

DISABILITY RIGHTS NEW YORK

25 CHAPEL STREET, SUITE 1005
BROOKLYN, NEW YORK 11201
(518) 432-7861 (VOICE)
(518) 512-3448 (TTY)
(800) 993-8982 (TOLL FREE)
(718) 797-1161 (FAX)
MAIL@DISABILITYRIGHTSNY.ORG
WWW.DISABILITYRIGHTSNY.ORG

December 18, 2014

Gordon Campbell, Chair
Members of the New York City Board of Correction
51 Chambers Street, Rm. 923
New York, NY 10007

Dear Mr. Campbell and Members of the Board:

Disability Rights New York (DRNY) submits the following testimony regarding proposed amendments to the Minimum Standards (1-05, 1-06, 1-07, 1-08, 1-09, 1-11, 1-12, 1-13, 1-16, 1-17) related to New York City Department of Correction (DOC) facilities to establish new long-term isolation units called Enhanced Supervision Housing (ESH). The proposed amendments implicate numerous significant issues of concern for incarcerated individuals with disabilities. As discussed below, DRNY is greatly concerned that the proposed rule and policies may lead to the abuse and neglect of individuals with disabilities due to the absence of mental health, therapeutic, and educational services, and insufficient accommodations for persons with disabilities.¹

DRNY is New York State's designated Protection and Advocacy system, with federal and state authority to ensure the protection of the rights of individuals with disabilities, investigate complaints of abuse and neglect, and pursue appropriate remedies under the Protection and Advocacy for Individuals with Mental Illness Act, the Developmental Disabilities Assistance and Bill of Rights Act, the Protection and Advocacy for Individual Rights Act, and New York Executive Law § 558.² DRNY carries out this federal and state mandate by monitoring conditions in facilities through regular on-site visits, investigations, records review, and by monitoring the development and implementation of new policies affecting individuals with disabilities.³

DRNY is currently conducting monitoring and investigation activities at Rikers Island. DRNY submitted comments to the Board in letters dated November 5 and 10, 2014 regarding DOC's "Request for Variance" related to Enhanced Supervision Housing and submits this

¹ See 42 U.S.C. § 10802 (defining abuse and neglect of individuals with mental illness); see 45 C.F.R. § 1386.19 (defining abuse and neglect of individuals with developmental disabilities).

² 42 U.S.C. §§ 10801-10827; 42 U.S.C. § 15041 *et seq.*; 29 U.S.C. § 794e; N.Y. Exec. Law § 558(b).

³ 42 C.F.R. § 51.31.

testimony in response to the Proposed Rule that entered into the rulemaking process on November 19, 2014. This testimony also responds to a revised draft directive by DOC that was released just today to a small group of advocates, which neither the Board nor DOC have distributed for public comment.⁴ This draft directive is a policy document that can be altered at any time and, accordingly, does not resolve DRNY's concerns.

*

DOC plans to house as many as 250 individuals in long-term, indefinite solitary confinement in ESH units, but there is currently little more than a skeletal plan about how DOC and the Department of Health & Mental Hygiene (DOHMH) will ensure that individuals with disabilities receive essential services and receive them in the least restrictive, most integrated setting possible. As discussed in more detail below, DRNY has particular concerns about the lack of exclusion for people with disabilities, hearing procedures, and the lack of mental health and other services and supports in the ESH.

I. Exclusion for People with Disabilities

DRNY has significant concerns about Proposed Rule § 1-16 related to initial admission and retention of people in ESH.

First, Proposed Rule § 1-16 contains no exclusion for individuals with serious mental illness or other mental health diagnoses, developmental and intellectual disabilities, traumatic brain injury, physical disabilities, hearing or vision impairments, or for young people under the age of 21 receiving special educational services. DOC's draft directive suggests a policy decision to exclude those with serious mental illness from ESH;⁵ however, this policy decision is not incorporated into the Proposed Rule and can be amended at any time, without a notice or comment process. Therefore, the Proposed Rule is the most relevant document for analyzing the impact that ESH will have on individuals with disabilities.

The absence of an exclusion for all persons with disabilities and the placement of such people in a highly restrictive setting with limited access to medical and mental health treatment, educational services, and other supports heightens the risk that persons with disabilities will be subject to abuse and neglect, in violation of the U.S. Constitution, the Americans with Disabilities Act (ADA), and the Individuals with Disabilities Education Act.

