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Via email

April 21, 2021

Jennifer Jones Austin, Chair
Margaret Egan, Executive Director
Members of the Board of Correction
New York City Board of Correction
1 Centre Street, Rm. 2213
New York, NY 10007

Re: Comments on the Proposed Rules Governing Restrictive Housing in New York City Jails

Dear Chair Jones Austin, Members of the Board and Ms. Egan,

The Legal Aid Society submits these public comments on the Board of Correction's Proposed Rules Concerning Restrictive Housing ("Proposed Rules").[1]

As we observed when the Board promulgated standards for Enhanced Supervision Housing ("ESH") in 2014, "DOC has a long-standing, fundamentally punitive attitude towards incarcerated individuals and a deep reluctance to address their conduct with anything but punishment. This attitude is well known to the Board and to anyone familiar with the agency…"[2] But unfortunately, neither the promulgation of the ESH standards and limitations on punitive segregation ("PSEG"), nor years of reports from a federal monitor critiquing the deep seated hostility the New York City Department of Correction ("Department" or "DOC") directs at the people it incarcerates, have curbed this reflexively punitive approach. Instead, it merely replaced the monolith of punitive segregation with a plethora of smaller measures imposed outside the realm of the due process, however flawed, that had governed punitive segregation.

We are grateful that the Board has sought to end the practice called "punitive segregation" and attempts now to inject stability, reliability and basic principles of justice into the disciplinary process through Proposed Rules that govern restrictive housing comprehensively. The fundamental approach and scope—defining restrictive housing functionally and requiring one system of units rather than the piecemeal, unregulated isolation that currently exists—is wise and practical. The Core Goals articulate the correct vision for disciplinary responses in New York City jails: dignity and respect for

[1] Restrictive Housing Rulemaking 2021, New York City Board of Correction. Available at https://www1.nyc.gov/site/boc/jail-regulations/restrictive-housing-rulemaking-2021.page (References hereinafter to "Statement of Basis and Purpose" and "Proposed" rules refer to these materials unless otherwise specified).
[2] Comments of the Legal Aid Society, "Rulemaking 2015 (Punitive Segregation and ESH)," https://www1.nyc.gov/assets/boc/downloads/pdf/Legal%20Aid%20Society.pdf.

all people in custody and staff, prohibitions on restrictions that dehumanize or demean, requiring the least restrictive means to accomplish safety, due process, procedural justice, and rehabilitation and community reintegration.[3]

However, the Proposed Rules as currently drafted frustrate their stated purpose in several respects and undercut the Board's efforts to curb harmful isolation and restrictions. These deficiencies must be addressed in the final Rule if it is to close gaps, secure basic human rights in new circumstances, and give substantive guidance to present and future Commissioners about the minimum standards that must control all restrictive housing.

The Board is right to reject punitive segregation as a tool for discipline—history shows us that the Department of Correction needs new approaches to the violence in the jails because the agency's reliance on current tools of isolation, force, and deprivation is demonstrably ineffective to create safety. The court-appointed monitor in *Nuñez* has documented time and again efforts to "dismantle the decades-long culture of violence in these Facilities," and reports that despite those efforts, "the [Use of Force] rate continued to climb and was the highest of any Monitoring Period to date" in the Tenth Monitoring Period[4]—just as it was in the years before.[5] In his most recent report, the Monitor describes the "prevalence of unnecessary and excessive force," "Staff's aggressive demeanor and lack of skills in de-escalation[,] prevalent failure to implement basic safety protocols," an "overreliance on Probe Teams and alarms," and "uniform leadership's inability to identify and address Staff misconduct."[6]

Punitive segregation and other tools of force and deprivation repeatedly fail to curb violence, and their use can no longer be justified. Prevailing wisdom, supported by the Monitor's consistent findings, is that prolonged isolation is not only ineffective, it is inhumane and deeply destructive to human beings. It has no place in New York City or any location. And yet, instead of eliminating the "harmful effects of punitive segregation," the Board's proposed RMAS units model themselves after some of the most protracted isolation sinkholes in the city jail (such as MDC 9 South and NIC) and further, codify enduring procedural and operational hazards that have proven unsuccessful and cruel in ESH and the Secure Unit.

We address many of our comments to these issues that, if unresolved, run the risk of undermining the hard work up to this point and more critically, will subject people to fundamentally inhumane treatment by the City. In each section, we make recommendations for changes to specific rules or sections that would redress these concerns.

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[3] Proposed § 6-01.
[4] Tenth Report of the *Nunez* Independent Monitor ("Tenth Report") in *Nunez v. City of New York et. al.*, 11-cv-5845 (LTS) (SDNY), filed October 23, 2020, pp. 2-3, 16.
[5] Ninth Report of the *Nunez* Independent Monitor ("Ninth Report") in *Nunez v. City of New York et. al.*, 11-cv-5845 (LTS) (SDNY), filed May 29, 2020, p. 13; Eighth Report of the *Nunez* Independent Monitor ("Eighth Report") in *Nunez v. City of New York et. al.*, 11-cv-5845 (LTS) (SDNY), filed October 28, 2019, pp. 19-20; Seventh Report of the *Nunez* Independent Monitor ("Seventh Report") in *Nunez v. City of New York et. al.*, 11-cv-5845 (LTS) (SDNY), filed April 18, 2019, p. 13.
[6] Tenth Report, pp. 3, 22.

The Restrictive Housing Models That RMAS Replicates Cause Harm and Suffering

Isolation and restricted housing have taken many forms in the New York City jails, with many names and locations, such as ESH, Secure, and the unregulated units in MDC 9 South and NIC. It is clear from the Proposed Rules that the RMAS will unfortunately codify some of these models and physical structures, despite their significant flaws. In the past month, our office spoke with several people in these restrictive housing units. Their experiences with the current restrictive housing landscape, and the harms that will translate to RMAS, are important for the Board to consider as it deliberates changes to the Proposed Rules.

As a threshold matter, it is important for the Board to note that the Department failed to produce *18 out of the 25 people* who were scheduled for attorney videoconferences with our office, requiring us to repeatedly reschedule those appointments. Failures to produce people housed in ESH were particularly common.[7] Many of the people that we spoke with reported that the Department also regularly failed to produce them for scheduled video visits with their families and loved ones.

These are some of the experiences of people in restrictive housing units:

- A person housed at NIC reported that the only time he was allowed outside of his cell was for one hour in what he described as an "outdoor kennel." "There is barely enough space to work out, I feel like I'm being treated like a dog," he stated. He also spoke about the mold in the bathroom and how the only so-called "programming" available are video games 1-2 times a times a week, and TV.

- This same individual was previously housed at West Facility – in *de facto* isolation, or as he aptly called it, "an underground bing"—for 17 months. "I went crazy being housed there," he said.

- A young adult housed at the Secure Unit at GRVC said that he had not been permitted to leave his cell for over a week. He had not had any access to showers during that time. He says that when he asks officers to help him get mental health attention, they walk right by him. The message he asked us to give the Board during this rulemaking process is: "Don't ignore us."

- Another young adult (21 y.o.) housed at the Secure Unit at GRVC reported that he is hungry, and that he is not receiving enough food. He says he longs to breathe fresh air. He has not been outside in months. He keeps asking for socks and law library access, but no one listens. He is not aware of any periodic reviews of his placement in Secure and does not know how he can leave.

[7] We were told by Department staff that individuals housed in ESH needed to be brought to the video conference booth by a captain, and that no captain was available.

- A 23-year-old locked up in punitive segregation at GRVC reported, "I'm isolated in here. I can't breathe in these cells. It's scaring me. I need to be able to walk around for my mental health, but I can't. I'm going crazy in here. We can't do nothing, we're just sitting here all day in our cells. I could die in here." The only access to recreation he has is one hour in another cage. "We're rotting in our cells," he said.

- A 24-year-old housed in punitive segregation at GRVC disclosed: "My thoughts are racing a million miles an hour." He was not aware of any hearing before he was placed in punitive segregation. He said that being housed at Rikers "has been the worst thing that has happened in my life. I want to move around and see what that feels like."

- A 24-year-old housed in ESH, Level II reported that he has been in Level II since last February. He is struggling to move to the next level. When he is outside his cell, he is placed in shackles and mittens. When ESH was moved to GRVC, "that's when everything changed," he said. "They just made it a more dangerous environment. Lots of stabbings and assaults. I have been forced to adapt to this. They try to provoke people to be violent. I'm in a jungle. Lions can pop out; bears can come out. I'm traumatized." He reports that there was not any out-of-cell time provided for several weeks after ESH was moved to GRVC.

- "The whole ESH program is a joke," reported another young person currently housed there. He has yet to receive any paperwork from his ESH placement hearing and he does not know what he needs to do to level up. He explained that when he is out of his cell, he is in shackles. He estimates that for over 3 weeks, he has only been released from his cell 6 times, and never for the required 7 hours.

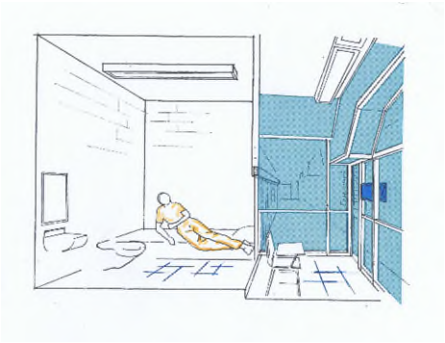
- A 19-year-old in the Secure Unit reported how he was left in the shower for 8 hours alone, freezing, with wet clothes. He said he has been in Secure for months. He told us that he is afraid and asked us for help getting mental health attention. "It's like a war zone in here. I have seen so much. I can't get it out of my head…I can't sleep at night. I'm going crazy in this cell. Please pray for me. Please!"

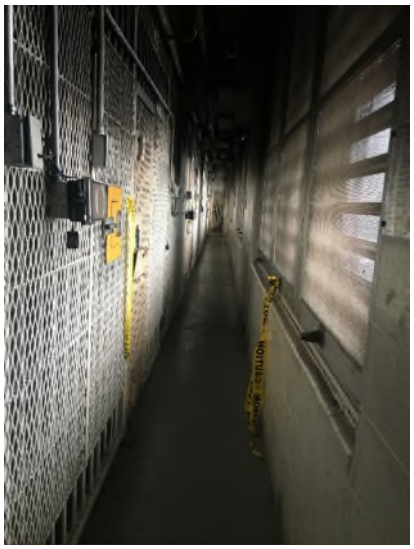
The experiences of the people—who will be housed in the system these Proposed Rules create—must inform amendments to the rules. When people are treated in inhumane ways, trauma and despair follow. These reports make clear that the harms of isolation, and the operational failures of restrictive units like ESH and Secure, will translate to RMAS absent strong action from the Board.

<u>The Proposed Rules Do Not Mandate Humane Physical Living Conditions</u>

The Proposed Rules provide virtually no minimum standards that ensure that the *physical* structure of restrictive housing units is humane and can be safely inhabited for the durations of anticipated confinement. The only limit on the design of these spaces is the exceedingly vague description of Levels 1 and 2 offered in proposed § 6-17(b-c), and the requirement of air-conditioning. There are no requirements for windows, access to daylight, spaces that allow for meaningful human

engagement and programming, or access to phones. Instead, the rules merely refer to time "out-of-cell" or in "dayrooms," without ever defining those terms. Apparently, this is how the Department defines those terms:[8]





As we understand it, the first photo depicts the NIC cells that the Department will use for RMAS Level 1 and are currently used to hold people transferred from MDC 9 South. This model speaks for itself—these units are unacceptable and certainly cannot be celebrated as an "end of solitary confinement." Rehabilitation is impossible in this setting. In addition, this model provides for nothing that can be called "out-of-cell" time. There is merely a smaller cage outside a larger cage, and a very narrow corridor, depicted in the second photograph. Calling time spent in any of these spaces "out-of-cell time" is offensive, Orwellian and wrong. "Out-of-cell" time must mean time out of these cages—and though New York City should do better than merely complying with the requirement in the HALT Solitary Confinement Act ("HALT") that people in segregated confinement must have four hours out of their cells,[9] these NIC units run afoul of the statute by providing none.

