Brooklyn Defenders

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WRITTEN TESTIMONY OF:

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Presented before
The New York City Board of Correction
Dwayne C. Sampson, Chair

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My name is Michael Klinger and I am a Jail Service Attorney in the Civil Rights and Law Reform unit at Brooklyn Defender Services (BDS). BDS is a public defense office whose mission is to provide outstanding representation and advocacy free of cost to people facing loss of freedom, family separation, and other serious legal harms by the government. For more than 25 years, BDS has worked, in and out of court, to protect and uphold the rights of individuals and to change laws and systems that perpetuate injustice and inequality. Thousands of the people we represent are detained or incarcerated in the New York City jail system each year while fighting their cases in court or serving a sentence of a year or less upon conviction of a misdemeanor. We thank the Board of Correction (BOC or the Board) for the opportunity to submit testimony today.

The Board of Correction is proposing to amend Chapter 1 and Chapter 6 of Title 40 of the Rules of the City of New York (Restrictive Housing in Correctional Facilities) to comply with the requirements set forth in Local Law No. 42 of 2024. The City Administrative Procedures Act requires the Board to provide an opportunity for and consideration of agency and public comment. Today's public hearing is an opportunity for members of the public to provide comments on the proposed rules, which the Board circulated on May 15, 2024, and published in the City Record on May 16, 2024.[1] The Board should adopt its proposed rules with clarifying modifications and amendments as detailed herein.

[1] *See* Board of Correction, City of New York, "Notice of Rulemaking Concerning Restrictive Housing in Correctional Facilities," Proposed Rules, New York City Law Department Certificate Pursuant to Charter Section 1043(d), and New York City Mayor's Office of Operations Certification / Analysis Pursuant to Charter Section 1043(d), May 16, 2024. *Available at* https://a856-cityrecord.nyc.gov/RequestDetail/20240514008.

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A. Local Law 42 and the Board's Proposed Rules

The New York City Council passed Local Law 42 on December 20, 2023, by a vote of 39-7.[2] In response to a subsequent Mayoral veto, an even larger majority of Council members voted to override the veto and pass the law by a vote of 42-9, on January 30, 2024.[3]

Local Law 42 ends solitary confinement in all forms and by all names in the New York City jails, for any period of time longer than four hours, and even then, only for de-escalation or emergencies. Critically, the Law allows for alternative forms of separation, which are intended to better support the health and safety of people in the Department's custody, as well as the safety and security of all people living and working in the Department's facilities.[4]

The city, over many years, has heard from experts whose research shows that greater safety and security result from reductions in reliance on punitive segregation and other related means of separating people alleged to have engaged in violent acts.[5] The Enhanced Security Housing model currently employed by the Department is a testament to the failure of such methods to actually reduce violence and increase security in jail settings.[6]

Advocates have long pointed to innovations both in New York City and elsewhere where pro-social, program-based interventions that involve full days of out-of-cell group programming and engagement have

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[2] Local Law 42 of 2024, Intro. No. 549-A, The New York City Council, Adrienne E. Adams, Speaker. Available at https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=5698267&GUID=6F47F49A-06A3-444C-BBB7-3CBFF899DD84&Options=ID|Text|&Search=549.

[3] *Id.*

[4] *Id.*

[5] *See*, *e.g.*, James Gilligan, M.D., and Bandy Lee, M.D., Jan. 13, 2015, Testimony on Proposed Rule by the New York City Board of Correction ("Decreased interaction with other people, rather than decreasing violence, actually increases violent behavior and increases the need for more intensive measures. This is because solitary confinement, in which people are deprived of human contact, interactions, and relationships, actually increases violent behavior toward others and toward the self."). *Available at* https://www.nyc.gov/site/boc/jail-regulations/rulemaking-2014-2015.page. *See also*, James Gilligan, M.D., and Bandy Lee, M.D., Sept. 5, 2013, Report to the New York City Board of Correction, (writing generally that punishment "is the most powerful tool we have yet created for stimulating violence," that "prolonged solitary confinement can only be seen by both inmates and staff as one of the most severe forms of punishment that can be inflicted on human beings," and that such confinement "can precipitate and/or exacerbate the symptoms of mental illness; that it can provoke suicidal, assaultive and homicidal behavior, self-mutilation, and other pathologic behaviors; and that it has been more or less universally recognized among the civilized nations of the earth as a form of torture and thus a most serious violation of human rights."). *Available at* https://solitarywatch.com/wp-content/uploads/2013/11/Gilligan-Report.-Final.pdf.

