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RESPONSE TO COMMENTS ON EMERGENCY AMENDMENTS TO

103 CMR 423, RESTRICTIVE HOUSING, AND 103 CMR 430, INMATE DISCIPLINE,

AND

RESPONSE TO COMMENTS ON 103 CMR 425, PLACEMENT REVIEWS IN SECURE TREATMENT UNITS, WHICH WAS PROMULGATED ON AN EMERGENCY BASIS

April 2019

REGULATORY AUTHORITY:

Massachusetts General Law, Chapter 124, §§ 1(b), (c), (i), and (q),
Massachusetts General Law, Chapter 127, §§ 39, 39A, 39B, 39C, 39E, 39F, and 39H

The Massachusetts Department of Correction (Department) filed emergency amendments to 103 CMR 423, Restrictive Housing,[1] and 103 CMR 430, Inmate Discipline, with the Secretary of State on December 28, 2018. On that same day, the Department also filed a new emergency regulation, 103 CMR 425, Placement Reviews in Secure Treatment Units, with the Secretary of State. The amended regulations were effective upon filing and were published in the Massachusetts Register on January 11, 2019.

[1] Prior to the emergency amendment, this regulation was entitled 103 CMR 423, Special Management.

In accordance with the public process requirements of Massachusetts General Laws (M.G.L.) Chapter 30A, and with the intent to adopt the emergency amendments and emergency regulation as permanent regulations, the Department announced a public hearing and public comment period by mailing out notices to interested parties and Department of Correction facilities on January 16, 2019, publishing notice in the Boston Herald on January 18, 2019 and February 8, 2019, and publishing notice in the Massachusetts Register on February 8, 2019. The Department held a public hearing on February 19, 2019 in the McCormack Building at One Ashburton Place in Boston. The official comment period was January 16, 2019 through February 19, 2019, although the Department continued to receive and accept comments up to and including February 21, 2019.

The Department received written comments from Prisoners' Legal Services of Massachusetts, Harvard Prison Legal Assistance Project, Boston College Defenders, Mental Health Legal Advisors Committee, Families for Justice as Healing, Michael Cox (on behalf of the Boston Chapter of Black and Pink), Mary Valerio, J.D. Carrier, Howard B. Brown, Bodhisattva Skandha, and Eni Monteiro. The Department greatly appreciates the time and effort taken by the commenters to provide the Department with valuable feedback and suggestions regarding these regulations. The Department carefully considered all the comments and made several changes to the regulations as a result.

I. COMMENTS AND RESPONSES[2]

As an initial matter, the Department notes that the majority of the comments referred to Restrictive Housing as solitary confinement. While these terms are sometimes used interchangeably, and other correctional systems outside of Massachusetts may use the terms differently, Restrictive Housing as utilized by the Department is not akin to solitary confinement. Solitary confinement is not and has not been used by the Department for many years. Historically, an inmate in solitary confinement was not allowed any time out of his or her cell for any purpose other than legal visits and would not be allowed to possess any property except for a religious book. This is not the case with Restrictive Housing in the Department. When an inmate is in the Department Disciplinary Unit or in a Restrictive Housing Unit (formerly known as a Special Management Unit), the inmate, among other things, has the opportunity to exercise out of his or her cell, to possess reading materials for leisure and religious purposes, to receive personal and legal visits, to make personal and legal telephone calls, to possess a radio, to purchase items from the Canteen, and to participate in programming.

There were also general comments received regarding the Department's implementation of those portions of the Act Relative to Criminal Justice Reform, Chapter 69 of the Acts of 2018 (CJRA), pertaining to Restrictive Housing and, in particular, inmates with a Serious Mental Illness (SMI) in Restrictive Housing. The CJRA amended numerous sections of Chapter 127 of the

[2] While not every aspect of every comment is described in this Response, the Department read and considered all the comments provided.