Moreover, it appears that some of the proposed designs involve extensive plexiglass walls separating cages from the corridor. The overuse of plexiglass raises ventilation and fire prevention measures that must be addressed. Moreover, virtually no meaningful programming can occur in this setting.

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[8] The photographs were obtained by the New York Campaign for Alternatives to Isolated Confinement via a request pursuant to the Freedom of Information Law, and the "architectural rendering" was provided by the Department of Correction to the Board of Correction. #HALTsolitary (@NYCAIC), Twitter (Apr. 14, 2021 at 5:22 p.m.). Available at https://twitter.com/NYCAIC/status/1382444060699455490; DOC RMAS Level 1 Rendering (April 14, 2021), New York City Board of Correction. Available at https://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2021-Restrictive-Housing/(2021-4-13)%20Rendering-Model-142.pdf.

[9] HALT Solitary Confinement Act, S2836, New York State 2021-2022 Legislative Session (2021). Available at https://www.nysenate.gov/legislation/bills/2021/s2836.

These inhumane and uninhabitable conditions are not unique to NIC, or the unit depicted above. Experience has shown that time after time, the Department has, in the name of security, created different iterations of these inhumane isolation spaces: for example, “Close Custody,” the RNDC punitive segregation unit, GRVC Building 2, or, more recently, MDC 9 South and West Facility. Nothing in the Proposed Rules changes this, and nothing in DOC practice or history suggests that, absent explicit regulations, DOC would choose a different model going forward. The fact that the rendering above is the model for RMAS Level 1 makes that abundantly clear.

Without explicitly defining the physical character of the RMAS Level 1 and 2 units, the Board cannot ensure that the new RMAS units will not perpetuate the serious physical and psychological harm it seeks to eradicate by eliminating Punitive Segregation.

> Recommendation: The Board should require the Department to provide architectural drawings or pictures of the locations and physical structures of all levels of RMAS immediately, and those plans should be subject to the Board’s approval before promulgation of new rules.
>
> The Board should provide specific standards in this rule for what must be included in those plans to set a floor for physical conditions, including requirements for natural light, adequate space for movement during lock-out, and meaningful programming, phone access, and all other Minimum Standards.

Moreover, the Rules provide very few standards for the conditions, physical structure, or service or privilege restrictions for RMAS Level 3 units. The Statement of Basis and Purpose references current units in the jails that will serve as the physical analogs for Levels 1 and 2 units, but does not provide any comparable information about the Department’s plans for Level 3 units.[10] The Proposed Rules themselves offer little additional guidance, indicating only that people confined in Level 3 units will receive 14 hours out of cell,[11] "shall have the same opportunity to engage with other people confined in their unit as in general population,"[12] and cannot be placed directly into Level 3.[13] However, as recent experience has shown, the Department deems some highly restrictive areas, such as MDC 9 South, to be “General Population” areas. This lack of minimum requirements for Level 3 conditions constitutes a lack of protections for the people who will be housed there.

The Proposed Rules also fail to indicate where the Department intends to house people confined in Rose M. Singer Center (“RMSC”) who are placed in RMAS units. It is unclear whether the Department intends to modify the Restrictive Housing Unit to serve those purposes—the unit in which Layleen Polanco died. The Board and the public must have more clarity about the realities of RMAS units for women and other people housed at RMSC.

[10] Statement of Basis and Purpose, p. 31.
[11] Proposed § 6-16(c).
[12] Proposed § 6-17(e).
[13] Proposed § 6-10(c).

Recommendation: The Proposed Rules should make clear what physical conditions, restrictions on services or privileges, and other operational characteristics are permissible in RMAS Level 3 units.

The Board should provide to the public information about the location of any RMAS facilities for women in the Rose M. Singer Center.

Chapter 1 Amendments

We support the Board's commitment to employing person-first and gender-inclusive language in the Minimum Standards ("Standards") and other Board materials. We appreciate that the Board is taking this rulemaking opportunity to update Chapter 1 of the Standards.

Revised § 1-02: Commingling.

The Legal Aid Society has long been concerned with the ongoing movement away from the commitments of the Young Adult Plan. The repeated approval of variances has been a large part of this, allowing the Department to avoid complying with the Standards that mandate the separation of young adults from adults. We therefore support the addition of provision § 1-02(b)(4) emphasizing that young adults should be housed separate and apart from adults and clarifying the limited circumstances where they may be together. The data reporting requirements will, we hope, encourage the Department to comply with the new standard, instead of returning to its prior practice of seeking variances and when those are denied, declaring non-existent emergencies to cover for the failure of will to follow the rules. We also hope that should the Department resort to its prior practice of seeking variances and declaring emergencies for multiple days in a row, the Board will issue a timely notice of violation.

Recommendations: Reporting requirements should identify, for any young adults in commingled housing, which of the permitted categories of commingled housing they are in: specialized medical housing, specialized medical housing, or housing for pregnant persons or the nursery. If the commingled housing does not fall into one of these categories, the Department must provide adequate justification for this placement and detail efforts to move the Young Adult to housing that complies with § 1-02(b)(4).

Revised § 1-06(h): Recreation.

The Proposed Rules shift the criteria for denying a person access to recreation from "only upon conviction of an infraction for misconduct on the way to, from, or during recreation" to "only due to imminent safety and security risks, which must be recorded and transmitted to the Board within one business day of the restriction." The Statement of Basis and Purpose asserts that this revision is due to SCOC guidance that the Department may not restrict recreation as part of a disciplinary sanction—critical, as access to recreation is "essential to good health"[14] and deeply important to

[14] Minimum Standard § 1-06(a).

people in custody, as noted above. We are also glad to see that the Board will be notified of such restrictions. These criteria, however, should be read narrowly and the Proposed Rule should incorporate safeguards against potential for abuse.

> Recommendation: Denying a person access to recreation should be under only highly exceptional circumstances, requiring levels of approval high within the Department. The Proposed Rule should require the Facility Warden to approve one day of such restriction, and the Chief of Department to approve any subsequent days.

Definitions and Elimination of Punitive Segregation

Proposed § 6-03(a): Definitions of Restrictive Housing.

We strongly support the scope of the definition of restrictive housing in the Proposed Rules. Proposed § 6-03(a) defines "restrictive housing" as "units where people in custody are housed separately from people housed in the general population *and*" other criteria (emphasis supplied). We support the practical criteria that follows the introductory clause, which describes specific conditions within the units rather than their purported functions.

We remain concerned, however, about the introductory clause itself, which defines restrictive housing as units that are "separate" from "general population." When read in conjunction with the definition of "General Population"[15]—describing a GP unit as a unit that is not a restrictive housing unit—the results are completely circular and self-referential. More critically, they create a loophole. The Department regularly describes highly restrictive, isolating housing areas as "General Population" units, even when they clearly are not. Some of the most troubling examples of prolonged isolation are so labeled, such as MDC 9 South, West Facility, and certain cell blocks in NIC. The Rules must make clear that labeling a unit "general population" does not take it out of the scope of these rules. As written, the definition of restrictive housing would fail to include Solo Housing or non-medical uses of West Facility—currently considered by DOC to be general population units—as subject to restrictive housing rules.

> Recommendation: Modify proposed § 6-03(a) to read "units where people are housed separately from people housed in the general population, *when*," followed immediately by the description of conditions or operational realities listed.

Proposed § 6-07: Prohibition on the Use of Punitive Segregation.

We strongly support the end of punitive segregation. We commend the Board's articulated commitment to end the "serious health risks…antithetical to the goals of social integration and positive behavioral change." Far too many New Yorkers have suffered in "the bing," enduring lasting physical and mental health harms and even losing their lives. We hope the Board considers

[15] Proposed § 6-03(b)(2).

the other changes we propose to the RMAS system to ensure that no other doors to harmful isolation open as New York City closes the door on this one.

We likewise strongly support the explicit prohibition in proposed § 6-07(c) on forms of restrictive housing not governed by these Proposed Rules. We hope this signifies an end to the endless cycle of off-label, unregulated restrictive housing units in New York City jails.

Pre-Hearing Detention, De-Escalation Housing, and Emergency Lock-Ins

Proposed § 6-04: Pre-Hearing Detention

Pre-Hearing Detention ("PHD") is in RMAS Level 1, which is an isolating and punitive setting. The placement criteria must be sufficiently narrow to prevent overuse. Given the severity of the deprivations of RMAS Level 1, an infraction hearing must occur within a week, not a week and a half. Moreover, the only justification for such placement should be safety—not the potential for witness-tampering, which the Department should address through transfer, protective custody, or other means not involving segregated confinement.

> Recommendation: Proposed § 6-04(a) should only allow PHD for serious safety concerns and eliminate the § 6-04(a)(2)(ii) language about witness tampering concerns, which can be addressed through means other than punitive isolation. Proposed § 6-04(b) and (c) should be amended to "7 days" rather than "7 business days."

As written, proposed § 6-04(d) also permits the Department to hold someone in PHD even if the security or safety risk that was the basis for their placement in PHD no longer exists (it reads "may be released").

> Recommendation: Amend proposed § 6-04(d) to read "must be released."

Proposed § 6-05: Confinement for De-Escalation Purposes

Despite its benign title, "de-escalation housing" is a practice ripe for abuse and reckless disregard for the safety of people in custody. The proposed rules do not adequately address the potential for harm inherent in isolating a person who is in crisis for 6 hours. Not only is the ostensible "maximum" placement time of 6 hours already a long time for someone in crisis, but it is not even a maximum at all. Instead, the rules permit placement for an additional six hours, without a firm prohibition on extending further reauthorizations indefinitely or making clear that the Department must *document*—rather than "consider"—the reasons why continued placement was necessary.[16]

CHS has no authority under the proposed rule to exclude people for medical or mental health contraindications, and the visual and aural rounding by DOC staff every 15 minutes is insufficient to ameliorate the risks. By definition, "de-escalation" housing is used for individuals experiencing

[16] Proposed § 6-05(g)(2).

heightened risk or trauma. The Board need look no further than the appalling tragedy involving 18-year-old Legal Aid Society client Nicholas Feliciano to recognize the harms that can befall an individual in a very short timeframe.[17] Mr. Feliciano had been in an intake cell for approximately 6 hours, and alone for one hour before he nearly died—and officers reportedly stood by next to a monitor trained on his cell for seven minutes as he struggled to save himself.

> Recommendations: Specify the actors in the requirement in proposed § 6-05(g)(2) that reauthorization must have "written approval up the Department's security chain of command" to ensure there is no confusion about who is accountable for the decision to let people languish in de-escalation, and make clear that the Department must *document* the reasons for continued placement and attempts to transfer the person out. Add language plainly stating the maximum number of hours someone may be kept in de-escalation housing. Amend proposed § 6-05(c) to require one-to-one supervision while someone remains in this unit, and require that CHS round daily and be given the authority to exclude people from the setting. Amend proposed § 6-05(g)(4) to require continual notification to the Board, every 3-hour-reauthorization that a person remains so housed.

Proposed § 6-06: Emergency Lock-Ins.

The term "emergency lock-in" is not defined in this section. It is unclear from the Proposed Rule whether these lock-ins are intended to respond to housing area-wide lock-ins in response to alarms, as is implied in the Statement of Basis and Purpose,[18] or whether the rules would also govern individual lock-ins like the notorious and harmful informal practice known as "deadlock."

