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Thursday, May 5, 2016

Martha King, Executive Director
Chair and Members
NYC Board of Correction
1 Centre St.
Room 2213
New York, NY 10007

Re: DOC request for a six (6) month variance from Minimum Standard 1-05(b) (Inmate lock-out periods) and 1-08(f) (Access to Courts and Legal Services)

Dear Executive Director King:

The Board of Correction should not vote at its May 10 meeting on the DOC's request for a six month variance—or should reject it subject to resubmission, as described below, because there are too many unanswered questions about how the Secure Units are intended to operate and interested parties are unable to formulate their opinions in the absence of information. See Standard § 1-15(d)(1) (Board shall consider the position of all interested parties, including correctional employees, prisoners and their representatives, other public officials and legal, religious and community organizations).

The variance request was not announced to any interested parties via email as has been the Board's practice. The variance request was initially posted to the Board of Correction website just 9 business days before the proposed May 10 vote. That initial variance request indicated that it was for a "continuing variance." Although the date on the request remained the same (April 27, 2016), the posting was changed to a request for a "six (6) month limited variance." The altered request was posted just 7 business days before the proposed May 10 vote. Some of the persons and organizations who have been active in the Board's variance and rulemaking process are likely unaware of the variance request. In addition, it has not been announced in the jails.

The amended April 27, 2016 variance request from the Department of Correction (DOC) contains little content to evaluate the plans for the development of the Young Adult Secure Units. Rather the letter asserts conclusory language about its "necessity" as a "critical management tool" without providing descriptions or definition of any of the proposed components of the due process proceeding, periodic reviews, exercise of discretion by the

Department, therapeutic and other programming, layout of the unit or, frankly, any information that would permit interested parties in providing valuable substantive comments.

The DOC draft Directive on the operation and policy of the Secure Unit has not been shared with the public and, despite multiple requests, has not even been shared with members of the Adolescent and Young Adult Advisory Board (AYAAB) to the DOC. On April 29, we were informed that the draft Directive has not yet been provided to the Board and although it is being worked on, no date for its distribution even in *draft* form is yet known. When it is ready, it will be shared with the Board and only thereafter with other interested parties including the AYAAB. The Board should not consider this variance request until that Directive has been provided to the Board and to the public; alternatively, the Board should make the Directive public as part of its notice of any renewal of this variance request. Such notice should include the e-mail notifications that have become standard practice but for some reason were not provided for this variance request.

The Department bears a heavy burden in justifying this variance request given the efforts by the Board and others to reduce the amount of time that incarcerated persons spend locked in their cells and the widespread recognition that long lock-in times are deleterious to mental health, particular for younger persons.

Significant Unanswered Questions Concerning the Secure Unit:

- On what factual or policy basis is DOC requesting the reduction in time out-of-cell from 14 hours to 10 hours per day in the Secure Unit?
 - The DOC claims that the ten hour restriction is a “critical management tool” and is needed so as not to “seriously compromise the safety and security of staff and inmates” is merely asserted, without any factual basis or policy explanation.
- What are the Due Process Protections that will be provided to Young Adults before they are transferred to a Secure Unit?
 - The letter mentions providing a due process hearing. There is no description of this process. For example, what assistance will be provided to the young adult? What burden of proof will control? Who will make the decision? Is there an appeal process? What is the decision that is made – placement or not? Or can/will there be additional sanctions included in the decision? If so, what are the additional sanctions? Is this placement based on conviction of infractions? If so, does the process for placement substitute for the infraction hearing? Or is it separate?
 - Is HHC involved in the due process proceedings? Will young adults with serious mental and physical disability be excluded from Secure Units? If so, how will they be identified for exclusion?
 - It appears that placement into a Secure Unit has an unlimited time duration and it is the 28 day review to evaluate an individual’s progress that is the only tool to move out of the Unit. How is 28 days appropriate to a young population with identified behavioral needs? This 28 day requirement appears completely contradictory to the notion of “tailoring to unique needs” and an individualized

approach to “therapeutic programming designed to address their specific behavioral needs.” See DOC Variance Letter, April 27, 2016.