Massachusetts General Laws by repealing certain statutory sections, adding new statutory sections, and/or inserting new statutory terms. See M.G.L. c. 127, §§1, 39, 39A, 39B, 39C, 39E, and 39F.[3] These statutory changes were effective as of December 31, 2018. The Department worked diligently to encompass the vast number of changes required by the CJRA in the amended regulations. As reflected in the regulations, the Department embraced and tackled the requirements of the CJRA by utilizing staff from a variety of disciplines in the implementation of such changes.

The CJRA created a new, greatly-expanded definition of SMI that resulted in a vast increase in the number of inmates in the custody of the Department identified as SMI. The Department, through its mental health vendor, immediately identified those inmates who are now SMI under the new definition to ensure that they are afforded all the treatment and reviews required by the CJRA. As required by the CJRA, and as set forth in M.G.L. c. 127, § 39A(a), the Department included language in 103 CMR 423.09 providing that no inmate with SMI shall be held in Restrictive Housing unless, within seventy-two (72) hours of the placement, there is a certification by the Commissioner of Correction or designee detailing why the inmate may not safely be held in general population, that there is no available placement in an alternative unit, that efforts are being taken to find appropriate housing and the status of the efforts, and the anticipated time frame for resolution. As also required by the CJRA, and as set forth in M.G.L. c. 127, § 39B(a) and (b), the Department also included language in 103 CMR 423.09 providing that an inmate with SMI must thereafter receive Placement Reviews every seventy-two (72) hours and may only be retained in Restrictive Housing if it is found that the inmate poses an unacceptable risk to the safety of others, of damage or destruction of property, or to the operation of a correctional facility. The Department included these same requirements pertaining to the placement of inmates with SMI in Disciplinary Restrictive Housing in 103 CMR 430.22 and 103 CMR 430.30.

There were some comments received regarding the definition of Restrictive Housing in 103 CMR 423 and 103 CMR 430. One commenter noted a concern with the language in the regulations describing Restrictive Housing as a "separate housing area from general population" where the inmate is confined for more than twenty-two hours per day. In response, the Department changed the definition of Restrictive Housing in 103 CMR 423.06 and 103 CMR 430.05 to describe Restrictive Housing, in relevant part, as "A placement that requires an inmate to be confined to a cell for at least twenty-two (22) hours per day...." The Department also added this amended definition to 103 CMR 425.

As for other comments regarding the exclusion of placements ordered by medical or mental health providers from the definition of Restrictive Housing, the Department notes that medical and mental health placements are made at the direction and discretion of medical or mental health professionals, not Department staff, and that such clinical placements are based on the medical or mental health needs of those specific inmates, not for any reasons related to Restrictive Housing placements. Indeed, if such placements were treated as Restrictive Housing, as suggested by some of the commenters, this would result in inmates having to be released from medical and mental health placements because the findings otherwise required by the CJRA to continue Restrictive Housing placements would never apply to medical and mental health

[3] M.G.L. c. 127, §§ 40 and 41 were repealed.

placements. This would result in harm to such inmates by denying them the medical and mental health care that medical and mental health professionals have determined is necessary and appropriate. The Department's definitions of Restrictive Housing in the regulations reflect both the requirements and spirit of the CJRA and ensure that the medical and mental health needs of inmates are appropriately addressed.

One commenter also inquired as to whether mental health watches were governed by any policy, Mental health watches are governed by 103 DOC 650, Mental Health Services. As set forth in 103 DOC 650.13(B)(3), a Qualified Mental Health Professional determines the level of supervision required for mental health watches and that determination is based on the specific needs of the inmate requiring a mental health watch. In accordance with 103 DOC 650.13(B)(8), mental health watches shall be no longer than necessary to deal with the mental health crisis that necessitated the watch and the decision to discharge an inmate from a mental health watch is determined solely on the basis of the clinical judgment of mental health staff. Similarly, as reflected in 103 DOC 630, Medical Services, decisions to place an inmate in an inpatient or infirmary setting for medical reasons are based on medical orders for care made by physicians. See 103 DOC 630.05. Another Department policy also provides that medical and mental health providers, based on their clinical judgment, are solely responsible for making all decisions regarding the type, timing, and level of medical and mental health services needed by inmates in the custody of the Department. 103 DOC 610.01.

