

Introduction

The City Council passed Council Bill 549-A on December 20, 2023. The bill seeks to ban the use of solitary confinement and set standards for the use of restrictive housing, de-escalation, emergency lock-ins, the use of restraints and housing special populations (e.g., mental health units, contagious disease units, housing for people who are transgender or gender non-conforming, housing for voluntary protective custody, and housing for purposes of school attendance). A copy of the bill is included as Appendix A.

The Commissioner of the Department of Correction, pursuant to the *Nunez* Court Orders,¹ requested that the Monitoring Team advise and provide feedback to the Department on how the requirements of this bill may impact the Department's ability to comply with the *Nunez* Court Orders. This document provides the Monitoring Team's assessment of the implications this bill will have on the City's and Department's efforts to address the unsafe conditions in the jails, protect individuals from harm, and implement sound correctional practices all of which are necessary to comply with the *Nunez* Court Orders.

Summary and Discussion of Council Bill 549-A

Council Bill 549-A is a well-intentioned effort to ensure that no person in the Department's custody is subjected to solitary confinement. This bill also includes a significant number of operational requirements that go beyond eliminating solitary confinement and that would impact the day-to-day management of the City's jails. The majority of these provisions directly relate to requirements of the *Nunez* Court Orders in which the Department is required to consult² and seek the Monitor's approval on many issues including, but not limited to, matters relating to security practices,³ the use of restraints,⁴ escorts,⁵ lock-in and lock-out time,⁶ de-

¹ See, Consent Judgment, § XX, ¶¶ 24 and 25 and June 13, 2023 Order, § I, ¶ 5.

² Consultation with the Monitor is required by over 80 provisions in the *Nunez* Court Orders. Consultation is also required by the Court's June 13, 2023 Order, § I, ¶ 5.

³ See Action Plan § D, ¶ 3 in which the Monitor may direct the Department to refine certain security initiatives to ensure compliance with security requirements of the Action Plan.

⁴ See Consent Judgment, § IV, ¶ 3(p).

⁵ See Action Plan, § D, ¶ 2(f) and August 10, 2023 Order, § I, ¶ 3.

⁶ See August 10, 2023 Order, § I, ¶ 4.

escalation,⁷ initial management following a serious act of violence⁸ and subsequent housing strategies.⁹

The Monitoring Team believes that eliminating solitary confinement is necessary and important. However, the Monitoring Team has deep concerns about many of the bill's provisions related to the use of restrictive housing, de-escalation, emergency lock-ins, and the use of restraints and escort procedures. Many of the provisions, as currently drafted, could inadvertently undermine the overall goals of protecting individuals from harm, promoting sound correctional practice and improving safety for those in custody and jail staff. Consequently, this could impede the Department's ability to comply with the *Nunez* Court Orders. These issues are described in detail below. Further, a listing of the provisions from the *Nunez* Court Orders that are immediately impacted by Council Bill 549-A, as well as the implications and related concerns to the Monitor's work, is included as Appendix B.

Managing Individuals Following Serious Acts of Violence

When evaluating the contents of the bill, important background and context are necessary to understand how individuals are managed following serious acts of violence. The Monitoring Team has repeatedly and consistently reported that the City and Department must have targeted initiatives to address the underlying causes of violence, protect individuals from harm, and ensure that staff use sound correctional practices. An essential component of the effort to ensure the safety and well-being of people in custody and staff working in correctional facilities is having a reliable, safe, and effective response to serious interpersonal violence. Those who engage in serious violence while in custody must be supervised in manner that is *different* from that used for the general population. Separating violent individuals from the general population, properly managing congregate time out-of-cell, and limiting out-of-cell time are standard and sound correctional practice, as long as the limitations are reasonably related to the reduction of harm. In this context, reducing out-of-cell time to less than 14 hours per day is necessary to protect individuals from harm and reflects sound correctional practice. The Department must be able to effectively separate those who have engaged in serious acts of violence from potential

⁷ See First Remedial Order, § A, ¶ 3 and Action Plan, § D, ¶ 2(b).

