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New York City Board of Correction
2 Lafayette St., Room 1221
New York, NY 10007

Re: Proposed Rules Concerning Restrictive Housing

Dear Chair Sampson, Board Members, and Executive Director Georges-Yilla,

The Legal Aid Society submits these public comments on the Board of Correction's ("BOC") Proposed Rules Concerning Restrictive Housing ("Proposed Rules"), which were issued on May 13, 2024.

Our Criminal Defense Practice, which serves as the primary defender of low-income people in New York City prosecuted in the State court system, interacts daily with incarcerated people and their families to hear their experiences in DOC custody. In addition, since its inception 50 years ago, the Prisoners' Rights Project has investigated and remedied unconstitutional and unlawful conditions in the City jails through individual and class action lawsuits and administrative advocacy. Our litigation has included reform of the systems for oversight of use of force and violence in the jails; relief from dangerous conditions such as fire risks, overcrowding, and unsafe sanitation; successful efforts to bring high school education to youth held in these adult facilities; and redress of the failures of medical and mental health care systems that result in needless deaths in custody.

I. Introduction

It has long been necessary to reform the use of isolated confinement in the Department of Correction ("DOC"). As we detailed in our comments during the 2021 rulemaking process on restrictive housing,[1] inhumane practices in DOC facilities have persisted under the guise of many different names and failed plans, including punitive segregation, MDC 9 South, CMC Max, North Infirmary Command (NIC), West Facility, and Enhanced Supervision Housing ("ESH").

"New" models purport to be innovative, but they inevitably replicate the same harms. The current model—ESH at the Rose M. Singer Center ("RESH")—demonstrates this cycle. The rates of use of force and stabbings and slashings in RESH are shockingly high—both are quadruple that of any

[1] N.Y.C. Board of Corr., Comment Letter on Proposed Rule Concerning Restrictive Housing in Correctional Facilities (Apr. 21, 2021), www.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2021-Restrictive-Housing/04-21-21-las-comments-on-boc-proposed-rules-concerning-restrictive-housing-with-appendix-a.pdf.

other DOC facility.[2] Fires are prevalent.[3] DOC staff fail to adhere to security requirements and do not implement the basic structure of the RESH model.[4] And DOC does not consistently maintain required staffing levels in RESH units, resulting in housing areas without necessary floor officers.[5] Nine months after it opened, RESH is mired in operational failures, and unsafe for the people DOC houses there.

DOC's various isolated confinement models have in common two realities: DOC reflexively reaches for isolation to address behavioral concerns, and DOC's implementation of the models counterproductively perpetuates danger and harm.

The City Council passed Local Law 42 to address these harms. We support all efforts to end the harms of isolated confinement and to require the City to invest in humane and effective interventions to prevent and address violence.

II. Recommended Amendments to the Proposed Rules

Legal Aid proposes some amendments to the Proposed Rules. We recognize that the Proposed Rules are intended to mirror the language of Local Law 42, and so our suggestions focus on language that is not required by the law and aim to protect the rights of people in custody.

A. Proposed § 1-05(b)(2): Involuntary Lock-In

Our concern: Proposed § 1-05(b)(2) provides, "People shall not be required to remain confined to their cells except for the following purposes . . . [d]uring the day for count **or required facility business that can only be carried out while people are locked in,** not to exceed two hours in any 24-hour period" (emphasis added). The term "facility business" is vague, undefined, and does not appear in Local Law 42. Inclusion of this term introduces confusion and may allow DOC to abuse its discretion by defining "facility business" broadly to include more than the statutorily permitted reasons for lock-ins: sleep, count, de-escalation confinement, and emergency lock-ins.

Our recommendation: Omit the clause "or required facility business that can only be carried out while people are locked in."

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[2] Report of the *Nuñez* Independent Monitor in *Nuñez v. City of New York et al*., 11-cv-5845 (LTS) (S.D.N.Y.), filed Apr. 18, 2024, at 33, 42.
[3] *Id*. at 40.
[4] *Id*. at 45-46.
[5] *Id*. at 47.

