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Testimony of The Legal Aid Society

on

IMPLEMENTATION AND IMPACT OF REVISED BOARD OF CORRECTION MINIMUM STANDARDS

Presented before

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

Presented by
John Boston
Director, Prisoners' Rights Project
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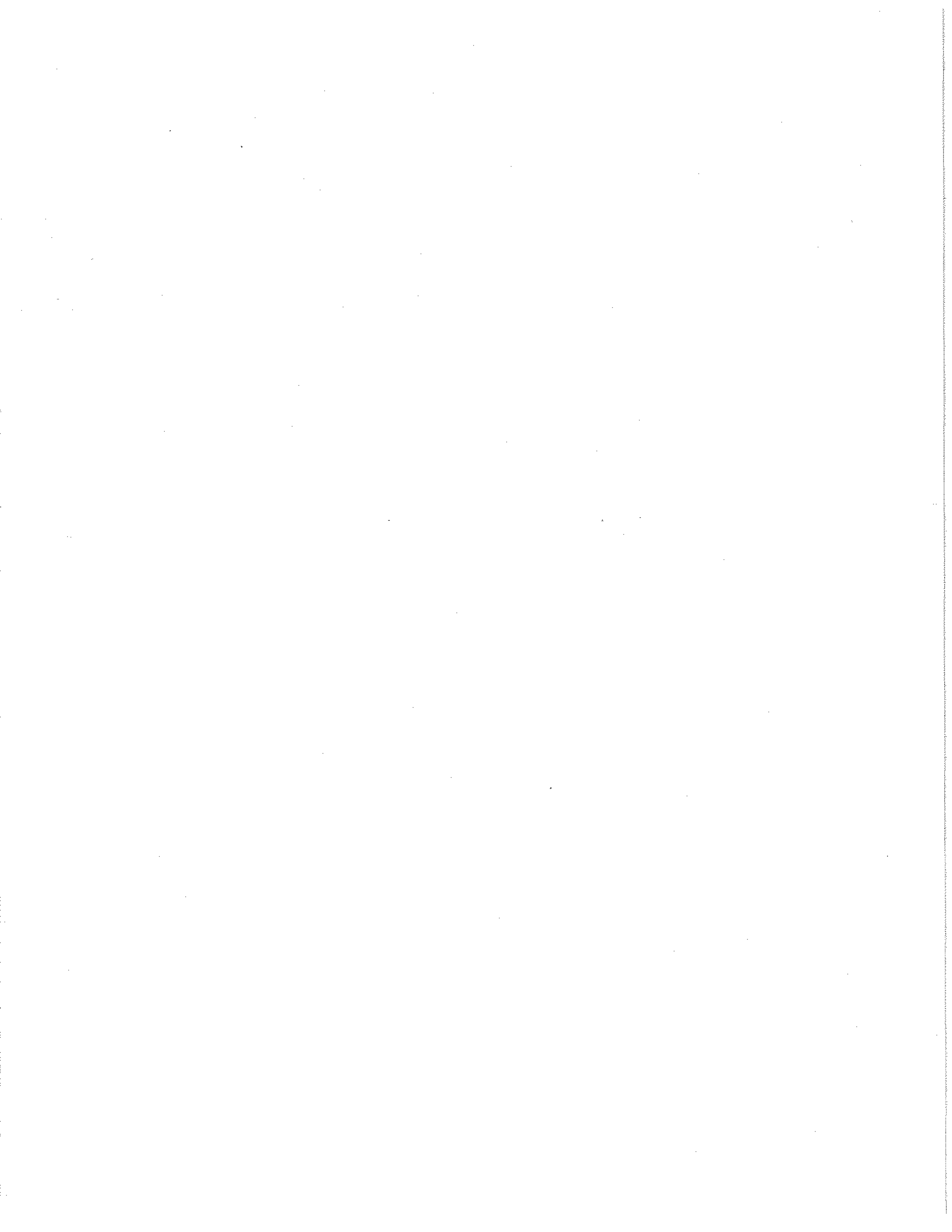
April 24, 2009



Testimony of the Legal Aid Society on Implementation And Impact Of Revised Board Of Correction Minimum Standards Before the Committee on Fire and Criminal Justice Services of the New York City Council April 24, 2009

Thank you, Chairman Vacca and members of the Committee, for convening this hearing and for giving us the opportunity to address issues arising from the implementation of Board of Correction revised Minimum Standards for the New York City jail systems.

The Legal Aid Society has been dealing with the problems of the jail system indirectly, through its Criminal Defense Practice,[1] for a century, and directly, through its Prisoners' Rights Project, for 35 years.[2] From both perspectives, Legal Aid is intensely interested in the City's own rules for the treatment of prisoners in its jails, the vast majority of whom are pre-trial detainees[3] who are entitled to the presumption of innocence and not legally subject to

[1] Legal Aid's annual criminal defense caseload has increased to 227,000 cases.

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

[3] The latest data available to us show that as of December 31, 2006, about 81% of the jail population consisted of pre-trial detainees (10,699 of 13,264). Rockefeller Institute of Government, 2007 New York State Statistical Yearbook, at 334, Table H-28 (http://216.7.28.163/research/1column.aspx?id=10034).

punishment until convicted. Legal Aid believes strongly that effective municipal regulation and oversight is essential to maintaining standards of human decency in the jails and to reducing the need for court intervention into this essential municipal function.

The Minimum Standards amendments were approved on November 8, 2007 and took effect on June 16, 2008, after a long process, some of it behind closed doors and known only to the Board of Correction and the Department of Correction, some of it during a more open and public process, involving considerable public opposition to a set of amendments that seemed designed to serve the convenience of the Department of Correction, with little benefit to prisoners, their families, or the communities from which they come. The Legal Aid Society participated extensively in that process, including a very useful hearing conducted by this committee. In the end, public pressure turned back some of the most pernicious of the amendments.

Today, we are presenting comments on some areas in which we think there have been significant abuses in the implementation of the new Standards: the clothing standard, with its confiscation of prisoners' personal shoes, and the standard concerning surveillance of telephone calls. That doesn't mean the other areas are problem-free; it means we don't know enough to make a judgment. We hope the Committee will develop information from other sources on some of the other amendments; we suggest areas of inquiry at the end of this testimony.

The Confiscation of Prisoners' Shoes

One conspicuous failure in implementation of the amended Minimum Standards is the confiscation of prisoners' shoes and their replacement with flimsy canvas sneakers, which

appears to have been done with a minimum of planning and coordination, and in substantial disregard for the medical condition of many prisoners.

One of the most hotly contested of the new Minimum Standards allows the Department to require all detainees to wear facility clothing, i.e., jail uniforms, rather than their personal clothing, as has been the practice. Minimum Standards § 1-03(g). The Board adopted this standard but postponed implementation until such time as the Department had established and operated adequate laundry and clothing storage facilities. The Board recognized the importance of having a system in place to ensure clean, hygienic clothing and a system to ensure that prisoners' clothing could be found for court appearances (the standard permits personal clothing for jury trials) and upon release from custody.

