NEW YORK CITY BAR

COMMENTS ON BOARD OF CORRECTION PROPOSED AMENDMENTS TO MINIMUM STANDARDS FOR NEW YORK CITY CORRECTIONAL FACILITIES

Prepared By New York City Bar Association Corrections Committee

In February of this year, the Board of Correction (the "Board") issued a notice of public hearing and opportunity to comment on proposed amendments to the Minimum Standards for New York City correctional facilities (the "Minimum Standards"). The proposed amendments, which had been under private discussion by the Board for more than two years, were presented to the public for the first time with this announcement. Concerned citizens were given an unreasonably short time in which to read and attempt to digest the proposed revisions prior to the Board's April 17 hearing.

The New York City Bar Association (the "Association"), founded in 1870, is a private, non-profit organization of more than 22,000 attorneys, judges and law professors, and is one of the oldest bar associations in the United States. We commented at the April 17 Board meeting regarding our deep concern about the closed-door process by which the Board drafted the proposed amendments, as well as our concern that the amendments themselves failed to provide any benefits for inmates or their families, seemed crafted to codify practices enacted for the ease of the Department of Correction (the "Department"), ceded too much authority to the Board to grant variances without requiring proof that they be necessary or proper, and generally reflected a drift toward low levels of correctional practice.[1]

The Association now writes to express serious concern about several of the proposed amendments themselves. We believe that the bulk of the proposed amendments should be rejected for the specific reasons outlined below. In general, not only is the need for the amendments not substantiated, and not only do they impinge on inmates' rights to decent, safe conditions of confinement, but the amendments were drafted without benefit of input from groups working with inmates, from inmates' families, or inmates themselves. As such, the infirmities in the amendments result directly from the infirmities of the process by which they were drafted.

Our instant comments incorporate information gleaned from a March 24, 2007 meeting (the "March Meeting") between members of the Association's Corrections Committee (the "Corrections Committee" or "Committee") and Department officials, including Commissioner Martin Horn. Because the Board declined invitations to meet with the Corrections Committee, the Committee lacks the benefit of any input from the Board.

The timeframe imposed by the Board did not provide for an opportunity to craft suggestions for

[1] A copy of the Association's April 17 Comments is annexed hereto.

workable and just alternatives to the proposed changes to the Minimum Standards. For this reason, and because the proposed changes appear to have been devised with no input from the public and thus do not incorporate proposals that might benefit inmates, we strongly suggest that the Board begin the drafting process anew. If given more time, the Association would welcome the opportunity to suggest concrete, viable alternatives to the current proposed changes.

The following are the Association's comments on specific proposed amendments.

SECTION 1-01: NON-DISCRIMINATORY TREATMENT

Summary of proposed changes:

The Board seeks to amend § 1-01 of the Minimum Standards ("Non-Discriminatory Treatment") by deleting the requirement, at §1-01(c), that each institution have sufficient Spanish-speaking employees and volunteers to assist Spanish-speaking inmates, and by adding a new requirement, at § 1-01(d), that the Department employ procedures to ensure that non-English speaking inmates understand all written and oral communications from facility staff members.

Analysis:

We support the new requirement at § 1-01(d) to expand access to translation services for inmates who speak languages other than English and Spanish. We do not, though, see it as a substitute for the deleted requirement that the Department retain Spanish-speaking employees and volunteers. Deleting the § 1-01(c) requirement would be acceptable only if the number of Spanish-speaking inmates had decreased to such a degree that this staff was no longer required. This can not be the case.

The proposed deletion of § 1-01(c)(1) represents a disturbing trend toward inmate-based translation. Inmates are not trained to act as translators, and do not necessarily provide unbiased, conflict-free services. Ulterior motives, including hostilities among inmates, could jeopardize the accuracy of such translations. Inaccurate translations could lead to confusion, unjust punishment, violence, and potentially threaten order in the jails.

Of particular concern is that, with the deletion of § 1-01(c), the Department would no longer be required to assist Spanish-speaking inmates in using the law library and in availing themselves of important institutional programs.

Moreover, the amendment jeopardizes the privacy of inmates. Inmates should not be forced to reveal private health concerns or other personal issues to fellow inmates due to the lack of personnel qualified to translate such information.

The Board fails to present any beneficial evidence to support the repeal of § 1-01(c)(1). It does not present data to show that the number of Spanish-speaking inmates has decreased in City jails, nor does it show or allege that providing Spanish-speaking staff creates any undue burden on the Department.

If § 1-01(c)(1) were retained, proposed § 1-01(d)(3) would be an encouraging first start on providing non-Spanish translation services. It is no substitute for § 1-01(c)(1), however. By

providing that only oral and written communications of facility staff will be "understood," it fails to ensure that non-English speaking inmates have adequate access to libraries or institutional programs. Proposed § 1-01(d)(3) also does not set forth specific means of providing for the translation of communications to non-English speaking inmates. This section should be revised and enhanced to ensure that the Department provide translation services to inmates who speak languages other than English or Spanish, not just for communications from facility staff, but also in order to help such inmates access law libraries, services and programs.

By failing to address discrimination on the basis of disability or sexual identity, the Board misses an important opportunity. The Minimum Standards should be further amended both to prohibit such discrimination and to take steps to make that prohibition meaningful.

Recommendations:

The Association recommends that the Board NOT delete § 1-01(c)(1) of the Minimum Standards concerning translation. The revision is neither supported by sound empirical data nor justified in any way. Reliance on inmate-based translation jeopardizes inmates' privacy in health care, legal and other confidential matters, and limits their ability to use law libraries and partake in other facility services and programs. Because inmate translators may not, for various reasons, translate accurately, and because they may be biased or have ulterior motives, it is possible that the inaccurate information they disseminate could result in confusion and possible violence in the jails.

The Association encourages the provision of translation services to inmates who speak languages other than English or Spanish. If the Board does adopt § 1-01(d)(3), the Association urges it to employ sufficient staff and other qualified persons to provide translation services.

Finally, the Association suggests that the Board amend § 1-01(a) to prohibit discrimination against persons with disabilities and discrimination on the basis of sexual identity in addition to the existing list of protected classes, and that it add new provisions to make this prohibition meaningful.

SECTION 1-03: PERSONAL HYGIENE

Summary of Proposed Changes:

The Board seeks to amend § 1-03 ("Personal Hygiene") to substantially modify existing rules regarding inmate clothing, right to showers, and access to shaving. Most significantly, this amendment would require that, upon the establishment of adequate laundry facilities, detainees -- who have not been tried or convicted of crimes -- wear Department uniforms, and that *all* inmates wear uniforms for court appearances other than for trial.

