



New York State Correctional Officers & Police Benevolent Association, Inc.

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October 25, 2019

Cathy Sheehan
Acting Deputy Commissioner and Counsel
Department of Corrections and Community Supervision
Harriman State Campus
1220 Washington Avenue
Albany, NY 12226-2050
Email: Rules@DOCCS.ny.gov

Re: NYSCOPBA Comment in Response to I.D. No. CCS-35-19-00001-P

Dear Acting Deputy Commissioner Sheehan:

On behalf of the New York State Correctional Officers & Police Benevolent Association, Inc., ("NYSCOPBA"), please accept the following comments in response to the proposed regulations (I.D. No. CCS-35-19-00001-P) regarding special housing unit ("SHU") reform.

NYSCOPBA's approximately 22,000 active members work in a variety of settings: as correctional officers and sergeants in state correctional facilities operated by the NYS Department of Corrections and Community Supervision ("DOCCS" or the "Department"); as security hospital treatment assistants in forensic psychiatric centers; and as safety and security officers who work as front-line security in state office buildings, to name a few. These are often dangerous, physically demanding jobs, and NYSCOPBA members are fundamentally impacted by all manner of changes to and reform of employer policies and procedures, even if such changes and reforms do not specifically target or focus on employees. The recent proposed regulations regarding comprehensive reform to DOCCS special housing units will significantly impact its correction officers and sergeants.

NYSCOPBA is gravely concerned with the inmate response to these major changes to SHU. Security staff are all too familiar with the fact that implementation of new rules and regulations often triggers new behaviors from inmates. These behavioral changes are not always positive. Therefore, NYSCOPBA is strongly opposed to the drastic reduction of the use of SHU

placement as a deterrent for inmate misconduct. NYSCOPBA further expresses serious concern over the cumulative burdensome effect the proposed regulations will have on maintaining the safety and security of all of the Department's facilities. These concerns are fully addressed below.

Restricted eligibility for SHU placement

Proposed 7 NYCRR 250.2 (e) indicates that segregated confinement is only for behavior that violates institutional rules involving conduct that poses an unreasonable risk to the health, safety, and security of the facility via eight (8) categories of offenses. NYSCOPBA is very concerned that this restriction eliminates other legitimate Tier 2 and Tier 3 offenses that previously resulted in placement in segregated confinement. These eight (8) types of offenses are not the only offenses that can cause substantial disruption or risk to the safety and security of the facility. NYSCOPBA strongly urges DOCCS to reconsider this approach and to maintain the status quo for offenses that could result in disciplinary time in segregated confinement. The practical result of such Tier reduction is that removing segregated confinement as a sanction for most offenses will not deter misbehavior, but simply forgive misbehavior.

Time Limits, Time-Cuts and Early Release from Programs

In proposed 7 NYCRR 301.1, no inmate may be placed in segregated confinement as a result of a disciplinary hearing, administrative segregation, protective custody, keeplock, or other admission for longer than necessary and pursuant to the following schedule: no more than 90 days effective on and after April 1, 2021; no more than 60 days effective on and after October 1, 2021; and no more than 30 days effective on and after April 1, 2022. Upon reaching the limit, the inmate must be diverted to a SHU-alternative program or be released to general confinement. NYSCOPBA continues to oppose reductions in maximum SHU time as those reductions also reduce the deterrent effect that SHU admissions can have on inmate misconduct.

In the proposed 7 NYCRR 255.01 (Time-Cuts), inmates serving time in segregated confinement or Residential Rehabilitation Unit ("RRU") (and who do not receive another Tier 2 or Tier 3 misbehavior report) will be eligible for a time cut, depending on the length of the sanction (less than ninety (90) days versus ninety (90) days or more), except for inmates who have committed various violent offenses (discussed above). For inmates serving keeplock confinement in segregated confinement or RRU, the reduction rate is three (3) days for every two (2) days served. NYSCOPBA requests clarification as to the ambiguity and possible conflict with proposed 7 NYCRR 250.2 (e), which indicates that segregated confinement for discipline can only result from the eight (8) categories of offenses. This section regarding time cuts discusses how time cuts are appropriate for inmates in SHU or keeplock, unless they are in SHU or keeplock for any of the eight (8) categories of offenses listed above. How can inmates be placed in segregated confinement for disciplinary purposes and qualify for time cuts if inmates are only supposed to be placed in segregated confinement for the eight (8) categories of offenses that do not qualify for time cuts?

