COMMITTEE ON CORRECTIONS AND COMMUNITY REENTRY

GREG MORRIL
CHAIR
42 W. 44TH STREET
NEW YORK, NY 10036
gregmorril@gmail.com

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Members of the Board of Correction
1 Centre Street
Room 2213
New York, New York 10007
boc@boc.nyc.gov

Re: Comments on Rulemaking Concerning Restrictive Housing in Correctional Facilities

The New York City Bar Association and its Corrections and Community Reentry Committee ("the Committee")[1] commends the New York City Board of Correction ("the Board" or "BOC") for undertaking rulemaking on restrictive housing in New York City correctional facilities, and urges the Board to go further to reform troubling uses of restriction and isolated confinement by the New York City Department of Correction ("the Department" or "DOC"). As New York City takes steps to close Rikers Island and reduce the capacity of its jail system, all actors must work together to reform the well-documented violent and dehumanizing culture[2] within our carceral system. The Board has a unique opportunity to advance that reform through the restrictive housing rulemaking process by adopting Minimum Standards that reflect modern correctional best practices.

I. THE BOARD SHOULD STRENGTHEN PUNITIVE SEGREGATION REFORMS AND CLOSE GAPS IN THE PROPOSED RULES

The Committee supports the Board's attempt to limit punitive segregation ("PSEG"), but in order to be faithful to the principles rightfully invoked by the Board in its Statement of Basis and Purpose, the proposed rules should go further. The United Nations' Mandela Rules on the treatment of prisoners unequivocally assert that solitary confinement in excess of 15 consecutive days constitutes

[1] The Committee is comprised of legal practitioners and focuses on issues affecting people in jails, prisons and other detention facilities, as well as people on probation and parole and with conviction histories.

[2] *See* Eighth Report of the *Nunez* Independent Monitor (Oct. 28, 2019), *available at* https://www1.nyc.gov/assets/doc/downloads/pdf/8th_Monitor_Report.pdf. (All links in this report were last checked on January 29, 2020).

torture or other cruel, inhuman or degrading treatment or punishment.[3] The Board indicates that its rulemaking is guided by the principles underlying the Mandela Rules[4] and similar recommendations from other national and international bodies[5] and has made important strides, such as the limit on PSEG I sentences to a maximum of 15 days in most circumstances.[6] Despite the changes recommended by the Board, the proposed rules still allow isolated confinement in PSEG in violation of the asserted principles. As outlined in a previous report by this Committee, we have serious doubts as to whether punitive segregation should be permitted at all given the well-documented psychological harm that it causes.[7] But if the Board is to allow punitive segregation, it should not permit any exceptions that would exceed the 15-day limit. Given that the Mandela Rules provide that leaving human beings in solitary confinement for an excess of 15 days is torture, New York City should not endorse this practice *under any circumstance*, regardless of offense and notwithstanding "waivers" from the Chief of Department.[8] Further, the proposed rules do not limit the duration of PSEG II at all[9]—a significant departure from the current Minimum Standards.[10] The Board must strengthen the proposed rules so that New York City treats people in custody humanely and, at a minimum, consistently with international norms.

The Committee is also concerned that, as drafted, gaps in the proposed rules permit DOC to subvert due process and minimum conditions requirements by creating new restrictive housing that does not fit into the specific housing categories outlined in the rules.[11] This could potentially lead to

[3] United Nations Standard Minimum Rules for the Treatment of Prisoners ("Mandela Rules"), Rules 43 and 44, *available at* https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf (prohibiting "solitary confinement for a time period in excess of 15 consecutive days" because "[i]n no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment.").

[4] Notice of Rulemaking Concerning Restrictive Housing in Correctional Facilities, New York City Board of Correction, at 6 n. 10 and 21 n. 69, *available at* https://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2017-Restrictive-Housing/2019.10.29%20-%20Rule%20and%20Certifications.pdf (hereinafter "BOC Notice of Rulemaking") (citing the Mandela Rules for the propositions that (1) the BOC's "first principle seeks to protect the safety of people in DOC custody and the staff who work in DOC facilities by" among other things "prohibiting restrictions that dehumanize or demean people in custody"; and (2) "punitive segregation should be no longer than 15 days.").

