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Sent via email

January 31, 2019

Jacqueline Sherman, Interim Chair
Margaret Egan, Executive Director
New York City Board of Correction
One Centre Street, Room 2213
New York, New York 10007

Re: Comments on the Proposed Rules Concerning Restrictive Housing in Correctional Facilities

Dear Chair Sherman, Members of the Board, and Ms. Egan:

The Legal Aid Society submits these public comments on the Board of Correction's Proposed Rules Concerning Restrictive Housing ("Proposed Rules"). We thank the Board for its engagement over the last five years in crafting standards for restrictive housing in the New York City Department of Correction ("Department" or "DOC"). Especially during this time of pivotal change in New York correctional practice, this rulemaking is essential for securing the gains of progress made in earlier years and protecting the health and safety of individuals during their time of incarceration in our City.

As we observed when the Board promulgated standards for the Enhanced Supervision Housing ("ESH") in 2014, "DOC has a long-standing, fundamentally punitive attitude towards incarcerated individuals and a deep reluctance to address their conduct with anything but punishment. This attitude is well known to the Board and to anyone familiar with the agency…"[1] But unfortunately, neither the promulgation of the ESH standards and limitations on punitive segregation ("PSEG"), nor years of reports from a federal monitor critiquing the deep seated hostility the Department directs at the people it incarcerates, have curbed this reflexively punitive approach. Instead, it fragmented, replacing the monolith of punitive segregation with a plethora of smaller measures imposed outside the realm of the due process, however flawed, that had governed punitive segregation.

The pattern has become familiar: faced with a security or behavioral challenge, the default response by the Department is a new form or practice of isolation. The practice lacks process or written guidance, and either contravenes or is not contemplated by existing BOC standards; due process is non-existent; after pressure from an independent actor like a monitor or the Board, the Department eventually gives the practice a New Name and writes a Directive or Command Level Order. The New Name practice is not called "punitive," but an objective assessment reveals that it is punitive in

[1] Comments of the Legal Aid Society, "Rulemaking 2015 (Punitive Segregation and ESH)," https://www1.nyc.gov/assets/boc/downloads/pdf/Legal%20Aid%20Society.pdf

nature. When the New Name isolating practice is eventually addressed by BOC standards, a Newer Name isolating practice emerges to take its place, ad infinitum.

We are grateful that the Board has sought to inject stability, reliability and basic principles of justice into this process through Proposed Standards that govern restrictive housing comprehensively. The fundamental approach and scope – defining restrictive housing functionally and addressing the full scope of minimum standards that it implicates – is wise and practical. The rules are based in evidence of the harms that prolonged solitary confinement causes to human health and to any correctional mission. Durational limits on isolation and guarantees of due process are critical.

However, the Proposed Rules as currently drafted frustrate their stated purpose in several respects and undercut several important protections in our jails. These deficiencies must be addressed in the final Rule if it is to close gaps, secure basic human rights in new circumstances, and give substantive guidance to present and future Commissioners about the minimum standards that must control all iterations of restrictive housing.

We address many of our comments to these issues that, if unresolved, run the risk of undermining the hard work up to this point and more critically, will subject people to fundamentally inhumane treatment by the state. In each section, we make recommendations for changes to specific rules or sections that would redress these concerns.

The Proposed Rules Sanction Dehumanizing Uses of Chains and Shackles

(Proposed § 6-36: Restraints)

It is outrageous that the Proposed Standards contemplate chaining or shacking people who are *quadriplegic*, paraplegic or near death. There simply can be no security reason to shackle someone who meets these definitions (a consideration wholly apart from any medical need for restraints). Yet this is exactly what Proposed § 6-36(o) does, in allowing people who are near death, paraplegic, or quadriplegic to be placed in restraints so long as the Department can articulate a "reasonable" security risk.

> **Recommendation**: Eliminate § 6-36(o) entirely. Health authorities should be permitted to determine that someone who is paraplegic, quadriplegic, or near death is contraindicated from the use of restraints.

Neither is it acceptable for the Board to condone the continued chaining of black and brown people through "restraint desks" for *any* period of time. High school students cannot possibly learn bound in chains, yet this is how "schooling" is supplied with restraint desks. Understandably, some young people who desperately need a high school education report to us that they forego school so as not to be subjected to the restraint desks. The Department is not using restraint desks at Horizon, and it

should not use them in DOC facilities. They do not actually serve the purposes of security and safety, as myriad testimonies and materials submitted to the Board attest.

> Recommendation: Proposed § 6-31(e) should read "As of March 2020, the Department shall eliminate the use of restraint desks or other restraints during lockout in all facility housing units." All subsequent related provisions should be edited accordingly.

