URBAN JUSTICE CENTER

Comments to the New York City Board of Correction
On Proposed Rule to Establish Enhanced Supervision Housing Units
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Submitted by
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The Minimum Standards are an articulation of the accepted limits on conditions and treatment of incarcerated persons in the City jails. They set the standard for humane treatment of individuals in Department of Correction (DOC) custody. Given that DOC operational decisions may be guided by budgetary concerns and staff efficiencies, the Minimum Standards are a safeguard against practices that infringe upon the rights of incarcerated people.

We implore the Board to rely on facts and data, best practices, and international human rights standards in setting and modifying the Minimum Standards. The Board cannot simply rely on DOC claims and assurance without solid factual support. The deep-seated culture of violence in the City jails will not be remedied through additional punitive units, depriving incarcerated people of basic human rights, and trusting DOC. What is critically needed is for the Board to exercise its full oversight authority and to hold DOC accountable for failing to comply with Minimum Standards.

We support the adoption of rules ending the practice of placing 16 and 17 year olds in solitary confinement and disallowing the practice of placing people in solitary confinement to serve time to which they were sentenced during a previous incarceration. These reforms are long overdue and have been recommended by Department of Justice[1] and New York City Council[2] respectively. The Board must go further and amend its proposed rule to include comprehensive limits on solitary confinement.

The Board should reject amendments to Minimum Standards §§ 1-05 Lock-in, 1-06 Recreation, 1-07 Religion, 1-08 Access to Courts and Legal Services, 1-09 Visiting, 1-11 Correspondence, 1-12 Packages, and 1-13 Publications. We urge the Board to disallow the creation of Enhanced Supervision Housing Units (ESHU). The Board should reject DOC's approach that ties reducing punitive segregation sentences to the creation of ESHU – at best replacing one form of punishing environment with another. Instead, the Board should adopt limits to solitary confinement that lessen the damaging impact of isolation and impose requirements on any new units that reduce lockout time to include a programming and rehabilitative component, strong due process

[1] CRIPA Investigation of the NYC DOC Jails on Rikers Island, U.S. Department of Justice, August 4, 2014, p. 62.
[2] New York City Council Resolution 379 adopted August 21, 2014.

protections, measures for ensuring access to medical and mental health staff, data reporting requirements, and staff training requirements.

I. The Board of Correction Must Adopt Rules that End the Use of Solitary Confinement in the New York City Jails.

The Board has failed to set a limit on DOC use of solitary confinement – the confinement of a person in a cell for 23, or more often 24, hours[3] a day. Minimum Standard § 1-05(b) requires that incarcerated persons be locked in their cells no more than 10 hours a day, but exempts people in punitive segregation from this requirement. The *only* limit on cell confinement for individuals in punitive segregation is the one-hour out-of-cell recreation requirement (§ 1-06(g)).

The detrimental consequences of isolating a person in a cell for 23 to 24 hours a day – whether for punitive reasons or otherwise – are now well documented.[4] Drs. James Gilligan and Bandy Lee's September 5, 2013 report to the Board makes clear the need for rules governing isolation:

> The use of prolonged solitary confinement can only be seen by both inmates and staff as one of the most severe forms of punishment that can be inflicted on human beings short of killing them; . . .
> • it can precipitate and/or exacerbate the symptoms of mental illness; . . .
> • it can provoke suicidal, assaultive and homicidal behavior, self-mutilation, and other pathologic behaviors; . . .
> • it has been more or less universally recognized among the civilized nations of the earth as a form of torture and thus a most serious violation of human rights; . . .
> • it therefore should not be imposed upon any inmates in the jail, whether they have yet shown signs and symptoms of mental illness or not; and . . .
> • it is not enough merely to liberate an inmate from this form of torture only after he has already been tortured to the point of experiencing emerging symptoms of psychosis and/or suicidality.
> From a medical/psychiatric standpoint, no one should be placed in prolonged solitary confinement, as it is inherently pathogenic – it is a form of causing mental illness.[5]

The specific conditions of isolation in the City jails provoke self-harming behavior in the individuals subjected to it. A comprehensive study of 244,699 NYC jail incarcerations over three years found that individuals punished by solitary confinement were almost seven times more

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[3] *Barriers to Recreation at Rikers Island's Central Punitive Segregation Unit*, City of New York Board of Correction Staff Report, July 2014 (finding that only 10% of the individuals in the Centralized Punitive Segregation Unit (CPSU) actually spent the one-hour of mandated recreation outside their cell).