Furthermore, NYSCOPBA is concerned that these time cuts will reduce the deterring effect that segregated confinement has on inmate misbehavior and misconduct. The limitations placed on sanctions for misbehavior and misconduct will further embolden inmates to act out, due to the

knowledge that their sanctions will be less severe as a general policy. NYSCOPBA also requests clarification regarding the practical effect that the 2021 and 2022 graduated reductions in maximum segregated confinement time will have on time cuts for inmates serving more than ninety (90) days in segregated confinement: will that portion of the regulation regarding inmates serving more than ninety (90) days in segregated confinement be rendered obsolete or would there still be a circumstance where an inmate can serve more than ninety (90) days in segregated confinement after the graduated reductions take effect? NYSCOPBA also respectfully requests a copy of any guidelines that Superintendents may be required to follow when determining whether to cut or commute the remainder of an inmate's sanction. There needs to be accountability and guidance in this facet of the time cuts so as not to provide unequal results that would endanger staff and inmates. NYSCOPBA would also like to confirm that time cuts are not available for inmates in the Step-Down Units. NYSCOPBA is concerned that inmates serving keeplock confinement in segregated confinement or RRU receive an automatic time cut without conditions. Why are inmates placed under keeplock not subject to the same or similar conditions and incentives as inmates in segregated confinement or RRU in order to receive time cuts?

In the proposed 7 NYCRR 255.02 (Release from Units and Suspension of Sanctions), inmates in RRU or Step-Down Unit, or adolescent offenders in an Adolescent Offender Separation Unit ("AOSU") (collectively "SHU-alternative programs"), shall be released at the earlier of the expiration of the sanction imposed or the completion of the unit's program. NYSCOPBA notes that the purported goal of these programs and placing the inmates therein is to help benefit the inmates through the programming to promote education and rehabilitation. Why would inmates be discharged from the program and not have to complete all of the recommended programming? If the Department believes that inmates will benefit from the programming, then the inmates should be required to complete it.

In proposed 7 NYCRR 301.6, 315.2(e), and 321.1(c) inmates in keeplock status in special housing or RRU, or adolescent offenders in AOSU, shall be credited at the rate of three (3) days for every two (2) days served. At the end of their keeplock confinement, they will either be deferred to a SHU-alternative program or released to general confinement. NYSCOPBA observes that there does not appear to be any conditions or qualifications for the 3-days-for-every-2-days-served time cut for inmates in keeplock status in these units; it appears to be automatic. NYSCOPBA expresses grave concern over this automatic time cut when an inmate engages in additional misbehavior and requests that conditions be placed upon this time cut similar to other time cuts.

Discouraging staff from appropriately sanctioning inmate misbehavior

In the proposed 7 NYCRR 255.04 (Additional Misbehavior), an inmate in SHU or a SHU-alternative program who engages in additional misbehavior will be addressed by staff with various de-escalation, intervention, and information-providing techniques. Misbehavior reports will only be written for serious offenses, where the behavior is a threat to the facility, or where there is repeated disruptive behavior. NYSCOPBA is concerned that this effectively removes the misbehavior report as a tool for all but the worst offenses; therefore, NYSCOPBA strongly encourages the Department to institute a policy whereby staff are not discouraged from the fair use of misbehavior reports. There is grave concern that, if the misbehavior report is a last resort, then it will be easier for inmates to misbehave and take advantage of the policy, yet still be eligible

for time cuts, property, privileges, programming etc., as staff are discouraged from writing misbehavior reports that would otherwise trigger longer stays in segregated confinement, RRU, Step-Down Unit, and a cessation of various privileges. In the event that these regulations take effect in their present form, new programs and SHU-alternative programs should be provided with additional materials and guidance for security staff to consult regarding which offenses are appropriate for misbehavior reports.

Unintended consequences of limiting SHU admissions

Although it may be difficult for those who don't work in corrections to believe, it is common for inmates to seek out confinement in a SHU. NYSCOPBA's first-hand experience with inmates confirms it. In fact, security staff at some facilities have estimated that a significant percentage of the inmates in special housing have purposefully committed infractions in order to be placed in the SHU. Under the proposed regulations, an inmate desiring SHU placement would have to commit a violent infraction to secure their preferred housing.

Unfortunately the SHU is, for some inmates, a safer environment than general population. Gang affiliations, interpersonal conflict, debts owed to other inmates, and other factors can result in inmates feeling unsafe in general population. In the SHU, inmates are insulated from each other. In NYSCOPBA's experience, many inmates are not willing to seek voluntary protective custody because it hurts their reputation or status. Instead, inmates who desire a less congregate setting often seek "self PC" by committing infractions that will result in SHU placement.

