



December 18, 2019

Jacqueline Sherman, Interim Chair
Michelle Ovesey, Acting Executive Director
Members of the Board of Correction
1 Centre Street, Room 2213
New York, NY 10007
Sent via email

Re: Restrictive Housing Rulemaking Public Comment

Dear Interim Chair Sherman, Members of the Board of Correction, and Acting Director Ovesey:

Girls for Gender Equity respectfully provides the following public comment in response to rulemaking concerning restrictive housing in correctional facilities (hereafter, the “Proposed Rules”). We write as an organization committed to challenging structural forces, including racism, sexism, transphobia, homophobia, and economic inequality, which constrict the freedom, full expression, and rights of trans and cis girls and young women of color, and gender non-conforming youth.

It has been widely documented that solitary confinement is used to trap vulnerable people; Black and Pink and the Sylvia Rivera Law Project in particular have steadfastly documented the disproportionate placement of transgender and gender non-conforming people in isolated confinement, protective custody or disciplinary housing.¹ We ultimately support the end of solitary confinement in the City’s jails and the following recommendations intend to reduce the harm of incarceration, with particular attention to the recent history of reforms pertaining to jail conditions for young people.

Age-Appropriate Programming and Services for Young Adults

In January of 2015 the Board revised the minimum standards with the reasoning that a new housing cohort for 18–21 year-olds would ultimately provide for “age-appropriate” programming and services,² explicitly including a revision that “provides that housing for [young adults] must provide age-appropriate programming, and requires the Department to

¹ Jason Lydon et al., *Coming Out of Concrete Closets: A Report on Black & Pink’s National LGBTQ Prisoner Survey* (2015); see also Sylvia Rivera Law Project, *It’s War in Here* (2007).

² New York City Board of Correction. (2015, January). Open Meeting. Available at [http://www1.nyc.gov/assets/boc/downloads/pdf/BOCMinutes%20\(1.13.15\).pdf](http://www1.nyc.gov/assets/boc/downloads/pdf/BOCMinutes%20(1.13.15).pdf).

report on its efforts to develop such programming.”³ This reform effort included millions of dollars of annual City spending on programming for 16–21 year olds in the City’s jails.⁴ Surprisingly, the new Proposed Rule removed language relevant to that reform (page 2):

[(2) Housing for inmates ages 18 through 21 shall provide such inmates with age-appropriate programming. No later than August 1, 2015, the Department shall provide the Board with a plan to develop such age-appropriate programming.]

The above should not be removed, and should rather be strengthened to ensure that, regardless of housing restrictions, the Department has a duty to provide all available age-appropriate services to incarcerated young adults. Regarding “Data Collection and Review” (pages 2 and 3), we request that reporting on housing units all be disaggregated by gender and facility, to better understand the restrictive housing infrastructure across facilities, and particularly utilization in RMSC, which is often not discussed or disaggregated.

We are also concerned the Proposed Rules do not direct sufficient attention to access to education, or “school” in particular, for those in restrictive housing who are eligible to attend. The Monitor recently reported 18 year olds in ESH or Secure have the opportunity to attend school three hours per day, while their peers at RNDC, EMTC, and RMSC have the opportunity to attend full-day school – a significant discrepancy that certainly compromises the quality of schooling.⁵ As noted in previous Monitor’s Reports, only a small segment of young adult students (ages 18 to 21) are enrolled in school and fewer attend consistently. We ask that the Board incorporate “school” in the final rules, in addition to an effort to ensure access to schooling regardless of housing placement.

Restraint Desks– Proposed Rule § 6–36(e)

The shackling of young people must end and the Department must no longer be permitted to shackle youth to desks. The 2022 deadline is too long to wait.

Further, Proposed Rules at page 28 describes *restraints* as “any of the following devices” with a list of ten different methods. Given the Department’s evolution and adaptation of restraint use, we ask that an overarching category be included, rather than what is now only a specific list of practices currently known to the Board.

Canines – Proposed Rule § 6–37

We ask that the section on canines also includes the reporting requirement that appears under the restraint desk category, to encourage more Board oversight for the use of dogs to control or intimidate people incarcerated – an issue that has been raised publicly before the Board, including during the implementation of young adult ESH.⁶

³ New York City Board of Correction. (2015, January). Notice of Adoption of Rules. Available at

http://www1.nyc.gov/assets/boc/downloads/pdf/boc_rules_governing_correctional_facilities_fr.pdf.

⁴ See, for example, https://www1.nyc.gov/assets/doc/downloads/press-release/BOC_YA_presentation_n.pdf

⁵ Eighth Report of the Nunez Independent Monitor, p. 259. Available at

https://www1.nyc.gov/assets/doc/downloads/pdf/8th_Monitor_Report.pdf.

⁶ See, for example, November 14, 2017 Public Meeting Minutes at page 4, available at

<https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2017/November-14-2017/November%202017%20Board%20Meeting%20Minutes%20Final%20.pdf>.

Disciplinary System Plans for Young Adults – Proposed Rule § 6-09

The Board should not require the Department to first obtain consent from the *Nunez* Independent Monitor before the Department submits a disciplinary system plan to the Board. The Proposed Rule also newly incorporates “principles of procedural and restorative justice” in the disciplinary process. We recommend that the Board, in consultation with practitioners of restorative justice, offer substantive guidance in this area, and build the work of gathering best practices and framing into the rule itself so as to guard against the potential manipulation of the principles of restorative practices by the Department.

