Written Testimony of

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Before the

**New York City Board of Correction**

Public Hearing on

# Proposed Rule to Amend the Minimum Standards, Create Enhanced Supervision Housing and Limit the Use of Punitive Segregation

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Good morning. Thank you for the opportunity to provide this testimony today. My name is Alex Reinert, I am a law professor at the Benjamin N. Cardozo School of Law where I teach and conduct research in, among other areas, constitutional law and prisoners' rights. My comments reflect my own views; I do not appear as a representative of my home institution. I am here to testify in opposition to the proposed amendments to the Board of Correction's minimum standards, to the extent that they create a new segregation unit, Enhanced Supervision Housing ("ESH").

The proposed amendments should be rejected for several reasons. First, there has been almost no explanation for the need to create the ESH. Although the Department of Correction ("DOC") has referred generally in scattered correspondence to increased violence at Rikers, the Department has produced no evidence indicating that the individuals targeted by ESH are the individuals who are most responsible for the trend in increased violence. Second, and relatedly, the proposed amendments use exceptionally broad categories for confinement in ESH, permit DOC to place a person in ESH based on almost any evidence, and offer almost no guidance to those who must decide which detainees should be placed therein. History teaches that combining vague categories with little narrowing guidance will inevitably lead to arbitrary application. Finally, while the proposed amendments make it extremely easy for detainees to be placed in ESH, it is unclear how, if at all, people will be released from detention in ESH.

The combination of these characteristics raises serious constitutional and policy questions. Constitutionally, both the entire program and some of its particulars are vulnerable. From a policy perspective, the apparent hastiness with which the proposal was put together suggests that more is at stake for DOC than simply stemming the rising tide of violence within

Rikers.[1] After all, just as reports of slashings and stabbings by detainees have risen, so have incidents of force used by correction officers, and there is no evidence that the DOC is doing anything other than business as usual with respect to disciplining or terminating officers who abuse their authority. The ESH proposal itself was introduced just as the Board was concluding a long period of deliberation regarding issues of segregation, at the same time that a national conversation is taking place addressing the harms caused by excessive discipline in prisons and jails, and when specific policies by DOC are currently under court challenge. When one considers the haste with which the ESH was created and the absence of any justificatory evidence, it raises the question of how much of the motivation for creating ESH is about addressing violence in Rikers and how much is about avoiding the regulatory eye of this Board and the courts.

## I. The DOC Has Provided Insufficient Justification for Amending the Minimum Standards

DOC requests that ESH be created "to address the dramatic increase in serious inmate violence in New York City jails." See Notice of Public Hearing and Opportunity to Comment on Proposed Rule at 2 (Nov. 17, 2014). The DOC "has specifically identified as significant contributing factors gang-related activity and the ready availability of small, concealable blades," and claims that a "relatively small number of inmates are disproportionately involved in these violent incidents." Id. According to DOC, the ESH is meant to "control the activities of [DOC's] most violent inmates." Id.

[1] Indeed, until just this week, the ESH proposal made no provision at all for release. That there now is a review of a detainee's ESH status every 60 days is a marginal improvement, but the fact that DOC only realized this failing a few days before BOC's public hearing offers little comfort.

It goes without saying that any act of violence at Rikers is of grave concern and that the Department and the Board should do their utmost to reduce the frequency of such conduct. Yet nowhere does DOC or the Board identify the evidence upon which is based the conclusion that the "most violent inmates" in Rikers and the ones contributing to the recent spike in violence are actually those people who fall into the broad categories eligible for placement in ESH. One would expect, for instance, some data indicating that people meeting the ESH criteria are overrepresented among those who contribute to the acts of violence pervading Rikers, before taking the extreme step of creating a new regime of isolation and segregation within Rikers. Such data would not be difficult to produce, but instead we are left with vague statements of justification that amount to a request that we should trust the Department's judgment.

It might seem obvious that the individuals identified by DOC as appropriate for placement in ESH are indeed those who have contributed to the increased violence on Rikers Island. But if it is indeed obvious, it should not be difficult for the DOC to produce evidence justifying that assumption. And given the BOC's role as an independent body exercising oversight responsibilities for the treatment of people held on Rikers Island, it is incumbent upon the Board to demand that evidence. It bears emphasis that the DOC has in the not too distant past promoted, and defended, correctional officials who were responsible for providing inaccurate data regarding rates of violence in specific institutions. See, e.g., *The Shake-Up at Rikers Island*, N.Y. Times A22 (Nov. 3, 2014). In this context, the Department's ipse dixit is insufficient.