Second, Proposed Rule § 1-16 lacks any mechanism for assessing whether an individual who has been placed in ESH should be diverted to a less restrictive unit because of a need for a higher standard of care. No intake procedure is foolproof. There must be a mechanism for

⁴ DRNY notes that the Board and the DOC have consistently undermined procedures for rulemaking. Before the November 18, 2014 Board of Correction meeting, materials were distributed mere *hours* before a public meeting. Now, yet again, just hours before a public hearing on rulemaking, the DOC has apparently prepared a new policy document, without making any of the materials widely available for comment by the public. These materials speak to fundamental aspects of rules and policy related to ESH, and the failure to distribute these materials at the initiation of rulemaking thwarts the rulemaking process.

⁵ Draft Directive, Enhanced Supervision Housing, pg. 2.

ensuring that individuals are regularly assessed by clinical staff and housed in a setting appropriate to their needs. With respect to medical and mental health care, once an individual's needs are well known to health and corrections staff, the neglect of such needs amounts to deliberate indifference.

The draft directive indicates that health staff may trigger “a higher level of review” if health staff determine that care “cannot be provided in ESH.”⁶ Significantly, the directive states that the DOHMH retains a role—as it must—in the process of determining housing placements for individuals with medical and mental health needs and that health reasons are a recognized basis for removal from ESH.⁷ However, the draft directive is little more than a bare-bones policy outline that has not been incorporated into the Proposed Rule. Individuals will be at risk of abuse or neglect if there is no binding standard with procedural safeguards that begin to address: how services will be provided; where individuals with less than severe mental illness will be housed; how decisions will be documented and reviewed; and who retains ultimate responsibility for ensuring that individuals receive appropriate care.

Third, Proposed Rule § 1-16 lacks any mechanism for assessing whether a need for disability-related services makes placement in ESH inappropriate. DRNY is greatly concerned that DOC lacks appropriate procedures for identifying and, if necessary, diverting individuals with disabilities who are at risk of abuse or neglect in ESH. During a monitoring visit this past Monday, December 15, 2014, DRNY found that in housing areas that are *less* restrictive than ESH, people with significant functional impairments are being deprived of access to necessary supports in violation of their legal rights. For example, one eighteen-year-old boy in a mental observation unit in the Robert N. Davoren Center reported that he was brutally beaten by corrections staff last week. Because of his disability, the teenager was unable to write a grievance independently and had not been provided writing assistance necessary to protect himself and preserve his legal rights. DOC is required to ensure that persons with disabilities receive equal access to programs and services.⁸ The absence of a clear mechanism for identifying need and providing services in the least restrictive environment amounts to abuse and neglect.

II. Procedures

DRNY is greatly concerned that Proposed Rule § 1-16(b) implicates the due process rights of individuals who may be subject to ESH. Under the Proposed Rule, DOC has no process for evaluating whether incidents of misbehavior are disability-related and fails to provide reasonable accommodations for individuals with disabilities.

⁶ Draft Directive, Enhanced Supervision Housing, pg. 2-3.

⁷ Draft Directive, Enhanced Supervision Housing, pg. 9.

⁸ 42 U.S.C. § 12132; *Pennsylvania Dep't of Corr. v. Yesky*, 524 U.S. 206 (1998).

First, DOC has indicated that individuals with mental illness will be placed in ESH based on past disciplinary incidents such as disturbances or other violent conduct.⁹ People with significant mental health needs and mental illness have, however, been wrongly disciplined in situations where the appropriate response by DOC should have been a referral to treatment and other services.¹⁰ The Mayor's Office and DOC have conceded that there are systemic deficiencies in the treatment of individuals with mental illness at Rikers Island and are allocating resources to create enhanced mental health programming (referred to as PACE units) with the goal of proactively preventing violence and disciplinary incidents. This is a sensible approach to reducing violence and disturbances at Rikers Island; however, much more is needed. Any decision with respect to housing placement should involve appropriate consideration of whether a disciplinary incident, including past incidents, is a manifestation of a disability or related to an unmet need for disability-related services. The Proposed Rule provides no procedure for engaging in this review and as such implicates the procedural rights of individuals with disabilities.

Second, DOC's draft directive reflects a policy decision to provide an ESH hearing facilitator when an individual is illiterate, the case is very complicated, or there is another reason that has prevented the individual from obtaining witnesses or material evidence. The ADA requires public entities to provide reasonable accommodations for individuals with disabilities for those who need them at every stage, including administrative, adjudicatory, or disciplinary processes. Moreover, restricting accommodations only to those individuals who are illiterate is contrary to the ADA.

