire and Criminal Justice Services for inviting our thoughts on the subject. We applaud the Council for tackling this important topic.

Since its inception over 40 years ago, the Prisoners' Rights Project of The Legal Aid Society has addressed the problem of violence in the New York City jails. Through advocacy with the Department of Correction ("DOC") and individual and class action lawsuits, we have sought to reform the systems for oversight of use of force and violence in the jails. Each week we receive and investigate numerous requests for assistance from City jail inmates who have been victims of violence in the jails. We interview inmates injured in violent encounters, and carefully review their medical records. Years of experience, including daily contact with inmates and their families, has given our office a firsthand view of the effects of jail violence, and it is on this basis that we offer these comments to legislators and all New Yorkers.

From our experience, we have seen that controlling violence in jails is a function of leadership by municipal officials: when top officials actively intervene to make clear to correction staff–by actions as well as words–that it will not tolerate management-by-violence, brutality ceases. When the leadership turns a blind eye towards misconduct—by failing to hold staff accountable for excessive force, conducting sham investigations, failing to supervise more closely those involved in questionable incidents and failing to discipline those who misuse force—it sends a signal to line staff that they can control troublesome, or defiant, or merely disrespectful prisoners by beating them.

Violence Against Inmates Is Epidemic in the City Jails

The New York City jails have long been tremendously violent. Inmates, staff, and sometimes visitors are seriously injured as a result. In the last year alone, we have settled a lawsuit in which a teenager suffered a lacerated kidney, bruised spleen and traumatic brain injury in a beating by other inmates, with the collusion of staff, at the adolescent jail, the Robert N. Davoren Center (RNDC), for which the City paid $850,000 in compensation (*John v. City of New York,* 11-cv-5610 (RPP)); advocated on behalf of several prisoners

suffering broken mandibles when attacked by other inmates; and filed another lawsuit on behalf of an inmate who has suffered permanent brain injury and multiple jaw fractures in a "program" beating. At the same time, as described below, we are counsel in law reform litigation seeking to stop the systemic excessive use of force by corrections staff against inmates. *Nunez v. City of New York,* S.D.N.Y., 11 Civ. 5485 (LTS).

While the Department frequently announces new measures and metrics to address violence by inmates, the serious safety threat posed by *staff* violence receives remarkably little discernible attention in comparison. Yet hundreds of New Yorkers are suffering preventable, serious injuries each year at the hands of uniformed correction staff, with drastic consequences for their safety and health and the security of the jails. In many cases, the force is wholly unjustified, and is used as "off the books" punishment for minor misconduct, complaints by inmates, or perceived disrespect. And while some use of force will be part of any correctional setting, in New York City, DOC staff often resort to highly injurious force under circumstances where, at most, some minimal, non-injurious restraint was justified to control an inmate.

The problem of brutality by New York City DOC staff against inmates in their custody has persisted for years, but the recent trends are alarming. In each of the last three fiscal years (FY 2010, 2011 and 2012), the Department has reported ever higher numbers of "class A" use of force incidents—incidents the Department deems most injurious to staff or prisoner. DOC statistics report:

Use of Force Incidents Class A (resulting in injury)

FY 2012 - 147
FY 2011 - 142
FY 2010 - 128
FY 2009—109
FY 2008—88
FY 2007—113
FY 2006—89
FY 2005—72
FY 2004—86
FY 2003—95

FY 2002 - 101

FY 2001 - 106

(Source: http://www.nyc.gov/html/doc/html/stats/doc_stats.shtml)

These numbers actually under-report serious incidents, because in our experience, DOC has chronically miscategorized use of force incidents and failed to designate as class "A" many incidents which, by their own directives, should be so designated. Moreover, this increase has occurred while the jail population has been declining. (www.nyc.gov/html/doc/html/stats/doc_stats.shtml).