Currently, only sentenced inmates are required to wear Department uniforms. Detainees, for the most part, wear non-prison clothing.

Under the proposed rule changes, *all* inmates, including detainees, would be required to wear

Department clothing once laundry and storage services are established.[2] Pursuant to §§ 1-03(g)(5)-(6), the Department would be required to provide certain items of clothing to inmates, and a change of clothes would be provided every 4 days. In addition, §§ 1-03(g)(2)-(3) would eliminate explicit permission for detainees to wear short pants and short sleeves in warm weather. The amended rules also propose to eliminate the female inmates' option to wear pants or a skirt.

The change to the Minimum Standards in § 1-03(b)(2) would also modify the rule that inmates have access to hot and cold water for daily showers, permitting greater latitude in denying inmates in punitive segregation this right and permitting denial of daily showers (except for dates of court appearances) for infractions or misconduct on the way to, from, or during the showers. The denial of access to showers could be increased upon repeated offenses, with sanctions ranging from a reduction to 5 shower days a week for two weeks for a first offense to a reduction to 3 shower days a week for the duration of the punitive segregation confinement.

The proposed change in the Minimum Standards would further affect access to shaving to permit denial of shaving in the same fashion as denial of showers. Sections 1-03(c)(1)-(2) would modify the access to hot water for shaving from "sufficient to enable inmates to shave with care and comfort" to merely "sufficient."

Under § 1-03(f)(3), the Department would pay for weekly towels and other personal health care items.

Analysis:

Changes in the Personal Hygiene standards have little to do with improving conditions for inmates and, instead, increase the punitive abilities of corrections staff and serve to decrease the dignity with which inmates are treated. No reason has been articulated as to why the Board should eliminate a simple and cost effective means to give dignity to inmates, particularly to detainees who have not been convicted of any crime.

Clothing: The Board suggests that because other jurisdictions in other cities require all inmates to wear institutional clothing, New York City should do likewise. This is not a valid justification for such a dehumanizing change, particularly in the total absence of any allegation or proof that the change will benefit anyone (including corrections staff, the public, or inmates).

This amendment appears designed to address an undocumented problem. During the March Meeting with the Corrections Committee, Commissioner Horn stated that he would prefer that all inmates wear Department clothing in order to prevent them from blending in with the general public if they were to escape, particularly when being transported to and from facilities. However, the Commissioner did not articulate how prevalent inmate escapes actually are. If the

[2] According to the proposed amendments, in the event that a jail facility compels that Department clothing be worn, the requirement may be imposed only upon establishment of clothing services such as adequate laundry, pursuant to §§ 1-03(g)(1)(i) to (vi). Additionally, the Department must be able to provide periodic replacement of facility clothing, as well as storage, cleaning, and timely retrieval of personal clothing for court appearances and discharge from custody.

number of escapes from custody is a serious problem, then the Department, along with the Board, should investigate the matter and seek to make narrowly-tailored changes directly related to that concern.

Additionally, the rules take away an inmate's right to wear non-facility clothing to non-trial court appearances. It is no longer controversial that a person's clothing and appearance in court creates an impression that may have a bearing on the outcome of his/her case. For this reason, non-facility clothing should be allowed for *all* court appearances.

Moreover, the wearing of uniforms during visits with relatives could prove especially harmful to an inmate's sense of dignity. Children of detainees, in particular, may be negatively impacted by seeing their parents in Department uniforms.

The proposed changes are also problematic in that they do not take into account the necessity or preference of some women to wear skirts due to religious reasons and beliefs, nor do they take into account the need for different sorts of clothing (such as long underwear or hats) depending on the weather.

Showers/shaving: No distinctions are made between men and women with regard to shower and shaving accessibility. There are times when daily showers may be more necessary for women, such as during menstruation, or for any inmate, such as during illness or hot weather.

Hygiene Issues: The proposed changes raise several health concerns. The Board has offered no accommodation for the possibility of spreading diseases, such as common infections or fungi, through shared clothing. Wearing one's own clothing reduces such instance of disease and daily washing and shaving reduces the spread of germs, infections, and fungi.

Cost: No cost analysis has been offered. Under the proposed standards, the Department would not only have to provide a multitude of additional clothing to detainees, but also increase laundry facilities. Staff would have to constantly distribute clothing, ensuring correct sizes, cleanliness, and quality, all of which would increase the cost of running the facilities without apparent benefit to inmates, staff, or the public. While other jurisdictions in New York State require institutional clothing, those jurisdictions are at best a fraction of the size of New York City and do not have the large inmate population of New York City.

Recommendations:

The Association recommends that the Board NOT adopt the proposed changes to § 1-03. The impracticality of the proposed changes, the unnecessary cost, and the lack of any perceived benefit to inmates, staff or the public, warrant close inspection. The Association accordingly recommends that detainees be allowed to wear their own clothing, which promotes both dignity and health, and further recommends that the standards be revised to allow women to wear skirts if desired, and to provide access to non-facility clothing for all inmates for court appearances and visits.

SECTION 1-04: OVERCROWDING

Summary of Proposed Changes:

The Board seeks to amend § 1-04 ("Overcrowding") to increase by ten the permitted number of inmates in each dormitory and to limit the amount of required square footage per inmate in dormitory sleeping areas.

Currently, no more than 50 detainees can be housed in a single dormitory. Proposed revisions to § 1-04(c)(5) would increase the maximum number of inmates in a multiple occupancy dwelling area (i.e. a dormitory) to 60 inmates. (The Board acknowledges, however, that building standards regarding toilets per inmate might functionally limit the increase in inmates to 56 per dormitory, rather than 60.) This proposed change also appears to eliminate the current distinction between detainees and sentenced inmates.

Under current standards, each inmate is allotted 60 square feet of dormitory sleeping space. Section 1-04(c)(2) would decrease the square footage allocated per inmate from 60 to 50 feet. Further, as amended, § 1-04(c)(3) permits one operable sink for every 12 inmates, replacing the current standard of one sink per 10 inmates.

Analysis:

The issue of overcrowding implicates several topics facing correctional institutions, including violence, sanitary health conditions, and physical plant issues. In the March Meeting with the Corrections Committee, Commissioner Horn acknowledged that the overcrowding proposal is intertwined with his plans to build a new jail in the Bronx. Guiding these plans is the overarching principle that the population at Rikers Island should be reduced. Commissioner Horn believes that that this amendment would serve as a mechanism to reduce the Riker's population, in conjunction with the elimination of wooden modular dormitories. Commissioner Horn informed the Corrections Committee that this amendment would also apply to newly-constructed dormitories in Brooklyn and the Bronx. This proposal signifies a shift from individual cell housing toward the increased use of dormitory housing.