Finally, we are pleased to see the rules reflect the basic fact correctional health authorities have important data about the functional needs or impairments of individuals that contraindicate the imposition of one or more otherwise permitted restraints. But the Department should be required to do much more than just *consider* the information provided by medical staff. Rather, the Board should empower correctional health authorities in this provision to protect individuals in custody more thoroughly.

> Recommendation: Proposed § 6-36(m) should give the Correctional Health Authority ("CHA") the authority to determine that a person *shall not* be placed in restraints under the circumstances listed.

The Structure of the Rules Undermines its Comprehensive Goals

As the Board notes, the new standard must be comprehensive, which requires "the definition of restrictive housing to include not only housing publicly identified as restrictive, but also housing which is not publicly identified as restrictive but operates as such."[2] Setting standards for housing based upon its name (e.g., Enhanced Supervision Housing, Secure Unit, Solo Housing) or putative purpose (e.g., punitive segregation, de-escalation confinement, separation status) simply replicates the problem these rules are intended to resolve. A functional definition of restrictive housing is the cornerstone of this approach, and we are heartened that the proposed rules adopt this approach.

However, we are concerned that as currently drafted, the Rule fails to achieve its own purposes and creates gaps in coverage. While it contains an appropriately broad *definition* of "restrictive housing," the substantive *standards* are set forth in sub-sections that apply only to discrete *types* of restrictive housing.

The recently created "Solo Housing" is an example. Solo Housing clearly meets the general definition of Restrictive Housing in proposed § 6-03(a). But where is it addressed in the *substantive* rules? It is not, and therefore may fall outside of the proposed process or protections. People in custody subject to Solo Housing can be and are often held alone in

[2] Notice of Rulemaking Concerning Restrictive Housing in Correctional Facilities, New York City Board of Correction, pages 10-11. *Available at* https://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2017-Restrictive-Housing/2019.10.29%20-%20Rule%20and%20Certifications.pdf. [*Note: this quote was taken from the discussion on "Structurally Restrictive Housing," but it is relevant here as a summary of the Board's intention*.]

large housing units intended for many people. This means they may potentially be allowed more out-of-cell time than contemplated by the Transitional/Administrative Housing definition in § 6-03(b)(23). Nor does it have the "physical design" characteristics that would make it Structurally Restrictive Housing definition in § 6-03(b)(21). Solo Housing serves as an example that under these proposed rules, DOC still has the ability to create unregulated solitary by another name. [3]

By our reading of the proposed rules, Subchapter G: Access to Health Services and the Placement Due Process, protections in proposed § 6-31 should apply to all restrictive housing (including Solo Housing). What the proposed rules lack for these unenumerated restrictive housing placements are standards for placement criteria, periodic review, programming and out of cell time, reporting, and the role of the Correctional Health Authority. Failure to promulgate these standards applicable to these units will necessitate a return to the endless, *ad hoc* governing by variance that this rulemaking seeks to avoid.

> Recommendation: The Board must ensure protections for housing that meets the general definition of Restrictive Housing in proposed § 6-03(a) but is not captured by the various subchapters in the rule. The protections should include:
>
> 1. Specific placement criteria that requires the person be held in such restrictive setting for the least time possible and must require approval from the Deputy Warden of the facility in which the person is housed;
> 2. At least 12 hours of out of cell time in any 24 hour period;
> 3. Meaningful programming and an individualized behavior and programming plan of sufficient specificity to make clear what the person in custody must do to progress;
> 4. Periodic review of the placement every 7 days by the Warden[4] of the facility, with protections equivalent to those laid out in proposed § 6-15;
> 5. Presumptive advancement to a less restrictive level or unit at each periodic review as required in proposed § 6-15(a)(3);
> 6. The Correctional Health Authority must have the authority to exclude a person from such placement or determine that the person should be removed to a therapeutic housing unit and observe the person for the first 24 hours in the housing unit (as provided for Structurally Restrictive Housing by proposed § 6-18(d);
>
> The Data Collection and Review requirements applicable to Transitional/Administrative Housing and Structurally Restrictive Housing in proposed § 6-17 to enable the Board to monitor *all* forms of isolation utilized by DOC.

[3] Solo Housing: A Case Study in DOC Restrictive Housing Practices (October 30, 2019), The Legal Aid Society. *Available at* https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2019/October/Legal-Aid-Society-Letter-to-BOC-Solo-Housing-as-a-Restrictive-Housing-Case-Study-for-Proposed-Rulemaking.pdf.

[4] This is currently required by the DOC Solo Housing Directive 4495 at IV.B.2.