[6] *See*, *e.g.*, *Nunez* Monitor's Status Report, Apr. 18, 2024 at 45-48, *available at* https://www.nyc.gov/assets/doc/downloads/Nunez/2024-04-18%20--%20Monitor's%20Report.pdf (Citing continuing "unacceptably high rates of violence" at the Enhanced Supervision Housing unit now located at Rose M. Singer Center).

simultaneously created healthier outcomes for individuals in custody as well as safer and more secure environments for entire housing units and facilities. Almost 20 years ago, San Francisco's Resolve to Stop the Violence Project (RSVP) demonstrated that a housing unit comprising individuals with a history of serious violent crimes, when provided an "intensive, multi-modal in-house 'culture'" would experience a precipitous drop in violence while incarcerated, and would even significantly improve outcomes for people served by such a housing unit after release from jail.[7]

While Local Law 42 essentially provides a new set of minimum requirements, full implementation requires a meaningful reconsideration of how life looks and feels for people in the custody of the Department of Correction. For example, the Law's required out-of-cell time and congregate programming requirements leave open the possibility of providing the sort of programming that was so effective in San Francisco's RSVP, and which led to emphatic reductions in violence and better outcomes for people in custody even after their return to the community. At a minimum, however, the statutory language of Local Law 42 bans solitary confinement beyond four hours, while requiring 14 hours of daily out-of-cell time with group programming and activities, and it also provides for greater due process protections, including access to representation, time limits on placement in restrictive housing, and public reporting on the use of solitary confinement and alternatives. It further requires the Board to craft rules to be followed by the Department in fully implementing the law.

In its Proposed Rules, the Board captures important aspects of Local Law 42. In particular, the Board's proposed rules correctly:

1. Place a four-hour limit on de-escalation confinement and emergency lock-ins and provide for additional protections during those four hours to better protect people's health and well-being;
2. Require that outside of such confinement everyone in the city jails must only be locked in for eight hours at night for sleep and two hours during the day for administrative reasons and thus must have access to 14 hours of out-of-cell time each day;
3. Require that people in restrictive housing have access to at least 14 hours daily of out-of-cell time with group programming and activities, with clear definitions of "cell" and "out of cell" to prevent solitary by another name;
4. Place appropriate restrictions on restraints;
5. Restrict the type of conduct and/or circumstances that can result in placement in de-escalation confinement, emergency lock-ins, or restrictive housing;
6. Increase due process protections, including representation at hearings and time limits on alternatives to solitary;
7. Ban the use of locked decontamination showers;
8. Ensure that young people have access to trauma-informed, age-appropriate programming and services on a consistent, regular basis;

[7] *See* James Gilligan, M.D., and Bandy Lee, M.D., "The Resolve to Stop the Violence Project: transforming an in-house culture of violence through a jail-based programme," Journal of Public Health, June 2005, Volume 27, Issue 2, pages 149-155. *Available at* https://academic.oup.com/jpubhealth/article/27/2/149/1595844.

9. Provide data reporting requirements on solitary and alternatives, with oversight by BOC; and
10. Make clear that the Department cannot request variances from Local Law 42 requirements.

