

CUNY SCHOOL OF LAW – SPRING 2021 PUBLIC INSTITUTIONS BOC GROUP COMMENT

April 11, 2021

Ms. Jennifer Jones Austin, Chair
Ms. Margaret Egan, Executive Director
New York City Board of Correction
One Centre Street
New York, NY 10007

Re: Notice of Rulemaking Concerning Restrictive Housing in Correctional Facilities

Dear Chair Jones Austin, Board Members, and Ms. Egan:

We write as concerned citizens and students at CUNY Law School regarding the Board’s proposed rules on restrictive housing in correctional facilities. First, we must say that we are pleased to see that the Board has listened to PSEG survivors and advocates by proposing an end to punitive segregation in our jail system. An end to punitive segregation is long overdue. Too many individuals have lost their lives because of this punitive system. We are also pleased to see an alternative system that prioritizes the safety of people in custody and staff, accountability and needs of those who are incarcerated. We do, however, believe that it is critical—particularly at this juncture in criminal justice reform and New York City jails—that we emphasize what must happen to truly create a more humane system that eliminates punitive segregation.

A. Human Interaction, Time Limits and Rehabilitative Programming

The Board’s proposed Risk Management Accountability System (RMAS) is the agency’s attempt to end solitary confinement with a more humane apparatus. Yet, it cannot be overstated that RMAS closely resembles “management tools” currently used by the New York City Department of Correction (DOC)—Enhanced Supervision Housing (ESH)¹ and the Secure Unit².

¹ *What Is Enhanced Supervision Housing?* https://www1.nyc.gov/assets/doc/downloads/press-release/esh-enhanced_supervision_housing_011415_final.pdf (last visited April 11, 2021)

² *Department of Correction Reports*, <https://www1.nyc.gov/site/boc/reports/department-of-correction-reports.page> (last visited April 11, 2021)

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Like ESH, RMAS is a level-based model that specifies out of cell time, a periodic review for advancement, and with the Chief's approval, does not provide a time limit an individual may be held inside the unit. Like the Secure Unit, incarcerated persons housed in RMAS Levels 1 and 2 will be allowed to engage with one to three other individuals locked inside a cage. While the newly proposed lock out times and shorter periodic review is a step in the right direction, the proposed rule should implement 15-day periodic reviews with a cap on the total amount of time a person can remain in RMAS to four months in any 12-month period across levels. Additionally, the Board's proposed rules should also be aimed at rehabilitative housing that emphasizes therapeutic and anti-violence programming, promoting good behavior, and more training for correctional officers.

B. Affording Due Process Rights to Individuals Held in Restrictive Housing

Prisons and jails impose greater restrictions on liberty, privacy, and communication, and restrictive housing amplifies the need for greater judicial scrutiny due to the unforeseen nature of placement in segregation.³ The Board's proposed rules afford incarcerated people in RMAS procedural due process but lacks detailed notification to the individual's defense counsel regarding the charge or reason for placement in this untested system unless housed for Grade I violent offenses. Failure to notify an incarcerated person's attorney of any charge and to provide clear and complete details of the alleged offense is a serious cause of concern because defense counsel is unable to advise a client about issues that are likely to arise in a disciplinary hearing or potential outcomes of a client's court case. Further, the proposed rules do not provide a person custody an opportunity to have a right to counsel at the disciplinary hearing stage prior to placement in RMAS.

³ *Constitutional Implications of Restrictive Housing*, CJINSTITUTE.ORG, https://www.cjinsitute.org/assets/sites/2/2015/05/25_Constitutional_Implications_of_Restrictive_Housing_final.pdf (last visited April 11, 2021)

Without counsel, the likelihood of conviction is inevitably higher due to a lower standard of proof and other relevant factors. The Board’s proposed rule should implement a detailed notification to counsel directive to promote fairness and equity because failure to address access to counsel at any RMAS level effectively locks out an incarcerated person’s due process rights.

ADDITIONAL COMMENT

C. Alternatives to Restrictive Housing for Medical and Mental Health Detainees and Sentenced Inmates

We acknowledge that the Board’s promulgated rules exclude individuals classified with a serious medical illness or intellectual disability from being housed in RMAS.⁴ This section of the Board’s proposed rules is in direct response to the body of research that demonstrate “solitary confinement causes adverse psychological effects and increases the risk of serious to individuals who experience it” and is strongly associated with suicidal ideation.⁵ In June 2019, the Board published a public report on “Access to Health and Mental Health Care” and delineated Correctional Health Services (CHS) approximately schedules over 50,000 health and mental visits, conducts over 9,000 sick call visits, conducts over 3,000 health intakes, and makes over mental health 600 referrals each month.⁶ Perhaps more important and worrisome, which is reflected in the Board’s report, is CHS and DOC have failed to implement many of the Board’s 2018 recommendation on access to health and mental health, notably the multitude of missed