## II. The Criteria for Placement and Continued Detention in ESH are Impermissibly Vague and Provide Insufficient Protection to People Held in ESH

The lack of any evidence to justify the use of ESH for particular categories of detainees is compounded by the broad range of people who will be subjected, with minimal process, to indefinite confinement in the new segregation units. Most people held on Rikers Island are presumptively innocent of any crime, and thereby may not be subjected to punitive conditions of confinement. The ESH, however, would impose conditions akin to punitive segregation upon a wide range of people, not for any current activity, but for past conduct. That conduct could be established through any source, including confidential sources of uncertain provenance, and need not have been found guilty of any infraction for the alleged conduct that forms the basis for their detention. Moreover, these individuals would be held in ESH indefinitely, with only the prospect of a review of their confinement every 60 days. But given that the basis for placement in ESH can be solely for past conduct and not any current behavior, it is unclear what meaningful review can happen every 60 days. As a package, the proposal offers few meaningful protections to individuals held at Rikers.

Detainees may be placed in ESH if they fall into any of the following categories: (1) identity as a leader of a Security Risk Group ("SRG"); (2) demonstrated involvement in a SRG-related assault while in DOC custody; (3) involvement in a slashing, stabbing, repeated assaults, riot or "inmate disturbance" while in DOC custody; (4) possession of a "scalpel or scalpel-like weapon(s)" while in DOC custody; or (5) engagement in "serious or persistent violence . . . or otherwise presents a significant threat to the safety and security of the department" if housed in general population. Of these disjunctive criteria for placement, only the last requires the DOC to make any showing that the person poses a risk to the safety and security of the institution. It appears that the DOC believes that the presence of any of the first four characteristics creates a presumption of dangerousness to the security of the facility. See Proposed ESH Directive Part

III.A (stating that the determination of threat to safety and security "shall be based on at least one of the following criteria. . . ."). The evidence that a person has engaged in any of this past behavior need not be based on a prior infraction report or disciplinary finding – rather, DOC may use any source, including confidential sources, to establish those facts. Why, one wonders, would DOC believe that a person was involved in a slashing or stabbing but not infract them? And if DOC could not establish evidence sufficient to impose punitive segregation for a slashing or stabbing, why should they be permitted to impose ESH conditions on a person? Nor are certain critical terms defined in the proposed directive – a "disturbance" in DOC-speak could involve a nonviolent demonstration; "involvement" in assaults could implicate a wide range of behavior, including self-defense; a "scalpel-like" weapon leaves much to the imagination. Moreover, there is no temporal limitation on the past behavior that may be relied upon justify an individual's placement in ESH.

Once a DOC staff-member determines that a person meets the criteria for placement in ESH, the person receives a hearing. But that hearing will not consider whether placement in ESH is necessary to vindicate interests in safety and security; rather, the hearing is limited to consideration of whether "the facts relied upon by the Department in making the determination for such placement do, in fact, exist and support such placement." See Proposed ESH Directive Part III.D.3. Once this has been established, the person will be placed in ESH with no real prospect of every being released from the unit during the remainder of the person's incarceration by DOC. A recently-revised proposed directive speaks to a 60-day review of ESH placements, but it is unclear how that review could be meaningful. After 60 days, all of the criteria that initially existed for ESH placement will continue to exist, and there is no provision in the ESH directive or any associated materials for behavioral intervention of the sort one would associate

with a sincere "step-down" or similar program. The most recent proposed directive states that the ESH Unit Captain will "explain the suggested steps necessary for an inmate's release from ESH," but this presumes that a person is placed in ESH for some kind of active behavior, not for historical reasons. And the Unit itself will not provide access to programming or any other interventions that could assist a person in meeting whatever conditions the Unit Captain identifies. Nor is there any guarantee, or procedure, by which a person could demonstrate that he has met the conditions imposed by the Captain and therefore is entitled to release.