The Department elected to implement the new standard separately for shoes, and announced to the Board in September 2008 its intent to confiscate prisoners' personal footwear and replace it with black sneakers.[4] At the November 2008 Board meeting, the Commissioner said that the Department would confiscate personal footwear and replace it with black slip-ons beginning December 1.[5]

Apparently this program was carried out in some places without adequate exercise of discretion or supervision. Legal Aid received a number of complaints from the Manhattan Detention Center about cell extractions and injuries incurred during the exchange. According to reports we received, force was used against some prisoners even when they were *not* resisting the footwear exchange.[6] Commissioner Horn reported on an estimated one hundred uses of force related to the confiscation of prisoners' shoes.[7] He did not say whether there were injuries.

[4] http://home2.nyc.gov/html/boc/downloads/pdf/2008-Sept-11-minutes.pdf, at 7.
[5] http://home2.nyc.gov/html/boc/downloads/pdf/2008-Nov-13.pdf, at 7.
[6] Legal Aid made complaints and requested investigations on behalf of two prisoners, one of whom stated he was beaten while in handcuffs and sustained a chipped tooth, a swollen left cheek and swollen and

In addition, the shoe replacement program was carried out with apparent disregard for the medical condition and needs of prisoners. A number of prisoners reported to Legal Aid that they suffer from a variety of disabling and degenerative conditions which necessitate specially fitted and constructed footwear equipment. Nonetheless, their footwear too was confiscated, and their medical needs largely overlooked in the Department's rush to impose this part of the amended Standard.

We note that the confiscation by correction staff of medically necessary items is a very old story. Legal Aid has been complaining both to the Department of Correction and the Board for years about seizures during searches and otherwise of medically authorized items such as crutches, canes, and even wheelchairs without first consulting with the medical provider. Legal Aid has requested that the agencies impose a rule that correctional staff verify medical authorization with the medical provider before seizing medical items. To date our requests have been ignored.

Here are some examples of unnecessary hardships and suffering caused by the replacement of medically-indicated footwear with the Department-issued slip-ons:

- The Department seized medically-authorized support sneakers from an amputee with a prosthetic leg who needed that footwear in order to walk. The slip-ons were completely inadequate and did not provide needed support. After his sneakers were taken, he required assistance from fellow prisoners just to be able to move around.
- Orthopedic shoes with arch supports were taken from a 63-year-old with degenerative disc disease, five herniated discs, back spasms, and extreme difficulty in walking. He went to the medical clinic a few days before the exchange was to take place in order to request a permit allowing him to retain the shoes. He obtained a temporary permit and was referred to orthopedics and podiatry for further evaluation. Despite the permit and

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bruised chin, while the other stated he sustained a fractured nose, multiple facial and body contusions, and trauma to his hand and wrists after being struck with a baton and fists and being kicked. Both stated that they were struck repeatedly after verbally questioning the confiscation of shoes, but not physically resisting. Legal Aid has not received responses to either of these complaints.

[7] http://home2.nyc.gov/html/boc/downloads/pdf/BOCMinutes20090109.pdf, at 7.

the pending consultations, his special shoes were confiscated. As of the end of December he had not gotten them back.

- Another prisoner with a painful, herniated disc had his shoes, which were fitted with orthopedic arch supports, taken. The footwear was apparently discarded. Later, this prisoner, who is diabetic, reported that he had developed blackened sores on his feet from chafing caused by the DOC-issued footwear. (The risks of infection and worse to diabetics from injuries to their feet are well known.)
- The Department confiscated medically-authorized sneakers from a prisoner suffering from a compound cervical fracture and degeneration of the spine.
- A prisoner needing special footwear following reconstructive knee surgery had the footwear confiscated.

The foregoing are a few of the numerous complaints reported to Legal Aid, which conveyed them to the Board of Correction for investigation, and also generally sent them to Correctional Health Services and the Department of Correction with requests to return the medically indicated footwear. We have not received responses.

The Board of Correction, too, began hearing reports of problems with the exchange at its January 2009 meeting. The Commissioner noted that some "health issues" were raised because prisoners entered the jails with orthopedic shoes or orthotics. He said that procedures were developed to include medical evaluations enabling retention of the medical footwear.[8] However, the Commissioner failed to mention the procedures were not actually in place when the exchange was performed, and that there were numerous instances when such footwear was confiscated and replaced with slip-ons.

In February, a Board staff report further advised the Board members about problems with the exchange.[9] This report was discussed at a Board meeting in March. Legal Aid obtained a redacted version of it in response to a Freedom of Information Law request, and a copy is

[8] http://home2.nyc.gov/html/boc/downloads/pdf/BOCMinutes20090109.pdf, at 7.
[9] Bi-monthly staff report – DOC's "footwear exchange" program, MEMORANDUM from Richard T. Wolf to the Members of the Board of Correction, February 19, 2009 ("Staff Report").

attached to our prepared testimony. We urge the Council to obtain an unredacted version, if you do not already have it.

The report confirmed the confiscation of medically necessary footwear, including specially designed shoes fitted on to prosthetic limbs, resulting in some inmates with artificial legs having to walk around with a canvas sneaker somehow attached.[10] There was poor communication between the Department and the health authorities (PHS) about this so the Department's default behavior, when there was a question of whether the patients' footwear should or should not be taken, was to take the shoes.[11] Further, the Department has dragged its feet in putting a workable protocol into place. Just days before the date for the exchange, the Department had not provided the Board with any applicable policies and procedures. Not until December 1, 2008 did the Department issue an Operations Order (#11/08), but that was done without advance notice to the Board, and the order itself required confiscation of all footwear, including supportive footwear. Delay was then built into the process because, in order to recover the footwear, the prisoners' recourse would be to go to sick call and obtain a consultation authorizing the footwear, following which a Deputy Warden would confer with medical staff to determine whether the prisoner could get it back.[12] Board staff expressed concern that this order would not address the problem of confiscation of medically authorized footwear, and in January the Department made available to the Board a draft revised Order.[13] However, as of the last Board meeting, on March 11, 2009, that Order had not been finalized.[14]

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[10] Staff Report, at 1-4, 10-13.
[11] *Id.*, at 3.
[12] *Id.*
[13] *Id.*, at 4.
[14] Board of Correction meeting, March 11, 2009, notes of Milton Zelermyer, Staff Attorney, The Legal Aid Society,

A second problem observed by Board staff was the absence of adequate storage space and effective retrieval systems to enable location of footwear for inmates going to court and inmates being released.[15] This was not attributable to the lack of space, but rather to poor planning for the utilization of space. Consequently, confiscated footwear was bagged and tossed into huge piles rather than stowed on shelves or other readily identifiable locations. Further, the absence of identifiable locations made it impossible to enter location information into a computerized inventory. These factors have led to enormous, and self-perpetuating, retrieval backlogs.[16]

A third problem was the inadequate supply of the Department-issued footwear in various sizes, including very common ones, resulting in the obviously foreseeable consequence of not having enough shoes to go around and some prisoners being forced to wear shoes that are much too large or much too small.[17] This is not just a cosmetic issue but is also a matter of safety and comfort.

The lack of planning by the Department of Correction and the inadequate communication and cooperation between the Department and the Board are astonishing, given the long lead times (as noted above, the relevant Standards amendment was approved in November 2007, more than a year before the actual confiscation and exchange). They do not bode well for the next round of implementation, which will involve confiscation of detainees' civilian clothing and exchanging it for uniforms.