The Due Process Requirements of the Rules Should be Enhanced

A. Proposed § 6-30: Disciplinary Due Process

Disciplinary hearings that could lead to subsequent criminal prosecutions have very high stakes for people in custody, ranging from years in prison and in post-release supervision, to immigration consequences, sex offender registration, even loss of parental rights, employment, and housing. The criminal justice and civil systems recognize that most of those potential consequences trigger a right to counsel, and people should not be left vulnerable to those consequences without representation simply because they are in custody.

> Recommendation: The Board should mandate that people in custody have representation at disciplinary hearings that could result in criminal prosecutions, and that defense counsel be notified of such hearings. Counsel should also be permitted to be present for interviews of their clients.

A critical element of due process is the right to be informed of the charges against you. For this reason, it is important not only that a notice of infraction is given within 24 hours of placement in Pre-Hearing or 3 business days after the incident, as proposed § 6-30(b)(3) and (4) provides, but also that the notice be given in adequate time for the person in custody to prepare for the hearing.

> Recommendation: The rules should make explicit that the person in custody receives the notice of infraction 2 business days prior to the hearing, and that failure to do so constitutes a due process violation warranting dismissal.

We think it is important progress that proposed § 6-30(c)(5) requires that refusals to attend hearings be videotaped and made part of the hearing record, but it is important that failure to do so has real consequences.

> Recommendation: Proposed § 6-30(c)(5) must also indicate that failure for the Department to produce a videotaped refusal and make it part of the hearing record is a due process violation warranting dismissal at the time of the hearing and/or on appeal.

It is positive that proposed § 6-30(c)(6)(v) includes the right to assistance of a hearing facilitator. In order for that facilitator to adequately perform the many important functions listed in (vi)—interviewing witnesses, obtaining evidence and/or written statements, for example—it is critical that the person in custody has access to that facilitator in sufficient time to prepare a defense.

Recommendation: Proposed § 6-30(c)(6)(v) should require that the person in custody has access to the hearing facilitator at the time the notice of infraction is served, at least 2 business days prior to the hearing.

B. Proposed § 6-31: Placement Due Process for Restrictive Housing

We have the same concerns regarding the timing of notices of placement hearings that we did for notices of infraction at proposed § 6-30(b)(3).

Recommendation: People in custody should not only be given notices of a placement review hearing within 24 hours of placement in restrictive housing, but notice of the hearing should be at least 2 business days prior to that hearing.

People in custody who "are unable to read or understand" the notice of initial placement should indeed be given assistance, as proposed § 6-31(a)(2)(v) provides. But the standards should make clear the circumstances under which that assistance is required. This function could perhaps be efficiently served by the hearing facilitators referenced in proposed § 6-31(b)(v), who should be made available to the person in custody with sufficient time to meaningfully assist in preparing a defense.

Recommendation: Proposed § 6-31(a)(2)(v) should contain the same criteria listed in § 6-30(c)(6)(v), and hearing facilitators should be made available to persons at the time they are served with the notice of initial placement.

We hear all too often from our clients that they dispute refusing not only disciplinary hearings, but restrictive housing placement hearings. These refusals, too, should be videotaped.

Recommendation: Proposed § 6-31(a)(vi) should require that all refusals be videotaped and included as part of the hearing record, and that failure to do so constitutes a due process violation that warrants overturning the placement.

As noted in the Eighth Report of the *Nunez* Monitor, determinations by Adjudication Captains for placement in Transitional / Administrative ("T/A") units like ESH or Secure frequently lack an adequate articulation of why the person in custody meets the criteria for placement in the unit. As the Monitoring Team notes, "more specificity is needed in the Adjudication Captains' narratives for ESH and Secure placements regarding the severity of injury, reasons that referral is not proximal to the incidents cited, and reasons for escalation from another [T/A unit]."[5]

[5] Eighth Report of the *Nunez* Independent Monitor ("Eighth Report") in *Nunez v. City of New York et. al.*, 11-cv-5845 (LTS) (SDNY), filed October 28, 2019, p. 279.

Recommendation: Proposed § 6-31(c) should require that the bases for determinations must specifically address the criteria for the unit in which a person is placed, and that failure to do so constitutes a due process violation that warrants reversal of the placement.

The New Rules Continue the Inhumane Practice of Prolonged Solitary Confinement and Deprivation

Proposed § 6-07(a): PSEG I

We strongly support the Board's expansion of exclusions for PSEG I in proposed § 6-07(a)(1) and reducing the maximum time in PSEG I to 15 consecutive days and 60 days within a 6-month period, which are important steps toward limiting the harms of solitary.