[4] See for example, Gilligan and Lee, *Consultants' Response to the Response from the NYC Office of the Mayor, the Department of Corrections, and the Department of Health and Mental Hygiene*, October 2, 2013 (includes seven and a half pages of citations outlining the general adverse effects of solitary confinement).

[5] Gilligan and Lee, *Report to the New York City Board of Correction* (Sept. 2013).

likely to attempt to hurt or kill themselves than other incarcerated people.[6] Only 7.3% of jail admissions included any solitary confinement sentence, yet "53.3% of acts of self-harm and 45% of acts of potentially fatal self-harm occurred within this group."[7]

The magnitude of the psychological harm of this practice can no longer be ignored. The Board must act to place an absolute limit on the amount of time that a person can be kept alone in a cell. In setting such a limit, the Board should be guided by international standards of decency. The United Nations Special Rapporteur on Torture has determined that "solitary confinement, when used for the purpose of punishment, cannot be justified for any reason precisely because it imposes severe mental pain and suffering beyond any reasonable retribution for criminal behaviour" and has called for "an absolute prohibition on solitary confinement exceeding 15 consecutive days."[8]

The Board should adopt a rule that the maximum amount of daily cell confinement of incarcerated persons can be no more than 20 hours. A rule that provides some out-of-cell time daily will ameliorate to some degree the harms of isolation. The Board should also set a limit on the number of consecutive days that a person can have 20-hour daily cell restriction. In light of the Special Rapporteur's findings, the Board should set a limit of 15 consecutive days and no more than 20 days total in any 60-day period.

The Board should also adopt a rule that limits the circumstances in which isolation can be used. Isolated confinement should only be permitted if a person is found to have engaged in serious acts of physical injury, forced sexual acts, extortion, coercion, inciting serious disturbance, procuring deadly weapons or dangerous contraband, or escape.

There are individuals whose vulnerability to the harms of isolation is so likely that they should be categorically excluded from its use. The Board acknowledges the need for adolescents (defined as 16 and 17 year olds) to be excluded. The rule should be expanded to include all vulnerable populations, including anyone under 25 years old,[9] people with mental and physical disabilities, and pregnant women and new mothers.

The Board should also adopt rules that enhance due process requirements by requiring hearings conducted by an independent and impartial hearing officer not employed by DOC and permitting incarcerated people to be represented by a trained and competent advocate.

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[6] Kaba, Lewis, Glowa-Kollisch, Hadler, Lee, Alper, Selling, MacDonald, Solimo, Parsons, and Venters, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUBLIC HEALTH 442 (Mar. 2014) available at http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301742.

[7] *Id.* at p. 442.

[8] *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/66/268, August 5, 2011, pp. 20-21 available at http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf.

[9] *The Solitary Confinement of Youth in New York: A Civil Rights Violation*, New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014, p.60.

II. The Board Must Not Amend Its Standards to Authorize the Establishment of an Unnecessarily Restrictive ESHU.

The basis for the proposed rule revision is to "address the dramatic increase in serious inmate violence in New York City jails." Reducing violence is undoubtedly important. However, there is no reason to believe that the creation of ESHU will lead to a reduction in violence. As it stands, the ESHU will be an entirely restrictive environment with absolutely no incentive for positive behavior, no positive programming, and the potential for violent clashes between ESHU residents and correction staff.

The Board certainly should not lower its standards regarding incarcerated persons' rights to out-of-cell time, recreation, participation in religious services, access to the law library, visits, correspondence, packages, and publications without extremely compelling evidence that the security of the facility requires such restrictions. DOC has failed to provide any evidence of the *need* to operate ESHU in such a restrictive manner. DOC assertions that it will be easier or more cost-efficient to operate ESHU this way are an inadequate basis for denying individuals these minimal protections.