When the Committee assesses the impact of the revised Minimum Standards, we encourage you to take a hard look at the Department's performance. The implementation of the clothing standard, even limited to footwear, was a mess, the effects of which will persist even if a

[15] *Staff Report*, at 1, 4-9.
[16] Board of Correction Meeting, March 11, 2009, notes of Milton Zelermyer,
[17] Staff Report,at 1, 9-10.

reasonable policy gets put into practice and the problems we have described today get fixed in the near term. The Department creates trouble for itself when it acts in a way that fosters bad feelings, mistrust, tension and violence. In choosing to conduct the exchange without proper planning and without conferring with the Board, the Department has unfortunately and unnecessarily created just such an atmosphere.

There are clear steps that must be taken to avoid any repetition of the footwear fiasco:

First, the Department must stop trying to rush programs into place before they are thought out and fully prepared. At the January 2009 Board meeting, Commissioner Horn tried to explain implementation difficulties by stating that the Department had to accomplish the exchange for 13,000 prisoners in thirty-six hours, starting December 2, 2008.[18] That timetable was not pre-ordained, and nothing compelled the Department to begin before it was aware of foreseeable consequences and fully prepared to address them. Similarly, at the March 2009 Board meeting, the Commissioner tried to explain the confiscation of medical footwear by stating that there was not enough lead time to confer with medical staff.[19] As noted above, there was more than a year's lead time between the amendment's approval and its implementation by the Department. It appears the Department simply did not use the time it had. Certainly if it needed more time, it should have taken it, and postponed implementation until it had a medically acceptable protocol in place and operational.

Second, the staff report makes it clear that the Department went ahead without informing the Board of the procedures to be used, thus depriving the Board of the opportunity to review and identify deficiencies in those procedures. The Department must stop acting unilaterally in the implementation of the Board of Correction Minimum Standards, and the Board must exercise its

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[18] http://home2.nyc.gov/html/boc/downloads/pdf/BOCMinutes20090109.pdf, at 7.
[19] Board of Correction Meeting, March 11, 2009, notes of Milton Zelermyer.

authority to obtain, and be fully satisfied with, the Department's policies and preparations before implementation goes forward. This point has been made explicit in the Standards amendment with respect to the next step in implementing the amended clothing standard: "DOC may not require detainees to wear facility clothing until DOC first establishes and operates adequate laundry and clothing storage facilities." DOC must comply with this requirement, and the Board must insist on compliance and verify compliance before DOC acts.

Telephone Monitoring

Among the Minimum Standards amendments approved last year by the Board of Correction was one that allowed the Department of Correction to monitor prisoner phone calls without a warrant. With the exception of calls to the Board of Correction, the Inspector General and other monitoring bodies, and to treating physicians and clinicians, attorneys and clergy, the new rule for the first time allowed prisoner calls to be monitored. In practice, the system works by recording *all* calls made from the inmate telephone system, unless made to a number that has been entered into a "Do Not Record" list, so the Standard requires DOC to enter into that list all the phone numbers of persons or organizations exempt from monitoring.

As the largest public defender in the City, The Legal Aid Society worked closely with the Department in identifying Legal Aid phone numbers that were to be exempted from monitoring. Our direct experience with the Department regarding the loading of our phone numbers onto the DOC exempt number system was positive. Bill Pepitone of DOC was particularly helpful in answering our questions and ensuring that our numbers were properly loaded before the monitoring program began. The Legal Aid Society has a number of offices on Rikers Island and we were recently reassured that the Legal Aid phones are not subject to the monitoring system. We know of no significant problems regarding the monitoring of calls to Legal Aid phones.

We are not so sure about other organizations that provide legal services to prisoner clients. Legal Aid notified a number of other organizations that provide criminal, civil, immigration, or other legal services and advice, and advised them to ask DOC to enter all of their phone numbers in the "Do Not Record" list. However, we surely missed some such organizations, and do not know whether they ever received notice of the change in practice from any source. We are not aware of any outreach to them from DOC.

The private bar posed different and more troubling concerns. The Department of Correction stated that it would load the entire Office of Court Administration (OCA) attorney registration database into its "Do Not Record" list. There were two things wrong with this plan. First, assuming that it worked correctly, it was inadequate, since telephone calls may be made to a variety of phone numbers other than the single number listed with OCA, depending on whether the attorney submits an office number or a direct line, and whether prisoner clients communicate directly with the attorney or with a paralegal, secretary, or assistant. Legal Aid avoided this problem by providing the organization's entire list of numbers to DOC. However, there is no way of knowing to what extent prisoners' legal telephone calls are being recorded, and possibly listened to by prosecutors or others, because the prisoner has called on a number that is not in the OCA database.

Further, the OCA data transfer did not work very well, at least at first. Initial reports indicated that DOC had loaded only 27,000 attorney phone numbers from OCA into its system for the 147,000 lawyers in the State. DOC cited a problem with the OCA database (the absence of area codes from many of the records) as a reason why more attorney phone numbers were not loaded prior to the initiation of phone monitoring.[20] DOC also posted a notice in The Law

[20] New York Law Journal, July 25, 2008, http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202423244773.

Journal as a way to inform private lawyers that they needed to register their phone numbers in the DOC system. This type of notice was clearly inadequate for the purpose of reaching every lawyer with a client in DOC custody. Certainly, many more lawyers have been placed on the "Do Not Record" list than was the case initially; DOC reported in November 2008 that there were 91,177 attorney numbers on the list.[21] To what extent that list reliably includes all the attorneys who may represent or advise prisoners in the jails, and their support staffs and switchboards, is unknown.

The notice provided to treating physicians and clinicians was even more problematic. In October of last year the head of the Correction Committee of the Association of the Bar of the City of New York wrote a letter expressing concern about DOC efforts to provide notice. Three months later, in January of this year, the Department responded that "a notice *will* be posted in a medical publication and/or website, to alert treatment providers of the 'Do Not Record' list." Six months after the monitoring program began the Department was, apparently, still in the planning stages as to how to provide notice to treatment providers.

There is a significant difference between the blanket prohibition of the recording of certain phone calls as proscribed by the Board of Correction rule and the actual practice of DOC, which places an obligation on the individual lawyer or treatment provider to learn of the phone monitoring program and place the appropriate number on the list. While we think the DOC effort to identify phone numbers is a positive step, the Board should also insist that any call between a prisoner and an attorney or treatment provider or other exempt group that does get recorded by DOC should be deleted once it is recognized as coming from a protected source. While the Department has assured the Board that DOC telephone monitoring does not violate

[21] http://home2.nyc.gov/html/boc/downloads/pdf/2008-Nov-13.pdf, at 7.

anyone's rights, we are far from convinced of this in light of the Department's uneven performance regarding notice to the protected groups.

In addition to these DOC implementation problems, the telephone standard has given rise to a new abuse in the criminal justice system. As the phone monitoring system has become better known, it has become standard practice for Assistant District Attorneys to order DOC phone records as pretrial preparation. The usual practice has been to refuse to share the information with the defense so as to keep it as a surprise for the trial itself. The District Attorneys' ability to withhold this information from the defense in spite of a specific request to produce it in discovery is now being litigated. One thing that is certain at this time is that the DOC phone records have the potential to significantly expand the all too common practice in criminal cases of trial by ambush. In civil cases where the dispute is over a contract or an amount of money that may be due, full discovery, including depositions, is allowed and encouraged. In criminal cases, where years of a person's liberty may be at stake, the exact opposite is true. The phone record issue is but the latest example of why the antiquated discovery system in New York needs to be reformed.