The Board must go further. Board members are no doubt familiar at this point with the United Nations minimum standard, adopted in 2015, that more than 15 days in solitary confinement constitutes inhumane and degrading treatment in violation of international law.[6] Simply and frankly put, solitary confinement beyond 15 days is torture. In any time and any place, but particularly in New York City in 2020 in a moment of touted criminal justice reform, the Board cannot sanction torture as a security exception.

More specifically, the Chief of Department should not be permitted to authorize a waiver of release from effectively torturous conditions in proposed § 6-07(a)(3)(v) or levy a sentence for any offense that violates international standards, as in proposed § 6-07(a)(3)(viii). The response to ongoing violent behavior should not be to force persons to continue to be held in conditions that will certainly deteriorate their mental health, as allowed by proposed § 6-07(a)(3)(vii). It borders on Orwellian to suggest that a person can "earn" their way out of a torturous setting for good behavior, as provided by proposed § 6-07(a)(3)(vii)(C).

If these reforms to Punitive Segregation are predicated on the well-established research cited by the Board in its Statement of Basis and Purpose[7]—finding that solitary is ineffective and poses significant risks of psychological harm to people of all ages—and the internationally accepted principle that isolation beyond 15 days is inhumane and degrading treatment, then the invocation of "security exceptions" cannot justify it.

Recommendation: Eliminate 7-day waivers and extensions beyond 60 days in a 6-month period, and do not allow sentences in punitive segregation beyond 15 days for any offense.

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6 UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) : note / by the Secretariat*, 29 September 2015, A/C.3/70/L.3, available at: https://www.un.org/en/events/mandeladay/mandela_rules.shtml.

7 Statement of Basis and Purpose, p. 20.

As written, the proposed rule also suggests that Correctional Health Services must wait until *after* an individual is placed into PSEG I or II before it has the authority to determine if that person should be transferred to a therapeutic unit. There are certainly circumstances in which CHS might not identify a person as meeting the criteria for exclusion in § 6-07(a)(1)(i) but determine that a therapeutic unit is nevertheless the appropriate clinical placement.

> Recommendation: Proposed § 6-07(a)(1)(iii) should be modified to read "CHA has the authority to determine if any person, *before or* after being placed in PSEG I…"

In highly punitive solitary confinement conditions, time out of the small cells used for punitive segregation is particularly important to mitigating psychological and physical harm. The Chief of Department should not be permitted to eliminate that limited time out-of-cell, nor is it sufficient to have any such determination that results in these inhumane conditions reviewed only every 7 days.[8] Likewise, the quality of that time out-of-call is of critical import.

> Recommendation: Eliminate the vague security exception in proposed § 6-07(a)(4)(i). If it is to remain, the language should make clear that this is to be a highly exceptional situation that requires exhaustion of other, less restrictive measures. Moreover, that determination must be revisited daily, and certainly more often than every 7 days considering the seriousness of the deprivation. The proposed rules should also make clear that a shower cannot constitute out-of-cell time, and that any programming provided pursuant to proposed § 6-07(a)(4)(iv) be meaningful and involve human contact.

Proposed § 6-07(b): PSEG II

As written, the rules appear to have no limitation on the length of a PSEG II sentence. We understand this to be unintentional, but wish to make explicit here that this must be corrected. Otherwise, it would directly contradict all the reasoning and research noted above underlying the reduction in PSEG I sentences to a general 15-day maximum. It would also serve as a tremendous step backward from the current Minimum Standards, which provide that "no inmate may be sentenced to punitive segregation for more than thirty (30) days for any single infraction."[9]

> Recommendation: Add a provision to the PSEG II Time Limitations subsection, proposed § 6-07(b)(3), to mirror the language in the PSEG I subsection that provides that "no person in custody may be sentenced to PSEG II for more than 15 consecutive days for any single infraction," and also include that "an incarcerated person may not be held in PSEG II for more than a total of 60 days within any 6-month period."

[8] Proposed § 6-07(a)(4).
[9] To-be-repealed § 1-17(d)(1).

Second, we believe that the same exclusions applying to PSEG I should apply to PSEG II. Our comments about what constitutes meaningful out-of-cell time in the above PSEG I section also apply to the companion PSEG II section, proposed § 6-07(b)(4).

> Recommendation: The language in proposed § 6-07(b)(1) should mirror proposed § 6-07(a)(1). At the very least, it should include people in custody who are pregnant or participating in the DOC nursery program.

Proposed § 6-04: Pre-Hearing Detention

Pre-Hearing Detention ("PHD") is in PSEG I,[10] which is obviously an extremely punitive setting. The placement criteria should be read sufficiently narrowly to prevent overuse, and the environment is severe enough to warrant an infraction hearing within a week, not a week and a half.

