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Board of Correction Public Comment: Proposed Restrictive Housing Rule

Written Testimony of The Bronx Defenders[1]
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I. Introduction

This past year, Daquan Carrasco had his first mental health crisis while awaiting trial on Rikers Island. Under the stress of his pending criminal case, the dangerous conditions in jail, and the isolation of incarceration — all magnified exponentially by the global pandemic — he decompensated very quickly. At the time of this first mental health crisis, Mr. Carrasco was housed in General Population and the Department of Correction (DOC) saw his behavior as "acting out," violent, and aggressive. He ended up in punitive segregation, followed by a prolonged stay in Enhanced Supervision Housing (ESH), where he remains today. Mr. Carrasco's story is typical of how DOC's current disciplinary system in the city jails responds with punishment instead of support. We have all heard DOC staff, including the Commissioner herself, talk about young people in restrictive housing as "violent," "dangerous," and as "having no remorse" — as if they are monsters that need to be caged and left to rot. This narrative fails to recognize that every single person in DOC custody is a human being with a story, a person who was not born "violent" or "dangerous," but is responding to inhumane and cruel conditions. It also fails to recognize that our clients will not be in custody forever; the vast majority will return to their communities, whether in a few months or a few years.

While we recognize the Board's efforts over the past year to create a less harmful disciplinary system than is currently in place in the city jails, the Board's proposed restrictive housing rule

[1] The Bronx Defenders is a public defender non-profit that is radically transforming how low-income people in the Bronx are represented in the legal system, and, in doing so, is transforming the system itself. Our staff of over 350 includes interdisciplinary teams made up of criminal, civil, immigration, and family defense attorneys, as well as social workers, benefits specialists, legal advocates, parent advocates, investigators, and team administrators, who collaborate to provide holistic advocacy to address the causes and consequences of legal system involvement. Through this integrated team-based structure, we have pioneered a groundbreaking, nationally-recognized model of representation called *holistic defense* that achieves better outcomes for our clients. Each year, we defend more than 20,000 low-income Bronx residents in criminal, civil, child welfare, and immigration cases, and reach thousands more through our community intake, youth mentoring, and outreach programs. Through impact litigation, policy advocacy, and community organizing, we push for systemic reform at the local, state, and national level. We take what we learn from the clients and communities that we serve and launch innovative initiatives designed to bring about real and lasting change.

(Proposed Rule) fails to break with the punitive narrative perpetuated by DOC, and does not provide adequate opportunities for someone like Mr. Carrasco to access the support he needs. And, critically, it does not end isolated confinement. It entrusts DOC with even more authority and autonomy in conducting disciplinary processes and restrictive housing placements. DOC has proven that it is not only incapable of doing this competently, but also that it does not understand how to change people's behavior and that it will continue to inflict the same punishments and expect different outcomes.

Moreover, by refusing to include a right to counsel provision, the proposed rule fails to cure the arbitrary and capricious disciplinary process that railroads people in custody and leaves them despondent. And it rewards DOC for creating end-runs around the ban on solitary confinement for young people by expanding structurally restrictive units like Northern Infirmary Command (NIC) and Manhattan Detention Center 9 South, units that impose extreme isolation on people with no due process and no way to challenge their placement.

We ask the Board to revise the proposed rule to address the following concerns:

- Structurally restrictive housing continues the harms of prolonged isolation;
- DOC's failure to administer a fair and accurate disciplinary system has proven that it cannot run this process without real checks and balances; and
- Without the right to obtain counsel for incarcerated people, the injustice and harms caused by DOC will continue.

We urge the Board to revise the rule in order to truly address the harms of isolated confinement and create a fairer, more balanced disciplinary system.

II. Structurally restrictive housing continues the harms of prolonged isolation

The Board is proposing to model new restrictive housing units (Risk Management Accountability System (RMAS) levels 1 and 2) based on the existing structurally restrictive units at NIC and the SECURE unit. By eliminating punitive segregation and other restrictive units that currently exist and replacing them with these new units, the Board and the Mayor will claim that New York City is "ending solitary confinement." Based on what we know about the model units from client feedback, however, this is absolutely not an end to solitary confinement, and is certainly not a true alternative to punitive and harmful isolation practices in the city jails.

