



Mental Health Project

January 31, 2020

BY EMAIL

Board of Correction
1 Centre Street, Room 2213
New York, NY 10007
[coc@coc.nyc.gov](mailto:boc@coc.nyc.gov)

Re: Public Comment on Restrictive Housing Rulemaking

Dear Interim Chair Sherman and Members of the Board:

The Urban Justice Center Mental Health Project strongly supports ending the torture of solitary confinement in New York City jails. Solitary confinement is detrimental to the health and well-being of those subjected to it, and it has no place in the City jails. We urge the Board to enact the rule proposed by the #HALTsolitary campaign (HALT) and NYC Jails Action Coalition (JAC).¹ This proposed rule provides for the following:

- 1) Ending the use of solitary confinement in City jails;
- 2) Ensuring that Enhanced Supervision Housing (ESH) and any other alternative units actually promote safety, rehabilitation, and violence prevention;
- 3) Limiting the use of individual lock-in and facility lockdowns; and
- 4) Restricting the use of restraints with a strong presumption against their use.

We support the Board enacting comprehensive regulations regarding all forms of restrictive housing, but the Board also needs to require the Department to develop a disciplinary system that does not rely solely on restrictive housing. In addition to adopting the rule proposed by HALT and JAC, we encourage the Board to strengthen various provisions of its proposed rule as described below. Most significantly, the Board should prohibit the use of restraint desks entirely.

¹ Available at <http://nycaic.org/wp-content/uploads/2019/10/Proposed-BOC-Rules-to-End-Solitary-Confinement-in-NYC-Oct-2019.pdf>. On October 29, 2019, members of the HALT campaign and JAC petitioned the Board to adopt the rule. Petition available at <https://www.nycjac.org/uploads/1/2/4/4/124453631/redacted-haltsolitary-jac-petition-for-rulemaking-to-end-solitary-confinement.pdf>.

The Board should not eliminate the requirement that young adults be housed separate and apart from adults² and that they be provided age-appropriate programming.³ The special needs of this population are well documented. The regulations requiring the Department to provide for them must not be diminished.

The Urban Justice Center Mental Health Project has advocated for people with mental health concerns involved in the criminal legal system for more than 20 years. We are deeply familiar with the difficulties people with mental health concerns have within correctional facilities and in accessing essential mental health services, housing, and benefits upon release. We represent the *Brad H. Class*, all incarcerated individuals who receive mental health treatment while in City jails. As Class Counsel, each week we conduct approximately 35 to 40 interviews of incarcerated individuals who have mental health concerns. We are extremely concerned that the jail environment, especially placement in solitary confinement, harms these individuals not only while they are incarcerated but after their release.

I. The Board should enact standards that prohibit the use of solitary confinement and require that incarcerated persons who need to be separated from the general jail population be afforded services and programming in a supportive, non-punitive environment.

The Board's Minimum Standards should require humane treatment for all persons in the City jails. The firsthand accounts of people who endured solitary confinement clearly establish the inhumanity of this practice.⁴ Moreover, research shows the severe psychological harm and other health effects that solitary causes both while a person is incarcerated and upon release. For instance, people exposed to solitary confinement are almost seven times more likely to attempt to hurt or kill themselves than other incarcerated people.⁵ They also have higher rates of hypertension than other incarcerated people with a recent study showing that one-third of the people in supermax units were more likely to experience heart attacks and strokes.⁶ They are more likely to die in the first year after release from incarceration, especially from suicide or homicide; more likely to die of an opioid overdose in the first two weeks after release; and more likely to be reincarcerated.⁷

Given the well-established harm solitary confinement causes, the Board should prohibit its use entirely. Where safety concerns require that a person be separated from others, that separation should be limited to the period in which the person poses an actual, physical danger to others

² Minimum Standard (Min. Std.) § 1-02(b)(3).

³ Min. Std. § 1-02(c)(2).

⁴ See the testimony of Trent Taylor, Marvin Mayfield, Vidal Guzman, Herbert Murray, Harvey Murphy, Evie Litwok, and Candie at the December 2019 public hearings on restrictive housing rulemaking as well as the comments of incarcerated persons submitted by advocates.

