April 14, 2016

MEMORANDUM

To: Members - LR 34 Committee

From: Marshall Lux, Ombudsman

Re: DCS Proposed Restrictive/Segregated Housing Regulations

One of the subjects covered by last year's LB 598 (Section 31) was concerned with "restrictive housing," which is a category that would include what is typically referred to as "administrative segregation." The crucial provision of LB 598 on this subject now appears as **Neb. Rev. Stat.** §83-173.03(2), which provides:

> The department shall adopt and promulgate rules and regulations pursuant to the Administrative Procedure Act establishing levels of restrictive housing as may be necessary to administer the correctional system. Rules and regulations shall establish behavior, conditions, and mental health status under which an inmate may be placed in each confinement level as well as procedures for making such determinations. Rules and regulations shall also provide for individualized transition plans, developed with the active participation of the committed offender, for each confinement level back to the general population or to society.

Neb, Rev. Stat. §83-4,114(5)(a) and (b), also enacted as part of LB 598, requires the Director of the Department of Corrections to appoint a "long-term restrictive housing work group" to advise the agency on "policies and procedures related to the proper treatment and care of offenders in long-term restrictive housing." James Davis of the Ombudsman's Office was asked by Director Frakes to participate in the work group, and he has been typically conscientious in taking part in this process.

The process of developing restrictive/segregated housing regulations has been going forward, and has now arrived the point where the Department of Corrections has submitted a draft of its proposed regulations to the Secretary of State's office as the first step in the actual promulgation process. You will find a copy of the Department's draft (Title 72, Chapter 1, of the Nebraska Administrative Code) attached. Over the last couple of weeks, as the Department was closing in on having the draft regulations ready for submission to the Secretary of State, the Ombudsman's Office has exchanged ideas with Mr. Frakes and his helpers in the hope of getting a work product that would best serve the Department and the people of this state who depend on the Department to manage its facilities and its inmates in the most effective way reasonably possible, consistent with accepted standards and evolving principles of humane treatment. At the end of March, we sent a document to Mr. Frakes in which we identified our understanding of the "core principles of a modernized system of administrative segregation." We based those principles on a number of sources, particularly the American Bar Association's Standards on the Treatment of Prisoners, which were adopted by the ABA in February of 2010 (specifically Standards 23-2.6 thru 23-2.9, and Standard 23-3.8). You will find a copy of our summary of those "core principles" attached. (Please see Restrictive/Segregated Housing Principles document.)

After we shared this information with Mr. Frakes, and followed up with an email sent by Jerall Moreland of our office on April 5, the Department did make some significant changes to their earlier draft of the proposed regulations. Of particular importance was the fact that the latest version prepared by the Department included a section which stated strict criteria for assigning inmates to segregated status, something that the Ombudsman's Office has particularly stressed. A public hearing on the Department's proposed regulations has been scheduled for May 9, and our office intends to submit a number of suggestions at that time, so that our ideas and concerns will be made a part of the record. However, there are several outstanding "big issues" that we have with the Department's proposed restrictive housing regulations, and we wanted to take this opportunity to summarize those for the LR 34 Committee.

1. **Segregation of Juveniles**
   Experts have concluded that the isolation of juveniles associated with administrative segregation is psychologically damaging, and can result in long-term mental health and/or behavioral health issues for the youth in question. In a number of states, steps have been taken to limit the use of administrative segregation (or "solitary confinement") in the case of juveniles. In our Principles of Segregation document, the Ombudsman's Office suggested that juvenile inmates should ***not*** be placed on segregated status, except in cases of a serious and immediate risk of harm to others, and that they should be kept in a segregated status for only a very short period of time (usually a matter of hours). In fact, we know that the Department does have juveniles in its custody in its Correctional Youth Facility, and does place juveniles in administrative segregation at NCYF (and in some cases has moved juveniles from segregation at NCYF to segregation in an adult facility). The only provision of the Department's draft regulations that addresses the subject of juvenile inmates directly (Section 004.04B1) states that, "The use of restrictive housing for…inmates under the age of 19 requires approval of the Warden within eight hours of placement." However, the proposed regulations do not place firm limits on why a juvenile can be placed in administrative segregation, or on how long they can be kept in that situation.

The State of Oklahoma has recently adopted a regulation that concludes that the "solitary confinement" of juvenile inmates "is a serious and extreme measure to be imposed only in emergency situations." Accordingly, the regulation provides that a juvenile may only be placed in solitary confinement when the juvenile is: (1) is 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 regulation also provides no juvenile "shall remain in solitary confinement in excess of three hours," and that the 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." This Oklahoma regulation, authored by that state's Office of Juvenile Affairs, is but one example of the many states that are addressing the issue of segregation of juveniles. (Please see the attached copy of an article in the most recent edition of the NCSL magazine.) It is our opinion in the Ombudsman's Office that there should be a similar regulation relating to the juveniles in the Department's custody.