In 2012 alone, the Prisoners' Rights Project interviewed, and wrote to DOC seeking investigations, on behalf of over 140 inmates injured in violent, and often unprovoked, encounters with uniformed staff. The frequency and severity of injuries, confirmed by medical records, was astounding, with the prevalence of injuries to inmates' faces and heads being most disturbing and notable. For example, the head and face injuries which we confirmed in 2012 alone, in use of force incidents with DOC uniformed staff, include:

- Inmate K.B., GRVC, fractured orbital bone, fractured nose, chin laceration
- Inmate T.M., AMKC, head injury, right subconjunctival hemorrhage, eye swollen shut, decreased vision in eye, abrasions to lip and face
- Inmate D.M., GRVC, 1.5 cm laceration above left eyebrow closed with dermabond, left orbital swelling, laceration on bridge of nose
- Inmate T.M., RNDC, multiple contusions to face, neck and scalp
- Inmate C.S., Queens court pen, contusion of right eye, contusion of face, laceration on face
- Inmate A.M., OBCC, black eye, severe swelling to face
- Inmate H.S., OBCC, 6 x 6cm echymosis on right forehead, 3 cm bruise under right eye
- Inmate S.V., OBCC, facial abrasions, eyebrow laceration closed with dermabond
- Inmate M.C., OBCC/GRVC, right perforated eardrum, left face swollen near eyes, closed fracture of malar bones and maxillary bones.
- Inmate J.S., RNDC, nasal bone fracture, bruises on face

- Inmate U.A., GRVC, multiple contusions to face, closed head injury, blood in urine
- Inmate O.R., OBCC, swelling and large hematoma to right side of head, right traumatic iritis
- Inmate T.N., AMKC, bruising and swelling right side of face, hearing loss, traumatic iritis.
- Inmate W.H., RNDC, transversal laceration in right eyebrow closed by 10 sutures
- Inmate T.R., Queens court pen, bruise and erythema right side of face, temporal swelling
- Inmate M.S., AMKC, nasal bone fracture
- Inmate A.S., RNDC, head injury, depressed fracture of skull, sutures over right eye, lip laceration
- Inmate R.W., OBCC, laceration to eyelid, multiple scalp bruises.
- Inmate J.L., GRVC, closed fracture of orbital floor, closed fracture of malar and maxillary bones, closed fracture to skull, open wound to lip.
- Inmate L.F., RNDC, closed fracture to the nose.
- Inmate Q.H., GRVC, swelling to left forehead, right eye swollen shut, blood in nasal passages.
- Inmate E.I., GMDC, nasal bone fracture, orbital fracture with hematoma
- Inmate M.H., AMKC, multiple facial fractures, right orbital contusion.
- Inmate D.L., EMTC, laceration of lower eyelid, nasal fracture, orbital fracture
- Inmate J.F., OBCC, perforated eardrum, facial contusions
- Inmate D.W., CPSU, 6 cm laceration to right eyebrow repaired with sutures, laceration below nose, abrasions to occipital area.

Shockingly, this is not even a comprehensive list of head and face injuries incurred—let alone other very serious injuries—but reflects merely injuries suffered by those individuals who reached out to our office for assistance, and for whom we could obtain medical records.

In the last few years we have represented numerous individual victims of staff brutality. These clients suffered a constellation of severe injuries such as a fractured orbital wall; facial bruising; severe bruising all over the body; a facial laceration requiring many sutures; a broken nose; and a skull laceration requiring many staples. These assaults by Department staff cost the City tremendous amounts of money. In 2009-2011, the City paid over $3.95 million to settle cases by victims of excessive force by uniformed staff simply in cases of which we are aware—and there are many more cases than that. Because such judgments are paid by the City, and not out of the DOC budget, the DOC is effectively outsourcing the costs of its failure—or unwillingness—to rein in its rogue staff.

Because so many detainees and sentenced inmates are suffering needless injury at the hands of uniformed staff, and because the problem of uniformed staff brutality is widespread throughout the system, we believe a systemwide reform of policy and practice is necessary to bring an end to this reign of violence. To achieve that end, on May 24, 2012, the Prisoners' Rights Project, together with the law firms of Ropes & Gray and Emery Celli Brinckerhoff and Abady, filed a class action lawsuit, *Nunez v. City of New York,* S.D.N.Y., 11 Civ. 5485 (LTS), on behalf of all New York City inmates held in commands not subject to court orders. The lawsuit seeks to end the pattern and practice of unnecessary and excessive force in the City jails. Defendants include the City of New York as well as the officers and captains who have inflicted brutal beatings on our clients, and have lied and coerced false statements to prevent those beatings from coming to light. It also includes the supervisors at these jails who have allowed staff to use unlawful violence with impunity. We have attached a copy of the Amended Complaint for your information.