- Is HHC involved in the periodic review process? If not, how will individualized assessments of progress in therapeutic programming and addressing behavioral issues be assessed? What qualifications are required to “assess the continued appropriateness of the placement and whether a more or less therapeutic housing option is appropriate”?
- What does “more or less therapeutic housing option mean”? Is “more therapeutic” the more restrictive setting of the Secure Unit? Or is “more therapeutic” the less restrictive setting of, for example, Second Chance or General Population?
- What is the physical design of the Secure Unit? Are the housing areas for Phase I, II and III similar in design to one another? Are individuals separately housed depending on Phase?
 - What are the recreation areas – individual cages? congregate recreation?
 - Do the cells have solid or barred doors?
 - What is the access to sick call? Is this included in the “mandated services and programming” that will be conducted on the unit? If so, is there space that is appropriate for confidential medical treatment?
 - What is the design of program areas in the Secure Units? Are there classrooms? Are the young adults shackled during programming? Are there computers, tablets, or other equipment available?
 - What is the access to phone calls?
 - How will visits be conducted?
 - In addition to the kiosk library and typewriters, will there be trained law library staff and clerks available in the unit to assist the young adults with their questions about their research and legal tasks?
- What is the higher staffing ratio that will be implemented?
- What is the programming that is “specifically geared towards addressing behavioral issues”? What is the capacity of each program?
- What is the Phase I limit on access to commissary and personal property?
- What are the privileges that can be earned in Phase II and Phase III?
- Why must the Secure Units be in separate jail facilities rather than in separate housing areas at GMDC? If the goal is to transition young adults into general population, this physical separation appears to hinder any gradual re-admission from a Secure Unit into another young adult unit with less restrictions.
- How does this end? Initially, the Department asked for a continuing variance; then they quickly changed it to a six-month variance. What is supposed to happen at the end of six months? Does the Department have a plan for returning to conformity with the Standards

after six months? Or do they expect to seek renewals of this variance indefinitely? Is this a *de facto* Standards amendment request?

Conditions that Should Be Imposed Before any Variance is Granted Limiting Standards for Young Adults:

If the Board does intend to take action, it should carefully articulate conditions on the variance that will require the DOC to implement an alternative to punitive segregation for young adults that is effective in promoting rehabilitation and reducing violence.

- Identify specific criteria that distinguish between placements in Second Chance Housing Unit (SCHU), Transitional Restorative Unit (TRU) and the Secure Units;
- Require the same due process protections as provided in Board Standards §§ 1-17(c)(1)(2)(3)(4)(5) notice, necessary assistance, hearing (within 7 days if placed pre-hearing), attendance, ability to make statements, present evidence and call witnesses, facilitator if illiterate or unable to understand or if needed to obtain witnesses and evidence, burden of proof on DOC, and preponderance of the evidence before placement.
- Establish time restrictions on placement in each Phase of the most restrictive Secure Unit;
- Require reporting weekly on lengths of stay and numbers of young adults who transition successfully out of each of SCHU, TRU and Secure;
- Require reporting on efficacy of programming – goals of programming, attendance, skill building;
- Require reporting on uses of force in each of SCHU, TRU and Secure including numbers of young persons and staff involved, injuries to young persons and staff, types of force utilized and corrective policy actions taken in response to incidents;
- Require daily treatment team meetings in SCHU, TRU and Secure that involve HHC and DOC staff in addressing goals and needs for each young persons housed in these areas;
- Require written treatment plans that provide young adults with the steps necessary to progress to a less restrictive setting;
- Require that clinical staff have the authority to move young adults into less restrictive settings;
- Require reporting on acts and threats of self-harm made in SCHU, TRU and Secure including the response to the threats and acts of self-harm;
- Require DOC policies to incorporate the principle that individuals should be held in the least restrictive alternative and that the goal is movement from more secure settings to less secure settings;
- Require more frequent reviews than the proposed 28 day review – movement to less restrictive settings should be a regular discussion point for the treatment team and decision should not be limited by a 28 day time-frame;
- Require DOC to include the young adults in the treatment team and review process.

- Require DOC to have a plan for phasing out the Secure Unit at the end of the six months for which they have requested a variance—or, if they do not intend to end it, deny the variance and direct them to submit a Standards amendment proposal if they are actually seeking an indefinite change, as appears likely.

Without information that answers the questions above, and others raised by the variance request, we cannot support the Board taking action at this time. If the Board does intend to take action, it should carefully articulate conditions on the variance that will require the DOC to implement an alternative to punitive segregation for young adults that is effective in promoting rehabilitation and reducing violence, and does not reduce out-of-cell time without justification.

Sincerely,

Sarah Kerr
Staff Attorney
Prisoners' Rights Project
Legal Aid Society

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