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BOARD OF CORRECTION
CITY OF NEW YORK
1 CENTRE STREET, RM 2213
NEW YORK, NY 10007
212 669-7900 (Office)
212 669-7980 (Fax)

Martha W. King
Executive Director

January 20, 2017

Via E-Mail

Joseph Ponte
Commissioner
NYC Department of Correction
75-20 Astoria Boulevard
East Elmhurst, NY 11370

Re: Notice of Violation of Minimum Standards

Dear Commissioner Ponte:

This letter serves as notice that the Department of Correction is in violation of Board of Correction Minimum Standard § 1-16(c)(1)(ii) as a result of its continued operation of Enhanced Supervision Housing units (“ESH”) for young adults ages 19-21, including Level 1 ESH where young adults are shackled to restraint desks by ankle cuffs during their 7-hour daily lockout. At the Board’s meeting on January 10, 2017, DOC withdrew its request for renewal of a six-month variance from § 1-16(c)(1)(ii)’s requirement that young adults be excluded from ESH. Consequently, the Board did not vote on whether to renew the variance, and it expired the next day. In an attempt to circumvent compliance with § 1-16(c)(1)(ii), DOC has “declared an emergency variance” every day since January 11, 2017 and submitted an emergency variance application to the Board on January 13 (“Application”). However, the Department has not demonstrated the existence of an emergency situation which prevents it from complying with § 1-16(c)(1)(ii). Such demonstration is required by the emergency variance provisions of Minimum Standard § 1-15.

Declaration of and Application for an Emergency Variance

At the Board meeting on July 12, 2016, BOC granted the Department a three-month variance from § 1-16(c)(1)(ii). On October 11, 2016, the Board renewed the variance with respect to 19-21 year olds for an additional three months, until January 11, 2017. Neither in its written variance requests nor at the October Board meeting did the Department make any mention of confining young adults to restraint desks when they were not in their cells. Since DOC and the Board treat young adults as developmentally distinct from the adult population — a distinction which is

codified in our Minimum Standards (*see, e.g.*, §§ 1-02, 1-16 and 1-17) — the Board assumed that DOC would have made mention of such a serious restriction were it to be imposed on young adults coming into ESH. Absent this information, the Board approved DOC’s initial variance request and its subsequent renewal.

Minimum Standard § 1-15(b)(3) states that a declaration of an emergency variance may be declared for a period of less than 24 hours when an “emergency situation prevents continued compliance” with a particular requirement of BOC’s Minimum Standards. Section 1-15(c)(3) permits the Department to apply to the Board for an emergency variance “when an emergency situation prevents continued compliance with a subdivision or section” of the Board’s rules. Section 1-15(c)(3)(ii) states that an application for an emergency variance for a period of 24 hours or more must state “the specific facts or reasons making continued compliance *impossible*, and when those facts and reasons became apparent” (emphasis added). Finally, § 1-15(e)(1) provides that the Board shall grant a variance “only if it is presented with *convincing* evidence that the variance is necessary and justified” (emphasis added).

If DOC believed that its inability to house young adults in ESH would create an emergency situation, it should have stated this in its December 27, 2016 request for a variance renewal, and it should not have withdrawn its variance request prior to the January 10, 2017 public meeting.¹ If an emergency situation had arisen or existed at the time of its initial July 2016 variance request, its October 2016 renewal request, or at any other time, DOC should have stated as much then. Absent an emergency situation which prevents compliance with § 1-16(c)(1)(ii), the Department has not demonstrated a basis for declaring an emergency variance. Moreover, DOC’s application for an emergency variance does not present any convincing evidence of why it is impossible to exclude young adults from ESH.

The Use of Restraint Desks

The Board applauds the Department’s historic accomplishment of ending punitive segregation for young adults. We also are cognizant of the immense challenges involved in developing an alternative disciplinary system and housing that is safe for individuals in custody and staff, developmentally appropriate for young adults, and prevents violence in the long term. However, the Board has significant substantive concerns about the Department’s confinement of young adults in restraint desks whenever they are out of their cells except when they are recreating in individual cages, showering or engaging with visitors. Recent ESH practice dictated that they spend all of their lock-out time shackled to a desk, which was not contemplated by the Board when it promulgated the ESH Minimum Standard. Board concerns, which must be addressed through thorough assessment and planning, include: the medical and mental health risks and impact posed by such protracted restraint; the differential impact of punitive segregation versus restraints; identification of specific and unique criteria for the use of restraint desks in ESH; and frequency of periodic review of restraints and a step-down process.

The Board understands that the Department is currently developing a young adult ESH policy which will address issues underlying its operation of ESH for this age group. The policy should also address the Board’s concerns expressed above. We look forward to reviewing a draft of this

¹ Although the Board granted the Department a three-month variance on July 12, 2016 to house young adults in ESH, DOC did not approve its first placement of a young adult in ESH until September 8, 2016.

policy and providing our feedback on it.

Sincerely,



Derrick D. Cephias

cc: DOC
Heidi Grossman, Deputy Commissioner for Legal Matters/General Counsel
Jeff Thamkittikasem, Chief of Staff

H+H
Patsy Yang, DrPH, Senior Vice President for Correctional Health Services
Dr. Homer Venters, Chief Medical Officer of Correctional Health Services

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Bennett M. Stein
Emily Turner