> Recommendation: Proposed § 6-03 or § 6-06 should define the term "emergency lock-in" to make clear the scope of § 6-06. If the Proposed Rule does not address the abusive deadlock practice, it should make clear that the practice is prohibited—perhaps in proposed § 6-07(c), in which forms of restrictive housing other than RMAS units are explicitly prohibited.

This section requires CHS staff to around after 6 hours of emergency lock-in,[19] but include no requirements for DOC staff to round in the interim or thereafter. This lack of required supervision is dangerous for people with medical or mental health vulnerabilities.

> Recommendation: Proposed § 6-06(g) should mirror the rounding requirement in proposed § 6-17(a), including language requiring DOC staff to conduct visual observations every 15 minutes of all persons confined in emergency lock-in, looking for and confirming signs of life.

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[17] Ransom, Jan. He Waited 6 Hours for Help at Rikers. Then He Tried to Hang Himself. The New York Times (December 4, 2019). Available at https://www.nytimes.com/2019/12/04/nyregion/nicholas-feliciano-rikers-islandsuicide.html.
[18] Statement of Basis and Purpose, p. 20.
[19] Proposed § 6-06(g).

Exclusions and Medical/Mental Health Care

The Mayor announced after the death of Layleen Polanco that people with certain serious medical conditions would be excluded from placement in isolated confinement. Such people, City Hall and the Board acknowledged, are at particular risk of serious illness and death in circumstances of ongoing isolation—a risk demonstrated by tragedy after tragedy, like the loss of Ms. Polanco. The Proposed Rules move starkly backward from that stated goal of reform, justifying this regression by asserting that "[RMAS] does not rely on the extended periods of isolation that characterize DOC's existing punitive segregation model," and theorizing that "the health risks to people with serious medical conditions stand to be similar whether they are in RMAS or in any other housing area in the jail system."[20]

These propositions are not only flatly incorrect, they have the potential for truly dangerous consequences. It is disrespectful to the memory of Layleen Polanco that the Board is seeking to replicate the very conditions that lead to her tragic death. As we describe, Levels 1 and 2 are housing assignments with severe physical structures and operational restrictions. People housed there will have very limited access to other people in custody, who often raise initial alarms when other incarcerated people in their unit are experiencing emergencies. Though DOC staff are required to conduct rounding, operational failures regularly cause gaps in wellness checks. Individuals in these units also report to our office that their medical and mental health care is regularly disrupted—of particular concern for incarcerated people receiving prenatal care, or with serious medical conditions.

Proposed § 6-09: Exclusions.

The Proposed Rule's list of exclusions fails to include people with serious medical conditions and physical disabilities. This is the opposite of the path City Hall took following the death of Ms. Polanco, where it stated such people would be excluded because of the risk isolated units pose to health. People with serious physical disabilities are also vulnerable—which is why they were excluded from punitive segregation, and should likewise be excluded from RMAS, particularly Level 1. The safeguards in the rules, like rounding, do not sufficiently ameliorate the risks to those populations given the nature of the setting in Levels 1 and 2.

It is positive that the proposed rule excludes people caring for children in the DOC nursery, but this rule should go beyond excluding only people within 8 weeks of a pregnancy outcome, especially given the deleterious impact of isolation on health and the ongoing reports of difficulty accessing regular medical care in restrictive housing units.

> Recommendation: People who are pregnant, have serious physical disabilities, or have serious medical conditions, including those described by the Mayor, should be excluded from RMAS—particularly Level 1.

[20] Statement of Basis and Purpose, pp. 34-35.

We are glad to see that the Proposed Rule grants CHA the authority to determine whether a person should be removed from an RMAS unit due to meeting exclusion criteria, but this section should include requirements for how quickly the Department must remove someone after that determination is made.

> Recommendation: Proposed § 6-09(c) should make clear that CHA should immediately notify the Department of a determination that a person is excluded or medically contraindicated from being placed in RMAS housing. Proposed § 6-09(c) should then require the Department to remove a person whom CHA has determined should be excluded or contraindicated from RMAS housing immediately, and no later than 6 hours from the time CHA notified the Department of such determination.

Proposed § 6-21: Updated CHS Exclusion Process and Rounding.

The updated process articulated in the Statement of Basis and Purpose to identify medical exclusions for restrictive housing is well intentioned, but raises serious problems.[21] Under previous practice, as articulated in the Statement of Basis and Purpose for the 2019 restrictive housing rulemaking process, DOC forwarded CHS a form seeking its input only after a person had been sentenced to punitive segregation, and only if the person had already been diagnosed with a mental illness or entered DOC custody less than five days before the infraction.[22] Though this system itself had flaws—a person could conceivably have an acute mental health need like suicidality, for example, without having previously received an "M" designation denoting mental illness—it at the very least required CHS involvement at the time a person was entering isolation. Under the updated process, set forth in proposed § 6-21(a), CHS will create a list of "excludable" people based on an evaluation of that person at admission to DOC custody and will assess people at clinical visits thereafter, but will not conduct a medical or mental health analysis contemporaneous with the restriction. Given the deleterious effects that incarceration has on both physical and mental health, there is a clear danger that persons who might not have been "excludable" at intake could have deteriorated to a point of serious risk by the time they enter RMAS.

> Recommendation: The Board must require the CHA to evaluate people in custody for physical, mental health, and disability exclusions at the time they are to enter the RMAS.

At least in part because of the fact that many individuals placed in the RMAS may be at particular risk for mental health decompensation in a restricted setting, but also because of the effect RMAS have on *all* persons, regardless of pre-existing susceptibility, we strongly support the requirement in proposed § 6-21(b) that CHA conduct daily medical and mental health rounds in the RMAS units. As is clear from the quarterly CHS Access Reports, people in custody are regularly not produced or must be rescheduled for their clinical appointments. In the December report for GRVC, for

[21] Statement of Basis and Purpose, p. 34.
[22] Statement of Basis and Purpose, *Proposed Rules Concerning Restrictive Housing in Correctional Facilities* (2019), New York City Board of Correction. Available at https://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2017-Restrictive-Housing/2019.10.29%20-%20Rule%20and%20Certifications.pdf (p.19).

example—where RMAS Level 2 units are expected to be—only 38% of scheduled medical visits were completed, with DOC failing to produce people in custody for 32% of scheduled medical appointments.[23] The need for rounding is even more acute for people in custody who are deteriorating and not able to make sick call requests for themselves—CHA must have a daily presence in the unit to identify people in crisis and intervene when necessary.

The Standards Provide No Reasonable Limitation on Who May Be Subjected to the Harsh Deprivations of RMAS Levels 1 and 2

The Proposed Rules do not reasonably cabin DOC's discretion in whom to subject to the serious deprivations of RMAS Levels 1 and 2. As a result, these units will become the default housing choice for too many people in custody.

Proposed § 6-10(e): Placement Criteria, Penalty Grid

This provision directs the Department to produce a written penalty grid that would render a person eligible for placement in RMAS Levels 1 and 2, as well as the sentence ranges for each offense. However, this contains no substantive guidance on the conduct that could result in such placement. When one purpose of this rulemaking is to attempt to address a DOC culture that resorts too often to isolation, this is an area where clarity and specificity is sorely needed.

RMAS Level 1, if it is to exist, should be used only as a last resort and in extreme circumstances. Using DOC's existing categorizations of conduct as Grade I or Grade II, or violent or non-violent, offenses, does not adequately delineate conduct that meets these high standards, because those categories are far too broad. Grade I "violent" offenses like attempted assault that do *not* result in injury[24] or spitting should not warrant this severe deprivation. Too often, those actions are the result of *staff provocation and misconduct*—ranging from staff initiation of use of force, which then results in a "cover charge" claiming the incarcerated person attempted to assault staff, to staff verbal abuse and hostility. This is not hypothetical: successive reports of the *Nuñez* federal monitor have increasingly criticized this Department for initiating and escalating conflict. As the Tenth Monitor's Report describes:

> "Several Staff practices have repeatedly been found to increase the likelihood that force will be used. For example, a pattern of unprofessional conduct and lack of efforts to de-escalate situations including at times hyper-confrontational Staff behaviors, a lack of adequate and quality supervision, an overreliance on alarms and the Probe Team, the misuse of OC spray, and the use of painful escort techniques have all plagued the agency's use of force practices since the Effective Date."[25]

[23] CHS Access Report: October - December 2020, Correctional Health Services (2021). Available at https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/chs-access-report-cy20q4.pdf (at p.34).
[24] 39 RCNY § 1-03(c)(2)(101.10).
[25] Tenth Report, p. 25.

The Monitor describes that problematic Staff behavior in greater detail elsewhere in the Report:

> "Often, the Staff's aggressive demeanor and lack of skills in de-escalation contributes to the event [resulting in a use of force], as does the prevalent failure to implement basic safety protocols (e.g., leaving doors unsecured, being off post). The Monitoring Team also finds that use of force incidents are frequently poorly managed, which escalates the incident and the risk of injury…Staff's tendency to use unnecessarily painful escort techniques (e.g., bending wrists or twisting arms) on an otherwise compliant person, which leads to resistance."[26]

To allow the serious penalty of RMAS Level 1 for conduct that does not result in injury perpetuates the Department's fiction that its degrading and abusive treatment of individuals can be separated from the response, and is a disproportionate response to non-injurious conduct.

RMAS Level 2 is likewise a serious consequence for people. There are a number of offenses that the Department categorizes as Grade I nonviolent or Grade II that should not warrant such restrictions: possession of contraband like tobacco or controlled substances,[27] "delaying the count,"[28] pulling or twisting away from a staff member,[29] disobeying "rules and orders dealing with seating, lock-in and lock-out." Responding to those offenses with restrictions like the ones in RMAS Level 2 is a perpetuation of a culture of overreliance on isolation and deprivation.

> Recommendation: The penalty grid should be included in the Proposed Rules. The Board must provide specific limits on what the Department can and cannot use as a justification to isolate and separate—what offenses warrant placement in RMAS Levels 1 and 2. Those limits should take into account that Levels 1 and 2 are serious consequences for people in custody, and strive to extend the reach of alternative incentive and violence disruption models like the ones contemplated by proposed § 6-23(b)(1) to address the vast majority of misconduct. Level 1 placement is a severe consequence, and should only occur after severe misconduct, for example: assault which results in serious injury to another person (when the alleged perpetrator is not in the middle of a psychiatric crisis). Level 2 placement should occur for misconduct that while less severe is still significant, for example: assaults that result in non-serious injuries, or possession of weapons. The Department should not be permitted to assess isolation consequences for offenses that are not violent. The Board must, through this rulemaking, require the Department to develop other responses for that conduct.

The RMAS Model Replicates Harms of Restrictive Housing Models like ESH

The Proposed Rules draw heavily from "levels" models in current restrictive housing units like ESH—models that the Department has demonstrably failed to operate in a humane or just manner.

[26] Tenth Report, p. 22.
[27] 39 RCNY § 1-03(c)(4)(103.05; 103.11).
[28] 39 RCNY § 1-03(c)(5)(104.11).
[29] 39 RCNY § 1-03(c)(10)(109.10).

ESH and the units like them have become a warehouse for people the Department deems challenging. Our clients languish there, not knowing how or when they will level up to less restrictive settings. They become frustrated, desperate, and anxious.