This ESH regime raises substantial constitutional concerns. At best, ESH is akin to administrative segregation.[2] Although individuals in ESH are permitted to be out of their cells for seven hours per day, they nonetheless are subject to restrictive conditions similar to those associated with administrative segregation: regular strip searches, limited access to recreation, regulation of communication and visitation, and the imposition of mechanical restraints. Given the extent to which placement in ESH infringes on protected liberty interests, the regime which results in placement of a person in and continued housing in ESH is woefully inadequate. It should be noted that for the vast majority of persons in DOC custody – pretrial detainees – Sandin v. Conner's "atypical and significant" analysis does not apply. See Iqbal v. Hasty, 490 F.3d 143, 162-63 (2d Cir. 2007), aff'd in part, rev'd in part, and remanded on other grounds sub nom. Ashcroft v. Iqbal, 556 U.S. 662 (2009); Benjamin v. Fraser, 264 F.3d 175, 188-89 (2d Cir. 2001). Indeed, the imposition of mechanical restraints alone may be sufficient to trigger a liberty interest requiring access to some due process protections. Benjamin, 264 F.3d at 188-90.

[2] As I will explain below, ESH also is punitive in many respects and therefore objectionable for independent reasons.

Moreover, the potentially indefinite nature of the confinement weighs heavily in favor of finding that a liberty interest is implicated. Wilkinson v. Austin, 545 U.S. 209, 224 (2005).[3]

At the very least, then, before a person can be placed in ESH, DOC must provide a notice of the grounds for assignment and an opportunity to object to the placement, either prior to or shortly after placement. Hewitt v. Helms, 459 U.S. at 476 & n. 8. Moreover, there must be some periodic review and opportunity for a person to establish that placement in ESH is no longer appropriate. See Gittens v. LeFevre, 891 F.2d 38 (2d Cir.1989) (holding unconstitutional regulations which permitted placement in administrative segregation without periodic review or opportunity to be heard on initial or continued placement in segregation); Ramsey v. Squires, 879 F. Supp. 270, 283 (W.D.N.Y.) aff'd, 71 F.3d 405 (2d Cir. 1995) ("If the state regulations do not provide for this minimal opportunity to be heard, they are unconstitutional on their face."); cf. Torres v. Stewart, 263 F. Supp. 2d 463, 469 (D. Conn. 2003) (finding no due process violation where pretrial detainee was put into close custody because of SRG status but was given opportunity through periodic review to return to general population).

The DOC has proposed no serious mechanism for release from ESH, other than a cursory 60-day review. The only requirement of the 60-day review is that it be logged. And given that the criteria for initial placement can be entirely historically-driven (past identity as a SRG leader or some assortment of prior behavior), it is difficult to understand how anything could ever change about the person's eligibility for placement in ESSH. Indeed, a person could be released from ESH, engage in no misconduct or safety-threatening behavior, and two days later be placed back in ESH without any barrier.

[3] Wilkinson, of course, involved application of the more stringent "atypical and significant" analysis, indicating that the indefinite nature of the conditions imposed by ESH are even more serious at least for pretrial detainees.

The failure to provide any meaningful release valve on the back end renders the ESH proposal fatally deficient. There must be "some sort of periodic review" to determine if there is a need for continued administrative segregation. Hewitt v. Helms, 459 U.S. at 477 n.9. And even if such review need not involve new evidence, id., it must be meaningful. DOC cannot satisfy due process if it engages in perfunctory review and simply repeats prior justifications for confinement in ESH. Smart v. Goord, 441 F. Supp. 2d 631, 642 (S.D.N.Y. 2006) (allegation that review hearings were a "hollow formality" and officials did not actually consider releasing plaintiff stated a due process claim); McClary v. Kelly, 87 F. Supp. 2d 205, 214 (W.D.N.Y. 2000) (upholding damage verdict for sham review), aff'd, 237 F.3d 185 (2d Cir. 2001); Giano v. Kelly, 869 F. Supp. 143, 150 (W.D.N.Y. 1994); see also Sourbeer v. Robinson, 791 F.2d 1094, 1101 (3d Cir. 1986); Anderson v. Colorado, 887 F.Supp.2d 1133, 1152-53 (D. Colo. 2012) (boilerplate reasons and check marks in boxes did not constitute meaningful review). The proposed ESH review does not on its face appear to offer anything other than a perfunctory review. And in the absence of regular reporting to the BOC about the outcome of ESH reviews, it is unclear that DOC will have a sufficient incentive to meaningfully consider releasing a person from ESH.

