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Members of the Board of Correction
1 Centre Street
Room 2213
New York, New York 10007

Re: Proposed Rulemaking Regarding Minimum Standards §§ 3-08 and 3-16

Dear Members of the Board of Correction:

We write to comment on the proposed amendments to the Board of Correction ("BOC" or "the Board") standards on preventing and investigating injuries in the New York City jails (Health Care Minimum Standards §§ 3-08 and 3-16). The Health Care Minimum Standards are a cornerstone of New York City's structure for protecting human rights and public health during incarceration. We appreciate these opportunities to improve the standards to better serve their purpose.

We appreciate the Board's efforts through the proposed rulemaking to clarify the circumstances in which it is appropriate for Correctional Health Services ("CHS") to share protected health information and to establish data collection and reporting structures that would encourage the Department of Correction ("DOC" or "the Department") to collaborate with CHS in investigating and preventing injury to people in custody.

As the Board has noted, the consequences of serious injuries in the jails are severe and wide-ranging.[1] The Department must seek to prevent the circumstances in which such injuries occur, and CHS must responsibly manage the tension between providing health information in service of appropriate investigations and protecting the privacy and confidentiality of patients in custody. That critical tension informs our comments below.

PROPOSED RULE:
Section 1. Subdivision (a) of section 1-01 of Title 40 of the Rules of the City of New York is amended to read as follows:

a) Policy. [Prisoners] People in custody shall not be subject to discriminatory treatment based upon race, religion, nationality, sex, sexual orientation, gender, disability, age or political belief. The term ["prisoner"] "person in custody" means

[1] Serious Injury Reports in NYC Jails (January 2019), p.3, Board of Correction. *Available at* https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/BOC-Reports/2019.01.07%20-%20BOC%20Serious%20Injury%20Report%20-%20Final.pdf (last visited June 19, 2019).

any person in the custody of the New York City Department of Correction ("the Department"). "Inmate" and "prisoner" both mean "person in custody" throughout this Title, and the Board will modernize to person-forward language in promulgating rules, so as to phase out the use of "inmate" and "prisoner." "Detainee" means any [prisoner] person in custody awaiting disposition of a criminal charge. "Sentenced prisoner" means any [prisoner] person in custody serving a sentence of up to one year in Department custody.

We commend the Board for the efforts to use language that reflects the humanity of our clients, and support the use of person-forward language in promulgating rules and other materials.

PROPOSED RULE: *Section 3-08(b)(2)*

The Health Authority shall not conduct body cavity searches or strip searches. The Health Authority also shall not conduct forensic evaluations of persons in custody for criminal prosecution or investigatory purposes, except in Forensic Psychiatric Evaluation Court Clinics (FPECCs).

We agree that the Minimum Standards must mitigate the ethical dilemma posed by dual loyalty in the correctional health context. We are concerned that the proposed terms disallowing "forensic evaluations for criminal prosecution or investigatory purposes" are not clear. As written, the proposed rule appears to prohibit qualified medical staff from conducting forensic medical examinations in service of a sexual assault investigation—a prohibition that would be inconsistent with both Minimum Standard § 5-10(c) and the Prison Rape Elimination Act ("PREA").[2] This would also prevent DOC or Department of Investigation investigators from requesting forensic evaluations while investigating allegations of staff misconduct, like officer brutality. We propose language reflecting those specific and narrow exceptions, and clarifying that any forensic evaluations conducted cannot be for the purpose of criminal prosecution or investigation *of the patient*.

We also object to CHS involvement in conducting evaluations pursuant to C.P.L. § 730, which raises the troubling appearance that the health practitioners on which our clients rely for care in custody are also aiding the criminal prosecution process.

PROPOSED RULE: *Section 3-08(c)(3)*

3. Subject to applicable state and federal law, health care personnel may report a[n] [inmate's] person in custody's health information to [the chief correctional officer] correctional authorities without the written consent of the [inmates] person in custody only when such information is necessary[,] to provide appropriate health services [for] to the [inmate] person or to protect the health and safety of the [inmate] person or others. Disclosures made under this section shall not include:

[2] While we understand that forensic medical examinations following an allegation of sexual abuse might sometimes be conducted on-site, we continue to advocate that the integrity of the investigation is better served by conducting such examinations at outside medical facilities with Sexual Assault Forensic Examiners, Sexual Assault Nurse Examiners, or other qualified medical practitioners.

(i) The entire health record;

(ii) Specific diagnoses, with the following exceptions:

(A) specific diagnoses of injuries sustained by people while in custody may be shared with correctional authorities for the limited purposes of investigating and identifying trends related to injuries;

(B) When an exposure to a specific communicable disease other than a common sexually transmitted infection has occurred in a facility, the Health Authority may disclose an individual's communicable disease diagnosis to correctional authorities for the limited purpose of contact tracing, and only when disclosing the identity of the individual is absolutely necessary to protect the health and safety of potentially exposed persons. In all other cases involving persons in custody with communicable diseases, the correctional authorities shall be instructed by health care personnel on proper precautions needed to protect correctional personnel and others without being told disease-specific diagnoses for individuals. Disclosures of individuals' communicable disease diagnoses made pursuant to this provision shall be reported to the Board in writing within 24 hours.