The Board claims that these amendments bring the city jails into conformity with the living arrangements in other large metropolitan areas such as Los Angeles, Phoenix, Houston, and Chicago. Yet, the corrections systems in those cities have experienced alarming rates of overcrowding and violence. Commissioner Horn admitted to the Corrections Committee that that he would rather use other counties in New York State as models instead of cities such as Los Angeles. However, the demographics of other New York counties are different from New York City, which makes them inapposite models as well.

An increase in the amount of detainees per square foot in dormitories raises concerns related to overcrowding and security. Because of the way the dorms are configured, the change would mean that each shift of officers assigned to a housing unit would be responsible for up to 20 more inmates. Housing units are made up of two dormitories joined by a "bubble" in the middle. Presently, one officer is assigned to the bubble, and one officer patrols the dormitories. There are currently a maximum of 50 inmates per dormitory. If this change were enacted, the two officers in the housing unit would be responsible for up to 120 inmates in the housing unit.

Correction officers, already taxed, would have an increased inmate population to monitor and safeguard.

As reported by other major cities, the phenomenon of overcrowding and short staffing invariably leads to increased violence among the inmate population. Commissioner Horn told the Corrections Committee that dormitories in which the existing crowding variances are in place have shown a decrease in violence. However, statistics show that while stabbings and slashings have decreased in theses dormitories, inmate fights actually have increased substantially from 2005 to 2006. Violence throughout the jails also has increased. This could in part result from the increased stress put on inmates living in overcrowded dormitories who then commit violent acts in other areas in the jails.

In addition to overlooking the effect of overcrowding on violence, the Board also fails to consider the impact of overcrowding on the delivery of health services and on physical structures. No data is presented regarding provision of health services in overcrowded conditions. The Board further fails to provide any data addressing the effect of overcrowding on already overburdened facility infrastructure.

Finally, current statistics do not indicate a problem with overcrowding in City jails. In fact, the population in City jails has declined significantly in the past years. If the Board believes that future trends will lead to a higher inmate population, which in turn would necessitate these proposals, no data to support such a hypothesis has been presented. Moreover, in the event that the jails experience a population surge, this does not justify implementing conditions that jeopardize the safety and health of inmates and correction officers.

Recommendations:

The Association recommends that the Board NOT adopt the proposed revisions to § 1-04 of the Minimum Standards concerning overcrowding. The adoption of the proposed new standards is neither warranted nor justified by any sound empirical data. The potential harm to inmates and corrections officers as a result of these changes far outweighs any benefit that is, at best, amorphous and unsubstantiated.

SECTION 1-05: LOCK-IN

Summary of Proposed Changes:

The Board seeks to amend § 1-05 ("Lock-in") of the Minimum Standards regarding inmates confined in punitive segregation, close custody, and the contagious disease units by eliminating its current policy that the time of segregation be kept to a minimum.

Section 1-06 has always permitted the Department to confine inmates to their cells when necessary for the safety and security of the jails. Although it violates existing Minimum Standards, it has been Department policy for some time to confine inmates housed in punitive segregation to their cells because the Department claims it is necessary for the safety of the facilities. However, it is only relatively recently that the Department has applied this same lock-in policy to inmates housed in close custody, and it appears that this change also violates the existing Minimum Standards. Instead of preventing the Department from continuing to violate

the existing Minimum Standards, the Board instead proposes a revision to ratify this unnecessarily punitive practice.

Analysis:

The Department created the close custody designation in 2005. Close custody housing is apparently meant to serve the functions of both protective custody and administrative segregation. According to Department directive, inmates may be placed in close custody housing if they require protection or for the safety and security of other inmates or staff. The Department recently amended this directive, commendably, to require that inmates be placed in close custody for their own protection only when no other less restrictive housing would be adequate to provide for their safety. Currently, vulnerable inmates may also be placed in "general population escort housing," which Commissioner Horn described in the March Meeting as identical to other general population housing except that inmates housed there are provided with staff escort for all movement outside of their housing unit.

Currently, the Minimum Standards allow inmates separated from the general population for reasons other than their misconduct to enjoy substantial "lock-out" time during which they can leave their cells to go to a dayroom where they can watch television or interact with other inmates, or utilize services such as the medical clinic, the law library, and the guidance and counseling offices. The proposed amendments would allow the Department to lock close custody inmates in their cells 23 hours a day – just like inmates who have committed disciplinary infractions – allowing them to leave only for showers and one hour of recreation that would take place in an individual recreation area. Services, such as law library and educational assistance, would be provided to close custody inmates in-cell. Inmates housed in close custody would also be denied access to congregate religious activity, such as prayer services.

Adoption of this new standard would have consequences beyond restricting close custody inmates' access to important services. Under the proposed amendment, the Board would effectively permit the Department to house vulnerable inmates in solitary confinement simply due to their vulnerability, not because they have broken any Department rules. Inmates who have legitimate, serious fears for their safety and who genuinely need protective housing are likely to be deterred from requesting it, if doing so would subject them to 23-hour isolation. It is unsound correctional practice to require an inmate to choose between his or her own safety and isolated confinement. Isolating individuals from most human contact and confining them alone in a small space for prolonged periods of time is detrimental to their well-being. It is well known that placement in isolated confinement can have severe consequences for mental health and can present a substantial risk of suicide.

The Department's current practices with respect to protective custody housing make clear that a standard as restrictive as the Board's proposed revision is not at all necessary. As Commissioner Horn stated in his March Meeting with the Corrections Committee, the majority of inmates who request some kind of protective housing are not housed in close custody but are housed in the general population escort unit where they enjoy out of cell time consistent with other general population inmates and with the current Board standards. Commissioner Horn stated that inmates in close custody for protective reasons, a relatively small group (33 as of March 29 of this year, according to the Department), are primarily individuals who require protective housing

but who cannot or will not identify a particular threat to their safety. An even smaller number of inmates (22 as of March 29 of this year, according to the Department) remain in close custody for reasons other than protection. Commissioner Horn stated that it would be too difficult for inmates housed in close custody to have more than one hour of out of cell time given the number of inmates housed in close custody. However, no concrete data has been provided that verifies this assertion. The Board should investigate whether it is feasible to provide more out of cell time and access to services to this population before imposing such a drastic measure.

Another concern with the proposed revision is that the close custody housing directive and the Board's proposed revision, which essentially incorporates that directive, give the Department broad discretion to determine which inmates requiring protection should be housed in a close custody area. The Department conceivably could amend its close custody directive to define close custody however it sees fit. As such, there would be little Board oversight concerning which inmates the Department could place in isolated confinement for non-disciplinary reasons.