Further, this developing practice clearly shows why this pernicious amendment should not have been adopted by the Board of Correction. It was presented as a means of responding to some very specific concerns, such as intimidation of witnesses or solicitation of criminal activity through the jail telephones. However, it has now become a generalized excuse for invading the privacy not only of the pre-trial detainees and other prisoners held in jail, but also of their families and friends in the community to whom they speak by telephone.[22]

[22] The Department of Correction's own figures are telling. Commissioner Horn reported at the September 2008 Board meeting that 159 phone calls had been monitored as a result of requests from District Attorneys' offices. *See* http://home2.nyc.gov/html/boc/downloads/pdf/2008-Sept-11-minutes.pdf, at 2.

Implementation of Other Amendments: The Need for Information

There are significant questions arising from the Standards amendments to which we do not have the answers. To our knowledge, no independent agency, including the Board of Correction, has assessed their implementation in any systematic way. As to the Board, this is not surprising: the Board's field staff, on whom the Board depends for factual investigation, has decreased by approximately half over the years and is grossly inadequate to the task of monitoring a jail system as large as New York's.

Standard 1-01, Non-Discriminatory Treatment: This standard was amended to add gender and disability to the kinds of discrimination prisoners are protected from. The Board stated that its intention in adding gender was "to ensure that interactions between staff and transgender prisoners should be the same as those with non-transgender prisoners."

In the Prisoners' Rights Project's experience, transgender prisoners have often been treated in an appallingly abusive manner. The Board of Correction or other independent agency should assess the treatment of transgender prisoners after the enactment of the amendment.

Standard 1-03(b)(2), Personal Hygiene: This standard was amended to allow the Department of Correction to provide less frequent than daily shower access to prisoners in punitive segregation who engage in misconduct going to or from or at the shower area. We expressed our concern during the amendment process that this amendment might be abused by depriving prisoners of basic hygienic needs for minor misconduct or for protracted periods. To our knowledge there has been no follow-up by any independent agency on the Department of

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However, at the March 2009 Board meeting (minutes not yet posted), the Commissioner reported a total of 1,900 subpoenas from District Attorneys' offices for recordings of telephone calls.

Correction's performance in that respect. There should be. Presumably the Department of Correction maintains records of such sanctions which the Council could obtain and review.

Standard 1-06(h), Recreation: This standard, similarly to the Personal Hygiene standard, was amended to allow limits on access to recreation (*i.e.*, outside exercise periods) for misconduct during, or en route to or from, recreation periods. As with the provisions for shower restrictions, we are concerned that this amendment could be abused by depriving prisoners of recreation for trivial misconduct, or repeatedly for long periods. There should be some independent review of the manner in which the Department of Correction imposes this sanction. Presumably this could be done from the Department of Correction's records.

Standard 1-08, Access to Courts and Legal Services: This standard was amended to provide that law libraries could be operated for two hours when general population prisoners are locked in their housing areas, in order better to accommodate prisoners from special housing areas, without increasing the total number of hours that the libraries are kept open. That is, general population prisoners would experience a *reduction* in law library access. To our knowledge, there has been no independent review of the actual consequences of this amendment for the access of general population prisoners, or of whether special housing unit prisoners have actually made use of the increased access the amendment contemplates—or, for that matter, whether the law library schedules have actually been changed at all.

Standard 1-11, Correspondence; Standard 1-13, Publications: These amendments together (and along with the telephone surveillance amendment, discussed above) substantially restricted the rights of prisoners to free and confidential exercise of First Amendment rights of communication. Standard 1-11(a) allows limitation of correspondence "when there is a reasonable belief that limitation is necessary to protect public safety or maintain facility order

and security." Standards 1-11(c)(6) and (e)(1) allow the reading of non-privileged correspondence based on a warden's written order articulating a reasonable belief that the correspondence threatens the safety or security of the facility, another person, or the public. To our knowledge, there has been no independent review of the frequency and the reasons for use of either of these provisions, which are potentially subject to overreaching, and which should be a matter of record within the Department of Correction since a written order is required.

Standard 1-12, Packages: This amendment restricted the right to receive packages from, or send them to, anyone "except when there is reasonable belief that limitation is necessary to protect public safety or maintain facility order and security." As with the communications amendments, this amendment is potentially subject to overreaching. To our knowledge, there has been no independent review of the frequency and the reasons for use of this provision. There is a provision for notice and appeal when an item is removed from a package, but no procedural protections at all when a package is blocked entirely.

Standard 1-13, Publications: This amendment expanded the Department of Correction's power of censorship both broadly and vaguely, empowering it to bar publications when "there is reasonable belief that limitation is necessary to protect public safety or maintain facility order and security." There has been no independent review to our knowledge of what the Department of Correction has been censoring under this amendment, and there should be, given the First Amendment issues at stake.