A Case Study: Perforated Eardrums

The persistence of perforated eardrum injuries in the jails is stark illustration of the Department's continuing failure to end longstanding problems of brutality. A perforated eardrum is an injury associated with the infliction of torture. See Istanbul Protocol, *The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2004) ("Trauma to the ears, and

especially rupture of the tympanic membrane, is a frequent consequence of harsh beatings.") Perforated eardrums are generally caused by blows with cupped hands to the ear. Medical experts have told us that it is almost impossible to inflict that injury inadvertently. The inexcusable prevalence of perforated eardrum injuries following applications of force by uniformed staff in the New York City jails is not news to DOC. In *Sheppard v. Phoenix*, litigation brought in the 1990s to address excessive force in the Central Punitive Segregation Unit ("CPSU"), former Commissioner Michael Jacobson described the injury as one "associated with" use of force in the CPSU. When he was interviewed by the New York *Times* after the *Sheppard* case settled, Commissioner Kerik, referring to the infliction of perforated eardrums, stated, "[t]hat kind of thing doesn't happen here anymore." *Rikers Island Guards Made "House of Pain" for Inmates*, New York Times, August 16, 1998. (http://www.nytimes.com/1998/08/16/nyregion/rikers-island-guards-made-house-of-pain-for-inmates.html?pagewanted=all&src=pm). Prior to the resolution of *Sheppard* in 1998, approximately 35 prisoners sustained perforated eardrums in the CPSU over a period of seven years.

The issue of perforated eardrums was again addressed in detail in the subsequent litigation about brutality in the jails, *Ingles v. Toro*, which was settled in 2006, and monitored extensively though 2009. Towards the end of our monitoring, at least four inmates suffered perforated eardrums in use of force incidents in a few months' time span towards the end of 2008. We filed lawsuits on their behalf, all of which were settled in 2010 for substantial damages.

Despite repeated litigation and significant cost to the City, the incidence of perforated eardrums in the jails was not curbed. Yet again in 2011, our client Mr. Muniz suffered a perforated eardrum in a savage beating caught on videotape, and the City bore the costs of compensating his loss too. And even since that suit was filed, we have received complaints from yet two more inmates who have suffered perforated eardrums.

There is simply no excuse or reason why this form of torture continues to be seen in the City jails. The fact that these incidents recur, despite being well known to the DOC and senior City officials points to a serious failure in supervision and oversight of the use of force by uniformed staff in the City jails.

"Those Who Do Not Learn From History:" The Department Has Known of the Brutality Problem For Decades

The misuse of force by uniformed staff in the City jails has been the subject of a series of class action lawsuits before *Nunez*.. The remedies implemented in those cases have shown that brutality is not inherent in the correctional mission, and that the City jails can be safely and securely operated without resort to excessive force—when the Department chooses to do so. The lessons learned from those successful reforms that reduced the incidence of use of force and the severity of the resulting injuries *should* be guiding policy today. Yet the frequency, severity and nature of brutality by staff that we are seeing at present reflects little of the progress we witnessed and expected to continue. There is one vital exception: in our view, the increased use of video cameras in the jails, which was required by our most recent class action settlement, has been a singularly effective means of deterring excessive force in the areas under surveillance, permitting the Department to hold staff and inmates accountable. But the other consequence is that staff have learned to engage in excessive force in areas which are off camera, and in some cases have taken prisoners into those areas to beat them. Expanding video surveillance throughout the jails should be a top priority, for the safety of both staff and inmates.

In a challenge to excessive force in the prison wards of New York City hospitals, a consent judgment provided for, *inter alia,* screening measures for correction officers to ensure that those with disciplinary records connected to use of force were assigned elsewhere. *Reynolds v. Sielaff,* 81 Civ. 101 (PNL), Order and Consent Judgment Approving Class Settlement at ¶¶ 43-48 (S.D.N.Y., Oct. 1, 1990). Complaints of use of force dropped significantly, providing an important lesson: active supervision of staff, and careful screening and assignments to marginalize those officers whose conduct is more suspect than others, will yield results. The DOC central office must exercise leadership in staff assignments and promotions, and send the message that an officers' *entire* use of force history will be scrutinized in all promotion decisions.