[Such information shall not include the specific diagnosis or the entire health record, but where necessary may include the following: [*text omitted*]]

Disclosure of information should be as limited as possible. To that end, we propose the rule add the explicit limitation that disclosure of diagnoses of injuries or communicable diseases for investigatory *purposes* should further be limited to the individual *staff* who require the information for those specific investigatory functions. The rule should explicitly prohibit re-disclosing that information to other staff.

The new rule should also include guidance regarding when it is appropriate, for the health and safety of the patient or others, for CHS to disclose information without disclosing a specific diagnosis. CHS should be encouraged to share, for example, an incarcerated person's dietary restrictions and modifications (including restrictions due to allergies), limitations on ability to work, limitations on specific types of restraints, a bar on placement in isolated confinement or a need for Mental Observation housing, or precautions needed in cases of suicidality.

PROPOSED RULE: *Section 3-16(b)*

(b) Investigations. Investigations of injuries of people in custody, including all supporting documentation such as Injury-to-Inmate forms, shall be completed in a prompt, accurate, and objective manner. For the purposes of this section, investigations shall mean investigations conducted in the manner required by the Department of Correction ("Department") including, but not limited to, investigations conducted by the facility or investigations contained in Injury-to-Inmate forms.

The Board should provide a specific time deadline by which the Department must complete investigations of injuries of people in custody. Given the tremendous backlog in Use of Force and

PREA investigations, we are concerned about the Department's ability to adhere to a requirement that investigations be generally "prompt." Providing a specific time period will better allow the Board to assess compliance as it performs its oversight function.

The rule should also prohibit the disclosure of Injury-to-Inmate reports, or the contents thereof, to non-investigation staff. We remain concerned about the disclosure of confidential information to DOC staff that may have been involved in causing the injury.

> **PROPOSED RULE:** *Section 3-16(c)(1)*
> (c) Coordination. (1) Quarterly Meetings. The Agencies shall engage in regular communication and quarterly meetings, to review data on injuries, identify trends, and perform quality assurance on injury report documentation. These communications and quarterly meetings shall include data informed development of corrective action plans.

The Department should be required to provide the corrective action plans named in this section to the Board and to the public. Corrective action plans should address the adequacy of staffing and whether the immediate presence of additional staff would have deterred, prevented or terminated the incident more quickly.

> **PROPOSED RULE:** *Section 3-16(d)(2)*
> (2) The Agencies shall provide the Board with a joint, monthly, public report of data on injuries and serious injuries to people in custody ("Joint Monthly Injury Report"), as follows: … [*subsequent text omitted]*

Generally, we support the requirement of reporting this information to the Board and to the public. A few amendments would better accomplish the intended purposes.

First, for assault injuries caused by other persons in custody, reporting should also require DOC to disclose for each assault: the type of housing area; the location of the assault; the time of the assault; the time of alarm notification; the time of the first officer's physical intervention to stop the assault; the time of arrival of any DOC response team/probe team/ riot squad; the number of officers physically present on the housing unit when the assault began; and the number of officers physically present within the dormitory or cellblock common area when the assault began. These data points will help the Board better understand the supervision deficiencies contributing to the Department's failures to protect people in DOC facilities.

Second, we recommend deleting the qualifier "facility" to the term "facility investigation" in section 3-16(d)(2)(ii)(C), (E) and (F). The term should simply be "investigation." Investigations into incidents causing injuries in DOC (e.g., use of force, fights) are conducted by several entities, most notably the Investigation Division. The term "facility investigation" is generally known in DOC to refer to a different, and more limited, type of review of a use of force incident wholly within the

chain of command. These have been widely criticized as a sham.[3] The term "investigations" more generally is understood to mean the official investigation of an incident, regardless of the specific sup-entity of DOC who conducts it.

In conclusion, we appreciate efforts by the Board to investigate and prevent serious injuries to people in custody. We welcome further discussion on these issues.

Very best regards,

Kayla Simpson
Staff Attorney

[3] *See, e..g.,* Seventh Report of the *Nunez* Independent Monitor, *Nunez v. City of New York* (April 28, 2019), *available at* https://www1.nyc.gov/assets/doc/downloads/pdf/7th_Monitor_Report.pdf, at 8 ("facility investigations add no value to the process of addressing Staff misconduct)"; and at 106 ("the findings of Facility investigations were generally not reliable, as they often ignored objective evidence, with analysis that is pro forma. The small sample of Facility investigations reviewed this Monitoring Period revealed use of force violations and issues that remained unaddressed, evidence that was disregarded, and findings and conclusions that were not based on the preponderance of the evidence. Facility investigators: • do not analyze use of force incidents appropriately, • do not appear to understand the concept of "proportionality" in using force or the types of Defensive Tactics which are permitted with certain types of resistance, • rarely identify when Staff use inappropriate techniques, • rarely identify when the inmate's actions or resistance was provoked by Staff, and • leave unaddressed inaccurate reports by involved Staff and Staff witnesses.").