Overly Broad Criteria for Placement in ESHU

The categories of people who may be confined in ESHU are extremely broad – for instance, anyone identified as a gang participant or anyone who presents a "significant threat to the safety and security of the facility if housed in general population housing" could be placed in ESHU and subjected to these restrictions. The Board must not allow DOC such wide discretion in determining who can be placed in this highly restrictive housing.

Inadequate Procedural Protections

There procedure set forth in the proposed rule is plainly inadequate. There is no provision for a hearing before an impartial factfinder before a person is placed in ESHU. The person does not have a right to be represented at a hearing. In fact, no hearing will even occur unless the person submits a request for an in-person hearing. The Board should not permit a person to be placed in a restrictive environment, where he is transported in shackles and strip searched every time he enters and leaves the housing area, without requiring adequate due process protections.

The proposed ESHU procedure includes no role for the Board in reviewing these determinations. The Visiting Standard § 1-09 requires the Board to receive notice of any determination to deny a person's visiting rights and allows for an appeal to the Board. Given that placement in ESHU results in the loss of not only contact visits but many other basic rights, including a process for appeal to the Board seems essential.

Furthermore, the proposed rule includes no reporting requirements about who is placed in ESHU and for what reason. Specific data-reporting requirements appear necessary for the Board to monitor whether ESHU is actually used as intended.

Substantial & Unnecessary Restrictions

DOC claims that ESHU will not be used as punitive segregation housing unit. However, the proposed Standards' amendments suggest otherwise. The proposed change to the Lock-in

Standard will decrease out-of-cell time by seven hours. The proposed amendment to the Recreation Standard could result in significantly more isolation as it takes away ESHU residents' right to engage in recreation activities within cell corridors and tiers, dayrooms and individual housing units (§ 1-06(e)). During lock-out periods, ESHU residents may be forced to choose between going to the dayroom and spending the entire period in their cell. Without the right to dayroom access, all ESHU individuals may be mandated to eat in their cells, even during their lock-out period. Without the right to move freely between the shower, phone area, wash room, and their cell, ESHU residents may be required to gain permission to leave their cell even during lock-out time. Reducing lock-in time seems to be based on DOC administrative convenience and costs rather than necessity.

Restricting visits, correspondence, packages, and publications to an entire class of people is significant. The current standards do not even permit these restrictions for individuals who are sentenced punitive segregation. Yet the proposed rule permits these restrictions to be imposed on broad categories of people. They are not narrowly tailored to a specific action taken by the individual. DOC may find it more expeditious to take away the rights of everyone in ESHU, but the Board must require individualized justification before taking away these basic rights.

The current Visiting Standards contains procedures through which visits can be limited. Section 1-09(h)(2) sets forth procedures through which the visiting rights of an incarcerated person with a particular visitor may be denied, revoked, or limited. Section 1-09(h)(3) contains procedures for denying contact visits. Rather than blanket restrictions on contact visits and restricting visits to an approved visit list for every person placed in ESHU, DOC should be required to show some nexus between visits and safety.

Similarly the Correspondence Standard currently includes procedures for reading outgoing and incoming correspondence (§§ 1-11(c) and (e)). Where there is an individualized "reasonable basis to believe that correspondence threatens the safety or security of the facility," DOC can monitor correspondence. The Board should not allow monitoring of correspondence based solely on the individual's placement in ESHU.

The amendments to the packages and publications standards do not adequately protect the rights of incarcerated individuals. Limiting incoming packages to items purchased and shipped from vendors creates a hardship on indigent incarcerated people and their families. The Board should be mindful of this hardship. There is no reason that DOC cannot shift some of its surveillance resources and staffing time to searching incoming ESHU packages thoroughly. Without any evidence from DOC of the need for packages to be sent from the outside, the Board should not shift such a heavy burden to families and friends of ESHU residents.