⁸ See Second Remedial Order ¶ 1(i)(e), Action Plan, § D, ¶ 2(h)

⁹ See Action Plan, § E, ¶ 4.

victims and, to some degree, limit their freedom of movement when they are engaged in congregate activity outside their cells. Reduced out-of-cell time increases staff's ability to control the environment, improves surveillance, minimizes unsupervised interactions, permits people with interpersonal conflicts to be separated within a single housing unit, and allows staff to better manage out-of-cell activities because fewer individuals are congregating at one time. The Department must also provide the necessary structure and supervision to ensure the safety of the individuals housed in a restrictive setting and should provide rehabilitative services that decrease the likelihood of the individual committing subsequent violent acts.

It must be emphasized that solitary confinement and restrictive housing are not the same and thus their operational requirements and constraints must be different. Outlined below are the distinctions between the two housing models.

- Solitary confinement limits out-of-cell time from between 1 to 4 hours a day,¹⁰ for prolonged periods of time (e.g. 15 days or more), affords little human contact and no congregate engagement, and does not provide access to programming.
- Restrictive housing programs include some restrictions on out-of-cell time and other privileges (e.g. limited commissary funds) in comparison to that afforded to the general population but *do not* involve the type of social deprivation that is characteristic of solitary confinement and, as a result, does not place detainees at risk of the significant psychological and physiological deterioration that is associated with solitary confinement.

Given the high level of serious violence in the New York City jails and the high risk of harm faced daily by both those in custody and staff, the Department must be able to operate a restrictive housing program. The goal of restrictive housing programs is to provide safe forms of congregate engagement for those who have committed serious acts of violence while in custody, without placing those housed in general population settings at risk of harm. Such a program clearly must be both well-designed and properly implemented. The distinction between restrictive housing programs and solitary confinement is worth repeating. Restrictive housing enables the Department to safely manage violence-prone individuals in a congregate setting

¹⁰ There is no standard definition of solitary confinement. Appendix C includes a summary of definitions of solitary confinement from various reputable sources.

wherein they also retain some access to privileges and programming; while solitary confinement seeks to manage individuals through complete isolation and severe and onerous restrictions.

New York is at the forefront of the nation's efforts to develop restrictive housing models as alternatives to solitary confinement. Restrictive housing models in correctional settings are still relatively new as only a few jurisdictions have attempted to *wholly eliminate* solitary confinement. Restrictive housing models offer alternatives to solitary confinement appropriately balancing the need to preserve order in the general population with the well-being of violence-prone individuals. Viewed on a continuum, there is a point between solitary confinement and general population housing that can accommodate both interests.

The Monitoring Team conducted a review of restrictive housing practices from across the United States (many of these programs have been cited by the City Council and other stakeholders in various public forums as promising alternatives to reduce the reliance on solitary confinement).¹¹ This review included programs in the following jurisdictions: Alameda County, Cook County Illinois, Colorado, Mississippi, Maine, Nebraska, New York state, and Washington D.C. These programs vary considerably with regard to the qualifying infractions, methods of referral and placement in the units, exclusions, use of isolation, privileges afforded, the role of programming and frequency with which an individual is reviewed. However, one component that was consistent across all programs with which the Monitoring Team is familiar is that they **all** include limitations on out-of-cell time that are more restrictive than that afforded to the general population.¹²

The complexity of developing appropriate restrictive housing programs cannot be overstated—programs for people with known propensities for serious violence who are

¹¹ See “A Local Law to amend the administrative code of the city of New York in relation to banning solitary confinement in city jails,” Committee Report of the Governmental Affairs Division, New York City Council, September 28, 2022, at pg. 15.; and Statement of Basis and Purpose for Notice of Rulemaking Concerning Restrictive Housing in Correctional Facilities, Board of Correction for the City of New York, March 5, 2021, at pg. 24.

¹² For instance, restrictive housing models in Colorado and Cook County, Illinois have been at the forefront of eliminating solitary confinement *and* developing viable alternative housing programs. These two jurisdictions have been held up as models for reforms to DOC practice. It must be noted the restrictive housing programs in these jurisdictions only permit 4 hours out-of-cell per day, with no limit on the duration that an individual may be housed in such a program, and restraint desks are used for any congregate out-of-cell time. Further, Colorado permits out-of-cell time to be revoked for 7 days as an immediate consequence for subsequent misconduct.

concentrated in a specific location necessitate unique and essential security requirements, particularly during time spent out-of-cell in congregate activities. It is also critical to provide programming and services that focus on reducing the risk of subsequent violence, which requires collaboration among multiple divisions and agencies.

