



November 27, 2019

Jacqueline Sherman, Interim Chair and Members
New York City Board of Correction
1 Centre Street, Room 2213
New York, New York 10007

Re: Restrictive Housing Rule Making Public Comment

Dear Interim Chair Sherman and Board Members:

The Children's Defense Fund-New York (CDF-NY) provides the following public comment concerning the proposed Restrictive Housing rules (hereinafter, the "Proposed Rules").

We commend the Board for its deliberate and thoughtful approach to comprehensive Rulemaking concerning Restrictive Housing and related minimum standards around discipline, out of cell time, and Young Adult housing areas.

That said, several of the Proposed Rules weaken protections for young adults in custody, despite the Board's repeated acknowledgement over the past five years that youth aged 18 to 21 are an especially vulnerable population entitled to dedicated, age-appropriate protections and supports.

Research from across scientific disciplines has established that that young adulthood is distinct--not only because of social conditions (young people completing education, entering the workforce, marrying, and living independently for the first time), but biologically. During this period of emerging adulthood, the prefrontal cortex of the brain, which regulates emotions, critical thinking, planning, and impulse control, is rapidly developing. Emerging adults are impulsive and often do not contemplate the consequences of their choices. (The Annie E. Casey Foundation and Jim Casey youth Opportunities Initiative, *The Road to Adulthood*, available at: <https://www.aecf.org/m/resourcedoc/aecf-theroadtoadulthood-2017.pdf>.) Brain development during this period means that individuals at this stage of life have significant capacity to change in both positive and negative ways. (*Id.*)

Our public comment below is grounded in this growing consensus, as well as our belief that the Department of Correction has an urgent duty to address system-wide failures in capacity to care for and preserve the safety of all people in its custody. We welcome this important rule-making process, and look forward to the Board approving new rules that codify the principles set forth in the Statement of Basis and Purpose. We respectfully offer this public comment with the hope of making the current proposals more consistent with that stated intent.

Amendments to § 1-02(c): Commingling of Young Adults with Adults

Age-Appropriate Programming and Services for Young Adults

The Proposed Rules strike language requiring the Department to “provide [Young Adults] with age-appropriate programming.” (See Proposed Rules Sec. 1-02(c)(2).) References to this age-appropriate programming (also referred to as the “Young Adult Plan”) are found only in reporting requirements. (See Proposed Rules Sec. 1-02(c)(6) “Data Collection and Review” at (iv).) The language contained in section 1-02(c)(2) should not be struck, but should be amended to ensure that the Department has a duty to provide *all young adults* with age-appropriate programming and services, regardless of housing area.

Proposed change: Sec. 1-02(c)(2) “The Department ~~Housing for inmates ages 18 through 21~~ shall provide ~~such inmates~~ young adults with age-appropriate programming and services.”)

References contained in the proposed rules concerning data collection and progress reports do not establish a clear duty for the Department to provide these essential programs and services, and are insufficient as drafted.

Young Adult-Only Housing Areas

The Proposed Rules also strike the obligation to ensure that young adults are “housed separately and apart from inmates over the age of 21.” (Proposed Rules Sec. 1-02(c)(1); see also Proposed Rules Sec. 1-02(d)(2).) Instead, the Proposed Rules permit the Department to remove young adults from these dedicated units, intended to be resource-rich with developmentally-appropriate programming, and placed with older adults where the Department is under no clear obligation to serve young adults in the same way. (The current language of the minimum standards states that “*Housing for inmates ages 18 through 21 shall provide such inmates with age-appropriate programming.*” Sec. 1-02(c)(2) (emphasis added).) Indeed, we know from testimony before the Board and the Department’s own reporting that young adults commingled with older adults do not have access to the same services and supports as those in dedicated housing areas. Moreover, there is no provision that sets forth how a young adult could be transferred back into young adult-only housing after a violent act.