Recommendations:

The Association recommends that the Board NOT adopt the proposed revision to § 1-05 of the Minimum Standards concerning lock-in. The adoption of such a standard would subject inmates who have committed no disciplinary offense to unnecessary and detrimental solitary confinement.

SECTION 1-06: RECREATION

Summary of proposed changes:

The Board seeks to amend § 1-06(g) ("Recreation") to permit the Department to deny an inmate recreation for up to five days merely "for misconduct on the way to, from or during recreation."

Although current standards do not permit denial of recreation for such misconduct, the Board provided the Department with a variance that essentially permits the change the Board proposes. However, the Association understands that denial of recreation has been applied very sparingly by the Department under the current variance.

The amendment would further exempt the Department from providing an indoor recreation area for use during inclement weather by inmates confined for medical reasons in the contagious disease units. Currently, the Department provides such indoor recreation pursuant to a Board variance.

Analysis:

No justification is given for denial of recreation to individuals confined in contagious disease units, recreation which is currently provided. The Board should instead continue its efforts to provide these individuals with opportunities for recreation and exercise.

The proposed amendment to §1-06(g) denies recreation to inmates who are found to have engaged in "misconduct" on the way to or from, or during, recreation, but does not define "misconduct." Consequently, under the revision, minor prison infractions occurring in the

recreation yard could lead to denials of recreation, including situations where such infractions are not, in fact, related to recreation.

It is our understanding that individuals found to have committed "misconduct" during recreation and sent to disciplinary segregation thereafter for this misconduct or for any other reason currently have access to recreation alone or in small groups. The modified standard would effectively permit the Department to deny recreation to these inmates. The Association believes that the Department should continue to permit these inmates to have recreation opportunities in an effort to promote inmates' physical and mental well-being.

Recommendations:

The Association recommends that the Board NOT adopt the proposed revisions to §§ 1-06(e-1) and 1-06(g) of the Minimum Standards concerning recreation. The Association recommends that the Board consider modifying this standard to require instead that any restriction on recreation be enacted only in response to a *serious* violation of facility rules and that prior to any such restriction, the Department determine, as part of a disciplinary hearing, that there is reasonable likelihood that future misconduct may occur if the inmate is permitted access to recreation. In addition, inmates who are sentenced to disciplinary confinement due to an infraction related to recreation should not be denied access to recreation in disciplinary confinement.

SECTION 1-07: RELIGION

Summary of proposed changes:

The Board seeks to amend § 1-07(c)(1) ("Religion") to add a provision that inmates confined for medical reasons in the contagious disease units not be permitted to congregate for the purpose of religious worship and other religious activities. Section 1-07(d)(1), as amended, would add the further requirement that the Department's Executive Director of Ministerial Services approve a "religious advisor." Similarly, § 1-07(i)(3) would require the Deputy Commissioner for Programs to approve an inmate's request to practice a religion not previously recognized.

Analysis:

The changes in §§ 1-07(d)(1) and (i)(3) both add an additional level of review to inmates' religious choices, by the Department's Executive Director of Ministerial Services and Deputy Commissioner for Programs, respectively. Before being permitted to adopt these proposed revisions, the Board should be required to provide justification. Currently, no information has been provided about any problems the proposals seek to remedy. How frequently do inmates request to practice unrecognized religions? What special considerations do such inmates request? Have any of these considerations affected inmate safety or facility security? Without answers to these questions, the proposed changes appear extreme and unwarranted.

Recommendations:

The Association recommends that the Board NOT adopt the proposed revision to § 1-07 of the Minimum Standards without some justification that the revisions address current problems. In the absence of such justification, the Board should not restrict religious worship.

SECTION 1-08: ACCESS TO COURTS AND LEGAL SERVICES

Summary of proposed changes:

The Board seeks to amend § 1-08 of the Minimum Standards ("Access to Courts and Legal Services") to reduce hours for access to law libraries.

Currently, § 1-08(f)(2) requires that larger facilities provide library access for ten hours, and smaller facilities for eight and one-half hours, and that this access be provided "during lock-out hours," i.e. when inmates are not confined in their cells. The Board has proposed deleting this phrase, with the result that hours of operation will include *hours when inmates are locked in their cells, dormitories or housing units*. This will effectively reduce general population library access by two hours each day in larger jail facilities.

Analysis:

There is reason to be skeptical about the Board's justification for this proposed reduction in services. The Board presents no information to suggest that inmates in special housing areas now have safety issues when accessing the law library. While it is possible that the Board is referring to problems experienced by inmates housed in "escort-only housing," these inmates constitute only a very small minority,[3] and may not, in fact, even be officially classified by the Department as a special housing population. The bulk of this population consists instead of inmates housed in punitive segregation units, who do not have access to the law library under any circumstances (legal materials are brought to them). Further, the Board proposes, at § 1-08(f)(4-a), denying access to inmates housed in contagious disease units, further reducing the numbers of special housing inmates with access to the library.

Recommendations:

The Association recommends that the Board NOT adopt the proposed revision to § 1-08(f)(2)(i) of the Minimum Standards concerning access to law libraries. Such an amendment lacks sufficient justification and would significantly limit the general population's access to law libraries in larger jail facilities.

SECTION 1-09: VISITING

Summary of proposed changes:

The Board seeks to amend § 1-09 ("Visiting") to require that any initial visit between detainees and the public (family and friends) made during the first 24 hours of detention be a "non-contact" visit.

The Board would further amend § 1-09 to prohibit contact visits at any time for inmates being treated in a contagious disease unit. In addition, visitors would be required to secure their

[3] "Escort-only housing" was developed in or about 2005 when the Department disbanded its "gay housing" unit at Rikers Island. Inmates who would formerly have been housed in "gay housing" who are physically vulnerable to attack and inmate violence are now housed with the general population, but individually escorted at any time they leave their housing area. This service is only available to physically vulnerable inmates, and is not available to inmates who fear violence as a result of gang or other inmate retaliation.

belongings in a locker.

Analysis:

The Board claims these changes are necessary to ensure the safety of the inmate, the visitor, and the facility. The Department has similarly expressed a strong concern about contraband making its way into facilities.

The proposal that visitors secure their belongings in a locker is prudent and does further the Board and Department's safety concerns, and the Association therefore supports it.