Evaluation of Provisions of City Council Bill 549-A

The members of the Monitoring Team have over 100 years of experience in correctional management and have also been at the forefront of the national effort to reduce and eliminate the use of solitary confinement in adult and juvenile systems. As such, the Monitoring Team is well positioned to evaluate the requirements of this bill and its impact on the Department's ability to address the requirements of the *Nunez* Court Orders and to advance the necessary reforms in the City's jails.

While Council Bill 549-A includes certain important requirements, such as eliminating solitary confinement, many of the provisions of Council Bill 549-A do not provide the City or Department the necessary discretion to safely respond to the immediate aftermath of a serious act of violence, create undue restrictions on management following serious acts of violence as well as on the use of restraints and escorted movement. Further, many of these requirements are not consistent with sound correctional practice or support the overall goal of protection from harm. Outlined below is a summary of the provisions in the bill that create the greatest concerns to safety and impact on the *Nunez* Court Orders. This is not intended to be an exhaustive list of the potential impact of the bill's many requirements.

- **Definition of Solitary Confinement.** The definition of solitary confinement in this bill is not aligned with any definition of solitary confinement known to the Monitoring Team. While there is no standard definition of solitary confinement, there are common parameters which include limiting out-of-cell time from 1 to 4 hours a day, for prolonged periods of time, affording little human contact and no congregate engagement, and denying access to programming. Notably, one of the most frequently cited definitions, the United Nations' "Mandela Rules," defines solitary confinement as an approach where individuals are limited to 2 hours out-of-cell per day and deems the

use of solitary confinement for more than 15 days as torture.¹³ The definition of solitary confinement in this bill appears to conflate solitary confinement with attempts to address out-of-cell time more generally. Eliminating solitary confinement must be addressed separately from any provisions regarding alternatives to such practice, such as restrictive housing models. It is important the definition of solitary confinement comport with the standard description of that practice to disentangle this practice from others, such as restrictive housing, that are critical and necessary in responding to serious acts of violence. A list of definitions of solitary confinement from a number of reputable sources is provided in Appendix C.

- **Out-of-Cell Time.** The bill requires that, in each 24-hour period, *all* incarcerated individuals must be afforded 14 hours out-of-cell with no restraints or barriers to physical contact with other persons in custody. The two minor exceptions (de-escalation confinement and emergency lock-ins) are limited to 4 hours and so they do not provide the meaningful distinction to this out-of-cell requirement that is needed. **A global approach to out-of-cell time for all individuals in custody significantly endangers both persons in custody and staff and is not consistent with sound correctional practice.** Those with a demonstrated propensity for serious violence must be supervised in a manner that is safe and effectively mitigates the risk of harm they pose to others. Some reduction in out-of-cell time to less than 14 hours per day, with appropriate safeguards, is necessary. For instance, seven hours out-of-cell time in a congregate setting may be appropriate in some cases and *does not* constitute solitary confinement under any correctional standard with which the Monitoring Team is familiar. Limitations on the 14 hours out-of-cell (such as limitations of seven to 10 hours) would, however, minimize the opportunity for violent and/or predatory individuals to visit harm on other persons in custody and staff. Without question, the Department must be permitted some degree of flexibility in order for it to be able to safely manage individuals following serious acts of violence and to protect potential victims, both other incarcerated persons and staff. In fact, the Monitoring Team

¹³ See, UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): resolution / adopted by the General Assembly, 17 December 2015, A/RES/70/175, Rules 43 and 44 available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/443/41/PDF/N1544341.pdf>*

suggested that such a violence control strategy was necessary to address the current dangerous conditions in the Monitor’s November 8, 2023 Report at pgs. 23-24.