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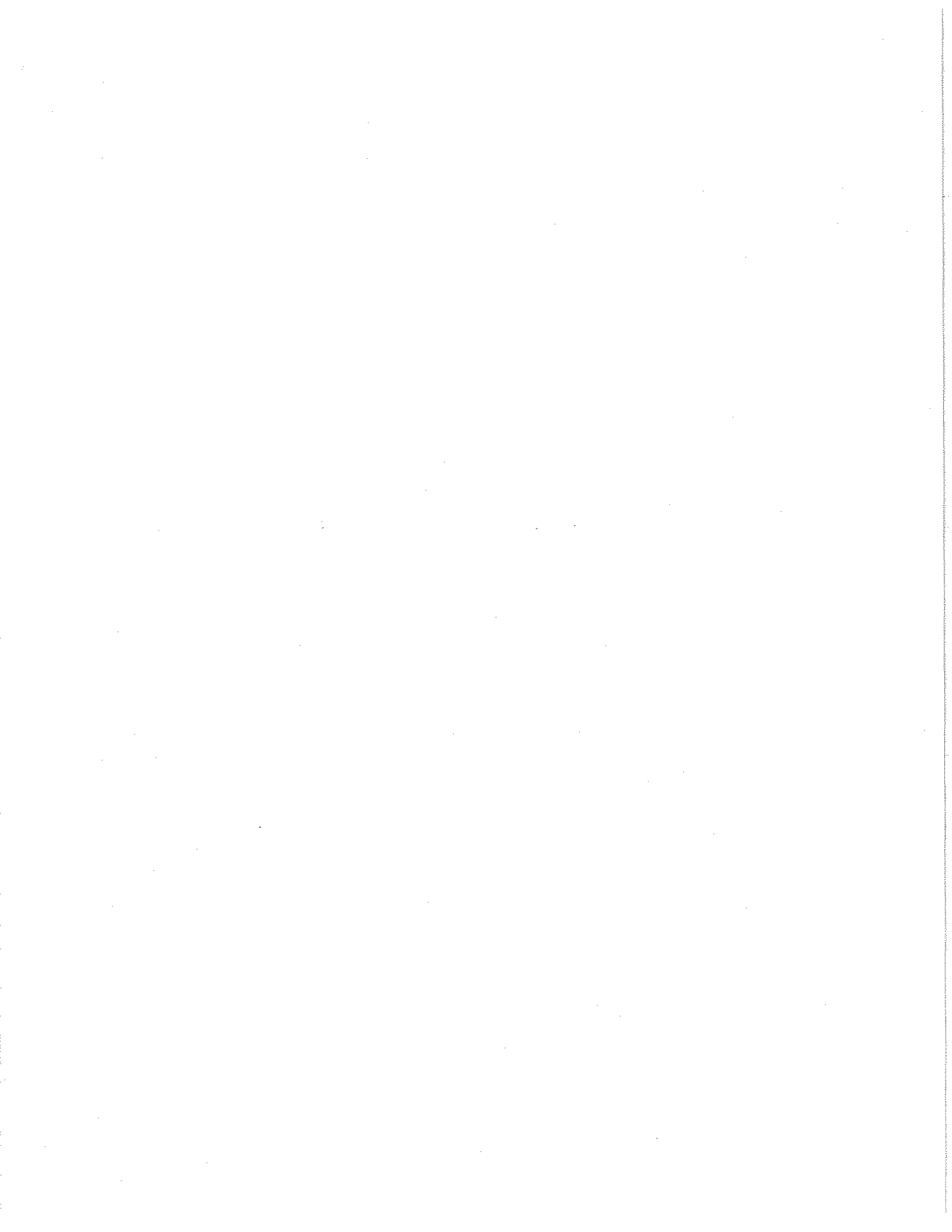
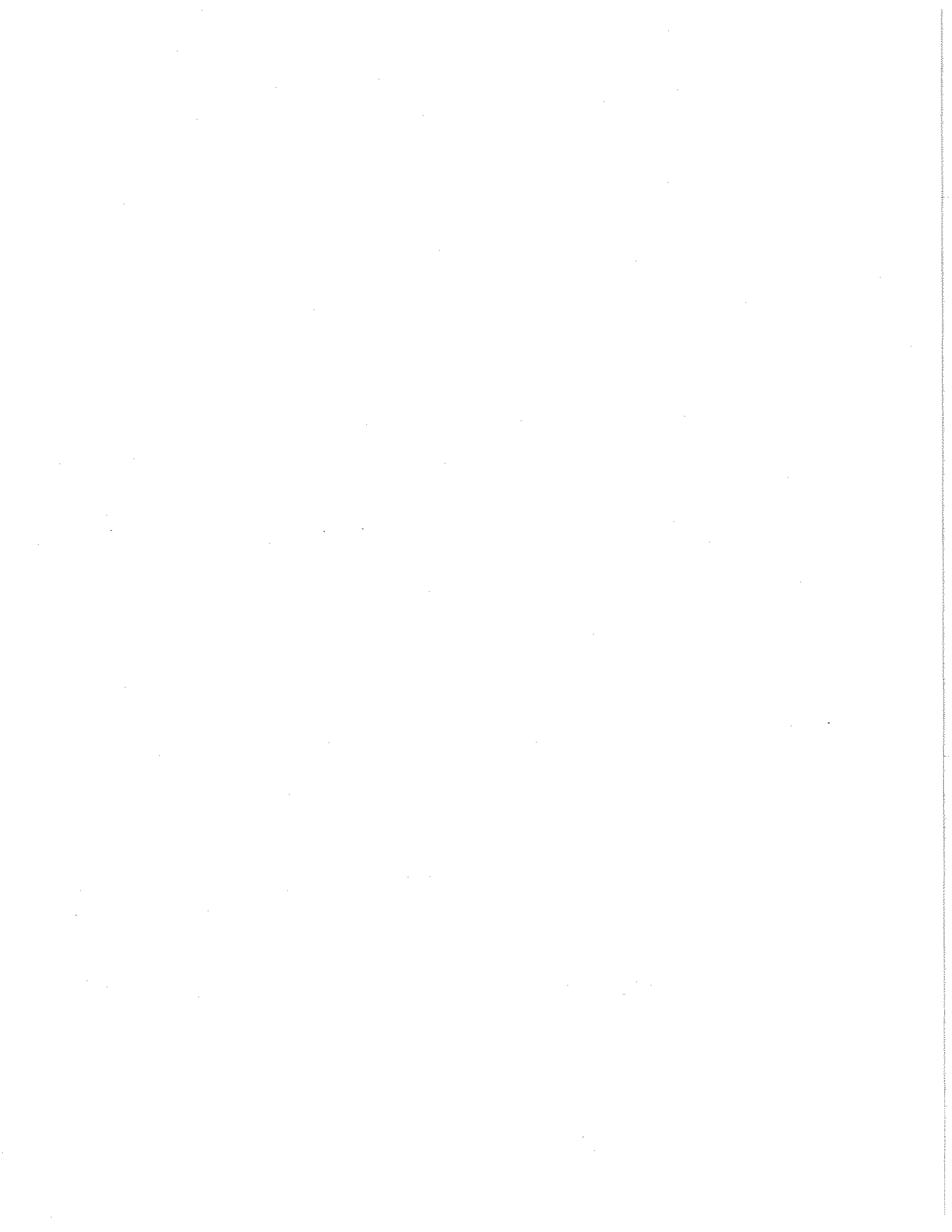
We thank you for this opportunity to testify at this important hearing and we welcome any questions that you may have.



Attachment

Board of Correction Staff Report on Footwear Exchange



City of New York
Board of Correction

MEMORANDUM

To: Members of the Board of Correction

From: Richard T. Wolf, Executive Director

Date: February 19, 2009

Subject: Bi-monthly staff report – DOC's "footwear exchange" program

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Summary

On December 2, 2008, the Department of Correction (DOC) began confiscating prisoners' personal footwear and issuing to all prisoners canvas slip-on sneakers. Prisoners and DOC staff alike call the slip-ons "Patersons", a reference to New York Governor David Paterson, because DOC obtains the canvas slip-ons from the State. Board staff has received numerous complaints about the confiscation process and about "Patersons". Some prisoners complained that the orthopedic shoes they were wearing when arrested were confiscated. Others complained that, even though they presented to DOC staff a written "consult" from a jail medical provider authorizing the prisoner to wear his supportive footwear, it was confiscated. All said it was very painful for them to walk in "Patersons".

After the system-wide exchange, prisoners told us that they were issued "Patersons" that were too small or too large, making walking difficult. Many complained that "Patersons" are flimsy, and come apart when wet. This has been confirmed by DOC and BOC staff.

Board staff's investigation substantiated many of the complaints. [redacted] When the system-wide exchange began, there were no written procedures explaining how prisoners might retain supportive footwear. We also found that DOC failed to obtain sufficient quantities of "Patersons". By January some new admission prisoners, who wore the most common sizes, were issued "Patersons" that did not fit and others were allowed to retain their personal footwear. One facility ran out of black sneakers and issued orange slip-on canvas sneakers.[1] To further complicate the situation, several jails lacked sufficient or appropriate storage space to accommodate the many hundreds of pairs of confiscated shoes, boots and sneakers. Furthermore, jails that we surveyed failed to enter into computerized records the identity of each prisoner whose

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[1] Prior to the system-wide exchange, DOC had issued orange "Patakis" to prisoners whose footwear had been confiscated because it was deemed to create a security risk (e.g., constructed with metal shank, contained hollow area to conceal contraband)

personal footwear had been confiscated, and its location. As a result, BOC staff have observed and DOC staff have acknowledged that jails sometimes are unable to retrieve a prisoner's shoes when he goes to court for trial or is released from custody.