Young Adult Lock-In

We ask the Board to strengthen the Proposed Rule to ensure all young adults experience at least 14 hours of out-of-cell time. Further, as written, the difference between occurrences leading to ten-hour or fourteen-hour lockout is unclear. For example, “The young adult engaged in assault or other behavior that resulted in an injury” (14-hour, page 45) conveys the same message as, “The young adult has participated in an assault on a person with injury” (10-hour, page 44). Additionally, the inclusion of “or other behavior” is far too broad and should be removed.

We also ask that the “riot” category be removed from 10-hour, and short of that change, that it be revised to not include “with other incarcerated people” and also “while in Department custody or otherwise incarcerated” (page 44). “Riot” in particular may be a retaliatory labeling of organizing against repressive conditions and the Board should pay particular attention to this justification.

We also ask that the word “negative” be removed from “the young adult engaged in persistent, negative, and/or aggressive behavior” (page 45). As written, this category is overbroad and subjective, potentially encompassing everyone.

Similarly, on Proposed Rules page 47 (3.i.), we ask that the word “disruptive” be removed. “Disruptive” should not be conflated with “violent,” and the inclusion of “disruptive” negates the Board’s important advisement that the Department “shall advance a person in custody to a less restrictive level.” We make the same recommendation where “disruptive” shows up on page 52, (2).

Disciplinary Due Process

Throughout this rulemaking process defenders have raised the need to strengthen due process protections. We support calls for ensuring the right to legal representation in the disciplinary process for all people in custody, as it is an important resource to aid in minimizing the scope of restrictive housing. Short of this commitment, we ask the Board to write in a baseline protection that includes the opportunity for notification to defense counsel.

It has been raised before the Board that young adults often face rearrest while being detained in jail, often for responding to circumstances having to do with their survival, that then prolongs their detention and exposes young people to other collateral consequences.

Disciplinary due process, as is, does not adequately parse out those instances where investigations could lead to subsequent criminal prosecution or other significant collateral consequences in addition to any resulting restrictive housing placement.

Address the Full Scope of Restrictive Housing

Firstly, under “Transitional/administrative housing” on Proposed Rules page 29, there is a list of housing units after the phrase “the following housing units currently in existence.” We ask that the language be revised to state “currently known to the Board.” The intent of the current Board rulemaking was to encompass all restrictive housing in New York City jails as the Department consistently creates new housing areas that are incompletely addressed by prior regulations. During the December 2nd CAPA hearing, for example, Board members and staff were surprised to hear of “Dead Lock” housing,⁷ an exchange that illuminates the distinction between “currently in existence” and “currently known to the Board.”

Proposed Rules § 6-08 Data Collection and Review (page 40) includes:

- (a) The Department shall maintain and update as necessary a list of the type of specific location of all Disciplinary Housing units. The list shall include the opening and closing dates of all such units. The Department shall provide this list to the Board on at least a monthly basis and notify the Board in writing when any new Disciplinary Housing units open, close, or change type.

We ask that the Board more strongly incorporate a moratorium on the opening of new disciplinary units. Short of that commitment, we ask that the above be revised to better align with § 6-39: New Restrictive Housing. Specifically, “notify the Board in writing at least two months prior to the Department’s implementation of new restrictive housing” (page 70) should be mirrored in the section above, rather than isolated to the final pages of the Proposed Rules.

Proposed Rules § 6-17 Data Collective and Review (page 48) includes the same language, referring to Transitional/Administrative Housing units, and we make the same recommendation as above.

We further ask that a section be added to mirror § 6-39 (page 70) to refer to “Closing” or “Discontinuing” restrictive housing, plus “Changing” restrictive housing. To the extent possible the Board must cement their oversight role in reducing the punishing power and scope of restrictive housing. With a moratorium, for example, § 6-39 could more clearly require Board oversight and approval of proposed new restrictive housing, rather than the Department’s inevitable “implementation” regardless of Board input, as implied by the Proposed Rules as currently written. The “opportunity to review the plan for such housing and discuss it with the Department” (page 70, b) is not strong enough as is.

⁷ NYC Board of Correction. 2019-12-02 NYC Board of Correction CAPA Hearing re Restrictive Housing Proposal Rule. [1:32:00] https://youtu.be/Lr2k_qfSdf8?t=5520.

Our concern with “Dead Lock” follows our concern with the recent development of “Separation Status,” and evolution of “Solo Housing:” housing units that are not called punitive segregation but are nonetheless punitive affirm why comprehensive regulations are incredibly important.

“Solo Housing” in particular – isolated confinement first identified publicly by a *Nunez* report – is of great concern and we are looking for comprehensive rules that incorporate the rejection of *indefinite* placement in restrictive housing.⁸ The *Nunez* Monitor has reviewed Solo Housing in many reports, including the documentation of the case of an 18-year-old young woman who spent 72 days in Solo Housing at RMSC.⁹ As noted in several previous Monitor’s Reports, the historically poor implementation of the Solo Housing policy for placements of youth are of serious concern.¹⁰

We urge the final rules to address every housing assignment that is restrictive in nature, and that the Department not have the continued ability to create unregulated solitary by a different name.

Thank you again for the opportunity to review and submit comments on the Proposed Rules.

Sincerely,



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⁸ Third Report of the Nunez Independent Monitor, p. 232. Available at https://www1.nyc.gov/assets/doc/downloads/pdf/Third_Report_Nunez_Independent_Monitor_4.03.17.pdf.

⁹ Seventh Report of the Nunez Independent Monitor, p. 235. Available at https://www1.nyc.gov/assets/doc/downloads/pdf/7th_Monitor_Report.pdf.

¹⁰ Eighth Report of the Nunez Independent Monitor, p. 282. Available at https://www1.nyc.gov/assets/doc/downloads/pdf/8th_Monitor_Report.pdf.