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Martha W. King
Executive Director

September 29, 2016

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 at West Facility

Dear Commissioner Ponte:

Please find attached a letter from our General Counsel to your General Counsel, which notifies the Department of the multiple violations of the Board's Minimum Standards associated with the current and proposed operation of the West Facility. I would like to note our particular concerns regarding the lack of timely explanation or requests for variances to the Board for the creation of this restrictive unit, the lack of procedural due process for placement in such a unit, and the placement of, and quality of mental health care available to, individuals with serious mental illness in this unit.

The Board looks forward to your swift response on the recommended action laid out in the attached letter. Should your proposed plan include variance requests, the Board will evaluate those when received.

Sincerely,

Stanley Brezenoff

cc: **BOC**
Derrick D. Cephas
Jennifer Jones Austin
Gerard Bryant
Robert L. Cohen

Bryanne Hamill
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DOC

Heidi Grossman
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Heidi Grossman
Deputy Commissioner for Legal Affairs/General Counsel
NYC Department of Correction
75-20 Astoria Boulevard
East Elmhurst, NY 11370

Re: Notice of Violation of Minimum Standards at West Facility

Dear Deputy Commissioner Grossman:

This letter serves as notice that the Department of Correction (“DOC”) is in violation of several of the Board of Correction’s Minimum Standards by operating West Facility (“West” or “Facility”) as a restrictive administrative segregation unit. We respect the Department’s concern that the jails’ most violent and assaultive inmates must be housed in a setting that ensures the safety and security of both staff and other inmates. However, in establishing this new housing unit, DOC has not sought a variance from any of the Board’s Standards. We thank the Department for its submission to the Board on September 23 of a “proposed approach” (hereinafter “Proposal”) for operating West in compliance with our Standards; however, this approach does not overcome all of the current violations.

Below we articulate violations associated with the Department’s current operation of the Facility as well as violations implicit in DOC’s Proposal, and then recommend next steps.

Minimum Standards Violations

Currently, 26 inmates are confined at West. According to the Proposal, the Facility is designed both physically and operationally to house some of the Department’s most violent inmates who are primarily of enhanced restraint or administrative segregation status and who were previously housed in numerous other housing settings that proved inadequate to prevent them from engaging in further violence. The Facility also houses certain protective custody inmates for their own protection and separation from other inmates, where the threat to them is particularly violent. Although not addressed in your Proposal, it appears that a few individuals

with serious mental illness (“SMI”), and perhaps also meeting the criteria above, are housed at West.

The Department’s current and proposed operation of the Facility violate the following Minimum Standards.

§ 1-05 (10-hour daily lock-in time). Section 1-05(a) and (b) limit lock-in time to 10 hours per day, except for inmates confined in punitive segregation units, enhanced supervision housing, or for medical reasons in contagious disease units. Inmates currently housed at West Facility — not for medical isolation purposes or as punishment for an infraction — are locked in their cells 23 hours per day in violation of this Standard. We further note that the current operation of West Facility is akin to DOC’s former operation of “close custody” housing for inmates who required protective custody as well as inmates who posed a serious threat to security. In *Jackson v. Horn*, 27 Misc.3d 463, 474 (Sup. Ct., NY Co., 2010), the court held that DOC’s closed custody housing program violated § 1-05 because inmates confined to these units were confined to their cells for up to 23 hours per day. Following this decision, the Department shut down the program.

DOC’s Proposal does not state the maximum lock-in time for the 26 inmates currently confined at West. Rather, the Proposal calls for (1) two day rooms to be established in each sprung; (2) time in the day room will be offered 4 times per day; and (3) on occasion, inmates may be in the day room by themselves if safe comingling combinations cannot be made. Absent a variance based on demonstrable reasons why full compliance with § 1-05 cannot be achieved, continued operation of the Facility that limits inmates to less than 14 hours of daily lock-out time would constitute a violation of this Standard.

§ 1-07 (Congregate religious services). Section 1-07(c)(1) states that “all prisoners shall be permitted to congregate for the purpose of religious worship and other religious activities, except for prisoners confined for medical reasons in the contagious disease units.” Section 1-07(c)(2) requires DOC to “provide all prisoners access to an appropriate area for congregate religious worship and other religious activities” that is “consistent with” the requirements of § 1-07(b)(1). Subsection (b)(1) states that inmates “are entitled to exercise their religious beliefs in any manner that does not constitute a clear and present danger to the safety or security of a facility.” Section 1-07(j)(1) requires that any determination to limit the exercise of any inmate’s religious beliefs be “in writing” and “state the specific facts and reasons underlying the limitation.” Moreover, the inmate must be afforded “an opportunity to respond” (1-07(j)(2)). This Standard codifies inmates’ constitutional right to the free exercise of their religion subject to limitations that are reasonably related to legitimate penological interests.

The Proposal states that religious services will be provided via rounds by various religious providers, and congregate religious services, like day room, will be offered when safe co-mingling can be provided. The denial of congregate services to inmates at West in this uniform manner violates § 1-07. Absent a variance based upon a sufficient showing that full compliance with §1-107 cannot not be achieved, denial of congregate religious services without any written basis for, or opportunity to respond to, the decision would constitute a violation of this Standard.