As one commenter noted, although 103 CMR 423 and 103 CMR 430 each included a definition of a Placement Review Committee, neither regulation included a definition of Placement Review. In response, the Department added language to 103 CMR 423.06 and 103 CMR 430.05 to include Placement Review as a defined term.

Some commenters questioned certain language in the regulations, i.e., the language used to describe the standard for an inmate to be held in Restrictive Housing (an unacceptable risk to the safety of others, of damage or destruction to property, or the operation of a correctional facility), the language used to describe instances where provision of various items may depend on whether such items are inconsistent with the security of the unit, and the definition of exigent circumstances. The Department notes that the complained-of language is taken directly from the CJRA. The Legislature, by utilizing such language, recognized that professional judgment must be exercised by correctional professionals who are the most familiar with the inmates and correctional facilities or units involved in order to render decisions that will necessarily be dependent on facts and circumstances unique in each case.

One commenter suggested that an outside time limit should be established in 103 CMR 423 for a Restrictive Housing placement if the inmate is awaiting a disciplinary hearing for an offense that is not referred for possible Department Disciplinary Unit (DDU) sanction. No changes to the regulation were necessary. As noted above and as set forth in 103 CMR 423 and the CJRA[4], an inmate may only be held in Restrictive Housing if the inmate is determined to pose an unacceptable risk to the safety of others, of damage or destruction of property, or to the operation of a correctional facility. The Department further notes that, even though an inmate may be awaiting a disciplinary proceeding, the determination that the inmate poses an

[4] With the exception of an inmate who may be held for his or her own safety when there are verified safety needs.

unacceptable risk could be based on any number of factors that may not be related to the length of a possible disciplinary sanction. Moreover, as set forth in 103 CMR 423.09, the Department has established a system to ensure that the status of every inmate in Restrictive Housing is reviewed even more frequently than required by the CJRA. In addition to the numerous Placement Reviews required by the CJRA, 103 CMR 423.09 also requires that a Placement Review for every inmate in a Restrictive Housing Unit, regardless of the reason for such placement, occur every Monday, Wednesday, and Friday, and that every inmate also be afforded a separate review by a Correctional Program Officer (CPO) within thirty (30) days of placement.[5] Further, for the CPO Reviews, as well as for Placement Reviews that occur approximately every ninety (90) days, inmates, among other things, are afforded forty-eight (48) hours written notice, have the opportunity to participate in person, receive written decisions and behavior standards and program participation goals, and have the opportunity to appeal. See 103 CMR 423.09. The regulatory requirement of forty-eight (48) hour notice exceeds the twenty-four (24) hour notice that the CJRA requires for certain Placement Reviews. The opportunity set forth in the regulation for the inmate to appeal is also not required by the CJRA. Furthermore, 103 CMR 423.09 provides that if it is reasonably expected that an inmate will remain in Restrictive Housing for more than sixty (60) days and once an inmate is in Restrictive Housing for more than thirty (30) days, the inmate will be provided with the enhanced Placement Reviews (i.e., 24 hour notice, opportunity to participate in writing, receipt of written decision and behavior standards and goals) set forth in the CJRA. This exceeds the requirements of the CJRA whereas the CJRA does not require enhanced Placement Reviews for every inmate in Restrictive Housing for more than thirty (30) days.