Even if DOC were to provide periodic review, it must be tailored to the justification for initial entry. Thus, if segregation is imposed to encourage a prisoner to improve his behavior, "the review should provide a statement of reasons [for retention], which will often serve as a guide for future behavior (*i.e.*, by giving the prisoner some idea of how he might progress toward a more favorable placement)." Toevs v. Reid, 685 F.3d 903, 913 (10th Cir. 2012); accord, Anderson v. Colorado, 887 F.Supp.2d 1133, 1152-53 (D. Colo. 2012) (holding reviews did not "provide meaningful input to Mr. Anderson as to what he needs to do to make progress").

Where ESH placement appears to be based almost entirely on some *past* behavior or status, without requiring any particular nexus to safety and security concerns, there is simply no opportunity to make progress to eventual release from restrictive conditions. As the Supreme Court has held, past behavior is not sufficient on its own to justify administrative segregation without some connection to safety and security; otherwise, it would violate the Court's statement that "administrative segregation may not be used as a pretext for indefinite confinement of an inmate." Hewitt v. Helms, 459 U.S. 460, 477 n. 9 (1983). Thus, even where a prisoner commits a murder while incarcerated, there is no meaningful review of administrative segregation when the institution "failed to explain to [the prisoner], with any reasonable specificity, why he constituted a continuing threat to the security and good order of the institution." Williams v. Hobbs, 662 F.3d 994, 1008 (8th Cir. 2011). Thus this procedural requirement that prison officials state a current justification for ongoing confinement becomes a substantive requirement that they *have* a current justification and not just a long-past act.

In sum, the procedures for placement into and release from ESH places nearly unfettered discretion in the hands of DOC officials. At the front end, the categories of people who can be subjected to ESH conditions is incredibly broad, the criteria for placement impermissibly vague, and the standard for justifying placement far too easy. At the back end, the person in ESH may be there indefinitely, with no guidance or assistance as to how to be released. In a system already rife with arbitrariness and abuse, the ESH is an ill-conceived avenue for capricious action.

## III. The Conditions Imposed by ESH Are Constitutionally Suspect

Even if ESH were to improve from a procedural perspective, the conditions imposed by placement in ESH would still raise serious constitutional concerns. The salient ways in which

ESH will alter the conditions of confinement for people detained therein are as follows: (1) reduced out-of-cell time to seven hours, with perhaps greater reductions in emergency situations; (2) mechanical restraints (rear-cuff) during movement; (3) strip searches during movement in and out of housing unit; (4) reading of incoming and outgoing correspondence without cause; (5) no contact visits;[4] (6) extremely limited access to legal materials; and (7) one hour of recreation per day. Taken together, there is reason to doubt the Department's disclaimer of any punitive intent, rendering all of these conditions unconstitutional as applied to pretrial detainees.

I start with the black-letter rule that pretrial detainees held in DOC custody may not be punished because "[a] person lawfully committed to pretrial detention has not been adjudged guilty of any crime." See Bell v. Wolfish, 441 U.S. 520, 536 (1979). Thus, if challenged conditions are punitive, they may not lawfully be applied to pretrial detainees. In Bell, the Court identified the following factors, from Kennedy v. Mendoza–Martinez, 372 U.S. 144 (1963), as useful guideposts in determining whether a challenged condition or restriction is punitive in nature:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Bell, 441 U.S. at 537–38 (quoting Mendoza–Martinez, 372 U.S. at 168–69).

Importantly, the Mendoza-Martinez factors are useful primarily where the legislation or regulation does not expressly indicate an intention to punish. See, e.g., LaCrosse v. Commodity

[4] The newly-amended proposed Directive speaks of the possibility that contact visits will be permitted as a reward for "positive behavior." This is the only indication that the DOC has given serious consideration to behavioral modification in designing the ESH.

