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To the New York City Department of Correction

Comments on Proposed Revisions to the Inmate Rulebook

June 13, 2019

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The Legal Aid Society writes to comment on the proposed revisions to the New York City Department of Correction ("DOC" or "the Department") Inmate Rulebook. The Prisoners' Rights Project of Legal Aid has protected the rights of individuals incarcerated in New York City jails for decades. We have brought numerous systemic cases obtaining reforms on a wide variety of problems in DOC. Additionally, we assist thousands of people in DOC custody every year who seek legal advice and help, many of whom are experiencing problems with the disciplinary process. The Special Litigation Unit of Legal Aid represents almost all persons in DOC custody challenging disciplinary determinations and security classifications imposed by the Department. These comments are rooted in the knowledge gained from our ongoing advocacy for our clients in DOC custody.

The proposed revisions to the DOC Inmate Handbook relating to disciplinary hearings, sex offenses, sexual harassment, and assault present serious problems. We express our concerns below.

Proposed Sections 101.15 and 101.15.1: Gang and Security Risk Group Assault

Assaulting another incarcerated person, including spitting or throwing any object or substance, is already a Grade I offense. It is unclear why the proposed regulations create new subcategories of assault that add nothing but qualifiers about Gang and Security Risk Group ("SRG") status, to no apparent end. Was the Department intending to impose liability on a wider group of incarcerated people adjacent to an assault because of suspected "gang" or SRG status? If so, that runs afoul of basic fairness because there is no prohibited conduct outside of mere presence or proximity to an assault. The failure to state any specifically prohibited acts or criteria is particularly troubling because of the ongoing practice of New York City law enforcement agencies to over-include individuals on lists of "known gang members," a pattern that most heavily burdens communities of color.[1] Furthermore, the Department fails to update its SRG classifications upon admission or readmission. Many persons are wrongly labeled as gang members, even in the absence of concrete facts and investigations by the Department. Our office consistently receives complaints from people in DOC custody that the Department has misclassified them as SRG members, and that they are housed unsafely as a result.

Moreover, the proposed revisions provide no guidance on what factual showings are necessary to establish an action "based on either inmate's [SRG] status or motivated by a [SRG] related purpose" (Section 101.15.1). The New York State Penal law concerning Hate Crimes, for example, requires that "[p]roof of [the protected qualities] of the defendant, the victim or of both the defendant and the victim does not, by itself, constitute legally sufficient evidence satisfying the people's burden."[2] Without more specific instruction on what constitutes being "motivated by a [SRG] related purpose," this section is overbroad, ambiguous, and does not provide

[1] *See, e.g.*, Speri, A., NYPD Gang Database Can Turn Unsuspecting New Yorkers into Instant Felons (December 5, 2018), The Intercept. Available at https://theintercept.com/2018/12/05/nypd-gang-database/ (last visited June 6, 2019).

[2] *See* P.L. § 485.05(2). Though Hate Crimes are not a perfect analog for SRG status, this subsection is a helpful comparison to a crime based on a status or similar identifying factor.

sufficient notice to incarcerated people as to what actions are prohibited. As written, this provision will lead to arbitrary determinations not based in actual alleged facts.

Proposed Revisions to Section 1-03(c)(10): Disrespect and Sexual Harassment towards Staff

In general, the proposed language changes describing offenses for disrespect of staff are overbroad and offend due process by not providing adequate notice to affected people. Unambiguous language would provide clear notice to incarcerated people, and help to curtail abusive and arbitrary application of these provisions.

Section 109.10. This revision would make flinching—a natural, automatic impulse to unwanted or surprising physical contact from an officer, especially a painful one—a Grade I offense. Even the Penal Law analog of Resisting Arrest, which is itself a broad statute, has a requirement that the conduct be intentional and for an improper purpose.[3] The language of this section should reflect those elements.

Section 109.11. The proposed language for this section is also unacceptably broad, is vague, and lacks a requisite element of intent. As written, it would prohibit not only conduct that is *intended* to annoy or harass a staff member, but also conduct that "annoys" or "harasses" the staff member. This means that guilt turns on a subjective assessment of how the officer felt, not the intent or objective actions of the incarcerated person. Because it is vague and overbroad, the section fails to provide adequate notice to the incarcerated person of what conduct is prohibited, which is especially troubling because it is a Grade I offense.

In addition, staff touching an incarcerated person in a sexual manner is prohibited by both the Prison Rape Elimination Act and in most instances the Penal Law. As the New York State Department of Corrections and Community Supervision (DOCCS) recognizes, touching by a person in custody should be punishable only if it is "forced" upon the staff member.[4] But DOC's proposed revisions do not look to objective indications of "force." This creates the illogical outcome that an abusive staff member can punish an incarcerated person by coercing some form of contact and then claiming they found it "unwelcome."