Introduction

The Board's comprehensive set of amendments to the Minimum Standards for NYC Correctional Facilities took effect on June 16, 2008. Among them were important changes to §1-03(g) ["Personal Hygiene – Clothing"], which authorize DOC to require all prisoners to wear facility-issued clothing. Even before the effective date, Commissioner Horn said that "the easiest and, from a security perspective, the most effective way to begin will be to confiscate all civilian shoes, and to prohibit shoes from being sent to inmates."[2] At the September, 2008 meeting, the Commissioner said DOC would replace personal shoes with "plain black sneakers", noting that the sneakers "will not reveal to a judge or jury that a defendant is in custody when appearing in court."[3] At the November 2008 meeting, he announced that the system-wide exchange would begin on December 1st.[4]

On December 2nd uniformed staff at all DOC facilities confiscated prisoners' personal footwear and issued "Patersons". [illegible], the system-wide footwear exchange was not without incident. Some prisoners, unhappy at the prospect of being required to relinquish their footwear and wear "Patersons", resisted staff's efforts to conduct the exchange.[5] Commissioner Horn offered this evaluation: "...DOC had 13,000 inmates and 36 hours to exchange one pair of personal issues shoes for Department-issue, and to confiscate the rest. DOC did not handle the process entirely perfectly but, given the circumstances, did fairly well."[6]

The Department's experience with the footwear exchange is instructive as DOC prepares to confiscate prisoners' personal clothing and require all prisoners to wear facility-issue uniforms, underwear and socks. A system-wide clothing exchange will involve more complicated logistical considerations than those of the footwear exchange. It is for this reason that the footwear exchange was selected as the topic for this bi-monthly staff report.

Findings

1. **Failure to implement appropriate procedures to address the footwear exchange:** When the system-wide footwear exchange began, DOC and DOHMH lacked procedures for determining whether a prisoner who was wearing orthopedic shoes or other supportive footwear should retain them, be given a DOC-approved substitute, or be required to wear "Patersons".

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[2] Minutes of BOC meeting, May 8, 2008, p 7.
[3] Minutes of BOC meeting, September 11, 2008, p.7.
[4] Minutes of BOC meeting, November 13, 2008, p. 7.
[5] DOC attributes approximately 100 "B" Uses of Force (UOFs) to the footwear exchange, particularly at the Manhattan Detention Complex, where UOFs increased in December to 21 from 6 in December, 2007, and at the Central Punitive Segregation Unit, where UOFs increased to 26 from 10. Draft Minutes of BOC meeting, January 8, 2009, p. 7.
[6] *Id.*

In discussions prior to voting to amend §1-03(g) at its November 8, 2007 public meeting, BOC Members agreed that before implementing the amendment, DOC would be required to provide written procedures to the Board for its review.[7] When DOC announced in mid-November, 2008 that prisoners' personal footwear would be confiscated on December 1st, BOC field representatives were directed to obtain copies of each jail's written policies and procedures governing the exchange. [redacted] – field staff asked each jail's senior managers how this issue in particular would be handled. Jail managers told us that they were awaiting instructions from Central Office.

By November 26, 2008 we still had not received policies or procedures from the jails. What we *had* received were complaints from prisoners who were fearful that their supportive footwear would be confiscated in a few days. We asked DOC for the facility-level procedures "for checking with medical re: an inmate's claim that s/he is supposed to wear a certain type of shoe for medical reasons..."[8]

The system-wide exchange began on December 2nd, yet the Board still had not received the requested procedures. [redacted] "special" footwear was being confiscated in almost all cases – even when a prisoner presented a medical consult to DOC staff – and that the prisoner would then be required to obtain new authorization from a jail medical provider before s/he could resume wearing supportive footwear.

DOC issued Operations Order #11/08 ("Inmate Footwear"), effective December 1, 2008, "to establish policy and procedures governing the confiscation and issuance of personal and departmental footwear to all inmates..."[9] [redacted] the Order made no provision for DOC staff to obtain from medical providers a list of prisoners eligible to retain personal footwear for medical reasons. The Order's only reference to supportive footwear required that *all* personal footwear be confiscated, and that thereafter an inmate could seek its "return" by making a request at sick call. If s/he received a medical consult authorizing supportive footwear, the prisoner was to present a copy to the Deputy Warden for Security. The Order provided that Deputy Warden would consult with medical staff "to make a determination to either approve or deny an inmate's request."[10]

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[7] Transcript of BOC Meeting, November 8, 2007, pp. 61-80. For example, see comment of Chair Hildy Simmons, "...(W)e need to decide among the various suggestions, mindful, again, that the Department has to come back to us with procedures. They can't implement this until we've reviewed those procedures." p. 69.

[8] Email from Deputy Executive Director Cathy Potler, November 26, 2008.

[9] DOC Operations Order 11/08, effective date: 12/01/08, §I, p.1.

[10] NYCDOC Operations Order #11/08, effective date: 12/01/08, subject: "Inmate Footwear", §III.D.5.a –b.

Responding to BOC concerns that prisoners who wore supportive footwear due to medical necessity were having their footwear confiscated, DOC emailed us late in the afternoon on December 2nd that "tonight" a new memorandum would be drafted "which will address Prescription Inmate Footwear".[11]

The memorandum, "Interim Command Level Orders re: Inmate Footwear", is dated December 2nd, but we received a copy on December 10th. The memorandum stated that its procedures "shall be placed into effect pending the revision of Operations Order #11/08..." The memorandum purports to establish procedures for determining whether a newly-admitted prisoner "in possession of prescription footwear or supports...shall be permitted to retain them..."[12] However, the procedures that follow do not address this issue. Instead, the memorandum explains how a prisoner whose supportive footwear already has been confiscated should go about seeking its return.[13]

Board staff continued to receive complaints from prisoners whose supportive footwear had been confiscated at intake even when they presented a consult to DOC staff. We continued to urge DOC to develop procedures that would allow incoming prisoners, in appropriate circumstances, to retain orthopedic and supportive footwear.

A draft revised Order ("Inmate Footwear"), which DOC sent to us requesting comment on January 14, 2009,[14] addressed the issue, declaring that during new-admissions processing, "Prescription footwear and footwear support items shall not be confiscated...The inmate shall be allowed to wear the footwear and/or supports to the clinic for the purpose of having medical staff examine the inmate and footwear...to ensure that the footwear and/or support items are medically required."[15]

The draft Order also provides procedures for dealing with inmates who do not have orthopedic or supportive footwear but "claim to have foot problems." This is important, because prisoners complain that "Patersons" are "flimsy" and provide very little support.

To date, the draft Order has not been implemented, and the jails continue to follow the limited procedures in the memorandum. Thus, the jails continue to confiscate orthopedic and supportive footwear at intake.[16]

2. **Inadequate Storage Space:** Some facilities lack sufficient space to store in orderly fashion the many hundreds of pairs of prisoners' personal footwear that the jails have,

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[11] Email from Office of Policy and Compliance, "re: Shoes", December 2, 2008.

[12] Memorandum from Bureau Chief Patrick Walsh, dated December 2, 2008, subject: "Interim Command Level Orders re: Inmate Footwear", §III.A, p. 2.

[13] Id., §III.B, p. 2.

[14] Board staff sent its comments to DOC the following day.

[15] Draft Operations Order (unnumbered and undated), subject: "Inmate Footwear", §III.A.6, p. 2.

[16] Language in the memorandum usurps medical providers' prerogatives. DOC's language includes the following: "If a problem is found to exist, conservative treatment measures (e.g. corn pads, arch supports...etc.) should be utilized for an appropriate period of time before any special order prescription footwear option is considered." Memorandum, §III.B.1, p. 2. See also §III.B.2-4, p. 2.