Later litigation challenged excessive force and inmate on inmate violence at the jail for sentenced misdemeanants on Rikers Island. The court found that DOC uniformed staff engaged in a pattern that sounds familiar today: "1) use of force out of frustration in response to offensive but non-dangerous inmate goading; 2) officers' use of excessive

force as a means of obtaining obedience and keeping order; 3) force as a *first* resort in reaction to any inmate behavior that might possibly be interpreted as aggressive; and 4) serious examples of excessive force by emergency response teams." *Fisher v. Koehler,* 692 F. Supp. 1519, 1538 (S.D.N.Y. 1988), *aff'd*, 902 F.2d 2 (2d Cir. 1990). The court found that DOC's "failure to monitor, investigate and discipline misuse of force has allowed—*indeed even made inevitable*—an unacceptably high risk of misuse of force by staff on inmates." *Id.* at 1558 (emphasis supplied). After the court ordered significant changes in the investigation of use of force and discipline of staff members, the use of force in that jail declined precipitously.

Concurrently, a suit about excessive force at the Brooklyn House of Detention yielded a settlement with similar terms, with the added requirement of installation of video cameras in areas where brutality was prevalent. *Jackson v. Freckleton,* CV 85-2384 (AS), Order Approving Stipulation of Settlement and Entry as Consent Judgment (E.D.N.Y., Nov. 27, 1991). This early experiment in the utility of cameras, long before the current digital technology was available, had dramatic results, as the complaints of misuse of force diminished sharply.

In 1998, in *Sheppard v. Phoenix,* the City and Legal Aid negotiated a comprehensive settlement addressing the horrific brutality by uniformed staff at the CPSU, which houses teenagers and adults who have committed disciplinary offenses. The warden of the CPSU testified at his deposition that that brutality was "ingrained in the culture" of the Department. *Sheppard,* Declaration of Plaintiffs' Counsel, June 26, 1998. To address this culture at its core, the City agreed to blanket the CPSU with recording videocameras, and to weed out the "bad apples," or officers whose use of force histories were troublesome. Two expert joint consultants in security, including a former head of the Federal Bureau of Prisons, provided technical assistance in transforming the "culture of violence" in the CPSU, with remarkable success. For example, from 1997 (the last year before the settlement) to 2001, the number of serious and injurious use of force incidents in the CPSU dropped from 177 to 15—an over 90% decline.

Even though these remedies proved that DOC *could* reduce the injuries suffered by inmates if it chose to do so, those reforms were not rolled out systemwide. Instead, the excessive force against inmates continued unabated in the other City jails. Legal Aid then

filed its first system-wide brutality case, *Ingles v. Toro*, to address excessive force in all of the remaining jails which had not been under Court order. *Ingles* settled in 2006. Central to the settlement were requirements for significantly more camera coverage in the jails, and the development and promulgation of new procedures to govern the Investigation Division, which had a history of merely whitewashing investigations of use of force incidents, rather than functioning as a genuinely investigative body. That settlement agreement terminated on November 1, 2009.

We observed some significant improvements in the Department's management of use of force while the *Ingles* settlement was in effect and permitted us to monitor systematically. However, the Department did not maintain its efforts once the spotlight was off, and the number of complaints of serious, injurious, and unjustified use of force again began to increase. We saw that we had to renew our systemic litigation efforts.

When we filed the *Nunez* class action, we were thus not writing on a blank slate. The Department knew steps that could work to curb violence in the jails, and refused to implement or sustain them systemwide. The incidents that have occurred within the last year—both the circumstances in which they have occurred (i.e., staff retaliation for inmate complaints or verbal annoyance) and the highly injurious nature of force used—are simply inexcusable in a system that has had ample opportunities to reform.

"The Program": Inmate-Inmate Violence with Staff Collusion or Encouragement

We are deeply concerned by another source of violence in the jails: assaults by inmates on other inmates, with the acquiescence or collusion of uniformed staff. This practice has become so entrenched at the adolescent jail, RNDC, that it is widely known simply as "the program." Under "the program," staff effectively deputize certain inmates (often a specific gang) to run a given housing area, ceding to these inmates authority to control access to telephones and meals and extort goods from other inmates and pay them with contraband or privileges. Youth who are not "with it" or "down with the program"—that is, those who do not acquiesce to the demands made by the inmate-controllers to turn over goods purchased at the commissary or telephone PIN numbers, or to beat other inmates—are beaten, often with full knowledge of the officers.