The proposed requirement that initial visits to inmates be "non-contact," however, is more problematic. This change could be highly detrimental to detainees and their families, and this detriment may outweigh safety concerns. The initial visit is an important event to both detainees and their families, particularly when a detainee is visited by young children or when the detainee him or herself is a minor. A non-contact visit, which is conducted through a glass partition, significantly reduces detainees' ability to candidly discuss their circumstances and their families' ability to do the same. This, in turn, may deter family members from visiting the facilities in the future, which could have a significant adverse effect on the moral and mental health of inmates. Furthermore, there is no clear explanation as to why requiring initial visits (as opposed to any other subsequent visits) to be non-contact would meaningfully contribute to facility, inmate and/or visitor safety. Specifically, the Board cites no justification for limiting contact during the first 24 hours of custody, nor does it point to any actual problems caused by the contact visits that now occur.

Recommendations:

While the Association supports the requirement that visitors secure their belongings in a locker, we recommend that the Board NOT adopt the remainder of its proposed revision to § 1-09 of the Minimum Standards concerning initial visits. In the alternative, the Board should direct that initial visits be presumed to be contact visits, except in those rare instances where the Department holds the rational belief, supported by sufficient evidence, that contact by a specific visitor with a specific detainee would constitute a legitimate threat to the visitor, detainee, or staff.

SECTION 1-10: TELEPHONE CALLS

Summary of proposed changes:

The Board seeks to amend § 1-10 ("Telephone Calls") of the Minimum Standards to permit the monitoring of inmate phone calls with general prior notice to inmates.

The current standard prohibits listening to or monitoring inmate phone calls, except to monitor time and cost, without a warrant. The proposed changes would discard the requirement of a warrant, and would amend §1-10(h) to permit the listening to and monitoring of all phone calls, exempting only calls to the Board, the Inspector General, "other monitoring bodies," treating physicians, attorneys, or clergy from being listening to and monitored.

Analysis:

Shifting from a standard that generally prohibits the warrantless monitoring of inmate phone calls to one that permits the monitoring of nearly all inmate phone calls without any judicial oversight is a drastic change that would impinge upon a number of fundamental rights. The monitoring, as proposed, would infringe on the privacy of inmates, their friends and families. This broad eavesdropping power could easily result in a chilling effect: inmates likely would be unwilling to make "exempted" calls for fear that they would nonetheless be monitored. For example, inmates might limit calls to monitoring bodies for fear that corrections officials would listen to the calls and retaliate against them for making complaints.

Unlike the proposed amendments regarding correspondence (discussed *infra*), this amendment fails to provide any internal safeguards for telephone communications that express unfavorable opinions about the facility, its staff, or the correctional system. Frequently, phone calls from inmates to the outside community serve as a check on unsafe and illegal conditions within jails. If calls are monitored, inmates would fear communicating about such concerns and this important check would be eliminated.

Inmates may also put their health at risk by avoiding talking about personal medical issues with a doctor, for fear that a corrections officer is listening to the call. Inmates may further fear that discussing such personal issues as their sexual identity or problems they are experiencing in the jail system could lead to retaliation by corrections officers. The amendment is also problematic because it does not specify that corrections officers who monitor calls be distinct from those assigned to guard inmates. Further, it does not prohibit corrections officers who monitor calls from sharing personal information about an inmate with other corrections officers or with other inmates. This could result in the abuse of such information.

Even though "exempted" calls would not be monitored, the general fear of monitoring would almost certainly affect the quality of defense that inmates receive as they censor what they tell their defense counsel for fear of being recorded. Additionally, inmates may fear notifying a corrections officer that they plan to make a privileged phone call for fear of casting suspicion upon themselves.

There is no indication that present methods of applying to a judge for a warrant are insufficient to address security concerns. In fact, Department spokesman Steve Morello told the publication City Limits that he was unaware of any trouble the Department has had in obtaining warrants. *See* "*Prisoners' Rights Revised: Draft Rules Open to Debate*," Jarrett Murphy, City Limits Weekly, No. 579, March 17, 2007. In the March Meeting with the Corrections Committee, Commissioner Horn said that it was very rare to ask for a warrant. Moreover, although according to the statewide minimum standards for jails, counties are permitted to monitor calls, Albany and Erie Counties have chosen not to monitor calls as a matter of policy. These counties' experiences indicate that it is possible to run a large jail system safely without monitoring calls.

The Queens County District Attorney's office claimed at the April 17 public hearing that it is difficult to identify an inmate for the purpose of obtaining a warrant to monitor a particular inmate's calls. However, this argument is disingenuous since every inmate uses a PIN number

when making outgoing calls. This PIN number can be used to obtain a warrant to monitor a specific inmate's outgoing calls. Since an incoming call usually results in a message being relayed to an inmate to return that call, the PIN number would be sufficient to track all of the inmate's telephone communications. In short, there is insufficient justification to warrant making a change that has such far-reaching, adverse consequences for the rights of inmates, and for the rights of their friends, families, and those who work on inmates' behalf.

Finally, implementing a program in which calls could generally be monitored but certain calls would be protected, and notifying inmates whether specific calls would be monitored would be extraordinarily burdensome. The possibility of mistakenly recording privileged calls is great. It is unclear how inmates and their friends and families would be warned in a language they understood that their calls were being monitored. It is also unclear what mechanisms would be put into place to ensure that privileged calls were not monitored. Moreover, it is not apparent that a log would be kept to record which calls were monitored and which were considered privileged. In the absence of such a log, there would be no way to check whether the Department was fairly implementing the proposed amendment. Commissioner Horn told the Corrections Committee that blocks could be put on certain telephone numbers, such as those for The Legal Aid Society or the Board. However, there is no way that blocks could be put on the office and cell phone numbers of all the doctors, health care providers, clergy, and private attorneys in New York. Commissioner Horn also acknowledged that initiating a system to block certain calls would be expensive.

Recommendations:

The Association recommends that the Board NOT adopt the proposed revision to § 1-10 of the Minimum Standards concerning telephone calls. Monitoring phone calls is a serious invasion upon the civil liberties of inmates, their friends, and their families. The vague reference to heightened security concerns does not justify the seriousness of the proposed change. In the event that the Board adopts this amendment over our and others' strenuous objections, the Association urges that the Board clarify how inmates and their prospective callers will be notified as to whether their calls would be monitored, require that the Department keep a log of all calls that were indeed monitored and those that were considered privileged, and further specify procedures to ensure that protected calls remain protected.

SECTION 1-11: CORRESPONDENCE

Summary of proposed changes:

The Board seeks to amend § 1-11(a) of the Minimum Standards ("Correspondence") to prohibit an inmate from corresponding with a person "when there is a *reasonable belief* that limitation is necessary to *protect public safety or maintain facility order and security*." (Emphasis added).