This is counter-intuitive and section 1-02(c)(1)(i) of the Proposed Rules should be struck. Youth who have “engaged in violent or assaultive behavior” should be subject to a “written plan detailing the key elements of the Department’s approach to discipline” for young adults. (See Proposed Rules Sec. 6-09.) This includes “penalties that may be imposed for engaging in [] prohibited conduct,” “due process procedures,” “progressive sanctions,” “penalties that are proportionate to the infraction charge,” “behavioral incentives,” and “principles of procedural and restorative justice.” (*Id.*) The Department needs to shift its thinking about young adult housing areas and the programming provided there from being places for “compliant” youth, to supportive, age-appropriate settings that are prepared for and can respond appropriately to predictable conflict and violence among young people who are being detained. The Board’s own

statements reflect this approach, citing references to “Vera Center on Youth Justice’s work with jails and prisons in Connecticut, Massachusetts, and South Carolina to establish a new practice model — ‘Restoring Promise’ — for young adults ages 18-24” where youth violence prevention is linked to age-appropriate settings with strong programming and supports. (Proposed Rules at page 25.)

We believe that there might be rare situations where a young adult is not safe in the young adult-only housing areas, and temporary placement outside of these units may be necessary. (See Proposed Rules Sec. 1-02(c)(1)(ii).)

Proposed change: Sec. 1-02(c) should be amended to contain provisions that permit young adults to return to these dedicated units as soon as safe to do so, timelines for review and return, and an obligation for the Department to create the conditions for that return, consistent with “principles of [] restorative justice.” (See Proposed Rules Sec. 6-09.)

Proposed Rules § 6-09: Disciplinary System Plans for Young Adults

As the Board recognizes, the Department “lacks a holistic and transparent approach to implementing discipline and behavior management for young adults,” despite being required by the *Nunez* Agreement to create an approved discipline program years ago. (See Proposed Rules at page 23; *Nunez* Monitor’s Report No. 8, available at: <http://tillidgroup.com/wp-content/uploads/2019/10/8th-Monitors-Report-10-28-19-As-Filed.pdf> at 284.) Indeed, the current non-individualized “Levels System” for youth discipline for 18-year-olds has been found to be “without integrity,” and the Department has failed altogether to implement graduated sanctions for individuals. (*Nunez* Monitor’s Report No. 8 at 281-2.) The absence of such a system predictably contributes to the increasing number of abuses and violence involving young adults within the facilities. (*Id.* at 5-6.)

In light of this, it is urgently necessary that the Department establish a comprehensive plan that meets the requirements of the Proposed Rules immediately. The Board should not require the Department to first obtain consent from the *Nunez* Independent Monitor before the Department submits the plan to the Board, or begins implementation of the plan. (See Proposed Rules at Sec. 6-09(a).) Based on prior performance, this could take months or years, and young people in the Department’s custody today must be able to rely on a fair and transparent, individualized system of discipline, grounded in the principles set forth by the Board, including “progressive sanctions”, “penalties that are proportionate”, and “responses to violence that are based on restorative justice.” (*Id.*). The Proposed Rules should be amended to remove references to *Nunez* monitor review and approval as a pre-requisite for submitting and implementing a discipline plan that conforms to the Board’s rules.

Proposed change: Sec. 6-09(a) “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 on restrictive housing and the requirements of the

~~Nunez Agreement. The Department shall not be required to submit the plan to the Board until after the Nunez Independent Monitor (or court) has approved the graduated sanctions disciplinary plan for young adults. The effective date for implementation of the disciplinary plan the Department submits to the Board shall be subject to the approval of the Nunez Independent Monitor or court.”)~~

Amendments to § 6-11(b): Young Adult Lock-in

Young adults, regardless of housing area, should be permitted at least 14 hours of out-of-cell time under the Proposed Rules. The current proposal, which sets this minimum at 10 hours for young adults in “transitional/administrative housing,” is inadequate. Youth justice experts have found that “involuntarily placing a youth alone in a room for any reason other than as a temporary response to out-of-control behavior that threatens immediate harm to the youth or others” is “harmful.” (See Jennifer Lutz, Mark Soler, and Jeremy Kittredge, *Not In Isolation: How to Reduce Room Confinement While Increasing Safety in Youth Facilities* (Washington, DC: Center for Children’s Law and Policy and the Justice Policy Institute, May 2019) available at: <http://www.stopsolitaryforkids.org/wp-content/uploads/2019/06/Not-In-Isolation-Final.pdf>).