As part of the Jails Action Coalition and #HALTsolitary campaign, we have asked that the Board release photos of the units that have been proposed for the RMAS. Most of the public has never seen these units. While the proposed units include the additions of a larger space and some resources to occupy the mind such as a phone and a TV, being alone in any physical space

without true presence of another human being is still torture. For the only exposure to others to be through a metal mesh barrier, and to refer to that time as "out of cell," is not effectively "ending solitary." The physical set up of the unit is still isolated confinement, and if the rule does go forward as is, those units should absolutely be subject to HALT Solitary Confinement Act provisions,[2] as per HALT's definition of segregated confinement. Not only does the proposed rule leave out the right to any outdoor recreation, but the proposed units for RMAS 1 reportedly do not have windows except across the hallway from the out of cell area.

The Bronx Defenders' Prisoners' Rights Project (PRP)[3] has worked with a number of clients who are housed in the current NIC structurally restrictive units, as well as in the SECURE units at GRVC. Recently, PRP received a referral from an attorney whose client is currently housed in the NIC structurally restrictive housing unit. The attorney described her client's report:

"He says that they are using NIC as punitive housing now. They are keeping them locked in cells or only out in a very small rec room but the entire place is outfitted to prevent the spread of infectious disease so it is de facto like the box - everything is plexiglass, even more than in regular facilities so the ventilation is terrible. He is forced to wear ankle shackles and is in hand restraints more than in gen pop. He never received a ticket or a hearing about this."

This client's description of the unit as being "like the box" should tell the Board everything it needs to know. It comports with the views of all of our clients who have been placed in the structurally restrictive units at NIC. RMAS is not the fundamental change that justice and human rights demands - not in the eyes of the advocates, and, most importantly, not in the eyes of the people in DOC custody.

We learned the most about NIC's model via our client Mr. Jones,[4] who spent **almost a year and a half** at NIC. At only 19 years old, Mr. Jones was locked in a cage for 24 hours a day, 7 days a week – with no hearings, no review of his placement, and no meaningful connection to the outside world. DOC may have officially called the NIC cages "General Population," but they amounted to solitary confinement and torture for Mr. Jones.

Mr. Jones's living space had three areas: The first contained his bed and toilet; the second, immediately next to the first one, contained a TV and a phone, which he and one other person in custody had access to; the third was a so-called "rec" space that was open to the sky, but contained no exercise equipment and was too small to run around in.

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[2] Retrieved from https://www.nysenate.gov/legislation/bills/2021/S2836
[3] The operation of PRP is such that advocates reach out to the PRP attorneys when a client describes a situation that feels unjust and untenable to them. As such, the clients PRP works with do not necessarily reflect all of our clients in restrictive housing, but more so the situations where conditions are reported as inhumane or there has been a lack of due process, or not uncommonly, both.
[4] A pseudonym

The only people that Mr. Jones had regular contact with were the officers and the one person in the cell directly next to his. Mr. Jones never had a hearing before being placed in this back-door solitary unit and there was no "leveling up." Even if there had been, there was no programming he could meaningfully participate in to demonstrate good behavior. He was a high-school student, and yet DOC denied him access to education while in this cage, despite our repeated requests to enroll him. Mr. Jones completely missed the latter part of his high-school education. Although he had received mental health services in the community, Mr. Jones had little access to mental healthcare at NIC. He received so-called "art therapy" through a slot in a door. He was also repeatedly stripped completely naked and searched, thus removing any doubt for Mr. Jones that he was not in a safe, therapeutic environment.

This unit, which was effectively solitary confinement with no age restriction, operated without the Board's explicit consent for years, just like the back-door solitary unit at West Facility. These units operated in clear violation of the Minimum Standards and the Constitution; in fact, DOC has recently been sued by a class of victims who were forced to spend months and months in these back-door isolation units without any due process protections.[5] Despite the experiences of people like Mr. Jones, the Board's proposed rule would *expand* this form of torture under the guise of "ending solitary." DOC's illegal back-door placements in prolonged isolation should be condemned, not rewarded with expansion.

III. DOC's failure to administer a fair and accurate disciplinary system has proven that it cannot run this process without real checks and balances

One of the most concerning aspects of the proposed rule is the inherent lack of checks and balances, or any true oversight over the disciplinary process. Without any time limitations on these new restrictive housing unit placements and without access to counsel, DOC has complete authority to allow people in custody to languish for months, possibly longer, in extreme isolation.

The Department of Correction has shown that it cannot be trusted to provide meaningful due process without oversight. Since the fall of 2019, when PRP was created to track our clients throughout the disciplinary process, we have encountered a bewildering array of proven failures and incompetencies in the disciplinary system that could have been prevented if our clients had access to counsel.