2. Strict Criteria for Placement on Segregation

It is our opinion that the single most important reform that needs to be done in this area is to include in the promulgated regulations strict criteria for making the decisions to place inmates in segregation. Historically, the Department has had no guidelines for making such a decision other than very general references to the "risk" that would supposedly be involved in allowing the inmate to remain in general population. The predictable result of this lack of any strict criteria was that, in practice, the segregation decisions tended to be arbitrary, not to mention inconsistent from case to case, because there were no strict criteria to assure that those judgments would not be made arbitrarily by the Department's decision-makers. In order to finally address this issue, we strongly recommended in our Principles of Segregation document that the Department's promulgated regulations on restrictive housing adopt strict criteria to be used by the agency's decision-makers. In doing this, we were particularly guided by Standard 23-2.7(b) of the ABA Standards on the Treatment of Prisoners, which limited an assignment 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. (Please see the ABA Treatment of Prisoners Standards relating to segregated housing attached.)

As I have mentioned, Mr. Frakes decided to include the criteria that we outlined in our Principles of Segregation document, which were in turn based upon the criteria outlined in Standard 23-2.7 of the ABA Standards on Treatment of Prisoners. However, in our Principles document we added one additional statement to the effect that those "inmates whose presence in the general population would create a significant risk of physical harm to staff and/or other inmates" could be assigned to segregated status, "*but only with the personal action and approval of the Director*." We included this language because we thought that it was advisable to offer the Department something like a "safety net" to cover those *highly unusual cases* where there was a need to segregate an inmate, but

where the inmate's history did not fit comfortably into one of the criteria for segregation stated in the ABA Standards. We based that "safety net" provision on similar language in the Administrative Segregation Regulations of the State of Mississippi.

As it now stands, the Department's draft regulations have the critical piece stating strict criteria for placement on segregated status, including the "safety net" provision as I have just described. (Please see section 003.02 of the Department's draft regulations.) But the problem is that the Department's draft has omitted what was the most important language of the "safety net" provision, namely the segment requiring that the segregation decision be made "only with the personal action and approval of the Director." Since the "safety net" provision is necessarily broad, including that provision *without the "Director only" language* will basically undo all the good that is done by promulgating the other strict criteria that are developed from the ABA Standards.

The result that we want to generate here is for all, or for almost all, decisions to assign inmates to long-term segregation to be based on very strict criteria, as are outlined in the ABA Standards. However, we were trying to recognize that there might be some unusual cases where there was a significant need to place an inmate in long-term segregation who did not meet the strict criteria taken from the ABA Standards. By requiring all of these "unusual cases" to be decisions made solely by the Director, we are basically trying to guarantee that these cases would be a highly uncommon event, a very rare exception to the general rule limiting segregation to those cases where the history of the inmate in question meets the strict criteria in the ABA Standards. *Under no circumstances* should the extremely broad language in the "safety net" section be included in the promulgated regulations without the "Director only" language, and if it is, then our recommendation would be that the Legislature simply enact Standard 23-2.7 of the ABA Standards into law at the first opportunity.

3. **Due Process**

In our Principles of Segregation document, the Ombudsman's Office recommended that, in making a decision to place an inmate in segregation for a period of time longer than thirty days, the Department should provide certain procedural protections as described in Standard 23-2.9 of the ABA Standards on Treatment of Prisoners. In most of the cases where decisions have been made to place inmates in long-term segregation, the decision has some factual basis, that is, some set of facts that indicates that the inmate needs to be segregated. The procedural protections outlined by the ABA are a way of testing those (alleged) facts, and of making a more reliable record reflecting why the decision has been made. Standard 23-2.9 of the ABA Standards provides for "effective notice," followed by an administrative hearing where the inmate "may be heard in person," and "confront and cross-examine any witnesses" whose testimony is relevant to the case. The ABA Standards further indicate that after the administrative hearing the decision to place the inmate on long-term segregation must be based upon an "individualized determination, by a preponderance of the evidence," supporting the conclusion that the inmate meets the criteria for such a placement.