- **Restrictive Housing Model.** While Council Bill 549-A describes its alternative housing models as “restrictive housing,” it does not appear to actually create or include any discernible restrictions. First, the bill does not permit graduated out-of-cell time for the individuals placed in restrictive housing, which eliminates an important incentive for prosocial conduct. Second, the bill sets arbitrary timeframes for discharge from restrictive housing (e.g., an individual must be removed from the unit if the individual “has not engaged in behavior that presents a specific, significant, and imminent threat” in a 15-day period and must be discharged within 30 days, with no exceptions regardless of the individual’s behavior) that do not account for whether an individual continues to pose a risk of harm to others’ safety. Third, the required procedures relating to placement on these units are protracted, including significant procedural requirements that provide myriad opportunities for undue delay by the perpetrator of violence before the Department can act to address the underlying conduct. Further, during the time in which this placement decision is being made, the bill includes an impractical standard for pre-hearing detention that could permit the perpetrator of serious violence to remain in general population while awaiting a determination for placement in restrictive housing. Finally, the programming requirements for restrictive housing are at odds with the reality of evidence-based practice. None of the evidence-based curricula with which the Monitoring Team is familiar can be completed within the proposed 15/30-day maximum length of stay in restrictive housing.¹⁴ The constraints this bill places on the design of a restrictive housing model create or exacerbate unsafe conditions because the bill does not permit adequate opportunity for separating those who engage in serious violence from potential victims, which is not consistent with sound correctional practice and support the overall goal of protection from harm.
- **De-Escalation Confinement and Emergency Lock-ins.** Council Bill 549-A limits the duration of de-escalation confinement and emergency lock-in to 4 hours in a 24-hour

¹⁴ See Monitor’s June 30, 2022 Report at pg. 25 which includes a discussion regarding the inability to address behavior change with set time periods for graduation.

period, without exception. It is unclear how this 4-hour standard was determined as the Monitoring Team is not aware of any evidence that de-escalation or the need for emergency lock-in will *always* be resolved in this set time period. While the imminent risk of harm these practices are intended to address *may be* abated in 4 hours, in the Monitoring Team's experience, that is not always the case for each individual or scenario. The goal of these management tools is to de-escalate an individual who has committed a serious act of violence, not a minor infraction, and to mitigate broader risks to other persons in custody or staff triggered by a serious incident that requires a temporary lock-in. Ensuring the individual has de-escalated or the situation that created the need for a lock-in has been addressed must be the guiding principle, not simply an arbitrary passage of time. The 4-hour maximum duration for de-escalation and emergency lock-in provides no flexibility to address a continued risk of harm. Setting an arbitrary time period within which de-escalation and emergency lock-ins must conclude is not sound correctional practice and can create or exacerbate unsafe conditions. The guiding principle for concluding the use of de-escalation and emergency lock-ins must be the extent to which the risk of harm has been abated and safe operations can resume and therefore some degree of flexibility in the duration to conclude these practices is critical and necessary.

- The bill contains specific requirements for de-escalation. Some are important, such as requiring that de-escalation does not occur in decontamination showers, but others do not appear to be relevant to the goal of de-escalating an individual following a serious event, such as requiring that the perpetrator of violence must have access to shaving equipment during the de-escalation period. De-escalation occurs when staff constructively engage with the individual to ensure the threat to others has abated. Permitting unfettered access to things such as the telephone (another requirement in the bill) could facilitate dangerous access to individuals who may perpetuate the threat to others' safety rather than reduce it.
- **Use of Restraints and Escorts.** Council Bill 549-A sets a standard for the use of *any* restraints requiring the presence of an imminent risk of harm, which is more restrictive than any standard with which the Monitoring Team has experience. While such a standard does not appear appropriate in many cases, it is further unclear how this

standard could even be operationalized. Of greatest concern is that the bill does not differentiate between the *routine* use of restraints and the use of *enhanced* restraints. The requirements for the use of routine restraints (e.g., the use of restraints for escorts such as transportation to court or movement within the facility) are burdensome, not operationally feasible, and are not aligned with sound correctional practice. Therefore, these restrictions and requirements will in all likelihood create or exacerbate the unsafe conditions. The requirements for using routine restraints also create situations in which one individual may be placed in restraints while others are not, thus placing that individual at unnecessary risk of harm and creating additional complications for staff in trying to manage such a system. Further, while additional procedures are necessary to determine the use of *enhanced* restraints, the standards promulgated in the bill and the process for the evaluating the use of enhanced restraints are burdensome, complicated, and appear to create undue delay, all of which will impede their proper use and potentially create additional risk of harm within the jails. Finally, the bill includes separate requirements for the use of restraints for adults versus individuals under the age of 22 and exceptions for that population that are not permitted for adults (e.g., regarding transportation, it is unclear why individuals under 22 may be restrained when being transported to Court, but adults cannot without meeting a high standard). There does not appear to be any basis for such a distinction, particularly since it is both routine and consistent with sound correctional practice to restrain individuals during transportation to Court and elsewhere. In summary, the bill places unnecessary restrictions on the use of routine restraints and creates overly burdensome procedural hurdles for the use of enhanced restraints, both of which are at odds with sound correctional practice and will potentially increase the risk of harm for detainees and staff.