B. Disciplinary Hearings

Among the rights granted by Local Law 42 is the right of individuals facing placement in restrictive housing or restraints to a hearing, at which they will further have the right to be represented by legal counsel or an advocate, the right to present evidence and cross-examine witnesses, the right to have any witnesses testify in person at the hearing, the right to written notice of any hearing at least 48 hours prior to such hearing, the right to adequate time to prepare for any such hearing and the related right to have the Department grant reasonable requests for adjournments, and the right to an interpreter if needed.[8] In anticipation of implementation of this crucial set of due process rights that will apply to individuals represented by Brooklyn Defenders and our peer legal defense organizations, our office joined our defender colleagues in drafting a proposed set of rules for the Board's consideration.[9]

The rules we propose will give full effect to the statutory language of Local Law 42, particularly in light of the many critical details left to the board in its rulemaking capacity. For example, although the Law states that people charged with infractions that could result in placement in restrictive housing, Enhanced Restraint Status, Red ID Status, or Central Monitoring Case Status are entitled to legal representation, the law does not specify how individuals will be made aware of this right, how they and their advocate or legal counsel will be notified of any alleged infraction and subsequent hearing, or the procedures – including obtaining necessary discovery – that will govern these hearings. The rules proposed by the defender organizations and formally submitted on May 30, 2024, address each of these.

Recommended Amendments

Our suggestions are presented as amendments to the Board's current proposed rules, and refer to specific sections within that document.

1. Section 9, amending section 6-03 of Title 40 of the Rules of the City of New York

The Board's proposed rule already states that advocates – including law students and paralegals – should be permitted to provide representation to people facing disciplinary hearings that could lead to placement

[8] *See* Local Law 42, amending Section 9-167 of the New York City Administrative Code, subsection f ("Restrictive housing hearing"), requiring that "the department shall not place an incarcerated person in restrictive housing until a hearing on such placement is held and the person is found to have committed a violent grade I offense. Any required hearing regarding placement of a person into restrictive housing shall comply with the rules to be established by the board of correction."

[9] "Joint Defender Proposed Rules Regarding Access to Legal Representation and Procedures Governing Hearings," attached as Appendix (*hereinafter* "Appendix").

in enhanced supervision housing or other restraints. We propose that the board clarify that any such law students must be working under the supervision of an attorney.[10]

2. Section 34, amending Paragraphs (5) through (9) of subdivision (d) of section 6-23 of the Rules of the City of New York, as renumbered by this rule

The Rights of the Person Charged

The specific recommendations for amendments to these sections proposed by the defender organizations seek to make explicit certain protections required by the Law. The rules must not only require that the Department, through its hearing adjudicator, create a full record of the proceeding(s), but must specify what is required to be made part of any such record.[11]

The Right to Legal Representation

The rules must explicitly state that they apply to individuals facing the possibility of placement in restrictive housing, Enhanced Restraint Status, Red ID Status, or Central Monitoring Case Restraint Status.[12]

While Local Law 42 provides that notice must be provided no less than 48 hours prior to any hearing, the Board's rules must specify that such written notice shall also inform the individual of their right to legal representation, shall be provided even in cases where the person has waived their right to appear at the hearing, and that this is in addition to the duty of the Adjudication Captain to notify the person charged of their right to legal representation on the record at the hearing.[13] Further, the rules must specify that any

[10] *See* Appendix, Section 9, in reference to Board of Correction Proposed Rules, Section 6-03(b)(1) (defining "Advocate").

[11] The Board's proposed rule, Section 34, Paragraph (6), requires that both the notice of infraction and the Hearing Adjudicator shall advise the person of their rights. We propose that the Hearing Adjudicator shall do so on the record. Moreover, as we propose in Paragraph (6)(i)(A), the Adjudication Captain must specifically notify the person charged of their right to legal representation on the record at the hearing.