Currently, an inmate can correspond with any person. The Board notes that criticizing the system or espousing unpopular ideas would not trigger the proposed limitation on correspondence.

Under the current Minimum Standards, outgoing correspondence cannot be opened or read without a search warrant. Pursuant to the proposed revisions, § 1-11(c)(6) would allow the

reading of outgoing non-privileged correspondence with a "warden's written order articulating a *reasonable basis* to believe that the correspondence threatens the *safety or security of the facility, another person, or the public."* (Emphasis added). Section 1-11(c)(6)(ii) of the proposed revisions stipulates that this written order state specific facts and reasons for the determination, and requires that the inmate receive written notification of the order. Section 1-11(c)(6)(iii), per the proposed revision, provides that a "written record of correspondence read pursuant to this subdivision shall be maintained . . . [including] the name of the prisoner, the name of the intended recipient, the name of the reader, the date that the correspondence was read, and the date that the prisoner received notification."

Currently, incoming, non-privileged correspondence may not be opened except in the presence of the inmate or pursuant to a warrant. Section 1-11(e)(2) of the proposed amendment would allow correspondence to be opened *and read* if there were a warrant, or without a warrant either if done in the presence of an inmate, or upon a warden's written order articulating a "reasonable basis" to support the belief that said "correspondence threatens the *safety and security of the facility, another person, or the public*." (Emphasis added).

In §1-11(d)(2), the Board proposes to remove the provision requiring that the Department submit for Board approval the list of items it chooses to allow in incoming correspondence. Additionally, § 1-11(d)(1) would extend the amount of time allowed for the delivery of mail from 24 to 48 hours.

Finally, the Board proposes to add § 1-11(e)(3) to state that, "incoming privileged correspondence shall not be read except pursuant to a court order and in the presence of the prisoner."

Analysis:

The proposed change eliminates the requirement that a warrant be obtained to monitor correspondence in situations where a "reasonable belief" exists that outgoing or incoming non-privileged correspondence poses a threat to the facility, another person, or the public.

The elimination of the need for a warrant, as well as the lowering of the threshold standard to one of "reasonable belief," poses myriad problems. First, the privacy of inmates would be placed in jeopardy. The current revisions not only threaten inmates' right to privacy, but also threaten their right to free association and freedom of speech. The very threat of prohibiting certain non-privileged correspondence, and of corrections officers opening and reading non-privileged correspondence could have a chilling effect. This could deter inmates from corresponding with lawyers and outside agencies. Inmates might be deterred from criticizing a facility or engaging in other protected speech, for fear that the revised standards would be enforced in an overbroad manner.

Moreover, while the guidelines appear to be content neutral, they pose a significant risk that a warden could implement them in a selective manner, particularly if, as proposed, the Board relinquishes its now explicit authority to approve the Department's list of the types of items inmates are permitted to receive via correspondence. Any item that the Department neglects to classify as acceptable could then easily be declared a "prohibited item" by corrections staff. If

an inmate disagrees with a warden's determination that mail poses a security threat, she or he must appeal to the Board and, if the Board denies the appeal, file an Article 78 proceeding. This is a protracted process.

Further, the revised standards are overbroad, even more so than the directives set forth by the State of New York Department of Corrections (the "NYS Directives"). Pursuant to NYS Directive G.5, incoming non-privileged mail (with the exception of inmate-to-inmate letters and inmate business mail) will not be read, unless it contains plans for sending contraband, plans for criminal activity, or information that creates a "clear and present danger to the safety of persons and/or the security and good order of the facility." At a minimum, the Department should adopt a "clear and present danger" over a "reasonable belief" standard.

The Board has failed to present evidence that current practices for prohibiting and reviewing correspondence are insufficient to address security concerns. A warrant can be obtained in the event that correspondence poses a threat. The Board has failed to assert why this mechanism should be changed. In fact, as noted *infra* in the Section addressing proposed changes to the Minimum Standards concerning telephone calls, even the Department acknowledges that it has no current problem obtaining warrants, and that the proposed rules are solely "prospective." *See* "*Prisoners' Rights Revised: Draft Rules Open to Debate*", Jarrett Murphy, City Limits Weekly, No. 579, March 17, 2007. If the Board has specific concerns such as communication among gang members, then tailored proposals should be made to address these issues.

As an independent oversight agency, the Board should not relinquish its authority to approve or reject the Department's determination regarding which items inmates may be receive via correspondence, as it now proposes to do. Such a revision cedes too much power to the Department, and the Board has provided no reasons for why it is necessary.

Finally, the proposed changes pose numerous problems of implementation. In addition to concerns that the warden would apply the proposed standards with too much discretion, thereby jeopardizing the inmates' right to free speech and association, a great likelihood exists of mistaking privileged correspondence for non-privileged correspondence. Additionally, the proposal to increase the time by which mail must be delivered to 48 hours could jeopardize an inmate's ability to receive time-sensitive notices resulting from or regarding a court proceeding.

Recommendations:

The Association recommends that Board NOT adopt the proposed revisions to § 1-11 of the Minimum Standards concerning correspondence. The warrantless monitoring of correspondence severely threatens the privacy rights of inmates and could have a chilling effect on free speech. The delay in delivering mail could jeopardize an inmate's ability to receive and read time-sensitive communications. Furthermore, the Board's abdication of its oversight of the Department's policy regarding which items may be received via correspondence cedes too much power to the Department.

Should the Board decide to adopt these amendments over our strong objection, the Association recommends, first, that inmate correspondence not be read unless the Department believes the content will pose a "clear and present danger" to the safety of inmates and staff and/or the

security and good order of the facility, and, second, that regular reports of the written records of intercepted and read incoming and outgoing mail be made available to a monitoring body or sent to a monitoring body regularly. The Association also recommends that the Board amend the standards to require the Department to create a list of items prohibited in correspondence (instead of a list of accepted items), with the explicit understanding that any item not appearing on the list would be permitted except in situations presenting a clear and present danger to the safety of persons and/or the security and good order of the facility. Finally, we strongly urge the Board to continue to require the Department to submit such a list to the Board for its approval.

SECTION 1-12: PACKAGES

Summary of proposed changes:

The Board seeks to amend § 1-12 ("Packages") to restrict the receipt and sending of packages "when there is *reasonable belief* that limitation is necessary to *protect public safety or maintain facility order and security*." (Emphasis added).

The current standard allows inmates to send and receive packages to or from any person. Correspondence in incoming packages may only be read pursuant to a court order or the warden's written order as described in the above section pertaining to Correspondence.