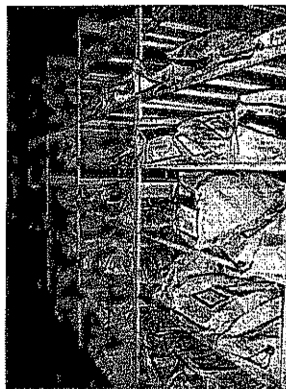
and continue to confiscate. Personal footwear confiscated on December 2 has not been posted in some facilities' computerized inmate property data bases, which are supposed to enable DOC staff to locate a prisoner's personal property promptly.

The amendments to Minimum Standards §1-03(g) require that, "Prior to requiring detainees to wear facility clothing, the Department shall establish and operate:...(ii) secure storage facilities from which prisoners' personal clothing can be retrieved promptly and cleaned for trial court appearances, and retrieved promptly upon prisoners' discharge from custody."[17]

DOC uniformed staff has told us that the lack of adequate and appropriate storage space for prisoners' confiscated footwear has created chaotic conditions in some facilities' storage rooms. Furthermore, some facilities apparently failed to assign sufficient property staff to process the extraordinarily large quantity of confiscated footwear. This resulted in conditions such as those documented in the pictures below, which were taken on January 29, 2009.

George R. Vierno Center (GRVC)

Personal property taken from prisoners transferred into GRVC is supposed to be inputted into a computer in the Property Office, which is located across from a storage room near the Intake area. Storage shelves are numbered, and prisoners' bagged property, together with a receipt, is supposed to be placed in a numbered section of a numbered shelf. (See picture below.) Two officers are assigned to manage prisoners' property at GRVC. One works from 5 a.m. to 1 p.m., and the other from 11 p.m. to 7 a.m.. Their tasks include recording and organizing the property of prisoners transferred into GRVC as well as property confiscated during searches, and retrieving property for prisoners attending trial court appearances the next day and prisoners who are discharged from custody.



[17] Minimum Standards §1-03(g)(2)(ii).

GRVC ran out of available property storage shelf space in early November, 2008. Because there were no available storage shelf locations, facility staff was unable to input property locations into the computer. Staff continued to generate receipts for prisoners, but with no shelf space for storage, facility staff placed prisoners' property in clear plastic bags, and put the bags in movable bins, or piled them on the property room floor. (See pictures below.)

[redacted] the conditions documented in the above pictures make retrieving a prisoner's property difficult and time-consuming. DOC encourages prisoners to send home excess or contraband property (e.g., clothing with prohibited colors determined by DOC as potential gang "identifiers"), but efforts to do so are increasingly stymied by staff's inability to retrieve difficult-to-locate confiscated property. Facility staff told us that this means that sometimes a prisoner's property does not get transferred when he is sent upstate. The situation results in more "lost" property, for which prisoners are told to file a Notice of Claim against the City.

The footwear exchange only compounded the problem. None of the more than 1000 pairs of GRVC prisoners' personal footwear that were confiscated beginning on December 2nd were entered into the facility's computer property storage data base, again

because there was no available shelf space in the GRVC's property storage areas. Prisoners were given receipts, but there were insufficient facility staff to find each prisoner's personal property and store his confiscated footwear with it. Instead, confiscated footwear was placed in yellow or clear plastic or brown paper bags, and brought to GRVC's basement, where the bags have been stored in a large locked area, separated in most cases by housing area. (See pictures below.)

Anna M. Kross Center (AMKC)

BOC staff inspected the property storage areas at AMKC on January 29, 2009 and found remarkable similarities to the problems observed at GRVC. When we arrived, facility staff was meeting with staff from DOC's Central Storehouse to assess what to do about the lack of available storage space to allow for the orderly retrieval of prisoner property. (See pictures below.)

The Cashier's Office (pictured above) is one of four areas used by AMKC to store prisoners' property. Staff estimated that several hundred yellow plastic and brown paper property bags are piled up in the Cashier's Office awaiting identifiable storage locations before being inputted into the computer. On January 29th, this property had been accumulating for more than a month.[18] As did their counterparts at GRVC, AMKC's staff described efforts to locate an individual prisoner's property that has not been inputted as extremely difficult and time-consuming. Appropriately stored property can be achieved quickly in both facilities.

Footwear confiscated during the system-wide exchange is being stored in a separate area. None has been entered into the computer data base, nor has footwear been stored with a prisoner's other property. Instead, as we observed at GRVC, footwear is being stored on shelves or piles on the floor by housing area.

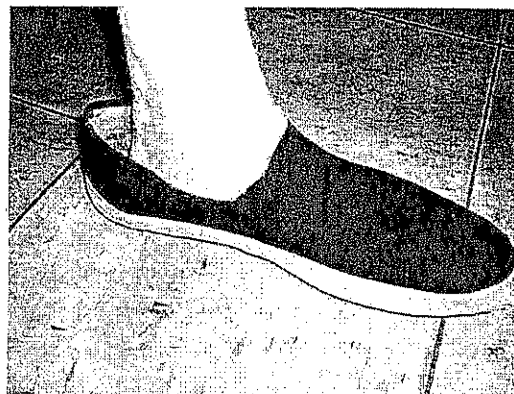
AMKC is a new-admissions facility and is much larger than GRVC, and this is reflected in the number of staff assigned to handle AMKC property: during the week, two officers on the day tour (no meal relief officer is assigned), one on the evening tour (responsible for retrieving personal footwear for prisoners scheduled for trial appearances the next day), and one officer on the midnight tour. On weekends, one officer is assigned on each tour. All property officers are expected to participate in facility institutional searches and may be pulled for tactical search operations. Thus, they do not spend their entire tours working on property chores.

The Deputy Warden for Administration explained that the facility was identifying additional areas for storage in AMKC, and hoped to obtain movable shelving units to maximize space. (See pictures below.)

[18] Facility staff told us that the already overburdened property storage situation at AMKC was compounded by the recent breakdown of a bar-code labeler used by the facility to generate prisoner property receipts.

Two violations of the amended Clothing standard occurred on February 5th when two prisoners housed in AMKC were sent to their trials without their personal footwear, which could not be located until after they had left the jail for court. DOC staff informed us that these were not isolated occurrences.

3. **Insufficient inventory of DOC-issued footwear:** The Department did not obtain sufficient quantities of "Patersons", especially in the most common sizes, to accommodate all prisoners [redacted] Some prisoners have been issued black "Patersons" that are too small or too large. Others received orange "Patakis". Finally, some prisoners for whom appropriately-sized slip-ons were unavailable were allowed to retain their personal footwear. Below are some examples. These photographs were taken in a new-admission dormitory at AMKC on January 29th.



[redacted] DOC [redacted] having cited prisoner fights over personal property as an important justification for requiring all prisoners to wear facility-issue clothing.[19]

The replacement footwear shortage has been compounded by the "Patersons'" flimsy construction. Facility staff and prisoners both report that the sneakers come apart when wet. This is a particular problem when prisoners participate in outdoor recreation when the area is wet, or attend school[20] or have a court appearance on a rainy or snowy day. Prisoners have expressed concern that attending court proceedings wearing "Patersons" – particularly "Patersons" that are coming apart – creates a negative impression for the judge.

We have been informed that the Department is awaiting receipt from the State of 100,000 additional pairs of "Patersons".