The Nebraska Department of Corrections has a long, if rather mixed, history of providing due process hearings like those contemplated in the ABA Standards in disciplinary cases, where an inmate has been accused of violating a specific rule relating to inmate behavior. The ABA Standards are, in essence, asking that there be a similar administrative hearing process for long-term segregation cases, with a "preponderance of the evidence" standard of proof. I am sure that the Department looks upon the prospect of having to hold such administrative hearings in segregation cases as being "arduous," at best. Nevertheless, the idea of requiring such administrative hearings, and providing a minimal Due Process, has two big advantages worth noting: (1) it would help to guarantee that the decisions to place inmates on long-term segregation status would be based on the strict criteria that I described above, that is, it would validate that criteria by testing each case against that criteria; and (2) since administrators would now know that they would need to prove the validity of their decisions assigning an inmate to segregation, it is likely that there would be fewer of those decisions, since the administrators would necessarily be more cautious in making those decisions.

4. **Segregation of Inmates With a "Mental Disorders"**

One of the most important principles in this area is that no inmate who is diagnosed with a serious mental illness should be placed in long-term segregated housing. According to section 003.05 of the Department's draft regulations, "inmates with 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." The key to this provision is the term "serious mental illness," which is defined in section 002.13 of the draft regulations. That definition makes it clear that inmates with identified personality disorders, or with other "mental disorders," would not qualify for placement in a therapeutic environment for the treatment of their disorder. In fact, the Department's draft regulations contemplate that even some inmates with a "serious mental illness" could be retained in an administrative segregation setting, if their "current level of functionality does not require residential treatment." (Please see section 006.04A of the Department's draft regulations.)

In our experience, there are still a number of identifiable inmates with at least a "mental disorder" who are being retained in long-term administrative segregation in Nebraska's system. And, as the Department's own draft regulations acknowledge, there could even be inmates with a serious mental illness being held in non-therapeutic segregation in our system. The fact that some inmates with a serious mental illness can receive treatment by being transferred to a Secure Mental Health Unit is obviously a positive thing. However, we believe that there are still a number of inmates with significant mental disorders being held in segregation cells in our system. We have also observed that these cases tend to be some of the most difficult, disruptive, and demanding inmates found in segregation in the Nebraska system. These inmates are the ones who will impulsively assault prison staff, these inmates are the ones who will self-harm, and these inmates are the ones who will scream obscenities day and night. And, in light of all of these negative behaviors, these are also the inmates in administrative segregation who will forfeit large amounts of good time, and who will be charged and convicted of assaults on prison staff, thereby receiving additional years on their sentences - all, in part, because they have not received the much needed therapy and/or medication that would alleviate their symptoms, and help them to

be more manageable, if not better, inmates. In effect, these are the forgotten souls in the system; the ones who are always on the brink, always ready to fall off the cliff, and never able to receive meaningful therapy to help relieve their condition, because someone has decided that their mental disorder is not a "serious mental illness." But, as the situation now stands, the Nebraska correctional system has no place to put these people other than in an administrative segregation cell, a placement that too often becomes a trap that they can never get out of due to their continued misbehavior.

The Department's proposed regulations talk about "mission specific housing," which would be designed to "provide effective living conditions and programming for specific populations," to include "residential treatment and response to cognitive disabilities." As contemplated in the draft regulations, this mission specific housing would "reduce the use of restrictive housing by providing a range of alternatives that address needs and reduce the behaviors that previously led to the use of restrictive housing." Groups that might be covered by this mission specific housing model would include: (1) those inmates in need of programming or treatment for sex crimes; (2) inmates with developmental/intellectual disabilities and traumatic brain injuries; and (3) inmates who are in need of residential substance abuse treatment. (See section 004.08 of the Department's draft regulations.) Of course, what truly distinguishes these mission specific housing units from all other general population units in the system is the fact that the inmates placed there will be in a therapeutic environment, with out-of-cell programming, something that does not exist in any meaningful way in the system's administrative segregation units.

If there are inmates in segregation units who have identifiable "mental disorders," but who cannot be sent to the Department's Secure Mental Health Unit because they do not have a "serious mental illness," then it is the view of the Ombudsman's Office that the Department should take action to develop a therapeutic placement for those inmates, so that their challenging behaviors could be addressed through some form of meaningful professional intervention. In effect, what this would be is a mission specific housing unit for the "mentally disordered" (but not seriously mentally ill) inmates whose troublesome behaviors are the result of their having a mental disorder. Of course, given the nature of the behaviors of some of these inmates, this unit, like the Department's Secure Mental Health Unit, would need to have the capacity to segregate the inmates, or some of them, from the other inmates in the unit. However, the point would be that the unit would offer a therapeutic environment for those inmates who have significant behavioral issues, but who do not qualify for the Secure Mental Health Unit.