The current standard also requires the Department establish a list of items that may be received in packages and submit that list to the Board for approval. Under the proposed revision to § 1-12(d)(3), the Department's determination as to what items are allowable would no longer be subject to Board oversight.

Analysis:

The analysis for this Section is substantially the same as the analysis for the Section regarding Correspondence, *supra*. The proposed amendment impinges upon the privacy rights of inmates, as well as their freedom of association. As it does with the proposed revisions to § 1-11(d)(2), in § 1-12(d)(3) the Board abdicates its current authority and responsibility to approve the Department's list of items inmates are allowed to receive in packages. Similarly, having the Department devise a list of acceptable items rather than a list of prohibited items suggests that any item not identified on said list could be deemed 'prohibited' by corrections staff. The proposed revision does not specify what circumstances would justify prohibiting a package in its entirety. The proposed revisions cede the Department too much discretion, and make oversight virtually impossible.

Recommendations:

The Association recommends that the Board NOT adopt the proposed revisions to § 1-12 of the Minimum Standards concerning packages, given that these amendments would impinge upon inmates' privacy, and would cede too much discretion to the Department. We recommend that the Board instead amend the language of § 1-12(d)(3) to require the Department to create a list of prohibited items, with the explicit understanding that any item not appearing on the list would be permitted except in situations presenting a clear and present danger to the safety of persons and/or the security and good order of the facility. We also strongly urge the Board to require the

Department to submit such a list to the Board for approval or, in the alternative, to continue to require that it submit its list of approved items to the Board for approval.

SECTION 1-13: PUBLICATIONS

Summary of proposed changes:

The Board seeks to amend § 1-13 ("Publications") to expand the Department's authority to restrict and limit incoming publications to include general instances where there exists a "reasonable belief" that public safety, order, or security may be threatened. Under the proposed amendments, censoring or delaying delivery still requires written notice of the basis for such action, and an appeal of the determination may still be made to the Board. The window for delivering incoming publications to inmates is extended from 24 hours to 48 hours.

Analysis:

The existence of the notice and appeal process could prevent facilities from abusing the new "catch-all" safety/security restriction category. However, unlike the proposed changes to § 1-11 (Correspondence) as discussed *infra*, there is no clarifying statement to protect speech that espouses unpopular ideas, particularly speech that is critical of a facility, its staff, or the Department and the correctional system in general.

Recommendations:

The Association recommends that the Board NOT adopt the proposed revision to § 1-13 of the Minimum Standards concerning publications. As with the proposed changes to the Correspondence section, the Association recommends that, if revisions are adopted over our strong objection, a provision be included to clarify that publications shall not be deemed to constitute a threat to safety and security of a facility solely because it criticizes a facility, its staff, or the correctional system, or espouses unpopular ideas, including ideas that facility staff deem not conducive to rehabilitation or correctional treatment.

SECTION 1-15: VARIANCES

Summary of Proposed Changes:

The Board seeks to amend § 1-15 ("Variances") to allow the Board to grant variances where the "best efforts" of the Department to maintain full compliance with current standards have failed. Previously, variances could only be granted where the "best efforts" of the Department ***and*** those of "other New York City officials and agencies" to "achieve" such compliance had failed.

Section 1-15, as amended, would also permit a variance from an existing practice, even if compliance with existing standards is practicable or could be achieved.

Section 1-15 is further revised to permit variances where compliance "prevents implementation of a correctional best practice that achieves the goal of [a standard], is appropriate for New York City correctional facilities, and is designed to improve safety, security, or prisoner access to services or programs."

Analysis:

Numerous City departments – including Health and Mental Hygiene, the Human Resources Administration, Sanitation, Building, Fire, and Transit – interact with the Department. As a watchdog agency, the Board should consider the behavior of these and other City agencies that may impact upon the Department's compliance with the Board's standards. The current, more inclusive approach should be retained.

Section 1-15, as revised, would provide a new basis for granting a variance. If adopted, the revised provision would require that applications for variances be accompanied either by "a determination . . . that continued compliance will not be possible" under the old standards or to implement a "best practice" procedure or program. No justification is given as to why a pilot variance for a "best practice" should not be tested in just one facility, or one portion of a facility, to determine effectiveness prior to imposing the system-wide experiment that the revised proposal would permit. Under this new category of variance, there is no requirement that the Department show any of the existing criteria for a variance, its prior "best efforts" to comply, or even a plan to meet an existing standard in the future.

Renewal of a "best practices" variance would also not be subject to any analysis of whether the variance moved the Department toward compliance with existing standards. Instead, the "best practices" variance would be renewed based on a showing it "improved Department performance." Further, "best practices" variances would not be subject to the existing criteria under which the Board must discontinue a variance.

Recommendations:

The Association recommends that the Board NOT adopt the proposed revisions to § l-15 of the Minimum Standards concerning variances. The "best efforts" analysis for granting variances should not be based solely on a review of the Department's efforts to comply with existing standards to the exclusion of efforts made by other City agencies. The addition of a "best practices" basis for variances beyond a narrow "pilot" project should be rejected. A limited "pilot" project would give the Department sufficient flexibility to try new methods it seeks to replicate from other jurisdictions while maintaining the standards themselves. Granting variances for "best practices" should not be used as a closed-door shortcut to the established, public process of variance modification.

##########

**TESTIMONY OF THE
NEW YORK CITY BAR ASSOCIATION**

**ON PROPOSED REVISIONS TO THE
BOARD OF CORRECTION'S
MINIMUM STANDARDS FOR NEW YORK CITY
CORRECTIONAL FACILITIES**

The New York City Bar Association welcomes this opportunity to comment about proposed revisions to the Board of Correction's Minimum Standards for New York City Correctional Facilities. The issues raised are vitally important.

We understand that many other groups and individuals plan to testify about, and submit objections to, specific proposed revisions to the Minimum Standards and to oppose their adoption. We share many of their concerns, particularly with respect to proposed revisions that would alter the standards for overcrowding, lock-in, telephone calls and correspondence, personal hygiene, interpreters, and access to courts and legal services.

The Association urges the Board to reject nearly all of the proposed revisions, and will be submitting written objections detailing our objections to specific proposals in the near future. My comments today will focus instead on the process that lead to the proposed revisions and their overall effect.

The Association generally opposes the proposed revisions for four basic reasons. ***First***, these revisions signify a major deviation from the Board's historic appointed role as an independent "watchdog" over the New York City Department of Correction. ***Second***, the process by which these revisions were created was not sufficiently open and lacked the consensus necessary to promote equitable standards. ***Third***, the revisions codify variances that were enacted solely for reasons of administrative convenience and standards that benefit the

Department of Correction, and we are concerned that the standards do not include any real proposals for standards that would benefit inmates and their families, or promote successful rehabilitation. ***Finally***, the proposed amendments provide for the granting of variances with little or no opportunity for outside review.