The regulations' incorrect assumption that all inmates will be incentivized to avoid the SHU will likely lead to an increase in violence against staff and other inmates. At present, inmates seeking confinement in the SHU can commit any number of non-violent infractions to receive SHU time. However, under the new regulations, only a few offenses—primarily, violent offenses—will qualify an inmate for confinement in the SHU. Inmates who seek SHU confinement for their personal safety are highly motivated to get out of general population. An inmate who might previously have received SHU confinement for a nonviolent disciplinary infraction may now have to resort to assaulting another inmate or staff member in order to be sent to SHU.

Security and logistical concerns regarding "most congregate setting available"

For inmates in a SHU-alternative program, the regulations—parts 315.1, 316.2, and 321.2—require that they be "afforded out-of-cell time in the most congregate setting available and shall be provided the least restrictive environment necessary to maintain the safety and security of the facility."

It is not clear from the regulations what this "most congregate setting available" will be. Although NYSCOPBA appreciates the acknowledgement that facility and safety and security must be a factor, placing these inmates in any kind of congregate setting for the time periods required will be logistically challenging and likely dangerous.

First, it is very likely that all the inmates in a SHU-alternative program cannot be placed together in a congregate setting. Whether there are personal conflicts, competing gang affiliations, or other issues, there is a good chance that some inmates will need to be separated.

Second, given the fact that it may not be possible to have congregate out-of-cell time for all the inmates in the unit at once, the out-of-cell time would need to be staggered, or held in multiple locations. Inmates in a RRU or Step-Down Unit and adolescent offenders in an AOSU will be entitled to five hours out-of-cell time per day most days of the week. If all inmates or adolescent offenders cannot spend their out-of-cell time together, the necessary staggering of out-of-cell time may result in scheduling and/or staffing problems. NYSCOPBA urges the Department to reconsider this policy in light of the logistical ramification.

Concerns specific to Step-Down Units

NYSCOPBA would appreciate clarification of the qualifications for placement in a Step-Down Unit. Part 316.2 of the proposed regulations indicates that Step-Down Units will be for “incarcerated individual[s] with a violent history or behavioral history that has led to long-term periods of segregated confinement in order to prepare him or her for return to general population or the community.” This definition does not say that an inmate must be serving a disciplinary sanction in order to be assigned to a Step-Down Unit. However, Parts 316.3(d) and 316(e) seem to assume that an individual in the Step-Down Unit is serving a disciplinary sanction. Additionally, the proposed regulations seem to be silent on what constitutes a “long-term period[] of segregated confinement” that would qualify an inmate for placement in a Step-Down Unit.

NYSCOPBA is concerned that Part 316 of the regulations does not apparently provide for keeplock status in a Step-Down Unit. While the proposed regulations with respect to RRUs and AOSUs provide for keeplock status within those units, the proposed regulations with respect to Step-Down Units do not make such a provision. The regulations make clear that inmates in a Step-Down Unit may only be sent back to SHU in extremely limited circumstances, and the regulations urge staff to use misbehavior reports only as a last resort. If inmates in a Step-Down Unit cannot be placed in keeplock status, and stand little chance of being sent back to SHU from the Step-Down Unit, what is the incentive for inmates to abide by rules and policies while housed in the Step-Down Unit? Without any deterrents for bad behavior, other inmates and staff are placed in a dangerous environment. NYSCOPBA hopes that this omission is an oversight; if not, NYSCOPBA urges the Department to make keeplock status available in the newly-created Step-Down Units.

NYSCOPBA is also concerned with how DOCCS plans to monitor and address recidivism within the SHU-alternative programs. Recidivism is already fairly commonplace among inmates who have “graduated” from the programming of at least one Step-Down Unit already in place. Inmates have been released from the Step-Down Unit then committed violent acts that ultimately brought them back to the Step-Down Unit. Many inmates also express a strong disdain for the programming in the Step-Down Unit; they do not receive information about the unit until they arrive, and the inmates dislike being in that unit and become upset, as they would rather have more downtime and no programming. Inmates have also refused to enter into the program and have to wait to be transferred out of the facility because of such refusal. Then the inmates wait and remain

in their cells and do not participate in any programs. NYSCOPBA also has significant concerns about Step-Down Unit inmates being allowed to move between their cells and programming unrestrained. Therefore, NYSCOPBA is concerned that the Step-Down Units are already showing signs of minimal effectiveness and have the unintended consequence of causing inmates to become more disruptive due to their unhappiness with the programming and their ability to more freely interact with inmates and staff and have less of a chance of receiving a misbehavior report for misconduct.