The "program" is no secret. The Bronx District Attorney ("DA") has explained that RNDC is run like an organized-crime family, where correction officers, under "the Program," give "favored prisoners free reign to beat, rob and extort whomever they please"—to quote an outraged *Daily News* editorial. RNDC was an "incubator for violent criminal activity sanctioned by adults in positions of authority," according to the DA. Bronx District Attorney, Press Release, *Two Correction Officers Plead Guilty to Charges in Connection to a Four Month Investigation of Assaults on Rikers Island,*(http://bronxda.nyc.gov/information/2011/case43.htm). In a January 29, 2009 editorial, the New York *Times* described this as a "horror story." Editorial, *Rikers Horror Story*, N.Y. Times, Jan. 29, 2009 at A26 (http://www.nytimes.com/2009/01/29/opinion/29thu2.html). The *Times* demanded that "the entire culture" of RNDC "needs to be changed" and laid the blame squarely on the City for failing to properly train and supervise correction officers. *Id.* As part of "the Program," the officers would conceal evidence of these crimes by "failing to intervene or stop the inmate assaults, making false reports about the assaults or directing inmate victims to make false reports regarding the assaults or acts of extortion, and by using violence or the threat of violence to ensure the victims' continued participation in the Program." Bronx District Attorney, Press Release, *The Death of an 18-Year-Old Inmate on Rikers Island Last October Leads to Numerous Criminal Charges Against Three Correction Officers and Twelve Teenage Inmates*, Jan. 22, 2009 (http://bronxda.nyc.gov/information/2009/case3.htm).

For years, and preceding the above mentioned criminal prosecutions, The Legal Aid Society has forwarded complaints about the "program" to DOC officials. We also testified about the "program" in detail before this Committee on November 24, 2008, long before it hit the headlines, and would happily provide copies of that testimony. Yet the practices continued, leading to the horrible "program" beating of inmate Kadeem John in RNDC in June 2010, and two beatings of our client Mr. Dwaine Taylor in May and November, 2011.

The consistency of the complaints coming out of RNDC about "the program," and the severity of injury that youth are suffering while in the City's care, raises very serious questions about the degree to which central management controls staff misconduct in the

jail. The Department has the ability to identify which staff repeatedly are present in locations where inmates are suffering serious injuries at the hands of other inmates, and to supervise those areas and staff closely. The Department should not be permitted to take refuge in the fact that teen inmates are often very reluctant to request a housing area change or to lodge complaints about their treatment. The adolescents' fear of retribution within the Department is entirely reasonable. Moreover, in free society, we do not depend upon 16 year olds' assessments of their personal safety in potentially dangerous situations, but rather expect their adult caretakers to be vigilant and protective. So too in jail, the Department absolutely must take responsibility for the violent culture created by "the program." This would include actively investigating indications or reports that staff have engaged in such misconduct; detailing and bolstering the measures taken to prevent staff from bringing into the jail contraband that facilitates this operation; taking seriously the complaints of inmates who are brave enough to report their overseers; and holding staff accountable to their supervisors for the inmate-inmate violence that occurs on their watch.

Meaningful Investigation, Supervision and Discipline

The Department already has extensive written policies governing use of force; an Investigation Division tasked with investigating and reporting on staff misconduct; overlapping systems for tracking which officers have been involved in use of force incidents; and a disciplinary system leading to formal charges against officers who break the rules. But these systems serve only to whitewash misconduct if they lack integrity, and if there is no ongoing vigilance by correctional leadership to ensure integrity.

In our experience, the Investigation Division of the Department has not been held accountable for its longstanding failures to conduct unbiased, even-handed investigations of use of force incidents. The default mode seems to be that the task of the investigation is to exonerate staff of wrongdoing, unless there is video evidence that precludes such a finding. This should not be, as ID has an excellent manual, created by the Department itself pursuant to the *Ingles* settlement, that, if followed, would guide investigations and evaluation of conflicting testimony and evidence. But in our experience, these requirement are not being followed in many cases. Key eyewitnesses are not interviewed; critical forensic medical evidence is not, as required, discussed with the Office of the Medical

Examiner, but rather is examined simply by jail clinicians not trained in the interpretation of such evidence; and inmate accounts are more or less automatically dismissed when they conflict with officers' accounts of disputed facts. It is imperative that the Investigation Division conduct its investigations meaningfully, thoroughly, and even-handedly if staff misconduct is truly to be discovered and addressed, and that end can only be accomplished through strong leadership and supervision from above in order to overcome an entrenched culture of bias and lack of thoroughness and professionalism.