[5] Miller et. al. v. City of New York, 21-CV-2616. "...[P]retrial detainees placed in indefinite isolation confinement at West Facility, NIC, or 9 South were not given a hearing or other meaningful opportunity to challenge the nature, conditions, or continuation of their isolation confinement. Indeed, it appears that Defendants deprived these pretrial detainees of that opportunity, and placed them in these stealth facilities, precisely because it was understood that placing them in indefinite isolation confinement violated DOC's own rules."

a. The periodic review process of ESH is meaningless and must not be recreated

Every single client we have interviewed who was held in custody in ESH reported that they experienced no meaningful fact finding before the initial placement. Many did not receive the ESH placement notice (a requirement of due process) prior to their ESH placement. The "hearing" consists of our clients being placed in a room and an upper level officer reading from a piece of paper the purported reasons for the ESH placement. There is no opportunity to challenge the placement or contest the accusations. Although some of the reasons for the placement are based on infractions that our clients may have had the opportunity to contest at a hearing, many are for infractions for which DOC falsely stated that our clients refused a hearing, or for incidents that never garnered tickets, or were based on "intelligence" our clients do not get to see. In our experience, it appears that ESH placement is based on not much more than a client garnering a bad reputation, or being "too influential," and not a robust finding that our clients actually committed acts of violence.

In fact, at least one client remained in ESH for nearly a year before we realized it and started sounding the alarm. Once this client's legal representatives began to inquire about the client's interminable stint in the unit, he was mysteriously moved back to General Population. He had no idea why he had remained at ESH for so long or what behavior changes he needed to make to get out. Had this client had representation at the beginning of the placement and throughout the periodic review process, this inexcusable placement never would have happened.

Daquan Carrasco has remained in ESH for over 90 days. His placement followed an illegal 30 day solitary confinement sentence. This young man was sent to ESH Level 1 without service of the predicate placement notices and without a meaningful initial review. As a result of months of advocacy, it was determined that he had served the PSEG time for a non qualifying offense. Other infractions that DOC relied on for his ESH placement involved erroneous departures from the directives and minimum standards, yet were upheld. DOC's response to our client's efforts to advocate on his own behalf were dismissive, misinformed, and devoid of any accountability or commitment to ensuring fairness and due process.

To date, Mr. Carrasco remains in ESH, and has recently been placed back into Level 2, for reasons unknown to him. He has been told, countless times, by countless DOC staff, they are unsure as to why he remains in ESH. He was told on multiple occasions that he would level out and be returned to General Population. However, he has yet to have any review hearings; he has yet to speak with anyone about why he has remained in ESH for weeks beyond the date he was supposed to be transferred back to general population; and he has yet to be served with records documenting that reviews ever occurred subsequent to being placed in Level 1 over 90 days ago. Similarly, DOC has ignored requests for these records made by both his lawyers and Board staff members.

b. Despite demonstrated incompetence, RMAS places an even greater responsibility on DOC to administer a system of due process

RMAS requires that correction officers undergo training on the principles of due process in order to effectuate a fair disciplinary system that lacks the right to obtain counsel. Defense attorneys and advocates have already received training on the principles of due process and are ready to assist in applying them. We need no additional training at the city's expense to assist with disciplinary due process.

Outside checks and balances on DOC's power to place people in extremely restrictive settings are absolutely necessary. Recently we learned that one of our clients was placed in punitive segregation for an unqualifying offense due to a "clerical error." When we brought this error to DOC's attention, it was revealed that multiple people in PSEG may have been victims of this error. For another client, we had to go through the entire punitive segregation appeals process to prove that our client was too young to be placed there; DOC had an incorrect birth year for him that was only corrected after he served his time. Another client won his infraction hearing but was not removed from PSEG for *three days*. DOC Legal assured us they would correct this mistake promptly but did not. Yet another client was in pre-hearing detention for two weeks without a hearing while officers repeatedly told him, "We don't know why you're here," but never did anything to move him out until his attorney made a complaint. Yet another client was not "leveled up" in ESH because ESH Level 2 and 3 were combined due to staffing issues.

Basic errors like these are serious and result in enormous harm to our clients. Our clients see the disciplinary "due process" system as meaningless and stacked against them. They know that they cannot expect any semblance of fairness, justice or even basic respect from any aspect of this process, and that perception is, in and of itself, dehumanizing.

