

To: NDCS General Counsel  
Cc: Interested Senators  
From: ACLU of Nebraska  
Date: November 15, 2021  
Re: Proposed Regulations to Title 72, Chapter 1 of Nebraska  
Administrative Code-Restrictive Housing



## Nebraska

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For over 50 years in Nebraska, the ACLU has worked in courts, legislatures, and communities to protect the constitutional and individual rights of *all* people. With a nationwide network of offices and millions of members and supporters, we take up the toughest civil liberties fights. Beyond one person, party, or side — we the people dare to create a more perfect union.

We submit this letter as testimony regarding the proposed regulations relating to restrictive housing with the Nebraska Department of Correctional Services (DCS). We ask that our testimony be included in the public record and that our comments be considered policymakers.

Nebraska’s prisons are among the most overcrowded in the country. The prison facilities have been consistently operating well beyond design capacity for several years. One unfortunate characteristic of the overcrowded correctional system has been the high use of solitary confinement or restrictive housing, or the practice of separating prisoners from the general population in individual seclusion. In recent years, Nebraska lawmakers have enacted legislative reforms to restrict the use and scope of restrictive housing within DCS to align with best practices, mitigate human rights abuses, and ensure better outcomes for all stakeholders.

In 2015 the Legislature enacted legislation to limit the scope and use of solitary confinement and restrictive housing in Nebraska’s prisons. Following legislative directives, DCS promulgated regulations relating to restrictive housing and placing inmates in restrictive housing.

In 2019 the Legislature enacted additional reform by prohibiting some prisoners from being placed in restrictive housing altogether. Section 83-173.03(3) provides that on and after March 1, 2020, no inmate who is a member of a vulnerable population shall be placed in restrictive housing. The statute further defines “vulnerable population as any “an inmate who is eighteen years of age or younger, pregnant, or diagnosed with a serious mental illness as defined in section 44-792, a developmental disability as defined in section 71-1107, or a traumatic brain injury as defined in section 79-1118.01”.

The overuse and treatment of members of a vulnerable population is an adoption of a recommendation from community stakeholders who have advocated for reform and national experts who examined our prisons. In 2016, the Vera Institute of Justice, an independent, nonprofit national research and policy organization focused on prison reform, looked at our state’s prison system. In its November 1, 2016 report, the Vera Institute noted that historically disciplinary segregation was over-used, typically for low-level violations. Notably, the Vera Institute strongly recommended that the Department “[e]nact firm policies that prohibit placing youth, pregnant women, and people with serious mental illness in any form of restrictive housing”.

This legislative change was a recognition of decades of research and repeated findings of courts that individuals with mental illness should be excluded from restrictive housing. The professional research is clear as to the psychological harms to youth by being placed in solitary confinement. Additionally, with respect to the mentally ill, solitary confinement and restrictive housing invariably contributes to the deterioration of prisoners’ mental health.

Despite reform, the frequency and duration of restrictive housing in Nebraska continues to be problematic. Although there is some indication to believe that there are decreases in the number of individuals in restrictive housing, both in numbers of individual prisoners and total length of stay. The Department of Corrections recently issued its 2021 Restrictive Housing Annual Report, which shows improvement from 2020 regarding restrictive housing. But the Report shows that the length and frequency of prisoners being placed in restrictive housing in Nebraska remains troublingly high. According to the Nebraska Department of Corrections, the average length of time for individuals who are placed in Long Term Restrictive Housing was 214.23 days in fiscal year 2021, with a median length of stay of 122 days. Apparently, four individuals in 2021 who have spent 1,350 days or more in Restrictive Housing.<sup>1</sup> A total of 1,800 unique individuals throughout all DCS facilities were held in restrictive housing for at least one day during fiscal year 2021.<sup>2</sup> Nebraska still surpasses most of its neighboring states in frequency and use of restrictive housing. Emerging best practices and international consensus point to utilizing the “Mandela Rule”<sup>3</sup> adopted by the United Nations in 2015 which set limits at or about 15 days for solitary confinement, have been adopted by our sister state in Colorado<sup>4</sup>, and should be further explored in Nebraska<sup>5</sup>.