⁴ New York City Board of Correction, Notice of Rulemaking Concerning Restrictive Housing in Correctional Facilities (2021), p. 24, at [NOTICE OF RULEMAKING CONCERNING RESTRICTIVE HOUSING IN CORRECTIONAL FACILITIES](#)

⁵ Leonard, Jayne, *What are the effects of solitary confinement on health?* Medical News Today (Aug. 6, 2020), <https://www.medicalnewstoday.com/articles/solitary-confinement-effects#mental-health-effects> (last visited April 11, 2021)

⁶ New York City Board of Correction, *Access to Health and Mental Health Care (January-December 2018) (June 2019)*, https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/BOC-Reports/Health_Access/4b_Access%20Report%202018%20Review_Final_June%202019.pdf (last visited April 11, 2021)

appointments and non-production of the incarcerated in New York City jails.⁷ It is critical that individuals who are considered eligible for placement in any RMAS level be evaluated and treated by medical professionals for serious medical illness or intellectual disability. This point cannot be overstated to avoid cases like the death of Bradley Ballard, who was locked inside a mental health unit cell for six days and was denied life-saving medication and running water.⁸ Moreover, the Board should strongly consider “program-intensive, treatment supported, and empowered-based” housing such as Clinical Alternatives to Punitive Segregation (CAPS)⁹ and PACE (Program to Accelerate Clinical Effectiveness)¹⁰. CAPS, PACE, and similar programs that are fitted with correctional and medical staff who are knowledgeable and trained to work with detainees and prisoners living with medical or mental illnesses, and they can oftentimes de-escalate situations that arise inside the specialized unit.

D. Unshackling Reproductive Rights

The Board’s proposed rules give a nod to the necessary protections and policies needed to protect incarcerated pregnant persons. Specifically, the Board states, “pregnant persons, persons within eight weeks of giving birth, and persons caring for someone in the nursery are also excluded from being housed in RMAS.”¹¹ The Board’s rule on pregnant persons implies individuals who fall within this category should not be isolated, but it does not explicitly address what type of

⁷ Id.

⁸ Weiser, Benjamin, *City to Pay \$5.75 Million Over Death of Mentally Ill Inmate at Rikers Island*, The New York Times (Sept. 27, 2016), <https://www.nytimes.com/2016/09/28/nyregion/rikers-island-lawsuit-bradley-ballard.html> (last visited April 11, 2021)

⁹ The NYC Jails Action Coalition & the #HALTsolitary Campaign, *A Blueprint for Ending Solitary Confinement in NYC Jails* (October 2019), <https://fa.urbanjustice.org/wp-content/uploads/sites/22/2020/09/Blueprint-for-Ending-Solitary-Confinement-in-NYC-Oct-2019.pdf> (last visited April 11, 2021)

¹⁰ NYC Department of Correction, *CAPS and PACE Backgrounder*, <https://www1.nyc.gov/site/doc/media/caps.page> (last visited April 11, 2021)

¹¹ New York City Board of Correction, Notice of Rulemaking Concerning Restrictive Housing in Correctional Facilities (2021), p. 25, at [NOTICE OF RULEMAKING CONCERNING RESTRICTIVE HOUSING IN CORRECTIONAL FACILITIES](#)

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alternative housing should be provided to pregnant persons incarcerated by DOC. Dr. Carolyn Sufrin, a gynecology and obstetrics professor at John Hopkins, describes the causal effect between isolation and psychological trauma as well as evidence that shows pregnant persons in restrictive housing often have limited access to medical care—a practice that can harm the health of pregnant persons and their pregnancies.¹² The Board has a meaningful opportunity to implement broader sweeping rules that explicitly ban DOC from housing pregnant persons in any restrictive housing area—not only RMAS—that could be dangerous to pregnant persons and children.

CONCLUSION

The mission of the New York City Board of Correction (BOC) is to provide oversight and enact regulations that support safer, fairer, smaller, and more humane jails.¹³ Despite offering some improvements in restrictive housing rulemaking, BOC has not provided essential oversight protections for the amount of time a person can spend in each Risk Management Accountability System (RMAS) level, falls short on notification to defense counsel for clients who have not been charged with Grade I offenses, and has not recommended actual rehabilitative means to support incarcerated persons transition from restrictive housing back to general population through therapy and programming.

Sincerely,

J. McFarlane, K. Dennie, K. Lee
3L CUNY Law Students

¹² McCammon, Sarah, *Pregnant, Locked Up, and Alone*, National Public Radio (June 16, 2019, 5:00AM), <https://www.npr.org/2019/06/16/732109546/pregnant-locked-up-and-alone> (last visited April 11, 2021)

¹³ NYC Board of Correction, *About*, <https://www1.nyc.gov/site/boc/about/about.page> (last visited April 11, 2021)