The Department also received comments pertaining to maximizing out-of-cell time in Restrictive Housing and maximizing outplacements from Restrictive Housing. In response to these comments, the Department added a new section to 103 CMR 423 entitled "Maximization of Out-of-Cell Activities and Programs," see 103 CMR 423.14, and added language to 103 CMR 423.11 to clarify how outplacements will be maximized. The Department also added similar language to 103 CMR 430.22(2), 103 CMR 430.31(8), and 103 CMR 430.33(3) in response to the comments.

Some commenters raised questions about Secure Treatment Units (STU) and Secure Adjustment Units (SAU), which are referenced in the amended regulations. For several years, the Department has successfully operated two STUs that serve as alternatives to Restrictive Housing for inmates with SMI. One STU is the Secure Treatment Program, which opened at Souza-Baranowski Correctional Center in February 2008. The other STU is the Behavioral Management Unit, which opened at MCI-Cedar Junction in July 2010. In light of the expanded SMI definition in the CJRA, the CJRA's limitations regarding the placement of inmates with SMI in Restrictive Housing, the CJRA's requirement that alternative placements for inmates with SMI be considered, the expanded program requirements of the CJRA for all inmates, and the limited number of beds available in the Secure Treatment Program and the Behavioral Management Program, it was necessary that new non-restrictive housing units be developed to serve as additional alternatives to Restrictive Housing. The new alternative unit currently being utilized is the SAU. The SAU, much like the Secure Treatment Program and Behavioral

[5] The CJRA only requires seventy-two hour Placement Reviews of inmates with SMI in Restrictive Housing and inmates held in Restrictive Housing for verified safety needs and there is no requirement that a CPO Review occur.

Management Unit, is a program-rich unit that offers inmates significant out-of-cell time and programming. Neither the SAU nor the long-existing STUs is a form of Restrictive Housing. In response to the comments received, the Department amended the definitions of Secure Adjustment Unit and Secure Treatment Unit in 103 CMR 423.06, 103 CMR 425.05, and 103 CMR 430.05 to clarify that these units are not forms of Restrictive Housing.

As for comments received regarding Placement Reviews in the STUs, the Department notes that, while the CJRA requires Placement Reviews for certain categories of inmates in STUs (inmates who are awaiting a disciplinary hearing or serving a disciplinary sanction), the CJRA itself acknowledges that STUs are not Restrictive Housing by stating that the timing of such reviews is to be at the same time intervals for those categories of inmates "**as if** the [inmate] were confined to restrictive housing." M.G.L. c. 39B(d) (emphasis added). The reviews required by the CJRA for inmates in STUs were already reflected in 103 CMR 425 so no regulatory changes were necessary.

One commenter questioned the inclusion of the "Emergency" provision in 103 CMR 425. The Department notes that similar emergency provisions appear in the majority of Department regulations, and that such provisions have been in Department regulations for many years. These seldom-used emergency provisions are necessary in the event that unforeseen circumstances, which might include things such as prison riots or prison escapes, would make compliance with some aspect of a regulation temporarily impossible or unsafe.

One commenter also requested that the regulations include language that inmates may not be placed in Restrictive Housing for reasons related to their gender identity. No changes to the regulations were necessary as both 103 CMR 423 and 103 CMR 430 already contained language stating that the fact that an inmate is lesbian, gay, bisexual, transgender, queer or intersex or has a gender identity or expression or sexual orientation uncommon in general population shall not be grounds for placement in Restrictive Housing. 103 CMR 423.08[6]; 103 CMR 430.35. This language is taken directly from the CJRA.

Another commenter remarked that inmates who are pregnant should not be placed in Restrictive Housing. As both 103 CMR 423 and 103 CMR 430 already contained language stating that a pregnant inmate shall not be placed in Restrictive Housing, no changes to the regulations were necessary. 103 CMR 423.08[7]; 103 CMR 430.35. The language in the regulations is taken directly from the CJRA.