⁵ Kaba F, Lewis A, Glowka-Kollisch S, et al. Solitary confinement and risk of self-harm among jail inmates. *Am J Public Health*. 2014;104(3):442–447. doi:10.2105/AJPH.2013.301742

⁶ Williams, B.A., Li, A., Ahalt, C. *et al.* The Cardiovascular Health Burdens of Solitary Confinement. *J GEN INTERN MED* 34, 1977–1980 (2019). <https://doi.org/10.1007/s11606-019-05103-6>

⁷ Brinkley-Rubinstein L, Sivaraman J, Rosen DL, et al. Association of Restrictive Housing During Incarceration With Mortality After Release. *JAMA Netw Open*. 2019;2(10):e1912516. doi:10.1001/jamanetworkopen.2019.12516

(measured in minutes and hours, not days and weeks). A person who is at risk of harming others should be housed in an environment that mitigates that risk through intensive engagement with skilled staff and programming that addresses the underlying cause of problematic behavior.

A. The limits on involuntary lock-in in Minimum Standard § 1-05 should apply to everyone in custody.

In units where out-of-cell time is reduced, the Department has not managed to create a therapeutic environment that promotes rehabilitation. Although Enhanced Supervision Housing (ESH) is intended to promote “rehabilitation, good behavior, and the psychological and physical well-being of [incarcerated persons],”⁸ it has proven to be a highly punitive environment. The Board found that “most young adults are spending nearly all day locked in their cells, rather than the minimum 7 hours provided for under the ESH standards.”⁹ Restricting out-of-cell time creates the perception by staff and incarcerated people that the unit is punitive. Punishment is ineffective in preventing or deterring violence.¹⁰ Thus, all units should allow for 14 hours out-of-cell time daily.

B. Cell confinement should occur in the context of deescalating a person or housing area and should be used for as short a time as necessary to quell the danger and restore order.

The rule proposed by HALT and JAC includes amending Minimum Standard § 1-05 to allow for emergency lock-in of an individual under specific circumstances¹¹ for a limited amount of time and pursuant to certain procedures.¹² It also includes provisions regarding lockdowns: the circumstances in which they may be used, time limits, required medical care, and public reporting.¹³ These provisions limit cell confinement to those circumstances in which there is an immediate need for separation.

1. Confinement for De-escalation Purposes (Proposed Rule § 6-05)

We support the Board’s comprehensive regulations regarding de-escalation confinement, especially the requirements regarding immediate notification to Correctional Health Services (CHS) so that access to care is not interrupted; conditions in intake and the provision of meals and snacks; calculation of time in de-escalation from time of initial placement through movement to other de-escalation areas; observation every 30 minutes; DOC’s obligation to inform the Board of all areas used for de-escalation; and DOC tracking of individual placements and reporting to the Board. However, we believe that the Board should adopt the more restrictive limits for placement in de-escalation confinement, including the time limits and procedures for extending the initial placement, set forth in HALT and JAC’s proposed rule regarding emergency lock-in.

⁸ Minimum Standard (Min. Std.) § 1-16(a).

⁹ An Assessment of Enhanced Supervision Housing for Young Adults, NYC Board of Correction, July 2017, at iii.

¹⁰ Gilligan J and Lee B. Report to the Board of Correction, September 5, 2013, at 5, available at <https://solitarywatch.org/wp-content/uploads/2013/11/Gilligan-Report.-Final.pdf>.

¹¹ HALT/JAC proposed § 1-05(b)(3).

¹² HALT/JAC proposed § 1-05(b)(4)-(5).

¹³ HALT/JAC proposed § 1-05(c).

We also encourage the Board to give CHS authority for determining that a person should be removed from de-escalation confinement based on their mental health needs or other health risks. Given the difficulties of de-escalation occurring in intake as described in the Board’s Statement of Basis and Purpose for the proposed rules, the Board should specify – not merely require the Department to consider – what features must be included in any de-escalation area in new facilities or renovation of existing facilities.