Board reporting from 2017 assessments of ESH and Young Adult ESH ("YA ESH") noted many troubling findings:

- **Lack of clarity to people in custody**. People in custody were confused about why they had been placed in ESH and what they must do to leave.[30]
- **Serious disruptions to medical and mental health access**. The Board found that in YA ESH, "the Department did not produce 30% (n=14) of scheduled health encounters, and 23% (n=31) of scheduled mental health encounters."[31] The problem was prevalent for adults in ESH, too: "nearly a quarter (24%, n=239) of all health encounters and 28% (n=1,016) of all mental health encounters for ESH patients were not seen due to either DOC non-production or CHS cancellations."[32]
- **Unacceptably long lengths of stay in the units**. For adults, average length of stay was 4.8 months, which one person having been in ESH for 636 days.[33] We have heard numerous reports from people housed in ESH who do not know what actions they need to take to graduate to the next level.
- **Lack of progression between levels and to general population**. Only 13% of Young Adults and 14% of adults with an ESH exit date were transferred to general population—the rest were transferred to another restrictive unit, sent upstate, or discharged from DOC custody.[34]
- **Failure to provide out-of-cell time**. Due to facility-wide and ESH area lockdowns, individuals in YA ESH had 39% fewer potential hours of out-of-cell time than the minimum hours required under ESH Minimum Standards.[35] Adults had 12% fewer hours than the hours to which the Standards entitle them.[36]
- **Failures to provide recreation**. "Recreation is consistently understaffed, causing the recreation staff to have difficulty providing timely-daily recreation to each house…. [p]articipation in daily recreation is very low, with an average of only 20% of young adults participating."[37]

Board staff also found in 2017 that in ESH—in which programming was required to advance between levels, just like RMAS requirements in the Proposed Rule—"Board staff observations and DOC staff confirm[ed] there [were] frequent disruptions to programming while it [wa]s in

[30] Assessment of ESH, p. vii.
[31] Assessment of Young Adult ESH, p. x.
[32] Assessment of ESH, p. viii.
[33] Assessment of ESH, p. vii.
[34] Assessment of Young Adult ESH, p. viii; Assessment of ESH, p. vii.
[35] Assessment of Young Adult ESH, p. x.
[36] Assessment of ESH, p. ix.
[37] Assessment of Young Adult ESH, p. x.

session."[38] We address programming and related sections of the Proposed Rule (§ 6-11 and § 6-20) more broadly below, but note it here because proposed § 6-13 provides that failure to engage in programming is a barrier to advancement.

Our clients, some of whom are quoted above, report that these problems persist in 2021.[39] As is clear in the sections below, the Monitor's Reports in *Nuñez* have likewise noted many of those same serious flaws over the years ESH has been in use. The Board heard further firsthand accounts of the operational deficiencies in these units from a current correction officer during the March 17, 2021 Special Meeting. The officer, assigned to ESH for years at both OBCC and now GRVC, described staffing issues, long delays in response times, and ongoing safety concerns and failures to provide for the basic needs of people in custody.[40] He said:

> "The problem is that we can't give them their recreation, they haven't been receiving their Minimum Standards, because we don't have the staff. We've made everybody aware of the situation. They have simple issues in Level 1 like we're taking them to the shower, and there's no mirror in the shower to afford them a razor in the shower, there's no mirror for them to shave, so these individuals are being upset and aggressive because there's certain things that we're not affording them…there's things that's going on that's gonna cause violence, but when you add things where we can't afford them their minimal rights and their Minimum Standards, that's gonna cause additional violence and that's what we're trying to point out to upper management."[41]

Deficiencies in programming, provision of Minimum Standards, and basic operation are not limited to ESH, but pervade other restrictive units like Secure, the structure of which will serve as a model for RMAS Level 2.[42] The Tenth Report of the *Nuñez* Monitor described how the Monitoring Team began holding regular calls with the Department to discuss the ongoing problems with Secure units: "increased admissions/population, staff turnover, longer length of stay, violence and other concerns raised by the Monitoring Team in previous reports."[43]

These reports—from our clients, from the Board, from the *Nuñez* Monitor, and even from DOC staff—make clear that the history of levels models like ESH and Secure has been marked with operational failure that seriously impacts the conditions in the units and the ability of people to level out of them. This protracted culture will follow the levels model into RMAS units, and urgently necessitates firm durational limits, clear individual plans and concomitant programming, and protections in periodic review hearings such as access to representation.

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[38] Assessment of Young Adult ESH, p. viii.
[39] *See supra*, at 3-4.
[40] March 17, 2021 Special Meeting: Young Adult ESH, New York City Board of Correction. Available at https://www1.nyc.gov/site/boc/meetings/march-17-2021.page (relevant segment 1:06:01-1:10:11).
[41] *Id*.
[42] Statement of Basis and Purpose, p. 31.
[43] Tenth Report, p. 274.

Proposed § 6-12: Individual Behavior Support Plans.

The history of individual behavior plans in these units indicates they are often anything but individual. Board staff found in a 2017 report on ESH that "incarcerated people expressed confusion about what they must do to be transferred out of ESH."[44]

The confusion of people in custody has been validated in *Nuñez* Monitor Reports. In the Ninth Report of the *Nuñez* Monitor, the Monitoring Team wrote that:

> "Behavior Support Plan[s ("BSPs") are] intended to include individualized, behavior-focused goals and a set of interventions designed to catalyze behavior change. Echoing the findings in several previous Monitor's Reports, the BSPs remain ineffective for this purpose. Goals are generally not specific, not measurable, not observable and otherwise not amenable for use as a guide for an inmate's participation in [restrictive housing]. Progress toward specific goals is not measured week-to-week. As a result, the requirements for youth to exit these [restrictive units] remain unclear and somewhat subjective…the time is ripe to reconsider the structure, operation and interrelationship of the [restrictive units] to ensure that the programs are mutually supportive and not unintentionally conflicting. Furthermore, given the persistent inability to craft BSP that are suited to the task, the Monitoring Team has recommended the Department refine the criteria for release/promotion by identifying objective, easily identifiable criteria."[45]

In the Tenth Report, the Monitor reiterated that "[p]roblems regarding the quality of behavior support planning remain."[46]

It is important, then, that the proposed rules already include the requirement for individualized behavior and programming plans, and that the Proposed Rules require specific, measurable goals and updates after periodic reviews. For those plans to be effective, however, the Board must provide oversight to avoid the issue, commonly reported to our office and found by the *Nuñez* Monitoring Team, that behavior plans seem vague or are not adequately updated to reflect progress or lack thereof. The goals must also be attainable for the specific person, which is why we think the language in proposed § 6-12(a)(2) is important—but it is likewise important to make clear in proposed § 6-12(a)(1) that the goals should be generally achievable.

> Recommendation: Proposed § 6-12(a)(1) should include explicit mention that the goals should not only be measurable, but achievable. The Board must also have mechanisms to monitor whether these behavior plans are actually meaningful, and not just the generalized, rubber stamps they have often been. The Board should regularly audit a representative

[44] *Assessment of ESH*, at v.
[45] Ninth Report, pp. 313-4.
[46] Tenth Report, p. 274.

sample of RMAS case files, including initial behavior plans and all subsequent updates to those plans.

Proposed § 6-13: Progression.

As written, this section allows for people to be held in RMAS Level 1 indefinitely. And though it is important that the Proposed Rules include durational limits for Levels 2 and 3, as written, they are not true limits; rather, they are rebuttable presumptions that also allow for indefinite time in those units, the flaws of which are explored further below.

The potential for prolonged time in restrictive housing units is not simply an academic exercise. The Board's 2017 ESH reports found lengths of stay extending to months and years.[47] The *Nuñez* Monitor, too, describes lengths of stay for young adults in ESH and Secure that extend to 89, 117, and even 215 days in the Tenth Monitoring Period.[48]

Indefinite or prolonged time in these RMAS units is not acceptable. The section above, about the physical conditions of the structures DOC intends to use for RMAS Level 1, makes clear that those units perpetuate some of the core harms of isolated confinement: the "hallmarks" of "social deprivation and enforced idleness" as described by proposed § 6-07(a) in justifying the end of punitive segregation. They are not conducive to meaningful programming and human contact, discussed further below. They have the potential to cause harm to the physical and mental wellbeing of people in custody.

Responses to misconduct must serve safety goals, both immediate and long-term. Overuse of isolation does not make facilities safer or encourage pro-social behavior. Segregation is not the only accountability tool available to the Department, and the Proposed Rules should serve as a catalyst for this agency to replace its reliance on isolation with more effective and humane mechanisms.

We often hear Department actors portray prolonged solitary confinement as if it were the only consequence for assaults on staff or other comparable misconduct. But the Department is not responsible for enforcing the criminal laws. People in custody who commit crimes are routinely prosecuted by the Bronx District Attorney. It is simply a red herring to suggest that indefinite, prolonged punitive segregation is the only possible response to such conduct.

> Recommendation: There must be firm durational limits on how long a person can be in each level. In RMAS Level 1, that limit should be 15 days. The nature of the physical environment coupled with how the Department's documented operational failure will exacerbate those conditions, including failures to provide meaningful programming and disruptions to medical and mental health services, render longer stays in this environment dangerous to people in custody both physically and psychologically. Should a person commit a violent infraction that would render them eligible for Level 1 placement while in Level 1, the Proposed Rules

[47] *See supra*, at p.15.
[48] Tenth Report, p. 273.

should follow the HALT Solitary Confinement Act[49] model and ensure that a person does not spend more than 20 days in Level 1 in a 60 day period. A person should certainly not be permitted to be housed in Level 1 for 60 days or beyond, which the Proposed Rule allows as currently written.

In any RMAS level, the Proposed Rules permit the Department to continue to hold a person therein if there is "specific documented intelligence" that the person "will engage in violence" in the next level. This rule must be rejected. First, the vagueness of these terms presents a process ripe for abuse. When proposed § 6-14(d) allows the Department to redact the intelligence that served as the basis for continued placement in the current RMAS level, that determination would likely prove very difficult for the person in custody to challenge in a periodic review, an appeal, or via an Article 78 proceeding. Second, the Board should not sanction continued isolation as a regular response to the so-called potential of future violence. If DOC security staff have specific intelligence about a conflict likely to occur in another unit, they should be encouraged to utilize that information to employ other strategies to address that violence: changing the location of a transfer, or violence interruption strategies proven successful in other correctional contexts. A true reimagining of how the Department responds to misconduct demands that kind of creativity in these processes.

This section also allows the Department to prevent a person from progressing out of Levels 2 and 3 if the Department deems them to "consistently and willfully refuse to participate in programming." This, too, should be rejected. Programming should not be used as a sword. Moreover, the physical design of the units does not even appear to make programming physically possible, and individuals should not be punished for, for example, not spending several hours in a hallway trying to yell through plexiglass.

The Board has documented well the Department's history of failing to provide consistent, meaningful programming in restrictive units. These programming failures are not simply the growing pains of an experimental unit—they have persisted for years. The most recent Young Adult ESH audit from February 2021 shows the significant unavailability of programming, kiosks, typewriters these youth are entitled to by current Minimum Standards.[50] Some Young Adults chose to participate in programming and the duration was literally 5 minutes, 15 minutes, or 25 minutes of programming across different units on different days. Not only does this inconsistency in offering programming limit a person's ability to demonstrate willingness to participate, it also has a perceptibly significant impact on the willingness of the people in these units to engage. It is not humane or sensical to penalize people for these inevitable operational programming failures with the potential for more restriction. As noted in our discussion of proposed § 6-12, the *Nuñez* Monitor regularly documents ongoing and persistent problems with individual behavior plans and how programming compliance is documented. Those problems make it all the more important that the Board not allow alleged programming failures to serve as a barrier to advancement to less restrictive units.

[49] HALT Solitary Confinement Act, *supra*.
[50] Young Adult ESH Compliance Audit – February 2021, New York City Department of Correction. Available at https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/DOC-Reports/february-2021-doc-audit-report-ya-esh.pdf.

Recommendation: If the Board fails to require firm durational limits on placement in RMAS levels, the Board should remove the ability of the Department to extend a person's time there based on "intelligence" or an alleged failure to adequately engage in programming. Programming failures and intelligence about future potential violence should not justify a person's continued isolation. The Board should require the Department to have an answer for these challenges other than isolation and restriction, and omit proposed § 6-13(a)(2), § 6-13(b)(1-2), and § 6-13(c)(1-2) and the language following § 6-13(c)(2).