> Recommendation: Proposed § 6-04(b) and (c) should be amended to "7 days" rather than "7 business days."

As written, proposed § 6-04(d) also permits the Department to hold someone in PHD even if the security or safety risk that was the basis for their placement in PHD no longer exists (it reads "may be released").

> Recommendation: Amend proposed § 6-04(d) to read "must be released."

Proposed § 6-05: Confinement for De-Escalation Purposes

Despite its comforting title, "de-escalation housing" is a practice ripe for abuse and reckless disregard for the safety of people in custody. The proposed rules do not adequately address the potential for harm inherent in this amorphous form of solitary. The putative durational limit is essentially non-existent. Not only is the ostensible "maximum" placement time of 12 hours too long, but it is not even a maximum at all. Instead, the rules permit indefinite placement as long as the Department notifies the Board *once*.[11]

CHS has no authority under the proposed rule to exclude people for medical or mental health contraindications, and the visual and aural rounding by DOC staff every 30 minutes is not sufficient to ameliorate the risks. By definition, "de-escalation" housing is used for individuals experiencing heightened risk or trauma. The Board need look no further than the recent appalling tragedy involving 18-year-old Legal Aid Society client Nicholas Feliciano to recognize the harms that can

[10] Proposed § 6-03(b)(14).
[11] Proposed § 6-05(f)(4).

befall an individual in a very short timeframe.[12] Mr. Feliciano had been in an intake cell for approximately 6 hours, and alone for one hour before he nearly died —and officers reportedly stood by next to a monitor trained on his cell for seven minutes as he struggled to save himself.

> Recommendations: Shorten the maximum time in proposed § 6-05(f)(1-4) from 12 hours to 6 hours. Specify the actors in the requirement in proposed § 6-05(f)(2) that reauthorization must have "written approval up the Department's security chain of command" to ensure there is no confusion about who is accountable for the decision to let people languish in de-escalation. Amend proposed § 6-05(g) to require one-to-one supervision while someone remains in this unit, and require that CHS round daily. Amend proposed § 6-05(f)(4) to require continual notification to the Board, every 6 hours that a person remains so housed.

The Proposed Rules Undermine Protection of Young Adults

Revised § 1-02(c): Commingling of Young Adults

The proposed amendments to this section are a very troubling departure from the intention of the Young Adult Plan contemplated by the Board when it enacted Minimum Standard 1-02(c) in 2014. As the Board notes in its Statement of Basis and Purpose, commingling young adults with adults in ESH ran "counter to the basic tenets underlying the Department's Young Adult Plan."[13] Yet the proposed rules lead to this same result by providing exceptions in revised § 1-02(c)(1) to the ban on commingling that have very real potential to swallow the rule.

The Board should not accept a response to young adult violence—especially when a person in custody is the *victim* of violence, as provided in revised § 1-02(c)(1)(ii)—that removes young adults from proximity to age-appropriate services, education, and programming. That only 68% of young adults are housed in young adult housing[14] indicates that this is not a mechanism the Department uses sparingly, and the Board should require that DOC manage security concerns in a way that is consistent with modern best correctional practices for that population.

> Recommendation: The Board must not retreat from the good practice of cohorting young adults by allowing the exceptions in revised § 1-02(c)(1). Those exceptions should be eliminated.

[12] Ransom, Jan. He Waited 6 Hours for Help at Rikers. Then He Tried to Hang Himself. The New York Times (December 4, 2019). *Available at* https://www.nytimes.com/2019/12/04/nyregion/nicholas-feliciano-rikers-island-suicide.html.
[13] Statement of Basis and Purpose, p. 5.
[14] Statement of Basis and Purpose, p. 47.

Proposed § 6-09: Disciplinary System Plan for Young Adults

We support the Board requiring the Department to develop a disciplinary system plan for young adults. It is critical that the Department have available to it a range of responses to both minor and significant misconduct, and that these interventions be developmentally appropriate for this age group. The Department has neglected its responsibility to intervene in young adults' lives in this thoughtful manner, as the *Nunez* Monitor pointed out by describing their "all or nothing" approach to discipline.[15] Proposed § 6-09 ensures that the Department engages this core correctional process, while remaining accountable to the Board.

As a matter of principle, any development of such a plan should, at the very least, include the people who will be most affected by that plan.

> Recommendation: Proposed § 6-09(a)(7)(i) should include "and people in custody."

As noted above, this section is not sufficiently clear that a disciplinary plan should involve not just "behavioral incentives,"[16] which could be *negative* incentives, but that it also must include a robust approach to *positive* incentives. This is essential to a behavioral plan consistent with best modern correctional practices for young adults and is especially important in a Department that so often resorts to negative stimulus.