[12] The Board's proposed rule Section 34, Paragraph (6)(i) must explicitly state these restraint statuses, each of which is contemplated by Local Law 42 in amendments to Sections 9-167(e) and (f) of the New York City Administrative Code, requiring that the department "shall not place an incarcerated person in restraints … until a hearing is held to determine if the continued use of restraints is necessary for the safety of others," and requiring that the department "shall not place an incarcerated person in restrictive housing until a hearing on such placement is held and the person is found to have committed a violent grade I offense."

[13] *See* Appendix, Section 34, in reference to Board of Correction Proposed Rules, Section 6-23(d)(6)(i)(A).

refusal of representation must be recorded, on camera, both upon the service of the infraction and at the disciplinary hearing.[14, 15]

Critical to the right of a detained individual to be represented by legal counsel at a hearing is the ability of the department to promptly notify any such counsel of all details related to the hearing. Our rules propose that the department shall notify the designated contact for each defense office and attorney of record who represents the person charged, and that to the extent an individual is unable to secure legal representation for the hearing through their counsel of record, the department shall maintain and regularly update a list of current eligible legal representatives or advocates.[16]

The Right to Appear

We propose bolstering the individual's right to appear personally at any hearing with an affirmative obligation on the department to inform the person charged that they have the right to appear, and to adjourn the hearing so that they may do so. Here, again, the department must be required to record, using video with audio, and to preserve such a record of any alleged refusal on the part of the person charged, such that it can establish that the individual knowingly and voluntarily waived their right to appear at the hearing and was aware of the consequences of failing to attend. A lack of video evidence of refusal should require dismissal of any alleged infraction.[17, 18]

The rules must further clarify that all disciplinary hearings covered under these rules shall take place in person in a DOC adjudication room, but must also provide for a virtual option upon request of the legal

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[14] *See* Appendix, Section 34, in reference to Board of Correction Proposed Rules, Section 6-23(d)(6)(i)(B).

[15] Our previously-submitted proposed rules contemplate the use of body-worn cameras. In May 2024, the Department took all body-worn cameras out of service following an allegation that one of the cameras spontaneously ignited. *See*, *e.g.*, Graham Rayman, "City Dept. of Correction pulls all body worn cameras after one ignites, injuries captain," Daily News, May 4, 2024. *Available at* https://www.nydailynews.com/2024/05/04/city-dept-of-correction-pulls-all-body-worn-cameras-after-one-ignites-injures-captain/.

To the extent the department may choose not to use body-worn cameras, we note that the department has testified to the City Council that it is prepared to use handheld cameras, in addition to the cameras placed throughout its facilities, to capture video. *See* Testimony of Department of Correction Commissioner Maginley-Liddie, at Executive Budget Hearing held jointly by the City Council Committees on Finance and Criminal Justice, May 17, 2024. *Available at* https://legistar.council.nyc.gov/MeetingDetail.aspx?ID=1194772&GUID=F0F72E46-17DA-4C60-9C74-F185AC4580E1&Options=info|&Search= ("[I]n the absence of a Body Worn Camera I just want to reiterate that we have over 12 thousand cameras throughout, departmentwide, and we also have handheld cameras that we are utilizing to capture any of these incidents.") We propose that the department's use of handheld cameras, which can also record audio, are appropriate to the task of recording any refusals.

[16] *See* Appendix, Section 34, in reference to Board of Correction Proposed Rules, Section 6-23(d)(6)(i)(C).

[17] *See* Appendix, Section 34, in reference to Board of Correction Proposed Rules, Section 6-23(d)(6)(ii)(B).