Proposed § 6-14: Periodic Review of Placement.

Reports from people in custody, the Board, and the *Nuñez* Monitor demonstrate that lengths of stay in restrictive housing units are often prolonged and that people struggle to advance. Outcomes of so-called "placement reviews" are difficult to challenge. The Board noted that in 2017, after almost two years of ESH operation, the Board was aware of only one person who was released from ESH after filing an Article 78[51]—and in our experience, those outcomes are still rare. For situations in which the Board has not ensured firm durational limits on a person's continued placement in RMAS units, a meaningful periodic review is all the more important. We include recommendations to make those reviews more meaningful below.

Recommendation: As a threshold matter, proposed § 6-14 should allow a person in custody to have access to representation in placement review hearings, and require the Department to provide notice to the criminal defense and parole counsel already assigned to many people in DOC. The placement review process should reflect the core due process protections we recommend in proposed § 6-24, as set forth in Appendix A: the person's counsel or other advocate should receive the notice of the hearing 48 hours in advance, be given sufficient notice of the material that the multidisciplinary team intends to consider to allow adequate time to prepare to advocate for the person, provided time to meet with the person in custody prior to the start of the review, and provided reasonable adjournments upon request.

As written above, we believe that RMAS Level 1 should have a firm durational limit of 15 days before advancing to Level 2. Should the Board disregard that strong recommendation, it is not acceptable for the *first* periodic review to take place after the person has already been there for 30 days. It is essential that a person has a meaningful opportunity to exit Level 1 as soon as possible.

Recommendation: If the Board elects to allow people to remain in RMAS Level 1 for longer than 15 days, the period to the first periodic review in proposed § 6-14(a)(1) must be shortened to 15 days rather than 30, and then provide for a review every 15 days thereafter.

The rules do not provide the person in custody with the requisite notice to address the concerns that the multidisciplinary team may raise in a periodic review. Proposed § 6-14(b) requires only notice of the hearing and the right to participate and/or make a written statement. This renders the placement

[51] Assessment of ESH, p. 20.

review far less meaningful and prevents the person in custody or their representative from having an adequate opportunity to advocate for advancement.

> Recommendation: Proposed § 6-14(b) should require the Department to provide specific information about what the multidisciplinary team will consider and any evidence supporting those considerations, as described in proposed § 6-14(c), to the person in custody and any counsel or advocate that they obtain to represent them at the review, at least 24 hours in advance of the hearing.

The rules do not include a presumption that the person will advance to the next less restrictive level, or to general population. Where firm durational caps on time in each level do not exist, this presumption of advancement is critical to prevent the impermissibly long lengths of stay that the Board and our clients have reported is endemic of these units.

> Recommendation: Proposed § 6-14(c) should include an explicit presumption that a person will advance to the next level or to general population.

Proposed § 6-14(c)(6) allows the Department to consider a person's "attitude" since placement in RMAS began. That is a highly subjective and immeasurable criterion, and it is one that invites personal bias in an already discretionary process. It provides no guidance to individuals on what choices they can make to change their placement. It penalizes normal and emotionally appropriate responses people may show to being locked in objectively harsh and unsafe conditions, denied contact with family and loved ones, deprived of liberty, and facing criminal penalties and possible prison time. What "attitude" does the Board of Correction believe, as a matter of public policy, should be required in these circumstances?

> Recommendation: Proposed § 6-14(c)(6) should omit "attitude" as grounds for consideration regarding advancement.

Current Minimum Standard § 1-16(h)(3)(iv) requires periodic reviews of ESH placement to consider "information regarding the effect of ESH placement or of individual ESH restrictions on the inmate's mental and physical health." The Proposed Rules do not have a parallel requirement, which is a step backward.

> Recommendation: Proposed § 6-14(c) should add a consideration mirroring the language of current Minimum Standard § 1-16(h)(3)(iv), using person-forward language rather than "inmate."

Proposed § 6-14(d) requires the Department to record the outcome of the periodic review in a report and to provide the report to people in custody within one business day of completion of the review. The provision fails to include specific and objective criteria for what evidence is relied upon and the reasons for the action taken. There must be a specific, articulated basis in the periodic review making clear the reasons for continued RMAS placement and the evidence on which decisionmakers rely.

This is essential to place the incarcerated person on notice and allow them the opportunity to meaningfully participate in advancement and restriction decisions made about them.

> Recommendation: Proposed § 6-14(d) should require that the written report list the specific information that served as a basis for determinations made regarding the considerations required by proposed § 6-14(c). That report should also be transmitted to a person's criminal defense counsel, as are certain individual behavior support plans pursuant to proposed § 6-12(d)(3). The Board should regularly audit a representative sample of those reports.

Proposed § 6-15: Extensions.

Because firm durational limits are essential to preventing harm, this section should be eliminated entirely. It the Board permits extensions which could serve as further potential for prolonged or indefinite placement these isolation spaces, the Proposed Rules must make these requirements more robust.

> Recommendation: Impose firm durational limits and eliminate the possibility that the Department may extend time in RMAS levels. Should the Board fail to decisively cap time in RMAS Level 1 at 15 days and RMAS Levels 2 and 3 at 15 days, Proposed § 6-15(b) and (c) should be modified to require that the Chief of Department review an extension of a person's time in RMAS levels every 7 days, and notice for that determination must be transmitted to the person in custody, the Board, and CHA. This section should also make clear that extensions to RMAS Level 1 should not run afoul of the HALT Solitary Confinement Act, and no person may be housed there for more than 20 days in a 60-day period.

Proposed § 6-16: Required Out-of-Cell Time.

HALT requires that alternatives to solitary confinement must have access to at least seven hours of daily, out-of-cell, congregate programs and activities.[52] The statute also requires that the programs available to people in these alternative units must be comparable to that which is available in general population.[53] If RMAS Levels 1 through 3 are alternatives to punitive segregation, they must comply with these requirements.

The out-of-cell provision of the Proposed Rules has a fundamental flaw: it does not define what it means to be "out-of-cell." With no information about what out-of-cell spaces must look like, or how they are intended to be used, the term "out-of-cell" is meaningless. The day cages depicted above[54] and the narrow corridor outside of them plainly do not meet any rational definition of "out-of-cell." Without this clarity, the Proposed Rule is meaningless.

[52] HALT Solitary Confinement Act, p.200 at 13-19.
[53] HALT Solitary Confinement Act, p.200 at 20-22.
[54] *See supra,* at 5.

Recommendation: Concomitant with the requirement that people in RMAS Level 1 shall be afforded 10 hours out of cell, these rules should read, "People in RMAS Level 1 shall be offered at least nine hours of daily out-of-cell congregate programming, services, treatment, recreation, activities, and/or meals, with an additional minimum of one hour for recreation pursuant to § 1-06." That language should be repeated for each successive RMAS level, altered to reflect the out-of-cell time requirements in proposed § 6-16.

The Rules also must articulate requirements for out-of-cell spaces as referenced above, including requirements for natural light, sufficient space for meaningful, congregate programming and provision of law library and other services, and all other Minimum Standards.

Proposed § 6-17: Other Conditions [Requirements for Physical Structures].

It is a critically important step that the Proposed Rules provide that all RMAS Levels 1 and 2 must be air-conditioned, and we applaud the Board for including this requirement. Given the confined spaces and limitations on access to self-cooling measures such as showers, this is a necessary health measure.

However, as we noted above describing the physical conditions, this section is flawed in that it fails to specify other requirements for the physical structures of RMAS housing. The only requirement for the physical structure of RMAS Level 1 is that people *may* lock out at the same time as one other person where they can "meaningfully engage both visually and aurally…without the need to raise their voices to be heard." This seems neither workable in the structures depicted above, nor sufficient to provide for meaningful human contact, let alone actual programming.

The Proposed Rules Lack Requirements for Meaningful, Effective Programming

Proposed § 6-11: Case Management.

This provision appears to attempt to create a structure for a supportive relationship between an incarcerated person and a Department staff member. However, any possibility of a therapeutic relationship with a case manager is seriously undermined by the requirement that the case manager serve on the multidisciplinary team to determine whether a person should be released from RMAS. The requirement that case managers evaluate a person's "progress," whether a person's participation in programming is "meaningful," and that they document this subjective determination in an incarcerated person's individual behavior support plan creates a dynamic that precludes any semblance of trust between an incarcerated person in RMAS and the case manager.

As described in our comments on proposed § 6-12, the RMAS behavior support plan is largely based on ESH and TRU models, which have demonstrated inadequacies as rehabilitative housing units. Under these conditions, it is impossible for a person to feel comfortable disclosing any personal information, asking for support or specific treatment, or confiding in a case manager in any way.

Meaningful rehabilitation can only successfully occur within a therapeutic setting, fostered by a sense of trust and safety. A correctional setting is the antithesis of such an environment. It is impossible to feel safe in the city's jails, and trust is exceedingly difficult to build.

Recommendation:

To provide meaningful support to people housed in its units, it is imperative that proposed § 6-11 require that every person in RMAS have a counselor to speak with confidentially, in addition to their case manager. The role of counselors in RMAS should be distinct from case managers in that counselors would not contribute to determinations regarding whether a person should be released from RMAS or enforcement of any punitive measures, but would serve solely as a support and therapeutic resource for people in the unit. Counselors in RMAS should be required to have prior documented social work experience and training.

Proposed § 6-11 should require counselors to meet with the people to whom they are assigned three times within the first week, and bi-weekly thereafter.[55] The rule should require a ratio of one case manager for every three people housed in the unit, and that all conversations between an incarcerated person and a counselor remain confidential.

Proposed § 6-20: Programming.

Robust, meaningful programming that provides for engagement with other human beings is essential to bringing about positive behavioral changes while protecting the health and well-being of individuals in custody. While the inclusion of programming requirements in the Proposed Rules is a laudable first step, without more explicit standards, programming goals will be undermined. The RMAS units are modeled after current ESH units, which are notorious for their lack of meaningful programing. This persistent failure to provide adequate programming in Young Adult ESH is well documented in the Young Adult ESH audits required by the Board.[56] The Proposed Rules do not sufficiently mandate a departure from this failed model.

The programming model discussed in § 6-20 claims that programming will encourage pro-social behavior, address the root causes of violent conduct, and serve to de-escalate violence by using "evidence-informed" programming. While this is positive, the Proposed Rules fail to provide specific information describing *what* program models will be used. They also fail to describe the implementation process of these programs, as well *how* they will function to promote rehabilitation. Moreover, the Proposed Rules do not address how these program models will work within the punitive, isolated, caged environment where they are required to take place.

[55] If a person wishes to meet with their counselor for additional sessions, they should be permitted to do so. A person should be provided to meet with their counselor an additional 1-2 times a week, per a particular counselor's availability in the specified week.

[56] Young Adult Enhanced Supervision Housing Compliance Audit, Department of Correction Reports, New York City Board of Correction. Available at https://www1.nyc.gov/site/boc/reports/department-of-correction-reports.page.

We urge consideration of two programming models that would provide a better foundation for RMAS programming. First, the Department's success with the Clinical Alternatives to Punitive Segregation ("CAPS") programming model provides an important alternative to isolated confinement.[57] The CAPS programming model is based on a therapeutic approach, rather than a punitive one. While the CAPS model is designed for people with mental illness, it could be tailored to serve people without a mental health diagnosis as well. The CAPS model provides for an array of therapeutic activities and interventions that reduce violence in correctional settings. CAPS incorporates group therapy, art therapy, community meetings and counselling in its program. This programming model fosters pro-social conduct by encouraging congregation and collaboration and communication between people. Given that the Department is already using the CAPS program model, it is a convenient and useful model for RMAS programming.