Section 109.12. The term "verbal abuse" is likewise vague. It also should not be punished as a Grade II offense, but instead should be a Grade III offense at most. Even the Penal Law punishes Harassment generally as a low-level violation, not a crime.[5]

Section 109.13. The proposed revisions to this section, prohibiting touching any part of one's own body for purposes that include "offense," is unacceptably broad. DOCCS more adequately defines the conduct that seems to be targeted by this section in its definition of Lewd Conduct: "An inmate shall not engage in lewd conduct by intentionally masturbating in the presence of an employee, or intentionally exposing the private parts of his or her body, unless as part of a strip

[3] *See* P.L. § 205.30.
[4] DOCCS Rule 101.11 states" An inmate shall not intentionally and forcibly touch the sexual or other intimate parts of an employee for the purpose of degrading or abusing such employee or for the purpose of gratifying the inmate's sexual desire. Forcible touching includes squeezing, grabbing, pinching and kissing.
[5] *See* P.L. § 240.26.

frisk, strip search, medical examination or other authorized purpose." Rule 101.20. The same broadness concerns also apply to Section 122.14.

By prohibiting conduct described "for the purpose of sexual arousal, gratification, annoyance, ***or*** offense," incarcerated people could be exposed to punishment for masturbation at the command of an officer for the officer's own gratification. Our client J.G., whose allegations against an officer were substantiated by the Department of Investigation, was ordered on more than one occasion by an officer to masturbate in the officer's view. The section should make clear that individuals cannot be punished for behavior instigated and sanctioned by an officer, whether ostensibly consensual or otherwise.

Section 109.16. Posting sexually explicit material should not be considered "sexual harassment of staff," especially considering that the definition of such material includes vague, undefined terms like "sexual conduct."

Proposed Revisions to Section 1-04: Hearing Procedures

Section 1-04(a)(1)(ii). The Department is legally obligated to have the Adjudication Captain make an independent assessment of confidential information that is utilized at a disciplinary hearing.[6] As such, this should be included as part of the proposed rule change.

Section 1-04(b)(1)(iii). The Department should not expand the time that a person can be held in Pre-Hearing Detention without a hearing, even by one day. DOC should still require that after three days, an Adjudication Captain must determine whether a hearing can be held in three additional business days and otherwise release the incarcerated person from Pre-Hearing Detention.

Section 1-04(b)(2)(i). All refusals to attend hearings should not be documented just by an officer, a practice rife with potential for abuse. We see evidence of that abuse potential now, as DOC staff regularly fails to show a valid waiver of the right to attend the hearing. It is well-established precedent that the Department has the legal burden to prove in the hearing record that the incarcerated person knowingly and willingly refused to attend their disciplinary hearing.[7] Especially given the possibility of serious consequences of failing to answer the charges at a disciplinary hearing, all refusals to attend should be recorded by a Body-Worn Camera and included as part of the hearing record.

Section 1-04(b)(3)(v). If a person requires a hearing facilitator for the reasons listed here, that facilitator should be provided at least three days prior to the hearing when notice is given. Twenty-four hours is not sufficient time to prepare for the hearing in the manner contemplated

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[6] *See*, *e.g.*, *Matter of Abdur-Raheem v. Mann*, 85 N.Y.2d 113, 119 (1995); *Britt v. Goord*, 40 A.D.3d 1321 (3d Dep't 2007); *Matter of Miller v. New York State Dept. of Correctional Servs*., 295 A.D. 714 (3d Dep't 2002); *Wynter v. Jones*, 135 A.D.2d 1032 (3d Dep't 1987).

[7] *See*, *e.g.*, *Ortiz v. New York City Dep't of Corr*., 2008 NY Slip Op. 250610 (1st Dep't 2008); *Melendez v. New York City Dep't of Corr*., 2007 NY Slip Op. 75100 (1st Dep't 2007). DOC's own rules codify this right and state that there is, "the right to appear personally unless the right is waived in writing or the inmate refuses to attend the hearing." DOC Inmate Disciplinary Due Process Directive 6500-E (III)(10)(a).

by this section: interviewing witnesses and obtaining evidence and/or written statements, for example.

Conclusion

If the Department wishes to deter prohibited behavior in a responsible manner, that conduct must be clearly defined and there must be robust due process protections against arbitrary or abusive applications of Inmate Rulebook standards. We welcome further discussion on these important issues.