> Recommendation: Proposed § 6-09(a)(7)(v) should be amended to require "positive behavioral incentives and privileges."

But we are very baffled that the proposed rule incorporates into the Minimum Standards in 6-09(a), to a bizarre degree, anticipated developments in ongoing litigation in *Nunez v. City of New York* (in which we are plaintiffs' counsel). To be sure, as *Nunez* counsel (and counsel in many other cases that similarly address subjects covered by the Minimum Standards), we are sensitive to the ways in which the Charter-derived obligations of an oversight agency like BOC can occupy the same field being addressed by a court order or federal or state monitor, and such oversight must be congruent. But we are troubled that dynamic and likely changing portions of *Nunez* appear to be incorporated into this proposed rule. There are ongoing discussions in *Nunez* about the need for disciplinary systems for young adults—the topic at issue in this proposed standard—and the Monitor is clearly an essential part of that process. But the contours of that plan are highly fluid, and most importantly, we do not believe the *Department is under any obligation in* Nunez *that conflicts with the proposed standard here.* Obviously, any conflict between BOC standards and monitor's recommendations that emerges should be resolved; but none is suggested here, and nor can we find precedent for incorporating into a BOC standard a reference to disputed portions of ongoing litigation.

[15] Eighth Report, at 253-54.
[16] Proposed § 6-09(a)(7)(v).

Recommendation: The first paragraph of Section 6-09(a) should read, "The Department shall submit to the Board a written plan for a disciplinary process for young adults in custody that is consistent with these Chapter 6 Standards as soon as is practicable. The plan shall include…. [remainder of section remains the same].

Transitional/Administrative and Structurally Restrictive Housing Rules Should be Strengthened

Proposed § 6-10: Exclusions of Vulnerable People From Transitional/Administrative Housing

It is excellent progress that people diagnosed with intellectual disabilities will be excluded from T/A housing. However, the Board should act to protect other vulnerable populations, and specifically, people in custody who are pregnant or participating in the DOC nursery program. While the Department does not label T/A units like Enhanced Supervision Housing as punitive, the restrictions imposed in these units are undoubtedly punitive. Individuals in these units also report to our office that their medical and mental health care is regularly disrupted—of particular concern for incarcerated people receiving prenatal care.

The importance of preserving the bonding relationship between incarcerated parents and their infants in the first 18 months of life is the predicate for Correction Law § 611, which is the statute that mandates the nursery in DOC. It is well-settled that separating newborns from their mothers causes the infants harmful physical and emotional changes.[17] Good public policy counsels that we disrupt that relationship only for the most egregious and serious reasons. If we exclude people in custody who are pregnant or participating in the nursery from PSEG I, for which they would arguably have to have committed a Grade I violent offense, we should exclude them from T/A housing.

Recommendation: This section should include people in custody who are pregnant or participating in the DOC nursery.

The most recent *Nunez* Monitor's report "identified several youth who were initially placed in Secure/ESH without the required clearance from H+H…Some of these discoveries coincided with personnel changes in the Health Affairs Unit, and so the underlying system failure could not be identified with any specificity. These findings suggested that the procedures in place were *ad hoc* and dependent on a single individual. This is not sustainable or reliable."[18] The Monitoring Team "recommended the Department create a written protocol for obtaining clearance and to include procedures for H+H to notify Health Affairs and [security] of the screening outcome so that

[17] "Neurochemical studies show that disruptions to the attachment process affect the growth and development of the brain, as well as social functioning, aggressiveness, reaction to stress, and risk for substance abuse during adulthood." M.W. Byrne, et. al., *Material Separations During The Reentry Years for 100 Infants Raised in a Prison Nursery*, 50 Family Court Review 77, 87 (2012).
[18] Eighth Report, p. 276.

[security] can make an appropriate housing decision. Furthermore, the protocol needed to include procedures for when an inmate required immediate removal from his housing unit, but an H+H determination could not be obtained that quickly. The Department submitted a written protocol which will be finalized during the next Monitoring Period with input from the Monitoring Team to ensure that both the protocol and the method for tracking referrals have adequate quality controls."[19]

> Recommendation: It is, of course, helpful that the *Nunez* Monitor is engaging the Department and CHS on this important issue, but standards should exist that require the abovementioned process should the court order be terminated or Monitor be engaged in other monitoring priorities. Proposed § 6-10 should mandate this process.

Proposed § 6-11: Out-of-Cell Time for Transitional/Administrative Housing

This provision requires only 7 hours of out-of-cell time for adults, which is no greater than that required for PSEG II. If the Department continues to argue that ESH is not punitive, it should not have the trappings of PSEG. Restrictive housing should make sense as a spectrum.