Futures Trading Comm'n, 137 F.3d 925, 930 (7th Cir. 1998) ("Thus the first step in our analysis is to determine whether the legislature in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.") (citing United States v. Ward, 448 U.S. 242, 248 (1980)). Where punitive intent is not obvious from the face of a regulation, whether a condition is imposed for a legitimate purpose or for the purpose of punishment "generally will turn on whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." Bell, 441 U.S. at 538 (internal quotation marks omitted)

Applying these factors, there are significant indications that DOC's ESH policy is intended to punish and hence is unconstitutional under Bell. See, e.g., Peoples v. CCA Detention Centers, 422 F.3d 1090, 1106 (10th Cir. 2005) ("If an act by a prison official, such as placing the detainee in segregation, is done with an intent to punish, the act constitutes unconstitutional pretrial punishment."). Application of the Mendoza-Martinez factors weighs in favor of finding that this is a punitive regime. First, confinement in the ESH "involves an affirmative disability or restraint" – restrictive movement, limited privileges, and the like. Mendoza–Martinez, 372 U.S. at 168–69. Second, most, if not all, of the criteria for placement in ESH involve the presence of scienter and many are already a crime. Id.

And although placement in ESH does not obviously serve the traditional purposes of punishment – retribution or deterrence – the regulations creating the ESH do not appear rationally connected to the alternative and legitimate purpose of maintaining safe and secure correctional facilities. See, e.g., Taylor v. Commissioner of New York City Dept. of Corrections, 317 Fed. Appx. 80, 2009 WL 792785, *1 (2d Cir. 2009) (concluding that it was reasonable to segregate pretrial detainee "for his own protection and that of the prison

population, after he was implicated in an assault against an inmate who subsequently died."); see also Bell, 441 U.S. at 540 (maintaining jail security is an appropriate justification for inflicting restrictions on pre-trial detainees). First, DOC does not require any inquiry, at the time it imposes placement in ESH, as to whether imposing the placement is necessary to ensure a safe and secure correctional system. Indeed, the application of the policy suggests otherwise, for detainees are eligible for placement in ESH no matter how much time has passed since the predicate incident that justifies their placement. Second, if DOC were actually imposing ESH based on an assessment of risk to safety and security, one would expect that issue to be considered at the hearing provided by the proposed regulation, and the detainee would presumably be able to offer evidence that the prior misbehavior is not indicative of a current risk to the security and safety of the facility. None of this appears contemplated by the ESH directive, however, again casting doubt on the argument that the use of ESH is something other than punishment or an exaggerated response to the problems of safety and security identified by the DOC. See Allah v. Milling, 982 F. Supp. 2d 172, 174 (D. Conn. 2013) (denying summary judgment because material issues of fact existed regarding whether placement of pretrial detainee in administrative segregation based on behavior during prior incarceration constituted punishment or was reasonably related to legitimate penological goals).

Finally, the regulatory context in which DOC has proposed creating the ESH suggests that there is a punitive intent behind the proposal. From the 30,000 foot view, it appears that DOC was not enthused about the BOC's deliberative rule-making process regarding segregation, and was disconcerted by the ongoing debate about the constitutionality of its use of "old" segregation time. One reasonable interpretation of DOC's conduct here is that it is anticipating that it will be deprived of the ability to use SHU as punishment for historical misconduct, and

that its ability to use isolation with few limits, as it has in the past, is threatened by the BOC's rulemaking. In this light, the creation of the ESH looks to be an attempt by DOC to maintain its ability to punish detainees for past misconduct, without running afoul of new BOC rulemaking or the pending litigation regarding old Bing time.

In this light, DOC's supposed concessions that it will only commit to if its ESH policy is adopted are meaningless. The DOC states that it will cease using "old" segregation time if the ESH is adopted, but making a deal to end an unconstitutional policy is not much of a concession. The City Council already has indicated its view that the DOC's use of "old" segregation time is unsupportable, and the policy itself is currently being challenged in court. There are strong arguments that DOC's policy violates the constitution, and every day that the Department continues to adhere to it exposes the City to greater liability. And the DOC's commitment to report back on its effort to reduce the length of segregation from 90 days to 30 days is not an affirmative commitment to take any action. In exchange, the City asks this Board to essentially suspend time-tested standards of treatment that offer a small measure of protection to some of our most vulnerable citizens. For the foregoing reasons, the Board should reject the proposal to create the ESH.