



# NYCLU

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## TESTIMONY OF THE NEW YORK CIVIL LIBERTIES UNION REGARDING PROPOSED RULE TO ESTABLISH “ENHANCED SUPERVISION HOUSING”

Hearing on December 19, 2014

The Department of Correction faces a daunting task in attempting to address historic levels of violence in its facilities, while at the same time trying to move away from deeply ingrained and highly ineffective punitive approaches and toward more humane and successful evidence-based practices. The Department’s statements made in conjunction with the ESH proposal and elsewhere indicate a strong vision and a commendable commitment to that transformation. The question before the Board is how to best translate that commitment into a concrete and broad-based framework that will protect human rights and guide this challenging and complicated work from the outset.

The New York Civil Liberties Union<sup>1</sup> (“NYCLU”) submits this testimony urging the Board of Correction to take two actions to ensure the Department achieves these goals as they relate to proposed rule regarding Enhanced Supervision Housing (“ESH”). First, the NYCLU urges the Board to set a firm timeline for the promulgation of comprehensive minimum standards regarding the use of segregation, and to integrate consideration of ESH into that process. Second, the NYCLU recommends that the Board amend the proposed rule in several ways including, most critically in our view, a “sunset” provision that will require the Department to present evidence-based metrics to the Board after an initial pilot period and prior to a request for reauthorization.

The NYCLU supports mission-based therapeutic housing units as one element of long-overdue reforms to New York City’s jails. Experience in other jurisdictions shows such units can reduce harmful and degrading isolation, lessen violence, and improve post-release outcomes when they are one element of a fully integrated approach to systemic segregation reforms and when the units have a clearly defined mission, well-trained staff, and are rigorously monitored using evidence-based approaches. On the other hand, experience also shows that the creation of these units, when simply tacked on to an otherwise dysfunctional system apart from broad-based change and with little meaningful oversight or accountability, are highly unlikely to have any

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<sup>1</sup> With 50,000 members, the NYCLU works to defend and promote the fundamental principles and values embodied in the Constitution, New York laws, and international human rights law, on behalf of all New Yorkers, including those incarcerated in jails and prisons. The NYCLU is an outspoken advocate for evidence-based corrections practices that improve public safety and respect fundamental human dignity.

lasting beneficial impact and can in fact concentrate and intensify harmful and unconstitutional practices.

Firmly seating ESH in the context of comprehensive segregation reforms, and amending the ESH proposal as recommended below, will protect basic rights while ensuring the effect of ESH can be meaningfully measured by the Board, affected communities, and the Department itself.

**1. Proceed with Comprehensive Minimum Standards and Integrate ESH into that Rule-Making Process**

The Department has outlined a laudable vision for reducing and reforming the use of segregation. The Department's recognition of the need for these reforms is no substitute, however, for comprehensive written standards that will establish firm baselines protecting human rights, address aspects of the harmful use of segregation that will not be fully remedied by the Department's current proposal, and ensure there is a lasting change in practices that have been entrenched for decades. The Department has indicated its' work on comprehensive reforms to segregation is already underway,<sup>2</sup> and the Board has been methodically working on a similar effort for over a year.<sup>3</sup> The NYCLU urges the Board to set a firm timeline to finalize these efforts, and to fold consideration of ESH into that process.

There is no question that the levels of violence in New York City's jails are profoundly serious and demand an urgent response. While a properly implemented housing unit like ESH may certainly be one element of reducing violence, however, no one asserts that such a unit, by itself, will be a silver bullet. The Department has a variety of other tools to address violence, and we presume it can and will employ those strategies immediately and effectively—even if ESH's operation is postponed for a few months to put it on the same track as comprehensive rule-making covering all forms of segregation.