Moreover, as recently as January 2020, people incarcerated in ESH report to us that the practice documented by the Board in its ESH Report of 2017 of locking individuals into their cells for *25 hours at a time* continues to this day.[20] This result obtains from alternating lockout times: an individual may have "seven hours" of lockout time on Monday morning, but then is locked into his cell at noon on Monday until *Tuesday afternoon*--when he receives his Tuesday "seven hour" allotment. This results in an unacceptably long period of lock-in time. The risks are even heightened in the summer, when individuals are locked into cells with no cooling measures: no air-conditioning, cold water showers, or adequate ventilation.

> Recommendation: Proposed § 6-11(a) should require that adults get 10 hours of out-of-cell time in T/A housing. Rather than specifying simply minimum out-of-cell time, the standards should also include *maximum in-cell* time in any consecutive block. For example, a "7 hour out of cell time" would correspond to "and no more than 17 consecutive hours of in-cell time."

Proposed § 6-12: Placement Criteria for Transitional/Administrative Housing

We support the omission of Security Risk Group language for T/A placement criteria, as our clients both in and out of custody often report to us that they have been misclassified as gang members, a claim borne out by The Legal Aid Society's experience with the NYPD database. We also support

[19] Id.
[20] An Assessment of Enhanced Supervision Housing (April 2017), New York City Board of Correction, at. *Available at* https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/BOC-Reports/FINAL-BOC-ESH_Assessment-Adults-2017.04.26.pdf ("Assessment of ESH").

the reduction of the window of qualifying behavior from 5 years to 1 year, particularly important for young adults with developing brains.

It is very important for placement criteria to be as precise as possible to prevent abuses of discretion, For that reason, we are concerned about vague words like "actively participated in *disturbances*" (emphasis added), which could easily be interpreted in an over-inclusive or retaliatory manner.

> Recommendation: The phrase "or actively participated in disturbances" in proposed § 6-12(a)(1)(ii) and proposed § 6-12(b)(1)(v) should be removed. The serious conduct appropriate for T/A housing is adequately addressed by other qualifying behaviors like "rioting," "violent dangerous activity," and "serious or persistent violence."

Proposed § 6-14: Individual Behavior and Programming Plans for Transitional/Administrative Housing

Board staff found in the 2017 report on ESH that "incarcerated people expressed confusion about what they must do to be transferred out of ESH."[21] Similar problems were reported in *Nunez* Monitor Reports. In the Eighth Report of the *Nunez* Monitor, the Monitoring Team writes that "Behavior Support Plan[s ("BSPs") are] intended to include individualized, behavior-focused goals and a set of interventions designed to catalyze behavior change. Echoing the findings in several previous Monitor's Reports, the BSPs remain ineffective for this purpose. Goals are generally not specific, not measurable, not observable and otherwise not amenable for use as a guide for an inmate's participation in [T/A Housing]. Progress toward specific goals is not measured week-to-week. As a result, the requirements for youth to exit these [T/A units] remain unclear and somewhat subjective…the time is ripe to reconsider the structure, operation and interrelationship of the [T/A units] to ensure that the programs are mutually supportive and not unintentionally conflicting. Furthermore, given the persistent inability to craft BSP that are suited to the task, the Monitoring Team has recommended the Department refine the criteria for release/promotion by identifying objective, easily identifiable criteria."[22]

It is important, then, that the proposed rules already include the requirement for individualized behavior and programming plans. For those plans to be effective, however, the Board must provide additional guidance to avoid the issue commonly reported to our office and found by the *Nunez* Monitoring Team that their plans seem vague or are not adequately updated to reflect their progress or lack thereof.

> Recommendation: Proposed § 6-14(a) should include a third provision requiring that the plans be current, reflecting behavior close-in-time to the periodic review, and of sufficient

[21] *Assessment of ESH*, at v.
[22] Eighth Report, p. 279.

specificity to make clear to people in custody what they must do to progress to less restrictive levels.

Proposed § 6-15: Periodic Review of Placement for Transitional/Administrative Housing

We strongly support the Board's important inclusion of a presumption of advancement to a less restrictive level or unit at every periodic review, and the shortening of the review period to 15 days. We urge the Board to carefully monitor whether the Department implements that presumption and periodic review window with fidelity.

Proposed § 6-18: Exclusions for Structurally Restrictive Housing

> Recommendation: For the same reasons noted in our comments on proposed exclusions from T/A Housing, we believe that people in custody who are pregnant or participating in the nursery program should likewise be excluded from Structurally Restrictive Housing.