Should the Board wish to look for additional guidance from other jurisdictions, the Resolve to Stop the Violence ("RSVP") project based in San Francisco is another successful model for rehabilitative programming within a correctional setting. RSVP is based on restorative justice principles; it addresses violence by acknowledging that when a violent act occurs, not only does the act impact the victim, the person who committed the violent act and the surrounding community are also impacted.[58] The project provides access to reality-based self-esteem and coping skills programming, drama workshops, and cognitive behavioral therapy that challenges the "male role belief system."[59] RSVP's community accountability model has successfully reduced incidents of violence, and improved safety within the San Francisco jail system.[60] The foundational values of RSVP require participants to take responsibility for their actions, and to demonstrate behavioral self-control. Programming in the RMAS could benefit from these restorative practices.

Outdoor recreation is an essential part of any program regime. Substance abuse treatment should be available, as well as Twelve Step Recovery Meetings. The curriculum should provide people with behavioral tools for self-reflection, communication, mindfulness, and for the de-escalation of violent conduct. Creative outlets must be provided, allowing for individual self-expression.

Further, programming should be voluntary and should not influence the length of time a person spends in the RMAS. People may not wish to participate in programming for myriad reasons. The punitive and isolated nature of the RMAS setting alone is likely to traumatize people placed there. Other issues such as speech impediments, low self-esteem, undetected mental health issues, and general shyness all may contribute to a person's decision not to participate in programming.

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[57] Sarah Glowa-Kollish, Fatos Kaba, Anthony Waters, Y.Jude Leung, Elizabeth Ford, Homer Venters, *From Punishment to Treatment: The "Clinical Alternative to Punitive Segregation" (CAPS) Program in New York City Jails*, International Journal of Environmental Research and Health, 13(2), 182, (2016), *available at*: https://www.mdpi.com/1660-4601/13/2/182

[58] *Violence Is Learned, It Can Be Unlearned*, Resolve to Stop the Violence Project. *Available at*: https://www.resolvetostoptheviolencesf.org.

[59] *RSVP: Model for Implementation*, Resolve to Stop the Violence Project. *Available at* https://www.restorativejusticersvp.org/model-for-implementation.

[60] James Gilligan, Brandy Lee, *The Resolve to Stop the Violence Project: Transforming An In-House Culture of Violence Through A Jail-Based Program*, Journal of Public Health, 27, 2 (2005), pgs. 145-155, *available at:* https://doi.org/10.1093/pubmed/fdi018.

Requiring programming to be mandatory depletes any possible therapeutic result from said programming.

> Recommendation: Proposed § 6-20 should explicitly require engaging, interactive, and therapeutic programming. The Department should provide the Board with the models of programming it seeks to use to ensure that these requirements are met. Programming requirements should explicitly include substance abuse treatment.
>
> Programming must be provided in a comfortable setting that allows for meaningful human interaction.
>
> Proposed § 6-20 should require the Board to do a programming-specific assessment 6 months after RMAS are implemented.

Programming should involve meaningful interaction with other human beings. Yet proposed §6-20(a) contains no such requirement, and indiscriminately permits "in-and-out-of-cell" programming. With no clear floor about what constitutes "out-of-cell" programming, the Rule could result in someone's daily "programming" consisting of no activities outside the cell, and no activities that engage with other humans.

> Recommendation: Proposed § 6-20 should require that at least four hours of the daily programming occur outside the cell and involve human interaction.

Encouraging High School Participation and Eliminating Barriers to School

Proposed § 6-20(c) specifically addresses education for young adults, yet, as currently drafted, perversely disincentivizes high school participation. This surely was not the Board's intention, and this section of the Rule must be substantially modified to promote education.

In recognition of the importance and power of education, New York State Law requires the City to provide education to eligible individuals in DOC custody.[61] Yet the New York City Department of Education ("DOE") did not provide school to young adults, aged 18-21, on Rikers Island, until we filed a class action lawsuit in 1996, *Handberry v. Thompson* ("*Handberry*"), No. 96-cv-6161 (S.D.N.Y.) (GDB). DOE now is required to provide three hours of high school to young adults via the East River Academy school. But the promise has not been kept, as the court-appointed monitor in *Handberry*, correctional education expert Dr. Peter Leone, has repeatedly found.[62] In 2015, Dr. Leone identified as the core problem with education in the jails that the "culture" on Rikers Island does not prioritize education.[63] In his July 2018 report, he noted that "institutional culture shapes the

[61] New York Education Law § 3202(7).
[62] Peter E. Leone, Ph.D., *Third Report on the Status of Education Services for Youth Aged 16-21 at Rikers Island, Handberry v. Thompson*, No. 96-CV-6161 (GBD), July 2, 2018 (Dkt. No. 273-2) (hereinafter "Leone Report") at 2.
[63] Peter E. Leone, Ph.D., *On the Status of Educational Services for Inmates Aged 16-21 at Rikers Island* 2 (May 11, 2015) *Handberry v. Thompson*, No. 96-CV-6161 (GBD) (Dkt. No. 231-4).

quality of and access to education," and that although the education program had improved during the prior two years, "access to education for inmates age 18 to 21 is a persistent problem."[64] Scheduling conflicts dissuaded many enrolled young adults from actually attending school. In July 2018, Dr. Leone found conflicts between "the school schedule and the schedule for commissary, recreation, and services provided by outside contractors."[65] For chiefly these reasons, Dr. Leone has characterized attendance among young adults as "highly variable."[66] Notably, Dr. Leone found significantly higher attendance among young adults housed in jails that either incentivized attendance or provided success houses/school dorms.[67]

Proposed § 6-20(c) exacerbates rather than resolves these scheduling conflicts by allowing programming to be conducted during high school hours. This forces young adults who are enrolled in school to choose between their education and programming—a choice that serves no legitimate policy interest and is directly antithetical to the stated purposes of the rules.

Proposed § 6-20(c) further discourages school enrollment by setting forth a new requirement: that high school students who wish to continue their education while at Rikers "indicate[] *in writing* that they wish to attend *and* demonstrate[] their eligibility for such services" (emphasis supplied). While enrollment for this age group is optional, there is no purpose served by requiring people who have not yet finished high school to ask *in writing* and bear a burden of proof of their "eligibility." Instead, both DOC and DOE should actively encourage school enrollment, and a student should be permitted to enroll verbally and not just in writing.

> Recommendation: Proposed Rule §6-20(c) should be amended to prohibit conflicts between programming and education for youth enrolled in the schools. This would be accomplished by replacing the first two sentences of §6-20(c) with the sentence: "The 5-hours of access to programming should be scheduled outside of school hours for those young adults enrolled in school."
>
> The provision should further be amended to eliminate the phrase, "provided that the young adult indicates in writing that they wish to attend and demonstrates their eligibility for such services."

Staffing and Training

Proposed § 6-18: Staffing.

Though proposed § 6-18(a) is entitled "Steady Posts," the Proposed Rules do not require steady staffing assignments in RMAS units. Steady staffing is important. As the *Nuñez* Monitor noted in the Tenth Report, "The overall purpose of consistently assigning Staff to the same housing unit is to

[64] Leone Report at 3.
[65] *Id.*
[66] *Id.* at 4.
[67] *Id.* at 5.

facilitate constructive Staff-[person in custody] relationships. Indeed, consistent staffing is a hallmark of Direct Supervision and is particularly important in units with [people in custody] who are difficult to manage (i.e., the [restrictive housing units]) or who struggle with mental illness. This same theme—the benefit of developing relationships in order to change behavior—applies to consistent assignment of Captains as well, given their essential role in helping Staff to improve practice."[68]

As important as it is to assign consistent staff, it is equally important to ensure that consistent staff actually work their assigned posts. The Tenth Monitor's Report revealed that though nearly all shifts in RNDC were assigned consistently to staff, "audits revealed that a little less than two-thirds of the posts were actually worked by the person assigned to them."[69]

> Recommendation: Proposed § 6-18(a) should add language similar to the *Nuñez* Consent Judgment and Remedial Order requirements: "The Department shall adopt and implement a staff assignment system under which a team of Officers, Captains, and ADWs are consistently assigned to the same RMAS unit and the same tour, to the extent feasible given leave schedules and personnel changes." That subsection should also require an audit, similar to the audit conducted by the Nuñez Compliance Unit at DOC, to be provided to the Board, detailing the reasons why assigned staff did not work their steady posts.[70]

Proposed § 6-19: Training.

The Proposed Rules require training, but do not provide requirements for that training. As written, staff could watch a two-hour video touching on the themes contemplated in proposed § 6-19(a) and have satisfied this requirement. Given the incredibly complex and sensitive needs of the population that will be placed in RMAS, this provision is insufficient.

> Recommendation: Proposed § 6-19(a) should require meaningful training from a person qualified to deliver it, and should require that Staff Members demonstrate a comprehension of the material.
>
> In order to make training most impactful, training should include interactive presentations by formerly incarcerated people, and family members with incarcerated loved ones.
>
> RMAS staff training must include instruction about recognizing symptoms of potential mental health crises, mental health diagnoses, related behaviors, and successful crisis de-escalation techniques specific to people experiencing a mental health crisis.

[68] Tenth Report, p. 266.
[69] *Id*. at p. 267.
[70] *See id*.

Due Process and Procedural Justice

Proposed § 6-22: Fines.

We strongly support efforts by the Board to curb regular assessment of fines for guilty infractions. We do not believe the rule makes clear whether this section seeks to only allow financial penalties—fines and restitution—for destruction of property and eradicate other fines, or whether it will allow fines for all offenses but only allow restitution for property damage infractions. It is likewise unclear, as written, whether any imposition of a restitution penalty should also take into account the person's ability to pay.

Moreover, there should be requirements for how restitution is assessed. All too often, we have seen the Department inflate restitution values on property damage. A person should not have to pay for a new model of television as restitution for damaging a years-old television, for example. In one particularly egregious case, we saw DOC seek restitution for broken sprinkler hardware in punitive segregation after a person in custody attempted suicide by hanging. In our experience, DOC also in some cases requests a blanket medical restitution amount of $100 for any assault on staff charge without providing specific documentation of medical bills.

> Recommendation: Use the term "financial penalty" throughout this section, rather than "fine," to make all three sentences consistent and their meanings clear. Include language requiring that "any imposition of restitution shall include a specific and itemized accounting for property alleged to have been damaged and must reflect the current market value of that property." The section should go further regarding ability to pay, providing that people in custody who are indigent shall not be required to pay financial penalties.

Proposed § 6-23: Disciplinary System Plans. The way this section is written implies that the Department should develop disciplinary plans—which "shall include mechanisms for addressing violations without resort to RMAS placement or limitations on individual movement or social interaction"—but that those plans are intended only to address Grade III offenses and those excluded from RMAS placement.[71] As we reference in our discussion of proposed § 6-10 above, there are Grade II and even Grade I offenses which should not result in RMAS placement, if we are to truly curb the Department's practice of using disproportionate sanctions for misconduct. Positive incentive structures, targeted programming, and conflict resolution approaches like evidence-based violence interruption programs are extremely valuable tools, and they are steps toward acknowledging the dignity and personhood of people in DOC custody. They should be used as widely as possible.

> Recommendation: The Board should make clear that disciplinary plans should consider the alternative mechanisms contemplated by proposed § 6-23(b)(1) for all offenses, including Grades I and II. Proposed § 6-23(b)(1) should not *allow* the Department to include those mechanisms—"such mechanisms may include, e.g.," positive behavioral incentives, targeted

[71] *See* Proposed § 6-23(a).

programing, conflict resolution approaches—the rule should *require* the Department to include those as elements of its plan.

Proposed § 6-24: Due Process.

DOC repeatedly violates its own Disciplinary Due Process Directive as well as the constitutionally protected due process rights of people in custody in DOC disciplinary hearings. Often, despite due process violations, people in custody will serve their punishment in punitive segregation or ESH before they can complete the appeal process and thus have no meaningful remedy to address significant violations of their due process rights.

