



November 13, 2017

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Members of the Board of Correction
Martha King, Executive Director
NYC Board of Correction
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Re: Department of Correction Variance Requests for “Six (6) Month Limited Variance Renewal Request to BOC Minimum Standards: Use of Enhanced Supervision Housing (ESH) Section 1-16 (c)(1)(ii) for Young Adults (18 to 21 years old)” (Exclusion of 18-21 Year Olds from Enhanced Supervision Housing) and “Limited Variance Renewal – Secure Unit – Minimum Standards §1-05(b) and §1-08(f)” (Lock-In and Access to the Courts and legal services, including law library in the Secure Unit).

Dear Director King, Acting Chair Cephas and Members of the Board:

The Legal Aid Society opposes the continued use of Enhanced Supervision Housing (ESH) for Young Adults, opposes the use of restraint desks in ESH and the Secure Unit and opposes the extension of these variances.

The Board has commenced rule-making on the conditions and use of restraints and restrictive housing within the City jails. The Board should deny these requests and proceed with rule-making in compliance with the City Administrative Procedures Act (CAPA), New York City Charter, Chapter 45. The Board should not, through variances, relinquish its role of independent authority over the Department of Correction (DOC), permitting the removal or reduction of significant protections from an undetermined number of people without public development of the factual basis for them. To do so impermissibly permits the DOC to limit rights of incarcerated persons absent the protections of CAPA, substituting the law with a process that:

- Lacks transparency,
- Evades the rule-making procedures,
- Increases the number and types of restrictions absent process,
- Increases the number and types of restrictions absent a developed factual basis, and
- Fails to consult with stakeholders and the public or to provide them with information and the opportunity to participate in the process.

ENHANCED SUPERVISION HOUSING (ESH)

The ESH, approved by the Board pursuant to rule-making in 2014-15, limited the restrictions in that housing area “to those tailored to the specific security or safety threat posed by that individual inmate.”¹ The Board recognized the importance of safety and security in the ESH *and* required “the parallel objective of promoting rehabilitation, good behavior, and the psychological and physical well-being of inmates.”² The Board required the Department to train correction officers and “provide ESH inmates with programming aimed at facilitating rehabilitation, addressing root causes of violence, and minimizing idleness.”³ The Board, in permitting the reduced hours of lock-out in these new units, excluded people aged 16-21 due to evidence of the dangers of such a restrictive unit for young persons with developing brains.⁴

Through the variance process, the DOC has eviscerated the terms of the rule-making that created the ESH. They have done so without sharing the policies, procedures, and assessment tools relied on to make determinations about placement into the various units at issue in these variance requests. Rather than utilizing individualized, tailored restraints that take psychological and physical well-being into account, the ESH utilizes extreme restraint and limited lockout time broadly in a one-size-fits all approach without the skill and care of a multi-disciplinary team of professionals.

ESH is a punitive setting. The constant presence of Emergency Services Unit, daily K-9 dog use, restrictions to booth “no-contact” visits, and the restraint desks where all out-of-cell time is spent chained by one’s feet in the Entry Unit and in Phase 1 of the ESH, and the use of those same restraint desks for all young people attending school, regardless of the Phase they have reached, are punitive measures. The lock-out time is regularly less than the required 7 hours per day and the ESH units are frequently subject to repeated lockdowns that terminate all movement and eliminate all out-of-cell time.