4. **Foreseeable consequences:** [redacted]

The existing procedures authorize DOC security staff to override medical decisions by providers. Prisoners, who often must wait weeks before receiving orthopedic or supportive footwear, complain of extreme difficulty and pain walking in canvas "Patersons", which provide virtually no support.

[19] In announcing the December date for system-wide confiscation of prisoners' personal footwear, Commissioner Horn said DOC would issue black slip-on sneakers "over which inmates will not fight." November 13, 2008 BOC Meeting minutes, p. 7.

[20] At RNDC, adolescents attending school must walk outdoors from their housing areas to get to the school classrooms in Sprungs., and as a result RNDC has had to replace many pairs "Patersons". Supplies of common sizes were depleted, and RNDC responded by issuing orange "Pataki" replacements. On the afternoon of February 10th, a BOC staff person observed that all prisoners coming into RNDC's social services program area were wearing orange slip-ons, except one prisoner who was wearing a pair of white, laced sneakers. (The State Department of Correctional Services (DOCS) issues white, lace-up sneakers to State prisoners, and RNDC allows State prisoners to retain DOCS-issued footwear.)

The Board has received more than fifty complaints from prisoners since DOC first notified them in November that their personal footwear would be confiscated. Below are several examples:

A. On December 2nd, DOC confiscated the shoes of all prisoners with prosthetic legs housed in the North Infirmary Command, and replaced them with "Patersons". Prior to doing so, DOC staff asked the medical providers whether the shoes should be confiscated and exchanged. The on-site providers sought guidance from the Prison Health Services Director, who was not available. DOC went ahead with the exchange. Several days later, when PHS [illegible] informed DOC that the prisoners' shoes should not have been taken, DOC returned them.

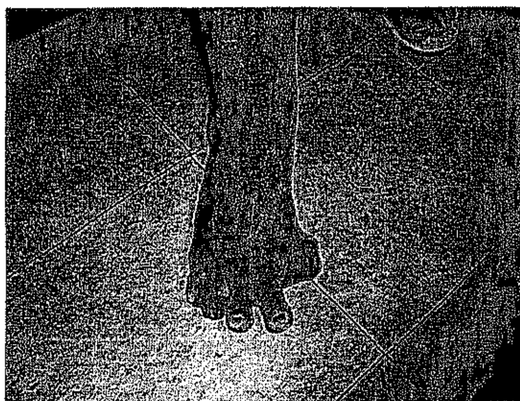
B. A prisoner's orthopedic shoes were confiscated on December 2nd, and since then he has been trying to get DOC to return them. On February 2nd the prisoner showed BOC staff his most current medical consult, which states that his orthopedic shoes should be returned him for medical reasons. Even with the assistance of BOC staff, the orthopedic shoes were not returned for nine more days. Four days later, however, DOC security staff again confiscated the orthopedic shoes – even though the prisoner showed DOC staff the medical consult.

C. Another prisoner's orthopedic shoes were confiscated on December 2nd, even though he presented to DOC a medical consult stating that he should wear the orthopedic shoes for medical reasons due to "high risk of fall". A second consult was written stating that the prisoner needed the footwear for medical reasons, and also needed to use a cane and be given an extra mattress. Still without his orthopedic shoes, last week the prisoner fell several times and was transferred to NIC infirmary, where he confined to a wheelchair, unable to walk due to numbness in his legs. He now is awaiting neurology and MRI appointments at Bellevue Hospital.

D. The prisoner whose feet are pictured below (left) complained to the Board that "special footwear" prescribed for his gout was confiscated by DOC staff on December 2nd and not returned. He was issued "Patersons" and could not walk in them, so he went to the facility clinic to attempt to get back his supportive footwear. DOC's procedures, requiring that the clinic provider refer the prisoner to a specialist at the West Facility for evaluation, caused a lengthy delay. On January 7, 2009 he was evaluated at the West Facility, and the medical necessity for his supportive footwear was confirmed. A consult was given to DOC requesting that the supportive footwear be returned to the prisoner, but more than two months after the footwear was confiscated, the prisoner still had not received appropriate footwear. We again contacted DOHMH, and the prisoner was again seen by a provider, and another consult was written and given to DOC on February 12th. Rather than return his confiscated supportive footwear or provide alternative, security-appropriate footwear approved by the medical provider as medically-appropriate to the prisoner's condition, facility staff offers the prisoner a choice of (1) "Patersons" or (2) DOC-purchased boots. The prisoner claims that, unlike his confiscated sneakers (with orthotics), neither choice allows him to walk without gout-related pain.

The decision as to what constitutes appropriate footwear for the prisoner's documented medical condition is being made exclusively by DOC, with no input from the medical providers. We will continue to follow-up until the prisoner receives back his personal footwear or is provided with substitute footwear appropriate to his gout.

E. A second prisoner complained that his personal boots, which provided support for his severely deformed right foot (see picture below, right), were confiscated and he could not walk in the "Patersons" he was given. A consult was written on December 9, 2008, requesting that DOC return the prisoner's boots because "pt. is a candidate for footwear." The boots were not returned, and on January 5, 2009, the prisoner requested and received a second consult, which noted, "Patient is candidate for footwear secondary to medical reasons." The prisoner told us that "people are laughing at my foot, disrespecting me." We are continuing to follow-up with DOC to arrange for return of the prisoner's boots.



F. DOC established a procedure whereby prisoners who require, for medical reasons, additional support than that provided by the canvas slip-ons, but whose confiscated footwear was not "orthopedic", would receive DOC-issued boots rather than canvas sneakers. However, prisoners have complained that they have not received boots because some facilities lack sufficient quantities in common sizes.

A prisoner whose personal sneakers were confiscated sought to get them back because he has a rod in his foot and requires footwear that provides support. On December 3, 2008, the day after the system-wide exchange, the prisoner filed a formal request with DOC's Office of Disability Rights for Inmates for supportive footwear. Five days later his request was forwarded to medical providers for evaluation. On January 9, 2009 the prisoner was told he would receive supportive footwear. However, the facility did not return his personal sneakers and had no boots in stock to distribute to prisoners who needed them. It established a list of prisoners who should receive boots whenever a shipment arrives.

Two weeks after receiving an authorizing consult for supportive footwear, the prisoner was given a pair of DOC-issued boots – seven weeks after his sneakers were confiscated.

Conclusion

Historically, prisoners have submitted many grievances about lost or damaged property. Over the last three calendar years, property grievance have accounted for 13% of all grievances. Property grievances typically are the third or fourth most frequently filed grievances, behind only employment, inmate accounts, and jail-time calculation grievances. The lack of adequate planning in advance of the system-wide footwear exchange has taxed the already-limited property management resources at several facilities.

The decision to confiscate all prisoners' personal footwear, without regard to medical necessity, has created [illegible] hardships for prisoners whose conditions make it difficult for them to walk in "Patersons".

[illegible] some prisoners were allowed to retain their personal footwear while others in the same housing area were required to wear the canvas slip-ons. Some prisoners were given orange "Patakis", and still others were given "Patersons" that do not fit.

Board staff anticipated that problems with medically-necessary footwear would occur. Our attempts to obtain written policies and procedures in advance from DOC, DOHMH, and Prison Health Services were unavailing. [illegible]

The amended Minimum Standards §1-03(g) requires that before DOC confiscates prisoners' personal clothing and exchanges clothing for uniforms, the Department must have adequate storage space, and must develop and operate systems for the cleaning and prompt retrieval of prisoners' personal clothing. [illegible]