[18] As above, whether the video recordings are made using handheld cameras or body-worn cameras, the critical detail is that the recordings must include both video and audio.

representative or advocate of the person charged, such that in both in-person and virtual formats, the legal representative or advocate shall have the ability to privately confer with the person charged both before and during the hearing.[19]

The Right to Review the Department's Evidence

We propose clarifying that the person charged and their legal representative have the right to review all evidence that the department relies upon for its allegations, and all other evidence or information related to the grounds for which the department seeks to charge the person.[20] All such evidence must be provided to the individual and their legal representative no later than 48 hours prior to the hearing.[21] Additionally, the rules must require that any evidence or information relied upon by the department or facility in support of the alleged infraction be presented at the hearing and made part of the record.[22]

To the extent any redacted information may be presented as evidence based upon a confidential informant, the rules must require the hearing adjudicator to determine the reliability of the evidence and the informant's basis of knowledge for such information through an independent credibility review, which must be made part of the record.[23]

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[19] *See* Appendix, Section 34, in reference to Board of Correction Proposed Rules, Section 6-23(d)(6)(ii)(C).

[20] *See* Appendix, Section 34, in reference to Board of Correction Proposed Rules, Section 6-23(d)(6)(v)(A).

[21] *See id.* We provide a non-exhaustive list of the types of evidence or information contemplated by these rules, as follows:

(a) Surveillance footage video and surveillance footage stills;
(b) Body-worn camera footage;
(c) Notices of infraction;
(d) Facility reports;
(e) Staff reports;
(f) Use of force reports;
(g) Injury reports;
(h) Medical documentation;
(i) Witness list;
(j) All statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to the allegations being relied upon by DOC to seek an infraction, Enhanced Restraint Status, Red ID Status, or Central Monitoring Case Restraint Status; and
(k) Any evidence of an alleged refusal, including body-worn camera footage or evidence that the charged individual knowingly and voluntarily waived their right to appear, or their right to access to legal counsel.

[22] *See* Appendix, Section 34, in reference to Board of Correction Proposed Rules, Section 6-23(d)(6)(v)(C).

[23] *See* Appendix, Section 34, in reference to Board of Correction Proposed Rules, Section 6-23(d)(6)(v)(E).

Available Remedies or Sanctions

In the event that the department fails to comply with its obligations under these rules to provide the charged person with an opportunity to review evidence and prepare for the hearing, the rules must explicitly empower the adjudicator to make a further order for discovery, grant a continuance, order that a witness be called or recalled, draw an adverse inference regarding the non-compliance, preclude or strike a witness's testimony or a portion of that testimony, admit or exclude evidence, order the dismissal of all or some of the charges, or make such other order as it deems just under the circumstances.[24]

With regard specifically to any situation in which evidence is lost or destroyed, or unavailable due to the failure or inability of the department to preserve it, the rules must require the adjudicator to impose a remedy that is appropriate and proportionate to the prejudice suffered by the person charged. Further, in the event that relevant body-worn (or handheld) camera footage is lost or destroyed, or the officer fails to turn on the body-worn camera when required by DOC policy, the rules should require that the remedy shall be dismissal of the infraction, Enhanced Restraint Status, Red ID Status, or Central Monitoring Case Restraint Status.[25]

The Right to an Interpreter

In order to give effect to the Law's right of an individual to an interpreter in their native language if they do not understand or are otherwise unable to communicate in English, the rules must specify that the consequence to the department for failure to provide an interpreter when one is needed shall be dismissal of the infraction.[26]

[24] *See* Appendix, Section 34, in reference to Board of Correction Proposed Rules, Section 6-23(d)(6)(v)(F).

[25] *Id.*

[26] *See* Appendix, Section 34, in reference to Board of Correction Proposed Rules, Section 6-23(d)(6)(vi).

Requests for Adjournments

Local Law 42 requires that the department "shall grant reasonable requests for adjournments." The rules must clarify, in a non-exhaustive list, some of the factors that must be considered when determining what constitutes a reasonable request for adjournment.[27, 28, 29]

C. Other Recommendations

In order to ensure that the Board's rules are in full compliance with Local Law 42, the Board should make some additional technical and strengthening amendments to its proposed rules. Specifically, the Board should:

1. Revisit section 1-05, to make sure that all provisions are at least as explicit as they are in Local Law 42, including that: a) all people in the jails, other than while people are in de-escalation confinement or emergency lock-ins, must have access to at least 14 hours of daily out-of-cell time; and b) the minimum out-of-cell requirements under the rules still apply to people in contagious disease units and involuntary protective custody.
2. Revisit section 6-19 to make clear that a) for the seven-hour programming requirement, everyone is entitled to such programming outside of a cell in a group setting; and b) all programming time shall be led by therapeutic staff, programming staff, outside community groups, or peers.