What we have learned from speaking to individuals in the ESH, including young adults housed in the most restrictive settings and required to sit at restraint desks, is that these restrictive measures are painful and humiliating, induce anger, frustration, and a growing hopelessness in young people who have no expectation that they will be moved to a less restrictive phase or that there will be any fairness from DOC in the process. Individuals expressed that they cannot advance, yet are not provided with assistance in completing the assignments. Individuals have reported that DOC staff tell them that “they will never advance beyond Phase 1,” that “they will never get out of ESH,” and from what they experience, they have no reason to think otherwise. The most recent DOC Young Adult Restrictive Housing Report demonstrates this lack of progress: many individuals move back into the ESH Entry Unit (where they are then automatically shackled for 30 days) from other phases and the majority of discharges from ESH are due to discharge from DOC custody.⁵

¹ January 2015, New York City Board of Correction Notice of Adoption of Rules Statement of Basis and Purpose, p.2 available at: http://www1.nyc.gov/assets/boc/downloads/pdf/boc_rules_governing_correctional_facilities_fr.pdf.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Reports are available on the Board of Correction website. This report may be found at: <http://www1.nyc.gov/assets/boc/downloads/pdf/young-adult-esh-secure-report-october-2017.pdf>

Yet many of these restrictions, including the use of restraint desks, were not even shared with this Board before being implemented by the DOC. For example, the DOC has made claims that other jurisdictions utilize the restraint desks similarly to the seven hour time stretches that are the current practice for young adults housed in Secure, ESH, Young Adult (YA) ESH, and the ESH Entry Unit. Yet, no policies or procedures from other jurisdictions have been cited or produced. From our own inquiries we are unaware of *any other jurisdiction* that permits the use of two point leg restraints for the 7-hour period utilized in our City jails.⁶ Rather, use of restraint devices are subject to regular and frequent review by a multi-disciplinary team of professionals including medical, mental health and program specialists in addition to security staff.⁷

The 30-day use of two-point restraints on young adults in the ESH Entry Unit is especially egregious and should be discontinued immediately. The blanket application of 30 days of leg-shackled programming contravenes all standards for humane and non-punitive treatment of individuals. The ESH Entry Unit is punitive in nature, there is no option available that is individualized, reduced, and “tailored to the specific security or safety threat posed” by the individual that the Board envisioned for the ESH.⁸ The automatic blanket application of leg restraints for 30 days, regardless of individual circumstance, provides no fairness or proportionality of outcome to purported act. Thirty days is itself excessive and punitive. The American Correctional Association forbids use of restraints for punishment. ACA Standard 4-4190 states: “instruments of restraint, such as handcuffs, irons, and straitjackets, are never applied as punishment.”

The lack of consistency in staff, in scheduling, in response to providing phone calls and other Board Standards in the ESH, the repeated use of lockdowns that terminate all movement and out-of-cell time, add to the lack of security for those who are housed in these areas. Our clients express increased reluctance to participate in the programming because of a lack of safety and a lack of a clear pathway to lesser restrictive settings due to the punitive response by staff and the high level of restrictions in the ESH. The lack of air-conditioning during hot summer

⁶ In the November 6, 2017, DOC letter requesting the six month renewal of the variance, the DOC asserts that there is no “national precedent” for ESH. This assertion appears to be more accurate than the previously made assertions that restraint desks are utilized elsewhere in this same manner.

⁷ The American Bar Association (ABA) Standards on the Treatment of Prisoners requires that “[w]hen restraints are necessary, correctional authorities should use the least restrictive forms of restraints that are appropriate and should use them only as long as the need exists, not for a pre-determined period of time.” ABA Standard 23-5.9 (b). The Standard requires that “[c]orrectional authorities should take care to prevent injury to restrained prisoners, and should not restrain a prisoner in any manner that causes unnecessary physical pain or extreme discomfort.” *Id.* “Correctional authorities should not use restraint mechanisms such as handcuffs, leg irons, straitjackets, restraint chairs, and spit-masks as a form of punishment or retaliation. Subject to the remainder of this Standard, restraints should not be used except to control a prisoner who presents an immediate risk of self-injury or injury to others, to prevent serious property damage, for health care purposes, or when necessary as a security precaution during transfer or transport.” ABA Standard 23-5.9 (a). The presumption is that use is time-limited unless a medical or mental health reason requires the use of restraints and that any such use requires that “the decision to use, continue, and discontinue restraints should be made by a qualified health care professional, in accordance with applicable licensing regulations.” ABA Standard 23-5.9 (e).