This bill must also be evaluated through the lens of the current conditions in the City's jails. A myriad of dysfunctional practices and management problems have plagued the City's and Department's management and operation of the jails, as the Monitoring Team has thoroughly documented. The Department remains unable to consistently implement and sustain basic security practices or to manage the jails safely and effectively. Requiring the Department to

implement the provisions of Council Bill 549-A discussed above, particularly given the bill's deficiencies, will only exacerbate the current dysfunction, will impede the goals of promoting the use of sound correctional practices and enhancing jail safety, and impact the Department's ability to comply with the *Nunez* Court Orders.

In summary, Council Bill 549-A includes absolute prohibitions in areas where at least some discretion is necessary, contains requirements that are both vague and ambiguous, contains multiple internal inconsistencies, and sets standards that are not consistent with sound correctional practice. These issues directly impact various Department policies and procedures addressed by the *Nunez* Court Orders and which require the Monitor's approval. In particular, the Monitor must approve procedures regarding managing individuals following serious acts of violence,¹⁵ de-escalation protocols,¹⁶ emergency lock-in protocols,¹⁷ the use of restraints and escorts,¹⁸ and security practices.¹⁹ The Monitor will not approve policies and procedures that include the problematic requirements outlined above because they do not reflect sound correctional practice and would further exacerbate the extant unsafe conditions. Consequently, the Monitoring Team must reiterate its concern that the bill's requirements, as discussed herein, will create situations that will impair, if not prevent, the Department from being able to comply with the *Nunez* Court Orders. An assessment of the impact on the *Nunez* Court Orders is included in Appendix B.

Conclusion

The Monitoring Team fully supports the effort to eliminate the practice of solitary confinement. Banning the practice of solitary confinement is an important expression of the value the City places on all of its residents. The goal is laudable and is one we support. Accordingly, the Monitoring Team recommends that the Department immediately ensure that solitary confinement²⁰ is eliminated in Department policy and practice. This includes

¹⁵ See Second Remedial Order ¶ 1(i)(e), Action Plan, § D, ¶ 2(h).

¹⁶ See First Remedial Order, § A, ¶ 3 and Action Plan, § D, ¶ 2(b).

¹⁷ See August 10, 2023 Order, § I, ¶ 4.

¹⁸ See Consent Judgment, § IV, ¶ 3(p), Action Plan, § D, ¶ 2(f), and August 10, 2023 Order, § I, ¶ 3.

¹⁹ See Action Plan § D, ¶ 3 in which the Monitor may direct the Department to refine certain security initiatives to ensure compliance with security requirements of the Action Plan.

²⁰ As discussed above, and demonstrated in Appendix C, no standard definition of solitary confinement exists. For purposes of this recommendation, the Monitoring Team recommends the most inclusive

eliminating the use of cells in NIC with extended alcoves, and any other cells or housing units that contain similar physical properties, that do not permit adequate congregate engagement and access to programming. Further, the Department must ensure that decontamination showers may not be locked or utilized for de-escalation or any other form of confinement.

The Monitoring Team strongly believes, based on its many years of experience and expertise, that the various operational requirements and constraints that accompany the elimination of solitary confinement in Council Bill 549-A will likely exacerbate the already dangerous conditions in the jails, intensify the risk of harm to both persons in custody and Department staff, and would seriously impede the City's and Department's ability to achieve compliance with the requirements of the *Nunez* Court Orders. As such, the Monitoring Team recommends significant revisions to Council Bill 549-A are necessary to address the issues outlined in this document and to support the overall goal of managing a safe and humane jail system and advancing the reforms of the *Nunez* Court Orders.

definition of solitary confinement is adopted which would prohibit the confinement of individuals for 20 hours or more a day.