Among other things, DOC consistently violates the fundamental due process right of people in custody to attend their disciplinary hearings[72] as well as their right to present evidence[73] and witness testimony[74] in their defense. The disciplinary hearing process is not a fair forum for persons in custody. Despite litigation and court orders to expunge disciplinary infractions, comply with hearing rules, refund disciplinary surcharges, and credit people in custody for time suffered in punitive segregation, DOC persists in routinely violating the due process rights of people in custody.

The only way to protect people in custody from the continued violation of their due process rights is to provide meaningful access to representation in DOC disciplinary hearings. This access to representation in an administrative hearing is not unique in New York City—indeed, attorneys and other advocates regularly represent New Yorkers in Fair Hearings, school suspension hearings, civil forfeiture hearings, and proceedings at the Department of Motor Vehicles adjudicating whether a person's license will be suspended following an alleged refusal to take a breathalyzer test following a DWI arrest.

Recommendation: We have proposed language to ensure meaningful access to representation. Because of the length of that submission, it is attached as Appendix A.

Reporting is a Critical Accountability Measure

Proposed § 6-25: Data Collection and Review.

The inclusion of significant data collection and reporting requirements in the proposed rule is an important step towards achieving the transparency that the Board and the public have long demanded of the Department. It is also good to see an acknowledgement that the current forms of data collection are outdated, unreliable, and wholly insufficient for performing the analyses needed to evaluate the RMAS.

[72] *See, e.g., Martinez v. New York City Dep't of Corr*., 67 Misc.3d 1232(A), 2020 WL 3408487 (Sup. Ct Bronx Cty 2020).
[73] *See, e.g., Murdaugh v. New York City Dep't of Corr.*, Sup. Ct, Bronx County, Feb. 4, 2020, Boyle, J., index No. 340415-19.
[74] *See, e.g., People ex rel. Azor v. Warden, Rikers Corr. Facility*, Sup. Ct, Bronx County, Jul. 6, 2010, Marvin, J., index No. 340335-10.

We are concerned that the Department may interpret the requirement that it "develop the system(s) necessary to collect accurate, uniform data on RMAS" as reason to delay the production of the required reports until that system is finalized and in regular use. Immediately upon approval and implementation of the new standards, all RMAS placements need to be documented and reported as required by those standards. Further, we ask that the list of the type and location of all RMAS units that shall be provided to the Board on a monthly basis under § 6-25(a) be included in the monthly public reports.

> Recommendation: The rules shall either provide a date by which the new data collection system be implemented and delay further RMAS placements until it is being used consistently and reliably, or make explicit that the reports required under §§ 6-25(a), (c) and (d) must be provided regardless of whether the data collection system has been finalized and implemented. The list of RMAS units and their locations should be added to the list of information that will be provided in a monthly public report.

Shackling to Desks, Other Restraints, and Canines

Proposed § 6-27: Restraints.

Is it not acceptable for the Board to condone the continued chaining of black and brown people through "restraint desks" for any period of time. High school students cannot possibly learn bound in chains, yet this is how "schooling" is supplied with restraint desks. Understandably, some young people who desperately need a high school education report to us that they forego school so as not to be subjected to the restraint desks. The Department is not using restraint desks at Horizon, and it should not use them in DOC facilities. They do not actually serve the purposes of security and safety, as myriad testimonies and materials submitted to the Board attest. The qualifier of "non-individualized" is not adequate protection. The rules should outright prohibit them.

> Recommendation: Proposed § 6-27(e) should read "As of the Effective Date, the Department shall eliminate the use of restraint desks or other restraints during lockout in all facility housing units." All subsequent related provisions should be edited accordingly.

For restraints that the Board does permit until November 1, 2021, it is important that the Proposed Rules contain a presumption of advancement out of restraints, but the circumstances under which the Department can overcome that presumption are too broad. The Proposed Rules allow "credible intelligence that the person may engage in violence in a less restrictive level or housing unit" to serve as justification for keeping someone in "non-individualized restraints."[75] First, we note the same concerns here about the vagueness of "credible intelligence" as we did above in regards to RMAS progression criteria.[76] Further, this provision, as written, lacks clarity about the circumstances under which a person could be accused of planning to commit violence and how that relates to the restraint at issue—this is an advancement out of a restraint status, not necessarily a

[75] Proposed § 6-27(g)(3)(B).
[76] Proposed § 6-13.

particular housing unit or level, so it is unclear why this provision identifies a potential for violence in another unit or restrictive level as a barrier for removing a particular restraint in the person's current level or unit.

> Recommendation: Proposed § 6-27(g)(3)(B) should be omitted entirely. If it is to remain, it should make clearer the circumstances under which the person is suspected to engage in future violence and how that suspicion is relevant to a particular restraint status.

The Proposed Rules do not regulate "individualized" use of restraints, like Red ID and Enhanced Restraint Status. Those restraint statuses are significant—Enhanced Restraint Status commonly includes waist chains or leg irons—and our clients remain in those restraint levels for long periods, with limited options to challenge them.

> Recommendation: Proposed § 6-27 should address "individualized" restraint statuses, create criteria for placement therein with requisite due process protections—including a hearing—establish periodic reviews with presumptions of advancement out of restraints, and require approval by the Chief of Department for ongoing restraints beyond a certain and reasonable time period.

We are pleased to see the rules reflect the basic fact correctional health authorities have important data about the functional needs or impairments of individuals that contraindicate the imposition of one or more otherwise permitted restraints. But the Department should be required to do much more than just consider the information provided by medical staff. Rather, the Board should empower correctional health authorities in this provision to protect individuals in custody more thoroughly.

> Recommendation: Proposed § 6-27(i) should give the Correctional Health Authority ("CHA") the authority to determine that a person shall not be placed in restraints under the circumstances listed.

Proposed § 6-28: Canines.

We strongly support the Proposed Rules' prohibitions on the use of canines. The use of dogs by law enforcement is steeped in a history of racist abuse.[77] However, given the Department's over-reliance on "searches" by its heavily armed tactical teams, the rules' exception allowing use of dogs for any search is too broad. Even searches by dogs have an inevitable menacing effect, particularly for people who fear dogs. Facility leadership must be responsible for and aware of how dogs are used in the buildings they command, and the terror they evoke. If canines are ever used for a search within a facility, individuals must be protected in a physically separate area. The Board of Correction should closely monitor the Genetec video footage of any canine searches to ensure compliance with these standards.

[77] *See* Parry, Tyler D., Police still use attack dogs against Black Americans, The Washington Post (Sept. 2, 2020). Available at https://www.washingtonpost.com/outlook/2020/09/02/police-still-use-attack-dogs-against-black-americans/.

Recommendation: Proposed § 6-28 should require that any use of canines for searches inside DOC facilities be conducted in the presence of a Tour Commander or comparable rank, and that incarcerated individuals must be in a physically separate location from any canine search.

Conclusion

We sincerely appreciate that the Board seeks to thoroughly engage a complex system, and support the focus on a prospective, comprehensive approach that provides clarity for correction officials and incarcerated people. The Board must finish the work to ensure that the Proposed Rules do not eliminate punitive segregation in one section, then use twenty more to build a system that combines the most intractable problems of ESH with physical spaces that impose the core harms of prolonged isolation. It is critical that the City take this opportunity to make progress.

Isolated confinement is not a solution to crisis. Placing people in isolation only serves to exacerbate trauma and crisis; decreasing safety for all. New York City must not lose sight of the fact that people housed in restrictive housing units are human beings, with communities, families and loved ones.

We welcome additional opportunities to discuss these critical human rights issues with Board Members.

Regards,

/s/

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Appendix A: Proposed Language for Due Process Sections

Access to Representation in Disciplinary Hearings and Other Recommendations

§ 6-24 Due Process and Procedural Justice.

(a) Purpose

(1) The following minimum standards in this section are intended to ensure that people in custody are placed into RMAS with due process and procedural justice principles.

(2) The requirements in this section apply to people in custody who are charged with violating Department rules and may be placed in RMAS Level 1 or directly into RMAS Level 2, if they are found guilty of violating such rules.

(b) Investigations

(1) When the Department conducts investigations into allegations of a person in custody's violation of Department rules, it shall do so promptly, thoroughly, and objectively.

(2) Department personnel conducting the investigation must be of the rank of Captain or above and must not have reported, participated in, or witnessed the conduct.

(3) If the rule violation in question could lead to a subsequent criminal prosecution, the Department must inform the person interviewed that while the Department's investigation is not pursuant to a criminal proceeding, statements made by the person may be used against the person in a subsequent criminal trial. The person must also be informed of the right to remain silent and that silence will not be used against the person.

(4) All investigations shall be documented in written reports that include a description of the physical, testimonial, and documentary evidence as well as investigative facts and findings.

(5) Investigations shall commence within twenty-four (24) hours after the incident.

(6) The Department shall proceed with adjudication of charges against a person in custody upon a determination that there is reasonable cause to believe the person has committed the infraction charged.

(c) Notice of Infraction and Access to Representation

(1) Prior to the disciplinary hearing provided in 40 RCNY § 6-24(d), people in custody must receive written notice detailing the charges against them and their right to obtain an attorney or other advocate to represent them at the disciplinary hearing. The notice must be legible, detailed, and specific and must include, at a minimum:

(i) Details as to the time and place of the rule violations charged;

(ii) A description of the person's actions and behavior that gave rise to the alleged violations;

(iii) (The proposed time and date of the disciplinary hearing relating to the conduct alleged;

(~~iii~~iv) A statement of the person's right to obtain an attorney or other advocate to represent them at the disciplinary hearing.

(~~i~~v) Contact information for the public defender organizations in New York City.

(2) People in custody who are unable to read or understand the notice shall be provided with necessary assistance.

(3) Notice of the infraction and access to representation shall be served upon any person placed in pre-hearing detention within twenty-four (24) hours of such placement, absent extenuating circumstances.

(4) Notice of the infraction and access to representation shall be served upon a person not placed in pre-hearing detention as soon as practicable but in no event later than two (2) business days prior to the hearing. Failure to do so shall constitute a due process violation warranting dismissal.

(5) Any member of DOC staff, except those who participated in the incident may serve the person charged with the notice of infraction and access to representation. The person will be asked to sign the notice as proof of receipt. If the person does not sign the notice, a staff member other than the person serving the notice must note the person's refusal on the notice. Staff members who serve the notice, including staff members who note a person's refusal to sign the notice, shall indicate their name and shield number legibly on the notice.

(6) All refusals to sign a notice of infraction and access to representation shall be videotaped. Failure of the Department to produce a videotaped refusal and make it part of the hearing record shall constitute a due process violation warranting dismissal of the infraction. The infraction shall not be redrawn. The refusal must be knowing, intelligent, and voluntary. The person must be notified of their right to attend the hearing and the consequences of failing to do so, including that the hearing will continue in their absence.

(7) ~~If the person is charged with a Grade I eligible offense that would render them eligible for placement in RMAS Level 1, n~~Notification of ~~such~~ the infraction shall be transmitted, via email, to the person's ~~criminal defense~~ counsel within one business day of service of the infraction on the person as set forth in (d)(4)(i)(1) of this section. This notification shall be legible, detailed, and specific and must include, at a minimum:~~not include specific details~~ concerning the alleged offense and potential penalties.~~.~~

(i) The identifying information of the person charged with the violation;

(ii) Details as to the time and place of the rule violations charged;

(iii) A description of the person's actions and behavior that gave rise to the alleged violations; and

(iv) The proposed time and date of the disciplinary hearing relating to the conduct alleged.