§ 1-08(f) (Access to law library). Section 1-08 provides, among other things that (1) “Each facility shall maintain a properly equipped and staffed law library” (§ 1-08(f)); (2) “[t]he law library shall be located in a separate area sufficiently free of noise and activity and with sufficient space and lighting to permit sustained research” (§ 1-08(f)(1)); (3) “Each law library

shall be open for a minimum of five days per week including at least one weekend day” and on each day a library is open “in facilities with 600 or fewer prisoners, each law library shall be operated for a minimum of eight and a half hours, of which at least six and a half shall be during lock-out hours” (§ 1-08(f)(2)(ii)); (4) “[t]he law library schedule shall be arranged to provide access to prisoners during times of the day when other activities such as recreation, commissary, meals, school, sick call, etc., are not scheduled. Where such considerations cannot be made, prisoners shall be afforded another opportunity to attend the law library at a later time during the day” (§ 1-08(f)(3)); and (5) “Legal research classes for general population prisoners shall be conducted at each facility on at least a quarterly basis. Legal research training materials shall be made available upon request to prisoners in special housing” (§ 1-08(f)(7)).

Currently, inmates housed at West are unable to access a law library, which violates various provisions of this Standard, as outlined above. The Proposal states that law library kiosks will be placed in one of the day rooms for each sprung, and law library will be afforded daily through kiosks. Requests for assistance from a library aide/coordinator can be made daily, and the Department will schedule such assistance for that day or the following day. Absent a variance based on demonstrable reasons why DOC cannot achieve full compliance with § 1-08(f), DOC would be in violation of this Minimum Standard.

§ 2-04 (Special housing for SMI inmates); § 2-06 (Restraints and Seclusion). Section 2-04(c)(1) of the Board’s Mental Health Standards requires that “special housing” be “provided to those inmates in need of close supervision due to mental or emotional disorders, and to those inmates in the process of being evaluated for such disorders.” In addition, “correction officers who have received not less than [35] hours of special training within the first year of their assignment shall be assigned to steady posts within these areas” (*Id.*).

Section 2-06(a) states that, consistent with the NYS Mental Hygiene Law, use of physical restraints or seclusion of inmates being observed or treated for mental or emotional disorders “shall not be used as punishment, for the convenience of staff, or as a substitute for treatment programs.” Section 2-06(c)(1) states that such use of physical restraints or seclusion “shall be permitted only where there is on-duty psychiatric coverage,” while § 2-06(c)(2) states that “[p]hysical restraint or seclusion may be used only upon the direct written order of a psychiatrist which includes the reasons for taking such action.” Such restraint or seclusion may be used only when the psychiatrist has examined the inmate and determined that it is appropriate after consideration of various enumerated factors (§ 2-06(c)(3)(i)-(iv)). Finally, inmates who have been placed in restraints or seclusion must be kept under constant observation and their need for continued restrictive measures must be assessed by nursing or mental health staff (§ 2-06(c)(4)).

The placement of even a few SMI inmates in a setting such as West violates these various Mental Health Standards. We appreciate the Department’s and Correctional Health Services’ current action and attention on this issue. Absent, a variance based on a sufficient showing that full compliance with these Standards cannot be achieved with respect to certain SMI inmates, these Standards would be violated.

§ 1-102 (Due process in connection with security classification). Section 1-02(f)(2) states that the Department’s security classification system shall, among other things “provide for involvement of the prisoner at every stage with *adequate due process*” (§102(f)(2)(iv); emphasis added); and “provide mechanisms for review of prisoners placed in the most restrictive security status at intervals, not to exceed four weeks for detainees and eight weeks for sentenced prisoners” (§ 102(f)(2)(vi)). Moreover, “[p]risoners placed in the most restrictive security status shall only be denied those rights, privileges and opportunities that are directly related to their

status and which cannot be provided to them at a different time or place than provided to other prisoners” (§ 1-02(f)(2)(v)). This Standard essentially codifies pre-trial detainees’ constitutional right to procedural due process when confined to a housing unit that is more restrictive and isolating than housing afforded to general population inmates.

Currently and as far as we are aware, inmates are placed in the Facility without *any* due process such as written notice of the placement including the reasons therefor or an opportunity to challenge the placement. Inmates at West are currently confined behind double cell doors and in their cells 23 hours a day or, as proposed, may have the ability to commingle with other inmates in another cell, which will serve as a day room. Inmates are denied access to a full-serviced law library, may be denied the right to practice their religion in a congregate setting, receive their meals through food slots on their inner cell door, and are confined to individual cages for recreation.

Recommended Action

In response to these violations, the Board recommends that the Department take the following immediate action:

Establishment of due process for West Facility inmates. Due process protections should include: (i) written notification specifying reasons for the placement in this unit; (ii) an opportunity to challenge the placement at a hearing at which the inmate may call witnesses and present documents; (iii) the assignment of a hearing facilitator if necessary; (iv) a written decision; and (v) periodic placement reviews.

Completion of a review of each West Facility inmate. This includes (i) a review of the security risks posed by providing these individuals with full and equal access to programs and services as required by the Minimum Standards; (ii) a review of each inmate’s housing history; (iii) a review of each inmate’s mental health care and health care history; and (iv) a comparative review of the security risks posed by incarcerated individuals at the West Facility versus those individuals who are also in protective custody and enhanced restraint status but who are housed in less restrictive settings.

In addition to the immediate steps outlined above, the Board will evaluate any additional proposal you provide for achieving compliance or a variance request detailing the reasons it is not possible to meet safety and security concerns while also maintaining compliance with the Board’s Minimum Standards at the West Facility. We note that, in the long term, the Board intends to address issues raised by establishment of this unit in its upcoming rulemaking on restrictive housing.

Sincerely,



Michele M. Ovesey

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