2. Emergency Lock-ins (Proposed Rule § 6-06)

We support the Board adopting rules regarding emergency lock-ins, especially the requirement of immediate notification of the Board and CHS and of the public when visits are affected. The rule should include a maximum time limit on emergency lock-ins. Correctional Health Services staff should be required to complete medical and mental health rounds in housing areas where lock-in has continued more than four hours. We urge the Board to adopt additional safeguards regarding lock-ins consistent with HALT and JAC’s proposed rule regarding lockdowns.¹⁴

C. The Board’s standards should require Enhanced Supervision Housing and any other units where incarcerated persons are separated to be operated as rehabilitative, non-punitive settings.

The rule proposed by HALT and JAC includes requirements to promote a therapeutic environment in ESH.¹⁵ The stated objective of ESH is “to protect the safety and security of [persons in custody] and facilities while promoting rehabilitation, good behavior, and the psychological and physical well-being of [persons in custody].”¹⁶ The current standard states that “ESH is designed to separate from the general population those [persons in custody] who pose the greatest threats to the safety and security of staff and other [persons in custody]. It additionally seeks to promote the rehabilitation of [individuals in ESH] by incentivizing good behavior and by providing necessary programs and therapeutic resources.”¹⁷ Enhanced Supervision Housing has never realized those objectives because although the Minimum Standards articulate that purpose, they also allow for the following:

- lock-out time to be cut in half (from 14 hours down to seven);
- a schedule that shifts from seven hours out in the morning to seven hours out in the evening resulting in people in these units spending 24 hours locked down every other day before the next seven hours out;
- restrictions on visits, correspondence, and packages; and
- out-of-cell time spent shackled to a desk or in a recreation cage when allowed outdoors.

These restrictions prevented the units from accomplishing stated purpose.

¹⁴ HALT/JAC proposed § 1-05(c).

¹⁵ HALT/JAC proposed § 1-16(d).

¹⁶ Min. Std. § 1-16(a).

¹⁷ Min. Std. § 1-16(a).

Instead HALT and JAC's proposed rule adds provisions to make these units truly rehabilitative.¹⁸ Fundamentally, the reduction in out-of-cell time and use of restraint desks must be eliminated. Congregate human interaction, including at least seven hours of quality, evidence-based programming, is essential. People in ESH should have access to trauma-informed therapeutic programming that promotes personal development and addresses the underlying causes of problematic behavior. Engagement with people in the unit should not be limited to group discussions and classes but also include individual counseling, efforts to connect with family and community members, and peer-led initiatives. The ESH units should be staffed by well-trained correction officers as well as civilian staff. The rule proposed by HALT and JAC provides for an increase in steady correction staff and for half of the staff assigned to ESH to be civilian staff trained in providing the required programming or correction staff with a master's degree in social work or other related degree.¹⁹

In addition, there must be a fair process for being placed in the unit, measuring the goals included in the rehabilitation plan, and being released from the unit. The ESH units should not be a place for warehousing individuals who have difficulty interacting with people in general population. Instead, ESH participants should be discharged from the unit when they substantially complete their rehabilitation plan or within four months, provided they have not committed a new act within the previous 30 days and discharge would pose a significant and unreasonable risk to the safety of others.

- Structurally Restrictive Housing (Proposed Subchapter F)

We commend the Board for regulating units that DOC asserts are general population housing but which function to isolate individuals in the equivalent of solitary confinement or limit contact to just a few other people. However, the proposed rule permits individuals to be held in units with only one or two other people *indefinitely*, provides no programming requirements, and explicitly allows services in a non-congregate setting. In addition, people with serious medical conditions, people ages 55 and older, and pregnant persons, persons within eight weeks of pregnancy outcome, or persons caring for a child in the Department nursery program are not excluded from these units where the conditions can be just as restrictive as punitive segregation.

The Board should amend its proposed rule to require DOC to operate structurally restrictive housing units in a manner comparable to ESH, consistent with the changes to ESH proposed by HALT and JAC. At a minimum the Board should require congregate programming and the presumption of release from the unit after a specified period. The Board should not leave it to DOC to decide whether the alternative provision of services in structurally restrictive housing is sufficient to meet the intent of the Standards.²⁰ The Department should be required to submit its plan for any alternative provision of services to the Board for its approval.

¹⁸ See HALT/JAC proposed amendments to § 1-16(d)-(e).

¹⁹ HALT/JAC proposed § 1-16(e).

²⁰ Proposed rule § 6-23.