Proposed § 6-21: Individual Behavior and Programming Plan for Structurally Restrictive Housing

We make the same recommendations for this section that we did for the T/A companion section at proposed § 6-14, above.

Proposed § 6-22: Periodic Review of Placement in Structurally Restrictive Housing

The placement criteria in proposed § 6-19 are vague and pose potential for abuse. For that reason, and to avoid overuse of this housing category, we think an even higher level of approval and accountability should be required for continued placement. We also think that because of the general lack of uniformity among the housing areas that qualify under this provision—and the concomitant lack of structure or systems to provide services—the review period of 30 days is too long.

> Recommendation: Amend proposed § 6-22(a) and (c) to require that a Warden reauthorize continued placement in Structurally Restrictive Housing and shorten the periodic review window to 15 days.

We again strongly support the important presumption of advancement to a less restrictive level or unit in proposed § 6-22(f). We likewise urge the Board to carefully monitor whether the Department implements that presumption with fidelity

The Proposed Rules Should Make Explicit the Minimum Standards for Programming Required in Restrictive Housing

Proposed § 6-01(a): Core Principles

Proposed § 6-01(a)(3) rightly sets forth a goal to "[p]romot[e] the rehabilitation of people in custody and their reintegration into the community by…incentivizing good behavior…and providing necessary programming and resources." Evolving principles of restorative justice and evidence-based best practices include positive reinforcement and the implementation of individualized plans that permit individuals to gain privileges and incentives for good behavior. Despite the reference to this important goal, the proposed rules contain virtually no programming requirements other than the obligation for DOC to offer "evidence based programming" for people held in PSEG I longer than 15 consecutive days or more than 60 days within a 6-month period.[23]

> Recommendation: The Board should require meaningful, evidence-based programming for everyone held in restrictive housing.

Proposed § 6-16: Transitional/Administrative Housing Conditions, Programming, and Services

This new section exemplifies the problem described immediately above due to the lack of programming mandates in the proposed rule. Proposed § 6-16 and the entirety of the T/A Subchapter lacks the requirement in the to-be-repealed § 1-16(d)(3) that the Department "provide ESH inmates with both voluntary and involuntary, as well as both in- and out-of-cell, programming aimed at facilitating rehabilitation, addressing root causes of violence, and minimizing idleness." There is no programming mandate in any other area of the Transitional/Administrative Housing subchapter—proposed § 6-14 requires an individual behavior and programming *plan*, but does not actually require the Department to provide programming nor does it specify the nature of the programming to be provided.

> Recommendation: The Board must include a programming requirement specific to this category of housing, particularly because the Board[24] and our clients report that a person in ESH is required to participate in programming to advance to a less restrictive level or housing area. The Core Goals of incentivizing good behavior and access to programming and services outlined in proposed § 6-01(3) also support including such a provision.

[23] Proposed § 6-07(a)(4)(iv).

[24] Assessment of Young Adult Advanced Supervision Housing" (2017), New York City Board of Correction, *available at* https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/BOC-Reports/2017.07.24%20-%20FINAL%20YA%20ESH%20Report%207.24.2017.pdf, p.viii ("Assessment of YA ESH").

Exclusions from Restrictive Housing for Medical Reasons

New CHS Exclusion Process

The new process articulated in the Statement of Basis and Purpose to identify medical exclusions for restrictive housing is well intentioned, but raises serious problems.[25] Under current practice, DOC forwards CHS a form seeking its input only after a person has been sentenced to punitive segregation, and only if the person has already been diagnosed with a mental illness or entered DOC custody less than five days before the infraction. Though this system itself has flaws—a person could conceivably have an acute mental health need like suicidality, for example, without having previously received an "M" designation denoting mental illness—it at the very least requires CHS involvement *at the time a person is entering isolation*.

Under the new process, CHS will create a list of "excludable" people based on an evaluation of that person *at admission to DOC custody*, has no medical or mental health analysis contemporaneous with the restriction. Given the deleterious effects that incarceration has on both physical and mental health, there is a clear danger that persons who might not have been "excludable" at intake could have deteriorated to a point of serious risk by the time they enter restrictive housing.

> Recommendation: The Board must require the CHA to evaluate people in custody for physical, mental health, and disability exclusions at the time they are to enter isolation.

Conclusion

The Proposed Rules are an essential step to ensuring that the New York City jails protect human rights of incarcerated people. We applaud the Board for its extensive engagement of a complex system, and its focus on a prospective, comprehensive approach that provides clarity for correction officials and incarcerated people. It is critical that the City take this opportunity to make progress.

Very truly yours,

/s/

Kayla Simpson
Veronica Vela
Mary Lynne Werlwas

[25] Statement of Basis and Purpose, p. 19.