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[27] *See* Appendix, Section 34, in reference to Board of Correction Proposed Rules, Section 6-23(d)(8)(ii).

[28] The rules should explicitly state that the following are reasonable bases for such a request:

(a) Additional time to locate witnesses;
(b) Additional time to obtain the assistance of an interpreter;
(c) Additional time to prepare a defense;
(d) A reasonable time for both the legal representative or advocate and person charged to be notified;
(e) A reasonable time for the legal representative or advocate to review discovery;
(f) A reasonable time for the legal representative or advocate to confer with their client; or
(g) Any other basis justifying the need for an adjournment.

[29] In addition, the rules should establish that if the Department fails to turn over complete discovery to the accused person and their representative or advocate at least 48 hours prior to the hearing, any adjournment sought by the person placed in pre-hearing temporary restrictive housing or their advocate should be treated as if it is requested by the Department. Pursuant to Section 6-04(d), "[i]f the Department does not hold an infraction hearing within [seven (7)] five (5) [business] days and the person placed in pre-hearing temporary restrictive housing has not sought a postponement of such hearing, the Department must release the person from pre-hearing [detention] temporary restrictive housing." To treat any requested adjournment under this circumstance otherwise would create an unintended exception to Section 6-04(d) that would run counter to the intent of these rules.

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D. Conclusion

Local Law 42 brings long-needed reform to the Department of Correction by finally and unequivocally disallowing the practice of separating people for solitary detention for periods longer than four hours, with only minor and carefully controlled exceptions. Just as critically, the law provides the due process protections necessary to ensure that the Department complies with the law with respect to its limitation on any restrictive housing for only those individuals found to have committed a grade I offense.

The Board should adopt its proposed rules with clarifying modifications and amendments as detailed herein.

If you have any additional questions, please feel free to contact me at mklinger@bds.org.

APPENDIX

§ 9. Section 6-03 of Title 40 of the Rules of the City of New York is amended to read as follows:

(b) For the purposes of this Chapter, the following terms related to restrictive housing have the following meanings:

[...]

(1) “Advocate” means a law student **who works under the supervision of an attorney, or a layperson, such as a** paralegal~~,~~ or another incarcerated person who represents an incarcerated person at a restrictive housing placement hearing or a continued use of restraints hearing pursuant to this chapter.

[...]

([8]11) "Legal Representative" is an attorney ~~or layperson who works under the supervision of an attorney~~.

§ 34. Paragraphs (5) through (9) of subdivision (d) of section 6-23 of Title 40 of the Rules of the City of New York, as renumbered by this rule, are amended to read as follows:

(5) *Refusal to Attend or Participate*. The refusal of people in custody to attend or participate in their hearing must be videotaped [or audiotaped] with audio and made a part of the hearing record.

(6) *Rights of the Person Charged*. The Hearing Adjudicator shall advise the person charged of the following rights at the hearing **and on the record, and** ~~which~~ must also be set forth in the notice of infraction:

(i) The right to legal representation: People charged with any infraction that could result in a placement in [RMAS Level 1 or 2] restrictive housing, **Enhanced Restraint Status, Red ID Status, or Central Monitoring Case Restraint Status** have the right to legal representation at their disciplinary hearing. If a person eligible for legal representation appears at a hearing unrepresented, the Department shall inform the person that they have the right to adjourn the hearing so they can engage a legal representative **or advocate**.