III. Mental health services

DRNY is greatly concerned that DOC is pressing forward to establish the ESH without a concrete plan for how mental health services will be delivered and how to make those services meaningful. Crucial pieces of information about the mental health services and programming in ESH, which are key to helping the public evaluate and comment on the Proposed Rule, have been entirely absent from the public discussion about ESH. These omissions are particularly shocking given incidents of extreme neglect resulting in the deaths of people with mental illness in the last year.¹¹ DOC should be redoubling efforts to ensure that individuals receive the services they need through an open and transparent process.

Key pieces of information that should be made available to the public regarding ESH include the following: information about assessment, evaluation, treatment, and therapy including the availability of group programming; mental health staffing; the frequency of mental health rounds and the frequency of out-of-cell, private clinical interviews; the location of clinical

⁹ In remarks at the Board of Correction meeting on November 18, 2014, Commissioner Joseph Ponte reported that individuals with mental illness, which make up 38% of the population, "drive" about 59% of incidents at Rikers Island.

¹⁰ See, e.g., Michael Winerip & Michael Schwartz, *Rikers: Where Mental Illness Meets Brutality in Jail*, N.Y. TIMES, July 14, 2014 (noting that a prisoner, who attempted suicide and was beaten severely by staff, was then charged with "physically resisting staff").

¹¹ Jake Pearson, *2 Deaths Put NYC Jail System Under Scrutiny*, ASSOCIATED PRESS, May 22, 2014.

interviews; information about the procedure for obtaining mental health services and receiving those services; and crisis intervention and mental health training for corrections staff.

DRNY's concerns about the failure to develop a concrete plan for mental health services were magnified after an on-site monitoring visit on Monday, December 15 to Otis Bantum Correctional Facility (OBCC) and RNDC. At OBCC, DRNY toured 1W, where DOC plans to locate one of the ESH units, and 5-North, which is a Restricted Housing Unit (RHU) for people with mental illness who are serving solitary confinement sanctions. At RNDC, DRNY toured a mental observation unit and the punitive segregation unit. Our tour of these units confirmed DRNY's concerns with respect to ESH and with respect to the delivery of appropriate programming and services more generally.

1W is a yet unopened 50-cell, two-tiered unit. The doors to cells are solid steel and the only opening in the door is a slot for a food tray. There is no dayroom on the unit or space for a private clinical interview. While there were 12 metal picnic-style tables in the unit, DRNY was informed that these would likely not be used for any group or congregate activity and that educational services were likely to consist of cell-study. DRNY was informed that group activity was antithetical to the overall mission and intended design of ESH. Earlier this week, Commissioner Ponte reported that programming in ESH will consist of a journaling program involving self-reflection. To date, there has been no other information describing what the programming will consist of and whether there is any out-of-cell or other congregate component aimed at supporting prosocial behaviors and mitigating the harm of extended indefinite isolation. The physical plant is built for isolation. In the absence of any information to the contrary, the ESH is just punitive segregation by another name.

5-North is a RHU that opened on December 2, 2014. DRNY toured this unit around 5:00pm after learning that individuals had been setting fires in their cells throughout the day. The entire unit was filled with an overwhelming stench of smoke and the floors were littered with old food trays. Because of the fires, mental health services had been interrupted. DRNY was told that both fires and disruptions in mental health services were a common occurrence in 5-North, and the fires were being set in response to neglect by corrections staff. In effect, the 5-North has become a punitive segregation unit in near-constant lockdown.

Finally, despite claims to the contrary, solitary confinement of juveniles has not ended at Rikers Island. At RNDC, on Monday, five juveniles were housed in 20-hour isolation in the old "bing." DRNY was informed that the juveniles had been moved there in the last week and will be moved to the new Transitional Repair Unit that is scheduled to open. One seventeen-year-old boy reported that he had not received educational services – a violation of the Second Circuit's decision in *Handberry* that requires DOC to provide such education.

DRNY is greatly concerned about systemic deficiencies in the delivery of mental health services, educational services, and other supports for individuals with disabilities. These deficiencies continue to this day. As discussed above, the Proposed Rule for ESH fails to respond to systemic problems and places individuals with disabilities at an unacceptable risk of abuse and neglect.

*

Thank you for considering the concerns shared in this letter.

Sincerely,



Elena Landriscina
Staff Attorney

cc: Amanda Masters, Acting Executive Director