Lack of Protection for Vulnerable Populations

We are very concerned that people with mental illness will be placed in ESHU. People with mental illness are particularly at risk in restrictive units. ESHU will most certainly be environments in which every person incarcerated there will be viewed as a threat. Because the purpose of the unit is to contain individuals who are considered security risks, DOC staff are likely to treat the people in the ESHU harshly and view any misbehavior as willful. Given that

people with mental illness in the City jails are more likely to be victims of DOC staff violence in general,[10] individuals with mental illness in the ESHU are at even greater risk.

The composition and design of the units suggests that incidents between incarcerated people and staff and among incarcerated people will be common. Even if individuals with mental illness are not directly involved in these incidents, their ability to access mental health treatment is likely to suffer. Lockdowns on units prevent individuals from being escorted from the unit to mental health appointments in the clinic and keep medication from being provided on a timely basis. Even when mental health staff go to the units, they cannot provide effective treatment to individuals whom DOC will not permit to be escorted out of their cells to meet with mental health staff in a confidential setting.

The proposed rule lacks any provision excluding vulnerable populations from ESHU.

III. The Board Should Require Any Units with Lock-in Time of Less than 14 Hours to Have a Therapeutic Component, Strict Criteria for Placement on the Unit, Strong Procedural Protections, and Outside Oversight.

Rather than grant amendments for a restrictive ESHU – that DOC claims is not punitive but by its design clearly is – the Board should enact standards that require DOC to adopt practices that have the potential to reduce violence.

DOC already has one successful model for reducing violence – the Clinical Alternatives to Punitive Segregation (CAPS) unit. Steady mental health staff offer programming throughout the day. Problematic behavior on the unit is addressed and deescalated by mental health staff, with DOC staff becoming involved only in extenuating circumstances when necessary to respond to a potentially dangerous situation. CAPS shows that a therapeutic intervention with a person who has violated jail rules is not only more humane, but is also more effective in reducing violence. DOHMH reports that rates of violence and self-harm in CAPS are less than half of the rates in the units where the individuals had previously been held.[11]

CAPS units are a much more effective intervention than the Restrictive Housing Units (RHU) in which people with mental health needs are kept in solitary confinement but provided with some out-of-cell mental health treatment and the possibility of earning additional out-of-cell time incrementally. According to DOHMH, CAPS units have more than six times fewer acts of self-harm than RHU (40 acts of self-harm per 100 patients in CAPS compared to 260 acts of self-

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[10] DOHMH's 11-month study found that 129 incarcerated people experienced serious injuries in altercations with DOC staff. Seventy-seven percent of those injured had a mental health diagnosis. *See* "Rikers: Where Mental Illness Meets Brutality in Jail," *The New York Times*, Michael Winerip and Michael Schwirtz, July 14, 2014, available at: http://www.nytimes.com/2014/07/14/nyregion/rikers-study-finds-prisoners-injured-by-employees.html?src=xps.

[11] Testimony of Dr. Homer Venters at NYS Assembly hearing Mental Illness in Correctional Settings, Nov. 13, 2014, available at http://www.nyc.gov/html/doh/downloads/pdf/public/testi/testi20141113.pdf.

harm per 100 patients in RHU).[12] DOC experience with RHU demonstrates that providing treatment in a punitive environment does not reduce violence.

The Board should require that any units DOC creates to separate individuals who engage in violent conduct from the general population meet the criteria set forth in the Humane Alternatives to Long-Term (HALT) Solitary Confinement Act (A8588A/S6466A). The Act specifically provides for the creation of separate secure residential rehabilitation units. These units must provide not only more out-of-cell time but trauma-informed therapeutic programming aimed at promoting personal development, addressing underlying causes of problematic behavior resulting in placement in a RRU, and helping prepare for discharge from the unit and to the community. On such a unit, non-disciplinary interventions to problematic behavior would be used and staff would be trained on the purpose and goals of the non-punitive therapeutic environment and dispute resolution methods.

Security can be maintained without punishment. The Board should promote the creation of trauma-informed correctional care – rather than endorse for the creation of additional punitive settings – and promote the culture change that DOC so desperately needs.

[12] *Id.*