[5] *See* BOC Notice of Rulemaking at 5-9.

[6] Proposed Rule § 6-07(a)(3)(i), (ii), (iii).

[7] *See* NYC Bar Association, Report on Legislation Restricting the Use of Segregated Confinement (July 2014), *available at* https://www2.nycbar.org/pdf/report/uploads/20072748-HALTSolitaryConfinementReport.pdf; *see also* Zachary Katznelson's Testimony before NYC Board of Correction (Dec. 16, 2019), *available at* https://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2017-Restrictive-Housing/19-12-16-A-More-Just-NYC-Testimony-for-BOC-Hearing-re-Solitary.pdf; A Blueprint for Ending Solitary Confinement in NYC Jails, #HALTsolitary campaign and the NYC Jails Action Coalition (Oct. 29, 2019), *available at* https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2019/October/Redacted-HALTsolitary-JAC-Petition-for-Rulemaking-to-End-Solitary-Confinement.pdf.

[8] Proposed Rule § 6-07(a)(3)(ii) and (iv).

[9] Proposed Rule § 6-07(b)(3).

[10] *See* current Min. Std. § 1-17(d), which the proposed rules would abolish.

[11] *See* Letter re: Solo Housing: A Case Study in DOC Restrictive Housing Practices, The Legal Aid Society Prisoners' Rights Project (Oct. 30, 2019), *available at*

excessive solitary confinement which, by any other name, is *still torture.* The Board should amend the proposed rules to provide protections for all forms of isolation meeting the definition of restrictive housing, regardless of whether it is within the "four corners" of the proposed rules.

II. THE BOARD MUST ENSURE DUE PROCESS AND PROCEDURAL FAIRNESS

The Committee also is particularly troubled by inadequate coverage in the due process section of the proposed rules. In order to address these concerns, the Committee recommends the following amendments to the proposed rules to ensure procedural fairness and to guarantee legal rights to persons in custody.

First, the Committee recommends the Board eliminate pre-hearing detention ("PHD").[12] The Committee understands that in certain circumstances an individual must be isolated for the safety of other persons in custody and DOC staff, and that a period of isolation can help de-escalate a person's behavior. The Board's proposed rules provide guidelines for that exact circumstance in § 6-05.[13] In light of § 6-05, there is no reason to require PHD.

The proposed rules permit ***seven business days*** of PHD.[14] To start, the seven-business-day rule could result in someone spending up to 13 calendar days in PHD if, for example, an individual was placed in PHD the Friday before Christmas. As a result, a person could spend nearly the maximum allowable time in PSEG without any due process.[15] Furthermore, since the Board acknowledges that hearings can take up to five days,[16] a person may be in PHD the maximum "seven business days" before the hearing commences and then remain in segregation during the pendency of the hearing. Thus, an individual could theoretically remain in PSEG the maximum 15 days (or more if the DOC exercised an exception to the rule) before an adjudicator found him or her innocent of the charged infraction. Permitting the DOC to place someone in PSEG without a hearing for an extended time period completely undermines the Board's goals of ensuring due process and procedural justice.[17]

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https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2019/October/Legal-Aid-Society-Letter-to-BOC-Solo-Housing-as-a-Restrictive-Housing-Case-Study-for-Proposed-Rulemaking.pdf (using Solo Housing as an example of the gap in the proposed rules and noting that it "clearly meets the general definition of Restrictive Housing in proposed § 6-03(a), but does not appear to fit within any category listed in the rules and therefore is not subject to any proposed process or protections.").

[12] The proposed rules provide that pre-hearing detention "shall count toward the person's punitive segregation sentence." Proposed Rule § 6-04(b). Accordingly, the Committee assumes pre-hearing detention meets the criteria for PSEG.

[13] Proposed Rule § 6-05 (requiring, among other things, re-authorization of de-escalation detention every four hours and a maximum duration of 12 hours in de-escalation detention without Board approval).

[14] Proposed Rule § 6-04(b).

[15] Apart from de-escalation, the Committee does not believe the DOC should place an individual in PHD for any period of time but notes the excessive time period currently permitted.

[16] Proposed Rule § 6-31(b)(7)(ii) ("[H]earings must be completed within five (5) days, absent extenuating circumstances or unless the person in custody waives this time frame, in writing").