Concerns specific to Mental Illness policy

There are many inmates with legitimate serious mental illness diagnoses who may appropriately be housed in a setting other than a traditional correctional setting. However, in our experience, there are inmates who “fake” a mental health diagnosis in order to manipulate their housing assignment, whether to secure a more or a less secure/restrictive setting. The proposed regulations, in Part 319, lay out a policy of keeping an inmate with a serious mental illness out of segregated confinement whenever possible. The proposed regulations already limit the circumstances in which inmates may be placed in segregated confinement to very serious, violent acts. Inmates committing these most serious offenses need to be housed in a highly secure setting for the safety and security of staff, other inmates, and the facility as a whole. Inmates will be aware of this new regulation that prohibits the placement of inmates with serious mental illness in segregated confinement; they will also be aware of the definition of a serious mental illness and list of covered diagnoses. NYSCOPBA fears that under this new policy, dangerous and violent inmates wishing to avoid segregated confinement may pretend to have a serious illness. Placing violent inmates willing to violate facility policy in less-secure housing poses a significant security risk. NYSCOPBA urges the Department to make determinations of serious mental illness with the utmost care to prevent inmates from manipulating the system to secure preferable housing assignments.

Miscellaneous concerns

Employee Training

The proposed regulations provide in Part 255.05 for staff training on techniques for dealing with inmates. NYSCOPBA urges the Department to include substantive training on the policies and procedures of these new units. The proposed regulations create entirely new housing units and do not include significant detail about how those units will be run. Security staff cannot be expected to run these units without additional substantive guidance from the Department.

ADR Pilot Program

7 NYCRR Part 256 is the pilot program for Alternative Dispute Resolution for inmates who are awaiting a Tier 2 or 3 hearing for a non-serious offense. It is a voluntary program that allows an inmate to enter into negotiations to attempt to settle the charge. NYSCOPBA requests that this pilot program be subject to clarification of its intended length, oversight as to effectiveness, and reporting requirements in terms of inmate participation, average length of initial sanction, average length of settled sanction, etc.

Reporting Requirements

In the proposed 7 NYCRR 255.06 (Reporting), DOCCS shall publish to its website monthly reports of the total number of inmates in segregated confinement or SHU-alternative programs, together with initial annual reports regarding the same, including inmates' average length of stay in each unit. NYSCOPBA believes that such reporting requirement should include data regarding staffing, inmate-on-staff assaults, inmate-on-inmate assaults, contraband found, etc. NYSCOPBA also believes that additional inmate information should be reported, including, but not limited to, rates of inmate re-entry (recidivism) into the SHU-alternative programs, whether inmates were placed back into SHU due to misbehavior in SHU-alternative programming, etc. This will allow for a more complete understanding of the efficacy of the new programs, and allow for more data to support additional improvements to the reforms.

Adolescent Offender Facility Eligibility

Based on a review of 7 NYCCRR 1.5 (v), it is unclear what circumstances would allow an inmate to be housed at an adolescent offender facility up to age twenty-three (23) (as indicated in the proposed language), since adolescent offenders are placed in an adolescent offender facility at age sixteen (16) or seventeen (17) and have, at most, two (2) years and four (4) months until transfer to an adult facility, or release from incarceration. The twenty-three-years-old maximum allowable age of an "adolescent offender" is contrary to the purpose of the adolescent offender facilities.

Employment Opportunities

The proposed regulations indicate an apparent increase in employment opportunities as a result of the implementation of the regulations. NYSCOPBA requests additional information as to the best estimates of the hiring increases because of the proposed regulations. Some facilities with Step-Down Units already face a significant amount of mandatory overtime, which is a burden placed almost exclusively on the correction officers and correction sergeants. Additional staff are necessary to adequately ensure that the "most congregate setting" available, as contemplated by the proposed regulations, is still safe and secure at all times. The implementation of these regulations will only exacerbate the current burden NYSCOPBA members face due to mandatory overtime.

NYSCOPBA appreciates the opportunity to comment on the proposed regulations. We would welcome any questions the Department may have about these comments.

Sincerely,



Tammy Sawchuk

Executive Vice President

New York State Correctional Officers and Police Benevolent Association, Inc.