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<sup>1</sup> 2021 Restrictive Housing Annual Report, August 27, 2021, p.18-19

<sup>2</sup> *Id.* at 12.

<sup>3</sup> [https://www.un.org/en/events/mandeladay/mandela\\_rules.shtml](https://www.un.org/en/events/mandeladay/mandela_rules.shtml)

<sup>4</sup> <https://www.aclu.org/blog/prisoners-rights/solitary-confinement/why-i-ended-horror-long-term-solitary-colorados-prisons>

<sup>5</sup> <https://www.aclunebraska.org/en/news/nebraska-must-do-more-end-inhumane-practice-solitary-confinement>



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The proposed changes to the regulations somewhat accommodate the statutory reforms from 2019 with respect to vulnerable populations and are intended to effectuate these legislative directives. Some of the proposed revisions are technical in nature, some are acceptable from the perspective of advancing best practices but overall, they fail to fully effectuate legislative intent in Nebraska. For example, we are concerned with the development of mission-specific housing, such as Secure Mental Health Units, that may become a type of restrictive housing/solitary confinement, for the mentally ill, in contravention with recent legislative reforms. In essence based on the prison leadership testimony in recent legislative hearings, ongoing concerns from advocates, and illustrated in these proposed rules Nebraska seems on a course to continue solitary for those incarcerated with severe mental illness under simply another label without meaningful reform that ends solitary for vulnerable populations required by state statute.

Regarding the proposed regulations, we support efforts to improve access to mental health treatment but are trepidatious about the new categories of Acute Mental Health Unit (AMHU), at 72 NAC 002.01 and Chronic Care Mental Health Unit (CCMHU) at 72 NAC 002.04, respectively. These are seemingly necessary categories intended to identify those prisoners who are diagnosed with mental illness who need to be placed in an alternative to restrictive housing or general population. However, we are concerned that these designations have the potential to allow vulnerable populations to be placed in an alternative type of longer-term restrictive housing. From reports within the current prison system, there seems to be a continued use of restrictive housing for members of vulnerable populations, which the Legislature has expressly deemed should not be placed in restrictive housing, by placing certain prisoners in alternatives to restrictive housing that are, in fact, quite similar to restrictive housing placements.

In fact, the 2021 Restrictive Housing Report describes the development and “realigning” the operations of the Secure Mental Health Unit at LCC to provide for a controlled and highly structured alternative to restrictive housing for individuals in need of residential mental health treatment as members of vulnerable populations.<sup>6</sup> But this alternative has the potential to operate as indistinguishable from restrictive housing. Arguably this potentiality is realized given that DCS continues to suffer from staff shortages and emergency staffing measures which limit the amount of time and opportunity for regular out of cell time. We urge DCS to implement regulations which clearly prohibit the scenarios in which individuals placed in structured mental health units from living in conditions that are indistinguishable from long term restrictive housing. Those who are mentally ill or members of vulnerable populations should not be placed in long term restrictive housing, regardless of what such restrictive housing is labelled.

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<sup>6</sup>2021 Restrictive Housing Report at 25-26.

While numbers of people who are released from restrictive housing directly into the community has been dropping each year, there were still 17 people who were released from restrictive housing into the community in fiscal year 2021.<sup>7</sup> The Legislature has made it clear that releasing people from restrictive housing directly to the community, without out transition or supervision, should be avoided. Such a practice does not provide for meaningful or effective reentry services to transition back into society which ensures better outcomes and advances our shared public safety goals. We would encourage DCS to implement regulations to further reduce and eliminate the situations in which individuals can be released directly from restrictive housing into the community and improve access to treatment, rehabilitation services, and re-entry planning and support.

As such, we urge DCS officials to further strengthen these proposed rules and regulations to fully implement Nebraska state law and best practices in both spirit and intent. At a minimum, those Nebraskans who are defined as vulnerable should not be placed in solitary confinement and much more must be done to limit or eliminate long term solitary confinement.

Respectfully,



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Attorney at Law & Registered Lobbyist



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<sup>7</sup> *Id.* at 28.