(A) Any person charged with any infraction that could result in a sentence to restrictive housing, Enhanced Restraint Status, Red ID Status, or Central Monitoring Case Restraint Status shall be provided written notice of their right to legal representation upon service of the infraction. Such notice must be provided no less than 48 hours prior to the scheduled hearing. Such notice must be provided even in cases when the person has waived their right to appear at their hearing. The Adjudication Captain must also notify the person charged of their right to legal representation on the record at the disciplinary hearing.

(B) Any refusal of representation must be recorded on body-worn camera upon service of the infraction and at the disciplinary hearing

(C) The Department of Correction shall notify the designated contact for each defense office and attorney of record who represents the person charged with the infraction, Enhanced Restraint Status, Red ID Status, or Central Monitoring Case Restraint Status on each criminal case.

(a) In the event that the person charged with an infraction is unable to secure legal representation for the hearing through their counsel of record, the Department shall provide the person a list of current eligible legal representatives or advocates.

(b) The Department shall regularly update the list of current eligible legal representatives or advocates.

(ii) The right to appear: The person charged **with any infraction that could result in a placement in restrictive housing, Enhanced Restraint Status, Red ID Status, or Central Monitoring Case Restraint Status** has the right to appear personally unless the right is waived in writing or the person refused to attend the hearing. **The Department shall inform the person charged that they have the right to appear, and the right to adjourn the hearing so that they may appear.**

(A) If the person charged **with the infraction, Enhanced Restraint Status, Red ID Status, or Central Monitoring Case Restraint Status** is excluded or removed from **their disciplinary** ~~a restrictive housing~~ hearing because it is determined that such person's presence will jeopardize the safety of themselves or others or security of the facility, the basis for such exclusion must be documented in the hearing record.

(B) If the person charged with the infraction, Enhanced Restraint Status, Red ID Status, or Central Monitoring Case Restraint Status allegedly refuses, DOC must establish that the client knowingly and voluntarily waived their right to appear at the hearing, and was aware of the consequences of failing to attend.

(a) If DOC is not able to establish that the individual knowingly and voluntarily waived their right to appear within the statutory time frame of five business days, the infraction shall be dismissed.

(b) If the statutory time frame has not expired, the individual charged with the infraction shall be given 24 hours to confer with their legal representative or advocate to secure the individual's appearance at the hearing. The hearing shall accordingly be adjourned for such time and purpose.

(c) A lack of video evidence of a refusal warrants dismissal of the infraction.

(C) Disciplinary hearings for those charged with an infraction, Enhanced Restraint Status, Red ID Status, or Central Monitoring Case Restraint Status shall take place in person in a DOC adjudication room.

(a) A virtual option for the hearing shall be made available upon request of the legal representative or advocate of the person charged with the infraction.

(b) In both the in-person and virtual options, the legal representative or advocate shall be provided the ability to privately confer with their client both before and during the hearing.

(iii) The right to **remain silent** ~~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) The right to present evidence and call witnesses: The person charged has the right to present evidence [and], call witnesses, and cross-examine witnesses.

(A) Witnesses shall testify in person at the hearing unless the witnesses' presence would jeopardize the safety of themselves or others or security of the facility. If a witness is excluded from testifying in person, the basis for the exclusion shall be documented in the hearing record.

(B) If a witness refuses to provide testimony at the hearing, the department must provide the basis for the witness's refusal, videotape such refusal, or obtain a signed refusal form, to be included as part of the hearing record.

(v) The right to review the Department's evidence:

(A) The person charged and their legal representative or advocate have the right to review~~,~~ the evidence relied upon by the Department **and evidence or information related to the grounds for which the Department seeks to charge them**, prior to the infraction hearing. The Department shall provide such evidence **as soon as practicable but no later than** ~~at least~~ forty-eight (48) hours prior to the hearing.