Some commenters indicated that there was some confusion regarding what constituted Disciplinary Restrictive Housing. In response to these comments, the Department amended the definition of the DDU in 103 CMR 423.06 to clearly state that the DDU is a form of Restrictive Housing that is governed by 103 CMR 430, Inmate Discipline. The Department also amended the definition of Disciplinary Restrictive Housing in 103 CMR 430.05 to clarify that Disciplinary Restrictive Housing consists of both Disciplinary Detention and the DDU. The Department also

[6] In the emergency regulation, this language appeared in 103 CMR 423.12. The language has now been moved to 103 CMR 423.08.

[7] In the emergency regulation, this language appeared in 103 CMR 423.12. The language has now been moved to 103 CMR 423.08.

notes that, although the CJRA does not place any limit on the length of Disciplinary Detention sanctions, the Department has always placed limits on the lengths of such sanctions and, as reflected in the definition of Disciplinary Detention in 103 CMR 430.05, the Department utilized language that has long been used in prior versions of 103 CMR 430 to keep the same limits in place.

There were also comments received regarding screening inmates prior to their placement in the DDU, Placement Reviews of inmates in the DDU, and suspension of DDU sanctions. In response to the comment regarding screening, the Department added a new section, entitled "DDU Screening" at 103 CMR 430.29 to clearly set forth the required screenings. This section states, among other things, that inmates are screened by medical staff to determine whether there are any medical contraindications to placement in the DDU, including the existence of any physical disability that precludes placement, in which case the inmate shall not be placed in the DDU.

As for Placement Reviews in the DDU, the emergency regulation (103 CMR 430) already contained language mirroring the language in the CJRA and M.G.L. c. 127, § 39B(a) in regard to required Placement Reviews. Accordingly, no changes were necessary. These Placement Reviews were previously reflected in 103 CMR 430.29, "DDU Reviews," but the section entitled "DDU Reviews" has been renumbered as 103 CMR 430.30. The Department also notes that inmates only receive DDU sanctions for the most serious of disciplinary infractions and only after an adversarial hearing that comports with due process principles whereas inmates, among other things, have the opportunity to cross-examine witnesses and present evidence.

In response to the comment noting that language in 103 CMR 430 would permit resumption of a previously suspended DDU sanction for a new, minor disciplinary infraction, the Department amended the language in 103 CMR 430.28 (7) to limit the possible resumption of a previously suspended DDU sanction to only those instances where the new infraction is for a Category 1 or Category 2 offense. Category 1 and Category 2 offenses are reserved for the most serious disciplinary infractions, as set forth in 103 CMR 430.25.

One commenter requested that 103 CMR 430 include language that the "default" position in the regulation should be that inmates charged with disciplinary offenses should be provided with photographs or photocopies of contraband items that may be relevant to the disciplinary proceedings. No changes to the regulation were required because 103 CMR 430.11(7) already contained language that the inmate be provided with photographs or photocopies of contraband evidence unless the photographs or photocopies themselves would be contraband or constitute a security risk (pornography, for example).

Finally, one commenter requested that 103 CMR 430 include language indicating that if the presence of the reporting staff person (i.e. the staff member who authored the disciplinary report) was requested, but that person is not present at the disciplinary hearing, the allegations in the disciplinary report need not automatically be accepted as true. No change to the regulation was required because 103 CMR 430.14(5) already contained language stating that the Disciplinary Hearing Officer may assess the credibility of the staff person's statements in the disciplinary

report and the Hearing Officer is not required to accept the statements as true. This language was added to the regulation in 2017.

III. REVISIONS TO EMERGENCY REGULATIONS

The Department received a significant number of comments from several organizations and individuals. In response to the comments received, as described above, the Department made numerous changes to 103 CMR 423, 103 CMR 425, and 103 CMR 430. If further modifications to the regulations are warranted based on ongoing operational experience or recommendations made by the Restrictive Housing Oversight Committee established by the CJRA, the Department will proceed in compliance with the public process requirements of M.G.L. Chapter 30A to amend the regulations, and will invite further public comment at that time.