D. The Board’s proposed rule permits torture to continue in NYC jails.

The proposed rule includes a 15-day limit for most infractions, and it requires that a person who has served 15 consecutive days be released from PSEG I for at least seven days before returning to PSEG I. The rule explicitly permits, however, a 60-day sentence for an assault on staff that results in serious injury to staff. Such a sentence is four times beyond what the international community considers torture for all people (15 days in solitary confinement).²¹ Moreover, a person serving such a sentence is not eligible to be released after 15 days in solitary as provided by § 6-07(3)(iii). In addition, while the rule states that an “incarcerated person may not be held in PSEG I for more than a total of sixty days within any six-month period,” it does allow for that maximum to be exceeded in certain circumstances.

Allowing for solitary confinement to be used even longer where the person engages in violence ignores the truth about solitary confinement – that it promotes violence rather than reducing it. In fact, in its Statement of Basis and Purpose, the Board cites the Vera Institute of Justice report which states, “Researchers have found no evidence that longer stays in disciplinary segregation decrease infractions or violence by people upon return to general population.”²² The Board seems to acknowledge that solitary confinement is harmful and through the proposed rules further limits its use. However, permitting any persons in custody to languish in isolation beyond the limits of the Mandela Rules is unacceptable.

Similarly, the rule provides for at least four hours out-of-cell time for those in PSEG I but also allows the Department to deprive an individual of that out-of-cell time in certain circumstances. Once DOC determines that an individual should not be afforded the four hours of daily out-of-cell time, the decision is not reviewed for seven days, and even then, without the involvement of the person in custody. The proposed rule includes no requirement that the four hours of out-of-cell time be spent with other people. Moreover, the Department is not required to provide “evidence-based programming aimed at addressing the root causes of the behavior that led to the person’s extended stay” until *after* the person has been in PSEG I for more than 15 consecutive days or 60 days in a six-month period.

II. The Board should require the Department to develop a disciplinary system that does not rely solely upon restrictive housing, and the Board should strengthen the proposed rule regarding other aspects of restrictive housing.

The Board should require the Department to develop a disciplinary system that does not rely upon restricting out-of-cell time. The Department should promote order and safety through positive incentives; through staff modeling professional, respectful behavior; and through consequences that do not involve the deprivation of minimal humane treatment. Positive incentives could include increased commissary, additional visits, and increased access to technology.

²¹ United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), Rules 43-44.

²² Anthony-North V, Roberts S, and Sullivan S. The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the New York City Department of Correction, June 2017, (Vera Report) 46-7, available at <https://www.vera.org/downloads/publications/safe-alternatives-segregation-initiative-findings-recommendations-nycsas.pdf>.

Between April 2015 and September 2016, the Vera Institute of Justice assessed the Department's overall use of segregation and made recommendations to advance the Department's efforts to safely reduce the use of restrictive housing. Vera's recommendations included:

- eliminating the use of punitive segregation for nonviolent Grade I and all Grade II infractions and using alternative sanctions;²³
- increasing privileges in general population so that the Department could respond to inappropriate behavior by limiting these privileges;²⁴
- providing targeted programming to address problematic behavior, such as substance use treatment programming as a response to a positive drug test;²⁵ and
- using conflict resolution approaches as a response to interpersonal conflict within the jails.²⁶

The Department should use these recommendations to develop a comprehensive disciplinary system that can be explained clearly to staff and incarcerated persons.

The proposed rule includes a requirement that the Department submit a written plan for a disciplinary process for young adults in custody, but it does not require the same for adults. The Board should amend the proposed rule to require a disciplinary system plan for adults. Successful reform of restrictive housing depends upon the Department developing alternative sanctions and approaches to address misconduct.

A. Pre-hearing Detention (Proposed Rule § 6-04)

The Board should not allow the Department to isolate a person in pre-hearing detention. Under the proposed rules, pre-hearing detention can result in persons in custody spending from nine to 12 days in isolation before their disciplinary hearing. Given that the proposed maximum sentence is 15 days for most infractions, requiring a person to serve more than half of the sentence before even having a hearing is unfair. In addition, the proposed rule provides no exclusion of vulnerable populations from pre-hearing detention and no immediate written notice to Correctional Health Services as required in Proposed Rule § 6-05(b).

