May 6, 2016

Public Comments - Proposed Regulatory Changes
Title 72, Chapter 1
of the
Nebraska Administrative Code
"Restrictive Housing"

The Nebraska Ombudsman's Office is submitting this document and the attached materials, incorporated herein by reference, as our official comments relating to the proposed regulatory provisions drafted by the Department of Correctional Services on the subject of "restrictive housing." The attached materials include: (1) a copy of an April 14, 2016, Memorandum to the Legislature's LR 34 Committee, "DCS Proposed Restrictive/Segregated Housing Regulations;" (2) document entitled "Restrictive/Segregated Housing Principles;" and (3) Standard 23-2.6 thru Standard 23-2.9 and Standard 23-3.8 the ABA Standards on Treatment of Prisoners. We are hereby submitting those materials, and this document itself, for consideration and inclusion in the official record as our "public comment" on the Department's proposed regulations dealing with restrictive housing, pursuant to **Neb. Rev. Stat.** §§84-906.02, 84-907(1), and 84-908(1)(b).

Our most pressing concerns about the proposed regulations as drafted are outlined and discussed in detail in our April 14, 2016, memorandum to the LR 34 Committee, and we would urge that the Department of Correctional Services amend the proposed regulations on restrictive housing to bring them into compliance with all of the points discussed in that memorandum. We would summarize those points as follows:

1. Because of the significant risk of causing long-term psychological damage, inmates who are juveniles should not be placed on segregated status, except in cases of a serious and immediate risk of harm to others, and even then should be held in a segregated status for a very short period of time (usually a matter of hours). We believe that the Department should include in these regulations language that would mirror regulatory language that was recently adopted in the State of Oklahoma to the effect that a juvenile may only be placed in administrative confinement when the juvenile is: (1) out of control; (2) a serious

and immediate physical danger to himself or others; and (3) has failed to respond to less restrictive methods of control. The Oklahoma regulations also provides that no juvenile "shall remain in solitary confinement in excess of three hours," and that a juvenile should be removed from segregation as soon as the juvenile is "sufficiently under control so as to no longer pose a serious and immediate danger to himself or others." We also believe that the regulations should include provisions stating that pregnant women and the elderly should not be placed in administrative segregation.

2. Because we believe that the single most important reform needed in this area is to state in the promulgated regulations very strict criteria for making the decision to place inmates in segregation, we have previously recommended that the Department's regulations on the subject of restrictive housing include Standard 23-2.7(b) of the ABA Standards on the Treatment of Prisoners. (Please see the ABA Treatment of Prisoners Standards relating to segregated housing, which are attached.) That Standard would limit assignment of inmates to administrative segregation to those cases involving: (1) a "history of serious violent behavior;" (2) cases of "escapes or attempted escapes;" (3) an involvement in "acts…likely to destabilize the institutional environment;" (4) having a leadership or enforcer's role in a "security threat group," or (5) incitement of "group disturbances" in the facility. In fact, Sections 003.02A thru 003.02E of the Department's draft regulations basically repeat those criteria. However, Section 003.02F adds an further criteria that is not found in the ABA Standards by authorizing the administrative segregation of inmates "whose presence in the general population would create a significant risk of physical harm to staff, themselves and/or other inmates." In our opinion, the language of Section 003.02F is overly broad, and would undo the underlying purpose of the ABA Standards, which is to state very strict *and narrow* regulatory criteria for the placement of inmates on segregation. Therefore, we believe that Section 003.02F should be deleted from the proposed regulations. In addition, every decision to place an inmate on segregated status should be supported by adequate documentation specifically stating the reasons for the placement on segregated status, and this documentation should specifically cite which of the five criteria enumerated above authorizes the inmate being placement on segregated status.

3. In a case where a decision is made to place an inmate in administrative segregation for a period of time longer than 30 days, we believe that the Department should provide Due Process protections, including notice, in writing, of the reasons for the placement in long term segregation, and an administrative hearing where the inmate can be heard in person, and can confront and cross-examine any witness whose testimony is relevant to the case. In that regard, we would strongly recommend that the Department's restrictive housing regulations be amended to include the provisions of Standard 23-2.9 of the American Bar Association Standards on Treatment of Prisoners. We also believe that these cases ought to be appealable to the District Court under the Nebraska Administrative Procedure Act as "contested cases," but we recognize that legislation would be require to accomplish this.

4. We have concerns with section 006 of the Department's draft regulations dealing with "Behavioral Health." According to section 003.05 of the Department's draft regulations,

those inmates with a "serious mental illness who present a high risk to others or to self and require residential mental health treatment shall be housed in Secure Mental Health housing." However, the term "serious mental illness," is defined very narrowly in section 002.13 of the draft regulations. The implication of this narrow definition is that there will be some inmates with significant mental disorders that do not qualify as a "serious mental illness" who will continue to be held in segregation cells in our system. We believe that this is ill advised, inhumane, and morally wrong, and that inmates with significant mental disorders, including those inmates with "cognitive disabilities," who cannot be managed in general population should be placed in a "mission specific" housing unit designed to "provide effective living conditions and programming" for those inmates who cannot be managed in general population because they are mentally disordered and/or cognitively disabled. We understand that it may take time to identify a workable placement for these inmates, but in the meantime we would recommend that the Department's new restrictive housing regulations be amended to reflect the intention to make such a unit available.

5. We recommend that the Department's restrictive housing regulations should provide that inmates may be held on Immediate/Investigative Segregation status for no longer than 15 days, except that Immediate Segregation status may be increased by 15 additional days to a limit of never more than 30 days, *with the personal approval of the Director*.

6. The Department's restrictive housing regulations should be amended to require that all decisions to classify an inmate to long-term segregation, and/or to continue an inmate's placement on long-term administrative segregation, be based on a risk-assessment tool that is evidence based, and validated by other correctional departments and/or experts.

7. The regulations should state that the minimum out-of-cell time for inmates on restrictive housing status (including both immediate segregation and administrative segregation) should be three hours per day, seven days per week (the calculation of these three hours per day would include time spent showering out-of-cell, in the yard, making telephone calls, with visitors, and at programming).

8. Section 002.04 defines "general population" as consisting of a situation where an inmate is out-of-cell at least six hours per day. We believe that this minimum out-of-cell time should be considerably higher, and would recommend that it be set at ten hours, rather than at six hours. We base this recommendation on the Department's current practice where ten hours out-of-cell seems to be the standard practice.

Respectfully submitted,

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Ombudsman

cc. Members, LR 34 Committee
Mr. Scott Frakes