Moreover, the Board’s citation to the Connecticut program, in which youth are out-of-cell for 13 hours a day in a “super-max” prison, does not support the 10 hour rule in City jails. (See Proposed Rule § 6-11(a); page 26 (emphasis added).)

Proposed change: Sec. 6-11(b) “Young adults in custody who are confined in transitional/administrative housing must be permitted at least ~~ten (10)~~ fourteen (14) out-of-cell hours per day.”

Proposed change: Strike Sec. 6-12(b).

We agree with the NYC Jails Action Coalition and #HALTsolitary campaign’s *Blueprint for Ending Solitary Confinement in NYC Jails*, that this 14-hour minimum should apply to all people in the City’s jails (other than in specified emergencies). The Proposed Rules should be revised to set this minimum out-of-cell time at 14 hours. (See Proposed Rules Secs. 6-11; 6-12.)

Proposed Rule § 6-36(e): Restraint Desks

The Department should no longer be permitted to shackle youth to desks. Under New York’s Office of Children and Families Services (OCFS) rules, which now apply to the 16 and 17-year-olds removed from Rikers Island a year ago and currently in Horizon Juvenile Detention Center, young people cannot be attached to furniture with mechanical restraints. (See 9 NYCRR Sec. 180-3.16(f) “In no case may a youth be handcuffed or foot-cuffed to any object”.) This is because adolescents in detention are likely to have histories of trauma, and the use of restraints exacerbate feelings of powerlessness, fear, humiliation and pain. Under these rules in Horizon, even the use of footcuffs, handcuffs and belts cannot be used if “a youth’s individualized [behavior] plan prohibits their use” because of these concerns. (*Id.*)

The Department currently staffs Horizon, and has been working under OCFS rules without relying on so-called “restraint desks” for over a year. The Board’s Proposed Rules acknowledge that shackling young people by their ankle to desks “magnifies what is already a highly restrictive environment,” and that “conditioning one’s right to lockout on being shackled to a desk is inherently punitive and inhumane and undermines the principles of procedural justice that form the bedrock of our criminal justice system and the 2015 amendments to the Board’s Minimum Standards.” (Proposed Rules at page 42.) There is no reason to permit the Department to continue “non-individualized” or “routine” use of restraint desks with youth aged 18 to 21 until March 1, 2022. (See Proposed Rule § 6-36(e).) Moreover, the Proposed Rules propose no end date for the “individualized” use of restraint desks.

Proposed change: Sec. 6-36 should be amended to immediately prohibit both “individualized” and “non-individualized” use of restraint desks.

Proposed Rule § 6-07: Punitive Segregation

We cannot endorse the 15-day sentencing limit for punitive segregation. While the Board cites liberally to the Vera Institute of Justice throughout the preamble to the Proposed Rules, it does not mention the organization’s report on solitary confinement, which recognizes “the long-established consensus among researchers that solitary confinement damages, often irreparably, those who experience it for even brief periods of time.” (Alison Shames, Jessa Wilcox, Ram Subramanian, *Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives*, May 2015, available at: https://www.vera.org/downloads/publications/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf at 17.) According to Vera, “[n]early every scientific inquiry into the effects of solitary confinement over the past 150 years has concluded that subjecting an individual to more than 10 days of involuntary segregation results in a distinct set of emotional, cognitive, social, and physical pathologies.” (*Id.*) The Proposed Rule that retains the 60-day sentence for serious assault is simply intolerable and should be struck.

We support the NYC Jails Action Coalition and #HALTsolitary campaign’s *Blueprint for Ending Solitary Confinement in NYC Jails*, which calls for the end of punitive segregation in the City’s jails, and an investment in de-escalation and the development of alternative units that actually promote safety, rehabilitation, and violence prevention.

We appreciate the opportunity to review and comment on these Proposed Rules.

Thank you,



Julia L. Davis, Esq.

Director of Youth Justice and Child Welfare, Children’s Defense Fund-New York