(d) Disciplinary Hearing

(1) Hearing Adjudicators

Infraction hearings shall be conducted by DOC staff of the rank of Captain or above. Hearing adjudicators shall not be DOC staff who initially recommended the person for adjudication or otherwise provided evidence to support the person in custody's infraction charge or was otherwise a participant, observer, or involved in any manner.

(2) Time of Hearing

Within three (3) business days of service of the notice of infraction on the person charged, the Department shall conduct an adjudication hearing.

(3) Due Process Violations

Prior to calling the person charged to the hearing, the Hearing Adjudicator shall review the notice of infraction to determine whether there are any due process violations that may require dismissal of the infraction.

(4) Access to Representation

(i) People in custody shall have the right to obtain an attorney or other representative to represent them in disciplinary hearings. The Department shall provide every person charged with a reasonable opportunity to obtain representation.

(1) If the person charged is currently represented by a public defender organization or an individual attorney on their criminal charges or on their parole violations, whether the charges or violations are pending or sentenced, the Department shall immediately notify, as set forth in (c)(7) of this section, the office of the assigned public defender organization or individual attorney of the disciplinary charges to facilitate their representation of the person charged. If the person in custody is not currently represented by counsel in a criminal or parole proceeding, notification shall be made to the office of the organization or individual attorney that most recently represented the person.

(2) The Department shall provide the person charged and their representative with all documents, materials, and evidence relevant to the Department's compliance with notice requirements and to the person's guilt or innocence at least forty-eight (48) hours before the disciplinary hearing.

(3) Failure of the Department to notify the assigned counsel of the person charged, provide a person charged with a reasonable opportunity to obtain representation, or to provide their representative with relevant documents, materials, evidence shall constitute a due process violation warranting dismissal.

(ii) Counsel or other advocate for the person in custody shall be afforded the opportunity to meet with the person charged in a confidential setting and with any potential witnesses at least forty-eight (48) hours before the disciplinary hearing.

(iii) If any accusing officer or other adverse witness is called by the Hearing Officer and testifies against the person charged, counsel or other representative of the person in custody shall be allowed to cross-examine the officer or witness. Counsel or other advocate for the person in custody shall be allowed to call witnesses and present evidence or arguments in favor of the person charged, and the representative shall be allowed to negotiate a plea disposition.

(5) Audiotaping

All disciplinary hearings must be audiotaped.

(65) Refusal to attend or participate

The refusal of people in custody to attend or participate in their hearing must be videotaped or audiotaped and made a part of the hearing record. The record shall show the person was advised of their right to attend the hearing and the consequences of failing to appear and refused after being properly advised. The record shall show that there was a knowing, intelligent, and voluntary waiver of the right to be present at the hearing. Failure to include video evidence of a knowing, intelligent, and voluntary refusal shall constitute a due process violation warranting dismissal.

(76) Rights of the Person Charged

The Hearing Adjudicator shall advise the person charged of the following rights at the hearing, which must also be set forth in the notice of infraction and access to representation:

(i) Access to representation: The person charged has the right to obtain an attorney or other advocate to represent them.

(ii) The right to appear: The person charged has the right to appear personally unless the right is waived in writing or the person refuses to attend the hearing.

(iii) The right to make statements: The person charged has the right to make statements. In cases where the infraction in question could lead to a subsequent criminal prosecution, the Hearing Adjudicator must inform the person that while the proceeding is not a criminal one, the person's statements may be used against the person in a subsequent criminal proceeding. The Adjudicator must also inform the person of the right to remain silent and that silence will not be used against the person at the hearing.

(iv~~ii~~) The right to present evidence and call witnesses: The person charged has the right to present evidence and call witnesses.

(~~i~~v) The right to review the Department's evidence: The person charged has the right to review, prior to the infraction hearing, the evidence relied upon by the Department. Should the Department provide any evidence to the person for the first time at the hearing, the Department shall inform the person at the hearing that they have the right to adjourn the hearing so they can review and prepare their defense.

(v) The right to the assistance of a hearing facilitator: The person charged is entitled to the assistance of a hearing facilitator if:

(A) The person is non-English or limited-English proficient;

(B) The person is illiterate;

(C) The person is blind or deaf, low vision, or hard of hearing;

(D) The person has otherwise been unable to obtain witnesses or material evidence.

(vi) The hearing facilitator shall assist a person charged by:

(A) Clarifying the charges;

(B) Explaining the hearing process;

(C) Interviewing witnesses;

(D) Obtaining evidence and/or written statements;

(E) Providing assistance at the hearing;

(F) Providing assistance understanding the waiver of any rights afforded under this section;

(G) Providing assistance in filing an appeal as provided in 40 RCNY § 6 24(h) of this Chapter.

(vii) A person in custody entitled to a hearing facilitator must be provided access to a facilitator at the time the notice of infraction is served, at least two (2) business days prior to the hearing. A hearing facilitator shall not be a sufficient substitute to satisfy the right of the person in custody to obtain counsel or an advocate to represent the person at the disciplinary hearing.

(viii) The Hearing Adjudicator may adjourn the hearing for the person charged to receive the assistance of a hearing facilitator. If the person requests the assistance of a hearing facilitator and that request is denied by the Adjudicator, the Adjudicator shall state the reasons for denying the request in the hearing record.

(ix)The right to an interpreter. In addition to a hearing facilitator, a person has the right to an interpreter in the person's native language if the person does not understand or is not able to communicate in English well enough to conduct the hearing in English.

(x) The right to an appeal. A person who is found guilty at a disciplinary hearing has the right to appeal an adverse decision as provided in § 6-24(h) of this Chapter.

(7) Burden of Proof

The Department has the burden of proof in all disciplinary proceedings. A person's guilt must be shown by a preponderance of the evidence to justify RMAS placement.

(8) Hearing Time Frame

(i) Once the hearing has begun, the Hearing Adjudicator shall make reasonable efforts to conclude the hearing in one session.

(ii) Adjournments ~~may~~ shall be granted upon request if: ~~the person charged requests additional time to locate witnesses, obtain the assistance of a hearing facilitator, or prepare a defense.~~

(1) The person is unable to obtain legal representation within the allotted time;

(2) The person's legal representation or witnesses would not be available on the day of the hearing;

~~(1)~~(3) The person, or their legal representative, could not properly prepare for the hearing in the allotted time.

(iii) Hearing Adjudicators may also adjourn a hearing to question additional witnesses not available at the time of the hearing, gather further information, refer the person charged to mental health staff, or if issues are raised that require further investigation or clarification to reach a decision.

(i) If an Adjudicator declines to grant a request for an adjournment, the Adjudicator shall state the reasons for denying the request in the hearing record.

(~~i~~v) Notwithstanding any adjournments, hearings must be completed within five (5) days, absent extenuating circumstances or unless the person charged waives this time frame in writing.

(e) Determination

(1) Absent extenuating circumstances, the person charged shall be served with a copy of the determination within two (2) business days of the conclusion of the disciplinary hearing.

(2) The determination shall be in writing, legible, and contain the following:

(i) A finding of "guilty," "not guilty," or "dismissed" on each charge in the infraction;

(ii) The evidence relied upon by the Hearing Adjudicator and the specific reasons to support~~in reaching~~ such finding;

(iii) The sanction imposed, if any;

(3) A summary of each witness's testimony, including whether the testimony was credited or rejected, with a statement of the reasons therefor.

(4) Records generated pursuant to a disciplinary hearing in which a person is found not guilty of the charges, after either the disciplinary hearing or appeal, shall be kept confidential and shall not be considered in making decisions pertaining to the person's access to programs, services, or in the granting of or withholding of good time for sentenced people, nor shall they be utilized in any future RMAS adjudications.~~.~~

(f) Hearing adjudicators shall impose sanctions that are proportionate to the infraction of which a person was found guilty and fair in light of comparable penalties given other people for the same or similar misconduct.

(g) People in custody must be placed in RMAS, within thirty (30) days of adjudication of guilt. If the Department does not place a person into RMAS within this thirty (30)-day period, the Department may not place the person in RMAS for that infraction at a later time.

(h) Appeals

(1) A person who is found guilty at a disciplinary hearing has the right to appeal such determinations. The appeal shall be in writing, shall be based on facts already in the record, and shall clearly set forth the basis for the appeal, except the person may raise any newly discovered evidence in the appeal.

(2) People in custody shall have three (~~3~~5) business days from receipt of a guilty determination to file an appeal, and the Department shall render a decision within two (2) business days of receipt of the appeal.

(3) Individuals in RMAS and other restrictive housing, shall have fifteen (15) business days to file an appeal of an adverse determination, and the Department shall render a decision within five (5) business days of receipt of the appeal.

(4) The Department shall provide prompt and adequate access to people in custody to file an appeal.

(5) A person may appeal based on the belief that there was a due process violation, insufficient evidence to support a guilty finding, ~~or~~ because the Hearing Adjudicator was biased, or any other error of law.

(6) The decision on appeal shall be in writing, legible, and state the reasons for granting or denying the appeal. People who are unable to read or understand the decision shall be provided with necessary assistance.

(7) Appeals shall be determined by DOC staff of the rank of Captain or above. Department staff who decide appeals shall not be:

(i) Staff who reported, witnessed, or investigated the incident underlying a guilty determination;

(ii) Staff who recommended the person's initial placement in restrictive housing other than disciplinary housing;

(v) Staff who recommended that individual restrictions be imposed on the person;

(vi) Staff who presided as the Hearing Adjudicator at the person's disciplinary hearing.

(i) Disciplinary Due Process Reporting

(1) Within one year of the Effective Date, the Department shall develop the system(s) necessary to collect accurate, uniform data on the due process requirements of 40 RCNY §6-24, and to centrally store related documentation, in a manner that may be analyzed electronically by the Board.

(2) The Department shall provide the Board with a public semiannual report on Disciplinary Due Process for the Adult and Young Adult population, including but not limited to information on:

i. Notices of Infraction, including the number and percent of Infraction notices, by Grade of top infraction charge (e.g., Grade I violent, Grade I non-violent, Grade II, Grade III), by whether the person charged signed or refused to sign the Infraction Notice and whether refusal was documented on video; by whether the

Notice was sent to defense counsel of the person charged with a Grade I violent charge; and by whether the person charged requested assistance in reading or understanding the person's infraction notice and whether the person was provided such assistance.

(ii) Hearings and hearing determinations, including the number and percent of infractions served, by top infraction charge (i.e., Grade I violent, Grade I nonviolent, Grade II, Grade III) by whether a hearing occurred, and by hearing outcome (Guilty, Not Guilty, Dismissed, e.g. due process violation).

(iii) Rights of people charged, including the number and percent of hearings by top infraction charge Grade (i.e., Grade I violent, Grade I non-violent, Grade II, Grade III), by whether the person charged refused to attend their hearing and whether the refusal is documented on video; and by whether the person charged requested a hearing facilitator or interpreter and whether such request was granted.

(iv) Disciplinary sanctions, including the number and percent of guilty determinations by top infraction charge Grade (i.e., Grade I violent, Grade I non-violent, Grade II, Grade III), by whether the individual was placed in restrictive housing, including RMAS, and by the reasons not placed (e.g., discharged from custody, excluded due to health contraindication, or placement did not occur within 30 days of adjudication).

(v) Appeals, including the number and percent of guilty determinations appealed by top infraction charge Grade (i.e., Grade I violent, Grade I non-violent, Grade II, Grade III and by outcome of appeal (e.g., determination upheld, determination reversed, remanded to redraw charges to address due process violation, dismissed due to discharge from custody).

(vi) Any other information the Department or the Board deems relevant to assessment of RMAS Due Process.

(3) The Department shall provide the Board with the individually identified data used to create the public reports required in this section and all due process documentation.

(4) The Board and the Department shall jointly develop the reporting templates for the public reports required by 40 RCNY § 6-25(i)(2), which shall be subject to the Board's approval.