IV. Without the right to obtain counsel, the injustice and harms caused by DOC will continue, regardless of physical structure

a. Allowing counsel to be present at both the initial disciplinary hearing and periodic reviews would prevent people from being placed in restrictive housing by mistake, and keep them from languishing there

Mr. Smith's[6] story highlights the complete lack of fact-checking or transparency in the disciplinary process, as well as the utterly inhumane conditions in the SECURE unit. Mr. Smith has spent the majority of his current incarceration in restrictive housing units, the better part of two years. It all began with a DOC error that incorrectly placed him in punitive segregation

[6] A pseudonym.

when he was ineligible due to his youth. His legal team helped him file an appeal that he ultimately won, but unfortunately at that point he had already served his PSEG time.

Mr. Smith quickly learned that there was nothing fair or just about the disciplinary process at Rikers. In September, he first appeared for a hearing after an alleged infraction, where an officer explained he would be placed in secure housing for a qualifying offense. During the hearing, an adjudication captain told Mr. Smith plainly, without a hint of shame, "The officer can say anything, they can say whatever they want, and they can be totally wrong." Mr. Smith shares that in his experience, "Whatever they write on the ticket, that's what they're gonna go by. If it was an incident with footage, then they play it in front of you. If there's no footage, the CO can just write anything." The amount of blind spots in the housing area where there is no video to capture what actually happened means it is often only the officers' word, and incarcerated individuals' perspectives of events are not valued or heard.

The week he would have "leveled up" to leave secure detention and return to General Population, he was accused of allegedly "smuggling contraband" through a package that a family member sent him directly from the store - a dubious allegation that was apparently not strong enough to inspire DOC to even write up an infraction. Yet, this paper-thin allegation was still part of the record in his denial of a "level up." This is a crystal clear example of why DOC *cannot* be responsible for conducting periodic reviews with zero oversight.

b. Counsel should be permitted to participate in eligibility determinations for restrictive housing and other restraints on liberty

People in custody regularly end up in restrictive housing when their medical condition(s) should have excluded them. Many people are experiencing mental health crises for the first time, or deteriorate mentally as their time in custody wears on. It should be the Board's utmost priority to ensure that people experiencing a mental health crisis do not end up in isolation. The legal team, in constant contact with the person in custody's family and community, must be permitted to share information that contributes to the decision about someone's mental fitness for prolonged isolation, and should be permitted to advocate for the person's health. The legal team often has better access to the person in custody's history, the circumstances of their arrest which may have been crisis related, and outside records.

CHS staff have taken to social media to decry the medical "greenlight" process for placing someone in restrictive housing. They are treatment providers for patients, not an arm of DOC security. Counsel should be permitted to argue, based on CHS's diagnosis or proposed diagnosis as well as information counsel can obtain from the community, that a person is medically ineligible for restrictive housing. By allowing for a robust argument, CHS staff is relieved of the burden of saying "yes" or "no" to placement. The doctor-patient relationship thus remains what it

should be, one of trust, objectivity, and confidentiality, while the advocate-client relationship remains one of zealous representation of the client's rights.

Counsel to people in custody should also be included in the serious decisions to designate our clients "centrally monitored," "Red ID," and "enhanced restraints." These statuses affect our clients' criminal cases - they make production to court more difficult, counsel visits more difficult, and they involve the possibility of having to wear shackles in front of judges and the public in courtrooms and virtual spaces. Some clients are burdened with these kinds of restrictions simply because the allegations against them are of interest to the media and the public even though they are still pre-trial detainees awaiting conviction, presumed innocent.

c. The right to obtain counsel has long been present in other jurisdictions

Granting a right to have their public or private defense attorney or advocate present at each disciplinary fact-finding - the initial infraction hearing and the periodic reviews - costs the city nothing and means the world to our clients. As the Board is well aware, Washington D.C. has allowed counsel in disciplinary proceedings in its city jails for almost 30 years. Massachusetts, Washington, Kentucky, Alaska, California, Minnesota, and fairly soon Los Angeles have all recognized that incarcerated people deserve advocates in any situation where their liberties are going to be further restricted. The Washington, D.C. Public Defender Services of D.C. ("PDS") has an entire unit of their office devoted to reentry and advocacy for incarcerated people, including representing them at disciplinary hearings at the jail, and they meet regularly with the DOC commissioner in a friendly exchange of information. It is not so novel.