At best, proceeding with ESH outside the framework of comprehensive reform may delay and confused direly needed reforms in many other areas. At worst, it risks merely shifting around or concentrating longstanding failures in the system, rather than addressing them head-on in a comprehensive fashion. Put simply, the costs of rushing forward with the ESH proposal in isolation are outweighed by the benefits of a brief postponement so that ESH can be considered alongside comprehensive reforms and made fully consistent and interoperable with those standards. If the Board acts to set a firm deadline for comprehensive standards and considers the proposed rule in that context, it will increase the chances that a unit like ESH—fully integrated into and consistent with a broad-based segregation reform framework—can achieve its stated mission without coming at the expense of fundamental human and constitutional rights.

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<sup>2</sup> "We are also in the process of a top to bottom review of the DOC's policies, practices and personnel, with particular attention to the adolescent and mentally ill populations, and the *application of punitive and administrative segregation.*" Letter from Commissioner Ponte to Board of Correction (Nov. 4, 2014) (emphasis added) ([http://www.nyc.gov/html/boc/downloads/pdf/Variance\\_Documents/ESH-Supplemental2%20%20Final.pdf](http://www.nyc.gov/html/boc/downloads/pdf/Variance_Documents/ESH-Supplemental2%20%20Final.pdf))

<sup>3</sup> The Board's Committee on Punitive Segregation unanimously moved to being rule-making on punitive segregation in September 2013. ([http://www.nyc.gov/html/boc/downloads/pdf/Minutes/BOCMInutes\\_20130909.pdf](http://www.nyc.gov/html/boc/downloads/pdf/Minutes/BOCMInutes_20130909.pdf))

**2. Amend the Proposed Rule to Mandate Evidence-Based Approaches, Individualized Treatment and Planning, Specialized Staff Training, Maximum Social Contact, and Exclusions for At-Risk Populations.**

Our second area of concern is with the substance of the proposed rule, which lacks provisions we believe are necessary to protect fundamental rights and to ensure that ESH is effective in treating individuals and improving post-release outcomes. In particular, the NYCLU strongly urges the Board to amend the proposed rule in the following areas<sup>4</sup>:

- a. Sunset provision and data reporting: The Department has characterized ESH as urgently and direly needed to address historic levels of violence. At the same time, there are substantive deficiencies in the proposed rule and an unaddressed need for rigorous accountability and monitoring given the mixed history of these types of units that have often failed to produce better outcomes while subjecting individuals to harmful and degrading conditions of confinement. A sunset provision, limiting ESH to one year and requiring the Department to show the Board and the public evidence-based metrics and outcome measures if the Department seeks to continue ESH after the initial one-year pilot period, is a common sense way to balance these concerns.
- b. Rigorous placement criteria and centralized decision-making: Placement into a restrictive unit like ESH should be the result of a highly centralized, evidence-based decision-making process. Some of the proposed criteria for placement into ESH, however, are overly broad. The rule should be amended to make clear that placement is justified only where an individual poses an immediate risk of causing serious physical injury—consistent with the Department’s statements regarding the target population for this unit—and requiring the Department to develop a validated risk assessment instrument to be used to guide placement decisions after the first six months of ESH operation.
- c. Individualized treatment and a discharge plan: To ensure that ESH operates as a non-punitive setting and does not become an indeterminate restrictive placement, the proposed rule should require access to programs, treatment, and a plan for the individual to progress out of ESH to a less restrictive setting. Even if the details of treatment and these programs are provided in directives or policies, the rule itself must guarantee the broad principles that each individual in ESH will be told what treatment and program goals he or she needs to meet to progress out of ESH, and be given access to all treatment and programs necessary to meet those goals.
- d. Mandatory training for ESH staff: The risk that ESH may fail to discard all-too-familiar punitive customs is increased by the absence of any specialized training requirements for staff

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<sup>4</sup> Because we urge the Board to postpone a final decision on ESH so that it can be considered in conjunction with comprehensive standards, we focus here only on broad areas of concern. In addition, this testimony was prepared without the benefit of reviewing any supporting directives or policies. As noted below, however, we believe it is appropriate that the core principles in the amendments proposed below be codified in the rule itself, in addition to whatever is ultimately contained in directives or policies.

working in these units. Breaking a decades-long reliance on inhumane and severely punitive responses to misbehavior will be a formidable task. Past experience on Rikers Island and in other jurisdictions makes clear that specialized training will be essential for changing the culture to create an environment where the dignity and rights of individuals in ESH are fully protected and where clinical and program staff can treat the underlying causes of problematic behavior. While the details of the training can be appropriately developed outside the rule-making process, the rule itself should be clear that such training will be mandatory and should outline the contours of that training, in particular, 20 hours of training informed by cognitive behavioral therapy and emphasizing de-escalation techniques, positive reinforcement, and education on trauma and mental health issues.