⁸ *Supra* fn 1. In the Fourth Report of the Independent Monitor in *Nunez* all of the “alternatives to Punitive Segregation” were noted to be lacking in their ability to “provide discipline that begins to address the underlying causes of violent behavior, therefore making it unlikely to reoccur” and, that to improve these programs, “the quality of behavior supporting planning must be improved, criteria for progressing through the programs must be clarified, and basic program monitoring and quality assurance protocols must be enacted.” 4th *Nunez* Report at p. 15.

days was particularly oppressive under these conditions where you cannot move about, cannot take showers or access water and ice to stay cool. All of these factors contribute to a growing frustration level in a population of individuals who do not deal with frustration and uncertainty well.⁹

This is not a recipe for reduced violence,¹⁰ rehabilitation, education, or improved program participation.

SECURE UNIT

The Board has permitted the DOC to utilize restraint desks in the Secure Unit. The Legal Aid Society objects to the use of these restraint devices for all of the reasons stated in the discussion of the ESH above. The Board should suspend the use of restraint desks in the Secure Unit.

The Department seeks another six month variance concerning lock-out time afforded to young persons housed in the Secure Unit. In their letter dated November 3, 2017, they assert the use of incrementally increasing the amount of out-of-cell time over the course of the phases. However, they provide no data about the numbers of individuals who have advanced within those phases.¹¹ They assert that 15 young adults have completed all three phases of Secure but provide no time frame. It appears that the 15 is from the time of the implementation of the Secure Unit at the end of June in 2016. The Secure Unit was originally designed to hold up to 32 individuals at a time. It has never functioned at a capacity close to that number. In fact, only 8 young adults were in the Secure Unit at the time of the DOC letter requesting this variance. At these very low numbers it does not appear necessary to restrict lock-out time for any reason. Moreover, the failure to implement other less restrictive alternatives such as de-escalation cells does not comport with the requirement that efforts were undertaken by the Department to achieve compliance. This variance request appears to be a placeholder for an amendment to the Board's Minimum Standards and a misuse of the variance process.

The Board should not grant the variance limiting the access to the law library for individuals housed in the Secure Unit absent factual information concerning the utility of the substitute kiosks. Factual information should include an evaluation of the ability of inmates to

⁹ The June 2017 DOC Evaluation of Enhanced Supervision Housing for Young Adults identified the same poor results that our ESH interviews reflect – few complete the phases, low participation in programming, the majority remain in the ESH until they are discharged from custody, lockdowns are frequent and highly disruptive, and outcomes are not well defined.

¹⁰ In the Third Report of the Independent Monitor in *Nunez* the Monitor reported levels of violence in the system as a whole were extremely problematic, and that the failure to supervise, investigate and discipline excessive use of force by DOC staff remain pervasive. The Third *Nunez* Report indicated that excessive use of force by DOC staff includes misuse of gas, head strikes, wall slams and other violent takedowns that often involve neck and chokeholds. The Third Report also reflected continued failure of DOC staff to accurately report on use of force incidents. The recent Fourth *Nunez* Report indicates that use of force rates have continued to rise, supervisory staff repeatedly involved in problematic use of force incidents are left in the position to engage in subsequent misconduct (showing a lack of accountability in DOC), and that internal abuse investigations are deficient, lacking in quality and result in no remedial action even when it is clearly warranted.

¹¹ The most recent DOC Young Adult Restrictive Housing Report includes some data showing movement from more restrictive phases to less restrictive phases in Secure and showing lengths of stay in each phase. However, it is not possible to determine how many individuals were counted in the tabulation of the length of stay data.

access and utilize the kiosks, as well as, whether there are working procedures which provide daily access to the kiosks and prompt assistance from a law library aide or coordinator upon request. Access to assistance from a library aide/coordinator should be daily with such assistance provided that day or the following day (similar to that promised for West Facility in the September 29, 2016 DOC letter.) The current variance request does not include the assurance of next day assistance. If the Board grants this variance, the requirement of same or next day assistance should be included in the variance.