(B) Such evidence or information includes but is not limited to:

(a) Surveillance footage video and surveillance footage stills;
(b) Body-worn camera footage;
(c) Notices of infraction;
(d) Facility reports;
(e) Staff reports;
(f) Use of force reports;
(g) Injury reports;
(h) Medical documentation;

(i) Witness list;

(j) All statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to the allegations being relied upon by DOC to seek an infraction, Enhanced Restraint Status, Red ID Status, or Central Monitoring Case Restraint Status; and

(k) Any evidence of an alleged refusal, including body-worn camera footage or evidence that the charged individual knowingly and voluntarily waived their right to appear, or their right to access to legal counsel shall be included.

(C) Any evidence or information relied on by the facility in support of the infraction must be presented at the hearing.

(D) Specific documented intelligence may be redacted in limited instances where the Department determines that disclosing such information would present a serious safety risk to specific individuals. In such cases, the Department shall inform the person in writing that the information is being redacted due to a specific security risk. The Department shall maintain records of both redacted and unredacted evidence.

(E) If any redacted information is presented as evidence based upon a confidential informant, the hearing adjudicator must determine the reliability of the evidence and the informant's basis of knowledge for such information through an independent credibility review. The adjudicator's findings shall be made part of the hearing record.

(F) Available remedies or sanctions. Where the Department fails to comply with subdivision (6)(v) of this section or an order imposed or issued pursuant to this rule, the adjudicator may make a further order for discovery, grant a continuance, order that a witness be called or recalled, draw an adverse inference regarding the non-compliance, preclude or strike a witness's testimony or a portion of a witness's testimony, admit or exclude evidence, order the dismissal of all or some of the charges, or make such other order as it deems just under the circumstances.

(a) Should the Department provide any evidence to the person for the first time at the hearing, the Department shall inform the person or their legal representative or advocate at the hearing that they have the right to adjourn the hearing so they can review and prepare their defense.

(b) Where evidence is lost or destroyed, or unavailable due to the failure or inability of the department to preserve such evidence, the adjudicator shall impose a remedy that is appropriate and proportionate to the prejudice suffered by the person charged with the infraction.

(c) In the event that relevant body worn camera footage is lost or destroyed, or the officer fails to turn on body worn camera when required by DOC policy, the appropriate remedy shall be dismissal of the infraction, Enhanced Restraint Status, Red ID Status, or Central Monitoring Case Restraint Status.

(vi) The right to an interpreter. The Department shall ensure that every person charged is aware they are entitled to [request] an interpreter in their native language if they do not understand or are not able to communicate in English well enough to conduct the hearing in English. The Department shall take reasonable steps to provide an interpreter. **If after taking reasonable steps, no such interpreter can be procured, the infraction shall be dismissed.**

(vii) 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 40 RCNY § [6-24(h)] 6-23(h).

(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] restrictive housing, **Enhanced Restraint Status, Red ID Status, or Central Monitoring Case Restraint Status** 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 be granted if the person charged or their legal representative requests additional time to locate witnesses, obtain the assistance of an interpreter, or prepare a defense. The Department shall provide the person charged and their legal representative or advocate adequate time to prepare for such hearings and shall grant reasonable requests for adjournments.~~

(ii) Request for adjournments: The person charged or their legal representative or advocate may make a reasonable request for an adjournment. In determining what constitutes a reasonable request for an adjournment, factors that must be taken into account include but are not limited to:

(A) Additional time to locate witnesses;
(B) Additional time to obtain the assistance of an interpreter;
(C) Additional time to prepare a defense;
(D) A reasonable time for both the legal representative or advocate and client to be notified;
(E) A reasonable time for the legal representative or advocate to review discovery;
(F) A reasonable time for the legal representative or advocate to confer with their client; or

(G) Any other basis justifying the need for an adjournment.

(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.

(iv) 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 or on the record.

(9) *Legal Representation*. People charged with any infraction that could result in a sentence to [RMAS Level 1 or 2] restrictive housing shall be permitted to have a legal representative or advocate represent them at their disciplinary hearing and in any ~~in~~ related appeal. People entitled to such representation shall be permitted to choose their legal representative or advocate.