In Washington D.C., whenever someone receives a ticket for a qualifying disciplinary infraction their Department of Correction gives the person in custody a form in which they can request that PDS represent them at the hearing. Then, the Department emails PDS a notification of the hearing at least 24 hours before it occurs. PDS does a conflict check and then tries their very best to make it to the hearing. The chief judge of D.C. issued an administrative practice order to allow law students to represent incarcerated people at these hearings under PDS attorneys' supervision. Although the date of the hearing could be any weekday because it occurs within 7 days of the incident, the hearings are always at the same time. Surveillance video and stills are frequently marked "for attorneys eyes only" to accommodate security regulations. The advocates will sometimes meet with witnesses in interview rooms and obtain affidavits for submission at the hearing. Rather than one hearing officer, an "adjustment board" of three experienced officers presides over the hearing. The decision is rendered immediately. Much of what is litigated involves procedural violations such as that the officer who investigated the case and obtained statements from other officers was also involved in the incident; chain of custody issues for possession of contraband; and not providing notice to the person in custody.

Furthermore, if the Board limits the right to counsel to only class 1 infractions, DOC will find a way to reduce the level of infraction to avoid notifying counsel. If the Board does not grant the right to counsel before all types of restrictions are imposed - housing as well as statuses and restraints - DOC will find a way to punish people using the tools that do not require real due process. All proposed restrictions on the liberty of people in custody must undergo an actually fair proceeding with counsel for the accused. People in custody awaiting trial who have not yet been convicted should be guaranteed effective due process before increasing restrictions on their liberty.

The use of restrictions of any kind would be greatly reduced if counsel were present to sound the alarm against erroneous placements in the first place. A robust check on DOC's power to restrict, isolate, fine, and reprimand people in custody would send a clear message that abuses of this power will not be tolerated.

d. HALT Solitary includes access to counsel, and New York City must go further than the State

The HALT Solitary Confinement Act includes critical language that permits people in custody across the state to be represented by an attorney in the disciplinary hearing that will determine their placement in segregated confinement. Notably, across the state, many people now protected by this provision of the rule have no active contact with an attorney, law student, or paralegal who could represent them, but they have the right to try and access that support. In New York City, however, a large portion of the jail population is being held pre-trial and therefore already has access to a legal team. Yet this Board has created a system for New York City that now falls far behind the state, failing to give people in custody the full representation of their legal team. With the proposed rule as is, New York City will be the outlier in torturing people with prolonged isolation with no counsel and no meaningful human interaction. It is truly shameful.

V. Conclusion

In the Board's published rule, the "History" section outlines how we got here. It details how far we have come from a situation in which someone like Kalief Browder, a teenager accused of a crime and too poor to pay bail, could have languished for years in solitary confinement, resulting in such a deterioration of his mental health that he took his own life. The history is missing an emphasis on who pushed the Board to make more humane changes and what advocates and survivors of solitary have consistently demanded for nearly a decade: a true end to solitary confinement. The Board and the Department now celebrate "progress" that has been made in terms of reducing the reliance on solitary confinement and recognizing the unique harms it imposes on young people, but we must remember that the history includes their resistance to those changes. And that when those changes were implemented and they were faced with the

prospect of finding new disciplinary solutions, DOC created end-runs around the restrictions with horrific back-door units that were "general population" in name only. ESH became an interminable placement with no meaningful review where human beings were shackled to desks, while West Facility and NIC at Rikers and 9 South at MDC were the new warehouses for inflicting sometimes years-long isolation on young people supposedly ineligible for solitary. Now, DOC resists the right to obtain counsel in disciplinary proceedings and resists a true end to solitary confinement.

Any disciplinary system created in response to the seemingly intractable violence on Rikers Island must include the person in custody's legal team. The person's criminal case is the driver of their life at that time; it is absurd not to include the legal team in any disciplinary proceeding arising out of the person's confinement. Access to counsel must be mandatory, not at DOC's discretion. Otherwise it will just be more of the same message to the most marginalized people in NYC - you are powerless, you are worthless.

The Board must heed warnings of advocates that prolonged isolation is dangerous and counterproductive, and most importantly, must listen to those who have experienced the models for these new units. The Board must create true alternatives to isolation. If the RMAS moves forward as written, this Board will go down in history as obstructing a major aspect of the decarceration civil rights movement.

Thank you for your time and attention in reading this comment, and we hope to see meaningful changes to the proposed rule in response to overwhelming public feedback.