B. Proposed § 6-05(a)(2): De-Escalation Confinement

Our concern: Proposed § 6-05(a)(2) includes language indicating that one purpose of de-escalation confinement is "to . . . [t]emporarily place a person in custody for the person's own safety after the person has been assaulted or otherwise victimized by another person in custody." This language is a product of the 2021 rulemaking process. But Local Law 42 does not contemplate DOC placing a person who was the subject of an assault in isolation. Rather, Local Law 42 requires isolating someone "immediately following an incident where the person has caused physical injury or poses a specific risk of imminent serious physical injury to staff, themselves or other incarcerated persons."

Our recommendation: Omit the referenced language in § 6-05(a)(2).

C. Proposed § 6-14(c): Periodic Reviews

Our concern: To determine whether ongoing placement in restrictive housing is appropriate, Local Law 42 instructs DOC staff to consider only "whether the incarcerated person continues to present a specific, significant and imminent threat to the safety and security of other persons if housed outside restrictive housing." But proposed § 6-14(c) contains language from the 2021 rulemaking process that lists other criteria DOC staff should consider, including a person's "attitude" since their placement in restrictive housing began. That highly subjective criterion invites personal bias in an already discretionary process. It also provides no guidance to individuals on what choices they can make to change their placement. And it penalizes normal and emotionally appropriate responses people may show to being locked in objectively harsh and unsafe conditions, denied contact with family and loved ones, deprived of liberty, and facing criminal penalties and possible prison time.

Our recommendation: Omit "attitude" as a ground for consideration.

D. Proposed § 6-23: Due Process

Our concern: People in custody may not be able to obtain counsel for due process hearings. Under BOC Minimum Standard § 1-17(c)(4), people who are illiterate or unable to understand or prepare for a hearing process were able to request a "hearing facilitator" to assist them by clarifying the charges, explaining the hearing process, and helping them gather evidence.

Our recommendation: Allow people in custody who are unable to obtain counsel for a due process hearing to request a hearing facilitator.

E. Proposed § 6-27: Restraints

Our concern: DOC often imposes, without a due process hearing, restraints on people in custody whom DOC has designated as a Central Monitoring Case.

Our recommendation: Amend this section to clarify that the section's due process protections apply to all instances in which restraints are used, including but not limited to people in restraints because DOC has designated them as a Central Monitoring Case, Red ID, or Enhanced Restraint status.

III. This Rulemaking Presents an Opportunity to Incentivize Other Interventions

Regulations serve the valuable purpose of clarifying and detailing how laws should be implemented—a purpose BOC Minimum Standards can and do serve for DOC. By removing isolated confinement as a tool, Local Law 42 seeks to incentivize DOC to develop and implement responses to violence other than isolation. In requiring BOC to develop regulations responsive to the statute, Local Law 42 provides an opportunity for BOC to set forth critical specifics that ensure DOC develops other interventions. We urge the BOC to use this opportunity to do so.

For example, given the *Nuñez* Monitor's finding that DOC fails to adequately staff RESH, BOC could set a floor for staffing ratios in restrictive housing units. It also could require consistent assignment of officers, captains, and Assistant Deputy Wardens to restrictive housing units—as *Nuñez* court orders require in Young Adult units[6]—to promote operational competence and stability. And BOC could set a timeline for DOC to provide public updates as to its development of programming, requiring the Department to delineate what programming is being offered, when, and by whom; whether it has secured commitments from community partners and how extensive those commitments are; and what auditing strategies it is using to assess how consistently that programming is provided and attended.

IV. Conclusion

We sincerely appreciate the Board of Correction's longstanding efforts to engage the complex questions posed by restrictive housing. As the City Council recognized, isolated confinement is not a solution to crises. Placing people in isolation serves only to exacerbate trauma and deprivation, which decreases safety for all. New York City must not lose sight of the fact that people housed in restrictive housing units are human beings, with communities, families, and loved ones.

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[6] Consent Judgment § XV, ¶ 17; First Remedial Order § D, ¶ 1 in *Nuñez v. City of New York et al*., 11-cv-5845 (LTS) (S.D.N.Y.).

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

Regards,

/s/ *Mary Lynne Werlwas*

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