There must also be an effective staff disciplinary system to enforce compliance with Departmental policies and ensure staff professionalism. The Department's disciplinary system necessarily depends on the investigative system to identify cases calling for disciplinary prosecution, and the above described deficiencies in the investigative system severely compromise internal staff discipline. Even in those cases that are identified for prosecution, the disciplinary system seems to move extraordinarily slowly in use of force incidents, and thus the deterrent value—or message sent—by discipline is so temporally removed from the misconduct itself that it is often meaningless. We encourage the Department to identify the obstacles to speedy yet just resolution of the charges it brings against officers it believes have violated the rules.

Even effective investigative and disciplinary systems cannot by themselves create a culture of professionalism in the jails. Active and effective daily supervision of staff is also essential. Departmental managers—especially wardens and supervisors in specific jails—can and should learn their staff's use of force histories, *not* to impose discipline, but rather to assess whether a staff member is properly assigned; whether he or she has repeatedly been involved in the same questionable scenarios; and whether his or her involvements with inmates should be more actively supervised. In our experience, the identity of the "head beaters" or "bad apples" in a jail is usually an open secret. Providing staff with impunity for their misconduct not only perpetuates the occurrence of serious injury, but also encourages other staff, such as new recruits, to join the company of rogue actors. The leadership from top to bottom must make clear that use of force histories will not be swept under the rug, but rather staff will be held accountable.

Mental Illness in the Jails

We are extremely concerned that many detainees and inmates with serious mental illness and serious mental health needs are frequent victims of violence and brutality in our City jails. The results are well known and harmful to this vulnerable population. Individuals with inadequately treated mental illness who cannot conform their behavior to jail rules due to untreated symptoms or who are punished for symptomatic behavior, end up injured due to unwarranted and overly aggressive confrontations with inadequately trained uniformed staff and are punished by placement into isolated punitive segregation where their mental condition worsens and they may accumulate additional disciplinary infractions and sentences to harmful isolated punitive segregation. The City does not adequately train its uniformed jail staff to recognize and accommodate mental illness and mental disability so that incidents of violent confrontations are minimized and does not appropriately refrain from the use of harmful isolated confinement despite the national trend to change policies and limit the known harmful use of isolated confinement in jails and prisons.

The recent Council of State Government Report on the New York City Jails that is the result of a Mayor's Task Force on Mental Illness in the Jails, *Improving Outcomes for People with Mental Illnesses Involved with New York City's Criminal Court and Corrections Systems*,[1] indicates that 33% of the jail inmates in New York City suffer from mental illness; jail inmates with mental illness are held in pretrial detention for significantly longer periods of time than inmates without mental illness; and the disproportionate length of their detention is not due to severity of criminal charge or risk of rearrest. The findings reflect that jail inmates with mental illness are more likely to be injured during their stay in custody and that DOC managers reported they were more likely to be involved in jail incidents. These findings reflect severe shortcomings by the City in providing appropriate accommodations so that individuals subject to arrest in New York are not discriminated against based on mental disability. The Report suggests that thousands of pretrial detainees with mental illness each year should not have been subject

[1] The report is available online at: http://consensusproject.org/jc_publications/improving-outcomes-nyc-criminal-justice-mental-health/FINAL_NYC_Report_12_22_2012.pdf.

to pretrial confinement and the resultant incidents of violence and injury that they experience in the jails. Changes to bail policies, improved training for uniformed staff and increased availability of Alternatives to Incarceration (ATI) and Alternatives to Detention (ATD) cannot be delayed.

Recommendations

A. Greatly expand the videocamera surveillance in the jails.

B. Exercise municipal and correctional leadership, and hold staff members who misuse force accountable for their misconduct through meaningful discipline.

C. Revise the Department of Correction's management and promotion policies so that staff members' use of force is addressed in assignment and promotion of staff.

D. Overhaul the Department's Investigation Division to ensure that it complies with the Investigation Manual and conducts bona fide, competent investigations.

E. Review the Department of Correction's systems for maintaining and utilizing information about violence against inmates, and for holding accountable staff who foster inmate violence.

F. End the use of solitary confinement of mentally ill prisoners.

G. Train department staff to recognize and accommodate mental illness so as to reduce the number of violent encounters with mentally ill inmates.

Thank you for the opportunity to speak about this important topic.

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