I will briefly explain these concerns.

A. Proposed Revisions Undermine the Board's Historic Watchdog Role

The Board of Correction, created in 1973, was entrusted to inspect Department of Correction facilities, evaluate the Department's performance, assist in coordinating the activities of the Department with probation and parole agencies, and make recommendations.[1] New York City Charter amendments in 1975 granted the Board the power, as well as charged it with the duty, to set Minimum Standards for City correctional facilities.[2] The amendments also required the Department to permit open inspections of its facilities and access to its records.

With the powers granted by the later amendments, the Board became an independent "watchdog" agency with true regulatory authority over the Department of Correction. The Board's watchdog role, firmly anchored in the City's Charter for more than three decades, depends in no small part on its independence from the municipal government.

While the Board should be exercising its authority to make sure that human standards are in place, we are troubled that the Board's proposed standards do not reflect any attempt to create more human treatment or living conditions for inmates, address concerns raised by their families, or encourage rehabilitative initiatives. The revisions appear to be drafted primarily to meet the concerns of the Department of Correction. We recognize that the City Charter allows for a certain relationship between the Board and the Department and that the Board must consult with

[1] *See* Local Law 25, *amending* NYC Charter, Chapter 25, § 626 (*eff*. February 5, 1957).
[2] *See* NYC Charter, Chapter 25, § 626(e).

the Commissioner prior to making changes in standards. Nonetheless, we do not believe the standards reflect an appropriate distance that should be kept between the Department and a Board that has the authority to oversee the Department's operation of the prisons.

B. Closed-Door Drafting Runs Counter to the Principle of Open Government

The proposed revisions appear to have been written with little or no input from entities other than the Department of Correction and the Board itself. This process runs counter to the principle of open government.

The Board of Correction meets on a monthly basis. Its meetings are open to the general public. The fact that the Board was considering whether to revise the existing Minimum Standards was raised at numerous meetings over the last two years. However, the actual substance of the proposed changes now under consideration was never discussed, debated nor revealed to anyone than the Department, despite requests by various organizations and community stakeholders.[3] There was thus no opportunity for input from persons affected by, or working within, the correctional system, and no attempt made to seek such input.

We do not believe that the public comment period now offered, some two years after the proposals were first considered and well after the Revision Committee of the Board deliberated about the changes, is adequate to transform this into an open or fair standard-setting process. There will be no opportunity for a meaningful dialogue between the Board and interested parties about the need for revisions or the appropriate balance of security concerns and inmates' rights.

To my knowledge, there is no follow-up public meeting scheduled for discussion of a

[3] The Association's request to meet with the Board to discuss the proposed revisions was refused. The proposed revisions also omit the language in the current standards that measures the Department's "best efforts" to comply with standards by its efforts and "the best efforts of other New York City officials and agencies." Instead, the yardstick for "best efforts" would be the Department's behavior alone. The Association opposes this change: the behavior of other City agencies may create the need for a variance.

new draft that takes public comments into consideration. There is no realistic expectation that one day devoted to hearings, plus written comments, will have any significant impact on determinations that have been reached in a private setting. This fundamental flaw in the process taints the proposed revisions.

C. Proposed Revisions Seek to Codify Systems Established for Administrative Convenience and to Lower Standards to Those of Other Localities

The Board itself acknowledges that many of its proposed revisions simply codify existing practices. The fact that certain methods of operation and management are presently in use, however, does not necessarily make them reliable or beneficial, or especially worthy of codification. Few of the proposed Minimum Standards have the necessary flexibility to address rapidly changing circumstances beyond the Department's control. The Board justifies many of the revisions by referring to jail conditions current only this and last year. This is not a pragmatic approach. Standards are written for the broad landscape and with an eye towards the future, and they should accommodate both "historic highs" in jail population and service utilization, as well as periods of downsizing where resource strain is reduced.

The Board justifies several of its proposed revisions by indicating a desire to parallel common correctional practices in other localities within and outside of New York State. This belies the very real differences between New York City and those localities in terms of demographics, correction law, government structure, and notions of justice. The Board should not dilute the Minimum Standards for New York City solely because such practices are the trend in other jurisdictions.

New York City has long served as a model for standard setting and humane treatment of inmates in that its Minimum Standards far exceed those set for New York State prisons. In

proposing to lower the City's Minimum Standards to those of the State correctional system or of other cities such as Los Angeles or Houston, the Board fails to demonstrate why the standards that have proven effective for more than two decades in the rarified and unique setting of New York City should be dismantled.

D. Proposed Changes May Threaten Legal Force of Board Standards

The Board's proposed Minimum Standards permit wholesale departure from existing standards through variance if the Department reports to the Board that it is adopting a "best practice" that has worked elsewhere. Under this proposal, the granting of "best practices" variances would no longer be measured by reference to compliance with the Board's existing standards or the inability or impracticability of meeting them, or of meeting them in alternative ways for a set period. Instead, the Board would be free to grant a system-wide "best practices" variance even when the Department is fully capable of complying with the standard from which it seeks the variance. No justification is given as to why, if a "pilot project" is to be given a chance to prove itself, a variance should be allowed system-wide before it is tested anywhere.

In a reversal from the existing standard, the proposed change to allow variances for "best practices" would no longer require the Department to devise a plan to eventually meet the standards from which the variance is sought. Renewals of variances for "best practices" would thus become unlimited, and variances themselves could too easily become the new unofficial standards. Because the Board proposes to grant "best practices" variances simply at the Department's request, this dilution of review and comment has the potential to eviscerate the force of law behind any of the Board's standards, rendering them superficial and meaningless.

CONCLUSION

It is the Association's view that proper Minimum Standards should represent neither ceiling nor floor, and must be developed by means of a collaborative process and confirmed on a foundation of common agreement. The proposed revisions to the Board's standards, however, frequently reflect a floor, do not reveal common agreement, and do not come as a result of collaborative process.

The proposed revisions compromise the Board's role as an independent watchdog. Because they were created apparently with neither input nor comment from persons or organizations other than the Department of Correction, they reflect the squandering of a historic opportunity to revise standards to reflect current demographic and societal realities and aspirations. The proposed revisions set dangerous new standards for the granting of variances, significantly weakening the Minimum Standards themselves. For these reasons, and because many of them reflect an unnecessary dilution of the existing standards, the proposed revisions should be rejected in their entirety.