B. Restraints (Proposed Rule § 6-36)

We urge the Board to prohibit restraint desks during lockout in all facility housing units. Restraint desks are dehumanizing and have no place in the City jails. According to the proposed rule, a core principle of the new restrictive housing section is “ensuring that all people in custody and all staff who work in facilities are treated with dignity and respect” and “prohibiting restrictions that dehumanize or demean people in custody.” It is difficult to imagine how shackling a person in a restraint desk can be viewed as anything but demeaning and dehumanizing. We urge the Board to prohibit the use of restraint desks. To the extent that the Board permits individualized use of restraint desks, the rules should include procedural due process protections, periodic reviews, and an appeal process.

²³ Vera Report at 45.

²⁴ Vera Report at 45.

²⁵ Vera Report at 46.

²⁶ Vera Report at 77.

C. PSEG II (Proposed Rule § 6-07(b))

PSEG II should be replaced with a disciplinary sanction that does not require reduced out-of-cell time. To the extent that the Board permits PSEG II to continue, the proposed rule should be amended to require programming; exclude pregnant people, people within 8 weeks of pregnancy outcome, or people caring for a child in the nursery program; and set forth a limit on the amount of time an individual can be confined in PSEG II.

D. Access to Health Services (Proposed Rule §§ 6-25 - 6-27)

Clinical encounters should never occur cell-side. Unfortunately, clients in restrictive housing often report that their contact with clinicians occurs at their cell or not at all. We unequivocally support the Board in adopting § 6-27. Given the history of the Department's unwillingness to bring clients in restrictive housing to the clinic, the Board must provide close oversight of compliance with this provision. We recommend enhancing the reporting requirements so that the Board can determine whether referrals made during medical and mental health rounds actually result in scheduled services for people in restrictive housing and whether these individuals are actually brought to the clinic for their scheduled appointments.

E. Fines (Proposed Rule § 6-07(c))

We wholeheartedly support eliminating automatic monetary fines. This change highlights the need for the Department to develop other responses to problematic behavior.

F. Disciplinary Due Process (Proposed Rule § 6-30)

Videotaping refusals to attend the hearing and notifying defense counsel where the person is charged with a Grade I violent offense are steps toward improving the disciplinary process. But they are not enough. Allowing persons in custody to be represented by an attorney or advocate is critical to ensuring a fair process. In addition, hearing adjudicators must be impartial. The Board should set forth additional requirements of hearing adjudicators to ensure that their role within the Department is independent from facility operations. Finally, we urge the Board to amend the proposed rule to require that the hearing adjudicator communicate the determination to the person directly. Vera recommended this change to allow the person an opportunity to ask questions about their placement in punitive segregation in an effort to increase transparency and trust in the disciplinary process.²⁷

G. Limitation on Access to Recreation (Min. Std. § 1-06(h))

We oppose the proposed change to the circumstances in which access to recreation can be limited. The Board should specify conduct that justifies denying an individual's access to recreation rather than allowing it to be denied based on "imminent safety and security risks." Such vague and subjective criteria are ripe for abuse. In addition, the Board should add procedural protections

²⁷ Vera Report at 47-8.

beyond the requirement that documentation be transmitted to the Board within 24 hours. Persons who are denied access to recreation should have a process for challenging such a determination including an appeal to the Board.

III. The Board should not turn away from the 2015 reforms that require young adults to receive age-appropriate programming and be housed separately from adults.

Young adults are different from adults – their brains are still developing, they have more capacity to change, and they are more impulsive and less aware of the consequences of their actions. The Department should treat them differently. In the last few years, the Department has retreated from its commitment to the Young Adult Plan, but the Board should not. The standards that require that young adults to be housed separately from adults and be provided with developmentally appropriate programming should not be eroded.

Instead the Board should require the Department to move forward with a disciplinary system plan right away. Developing such a plan is essential to successfully implementing young adult housing.

Conclusion

Through this rulemaking process, the Board can move the City toward a more humane, fairer, and safer jail system. Eliminating the use of solitary confinement, creating alternative units focused on rehabilitation, and developing a disciplinary system grounded in procedural and restorative justice are essential to improving the operation of the City jails.

Sincerely,



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