[17] BOC Notice of Rulemaking at 33 ("[T]he Standards in Subchapter H are intended to ensure that people in custody are placed into restrictive housing in accordance with due process and procedural justice principles. These Standards are

Second, the Committee recommends the Board require the DOC to provide persons in custody *at least* oral notice of their infractions and a recitation of their rights before the DOC interviews them. Under the proposed rules, it will take one to three days for a person in custody to receive notice of his or her infraction,[18] but the investigation of the incident must commence within 24 hours.[19] In other words, the DOC will likely interview a person in custody before the person in custody receives notice of his or her infraction. Since alleged infractions may also constitute criminal activity, all persons in custody should be read modified *Miranda* rights before an interview based on a charged infraction. Under the proposed rules, the Department must inform the person in custody of his or her rights only "[i]f the rule violation in question could lead to a subsequent criminal prosecution."[20] Respectfully, DOC staff should not be tasked with deciding whether conduct has criminal implications. Moreover, the Committee questions why any individual would be subject to punishment as severe as PSEG if the individual's conduct did not rise to the level of criminal activity.

Third, the Committee recommends the Board require the DOC to contact the attorney for the person in custody *prior* to interviewing him or her. The current proposed rules provide that the DOC must notify an attorney of an infraction only when the conduct amounts to a Grade I violent offense.[21] However, a person in custody has a right to meet with his or her attorney when accused of any crime, not just a serious violent crime. And again, it would be inappropriate for DOC staff to determine whether conduct may have criminal ramifications. The Board should also require that the DOC notify a person's attorney before interviewing them. The current proposed rules provide that, even when the DOC contacts a lawyer, this contact does not occur until notice is provided.[22] As explained above, notice may not be provided until after an investigation commences and the DOC interviews the person in custody. Persons in custody have the right to receive notice of their infraction, hear their modified *Miranda* rights, and consult with their attorneys before they are questioned. This is especially important since the individuals are already incarcerated and may not understand that they have the option to refuse to answer questions or may consult with an attorney.

Fourth, the Committee recommends the Board provide all persons in custody subject to disciplinary hearings the assistance of a hearing facilitator if their lawyers do not attend the hearing. The current proposed rules provide that persons who are "unable to obtain witnesses or material evidence" have a right to a hearing facilitator.[23] The Committee understands that all people who are incarcerated will have difficulty locating witnesses and material evidence. Moreover, there is an inherent unfairness in providing only certain individuals with a hearing facilitator who will, according to the proposed rules, clarify the charges, explain the hearing process, interview witnesses, obtain

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consistent with a central tenet of procedural justice — that people believe justice as fair, based on their perception of fairness in the process, not just the perception of a fair outcome." (internal quotation marks and citations omitted)).

[18] Proposed Rule § 6-30(b)(3), (4).

[19] Proposed Rule § 6-30(a)(5).

[20] Proposed Rule § 6-30(a)(3).

[21] Proposed Rule § 6-30(b)(7) ("If the person is charged with a Grade I violent offense, the notice of infraction shall be transmitted, via email or fax, to the person's criminal defense counsel at the same time it is served on the person.").

[22] *Id.*

[23] Proposed Rule § 6-30(c)(6)(v).

evidence and/or written statements, and provide assistance at the hearing.[24] The Committee does understand the budgetary constraints of the DOC. If the Department cannot immediately offer hearing facilitators for every person in custody facing a disciplinary hearing, the Committee recommends the Board require a pilot program in one facility to help the Department determine budgetary needs and subsequently petition the City for necessary resources to provide guaranteed hearing facilitators in all facilities.[25] The Board may also consider using a law school clinic program to increase access to hearing facilitators at a lower cost.

The Committee thanks the Board for its consideration of these recommendations and looks forward to working with the Board to ensure that New York City treats people in custody humanely and guarantees them fair process and essential legal rights.

Respectfully submitted,

Greg Morril
Chair, Committee on Corrections & Community Reentry

[24] Proposed Rule § 6-30(c)(6)(vi).

[25] The Committee expects that providing hearing facilitators may actually lower the costs of disciplinary hearings because hearings will proceed more efficiently and require fewer adjournments, which should shorten the duration of hearings.