RECOMMENDATIONS

- Due Process Protections – Both ESH placement and Secure placement should require full due process protections. The process must have substance – real reviews with input from incarcerated individuals and assistance to them in challenging restrictive placements.
 - Decision makers must have demonstrated competency and training in behavioral health, effects of trauma, mental health, conflict resolution and violence reduction. Decision makers must have access to knowledgeable individuals to engage in discussion and input concerning complex decision-making.
 - A full hearing must be provided before any individual is placed in the ESH Entry Unit, whether as an initial placement or a return to ESH Entry Unit from a less restrictive phase or from the Secure Unit.
 - The Board should include notice to defense counsel and right for counsel to be present at the hearing and to advocate for their client.
 - The Board should include notice to defense counsel of assessments including, for example, questioning of their client in the ESH Entry Unit.
 - Implement presumptions of advancement and reductions in restrictions based on lack of serious incident.
- Transparency – Require the DOC provide its policies, directives, phase criteria, manuals, assessment instruments, and interview questions for all restrictive settings in the jails.
- Restraints Desks – Get rid of the restraint desks or make their use much more time-limited and individualized. Require multi-disciplinary team decisions on use (implementation) and review of need and utility. Require frequent review, require use limited to the least amount of time with presumption of advancement within a specified period. Impose a time limit for number of hours at a time and number of days.
 - H & H must be involved in determining outcomes and progression.
 - 7 hours in restraints is unreasonable and must be reduced.
- Restrictions and Restraints – Need for increased restrictions should be based on more than the presence of problems/occurrence of incidents. Frequently problems and incidents in the jails are due to failures to follow policy and/or inadequate training, staffing shortages, inexperienced staff, and poor supervision. They may also be due to the

inadequacy of policy and the actual need to implement different policies that will improve practice and reduce the identified problems and incidents.¹²

- Reduce the time periods for imposition of restrictions including length of times in phases – require multi-disciplinary team decisions on use and individualized need for restrictions and restraint; reduced time permitted in assessment and in each phase; the presumption of leveling up (absent serious misconduct); and multi-disciplinary input into placement, retention and use of restraints.
 - Time frames for ESH must be lowered and must be flexible – there should be movement to the least restrictive alternative as soon as possible.
- There must be mechanisms in place that ensure no long-term placement in the ESH Entry Unit, ESH 1, the Secure Unit or in any other level or phase.
- Policies are needed that set out criteria for movement in, criteria for movement out, protections for vulnerable populations, data collection and publication of data, staffing ratios in accordance with identified standards, hours for clinical staffing and appropriate confidential therapeutic space for clinical meetings with individuals.

CONCLUSION

DOC has a long-standing, fundamentally punitive attitude towards incarcerated individuals and a deep reluctance to address their conduct with anything other than punishment and increased restrictions. This attitude is well known to the Board and to anyone familiar with the agency – as is its culture of misusing force as a correctional tool. This ongoing predilection to heap on punitive measures and add restrictions must be recognized as failed policy lacking evidentiary basis. Instead, DOC must look closely at its own operations and the conduct of its staff. DOC must stop its efforts to make the jails even more oppressive for incarcerated persons and their families, and the Board must refuse to enable this conduct.

The Board should deny the variance requests for the reasons stated. The Board should not, through variance requests, relinquish its role of independent authority over the DOC, permitting the removal or reduction of significant protections from an undetermined number of people without public development of the factual basis for them. To do so impermissibly permits the DOC to limit rights of incarcerated persons absent the process protections of CAPA. The DOC should be required to proceed with rule-making in compliance with the City Administrative Procedures Act (CAPA).

Sincerely,

SARAH KERR
Staff Attorney

¹² Increased use of restraints should not be reactive to DOC's own failures to curb brutality, conduct investigations and provide oversight and training for staff. See fn. 10 above.

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