- e. Maximize access to visitation, congregate activities, recreation, mail, and packages: Mission-based housing has the best chance of treating and breaking cycles of violence if congregate activity and social contact is permitted to the maximum extent possible consistent with safety concerns. A robust body of research shows, for example, that communication and contact with loved ones are highly effective in improving outcomes both inside and outside jail walls and help to prepare individuals for a transition to a less restrictive environment.<sup>5</sup> Most fundamentally, maximizing this access—even in the most restricted setting—is consistent with human rights principles and necessary to reduce the risk of harm caused by isolation.

The proposed rule, however, appears to contemplate *per se* restrictions on recreation,<sup>6</sup> mail, packages, and visitation for all individuals admitted to ESH. Even if the placement criteria for ESH were improved as suggested above, determining that an individual poses a serious and ongoing risk of violence in general population indicates little, standing alone, about whether it is necessary or appropriate to restrict that individual's access to things like in-person visitation. Imposing such restrictions for no specific reason other than admission to ESH could exacerbate problematic behavior, impede effective treatment, and raise legal concerns.

To be sure, a unit like ESH would be expected to house particular individuals who pose a serious risk of harming others or introducing dangerous contraband. The Department, however, appears to have the tools it needs in the existing standards<sup>7</sup> to address a legitimate risk by imposing individualized and time-limited restrictions, without depriving every person in ESH of access to social connections that reduce isolation and encourage pro-social

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<sup>5</sup> See, e.g., Poehlman, J., et al., *Children's contact with their incarcerated parents: Research findings and recommendations*, *American Psychologist*, (65) 6, 575-598. (2010) (showing that greater physical contact with children is associated with lower levels of depression among incarcerated parents).

<sup>6</sup> The proposed rule appears to contemplate the possibility of movement from cell to dayroom only by escort, which may create an environment where many individuals stay in their cells even during lock-out time, increasing the effects of isolation, because of the scarcity of available escorts or because of fears regarding the escort process itself.

<sup>7</sup> For example, the Department has the authority to open and inspect incoming packages, (see § 1-12(e)(1) of the Minimum Standards), and to revoke the right to contact visits to reduce a serious threat. See § 1-09(h)(3) of the Minimum Standards.

behavior. Provisions in the rule that create the potential for such across-the-board restrictions should be amended or removed in favor of individualized decision-making with procedural protections.

- f. Categorically exclude at-risk populations: The rule should clearly exclude populations that should not be subjected to the 9-hour lock-down contemplated by ESH under any circumstances, including pregnant women, the physically and intellectually disabled, and adolescents up to age 25.<sup>8</sup>

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We thank you for the opportunity to submit this testimony, and would welcome the opportunity to elaborate on any of the points raised herein.

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<sup>8</sup> Research on brain development has revealed that the human brain is still developing up to the age of 25. See Johnson, S., et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, Journal of Adolescent Health, p. 216 (2009), available at [http://www.jahonline.org/article/S1054-139X\(09\)00251-1/pdf](http://www.jahonline.org/article/S1054-139X(09)00251-1/pdf). For that reason, psychologists now refer to adolescence as ending at 25. See Wallis, L., *Is 25 the new cut-off point for adulthood?*, BBC News, (Sept. 23, 2013), available at <http://www.bbc.com/news/magazine-24173194>. Because their brains are still forming, adolescents are at a greater risk of developmental and psychological harm, which could result in serious mental health problems.