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Use of ‘Controlled Movement Units’ Within NDCS facilities

SUMMARY OF AN INVESTIGATIVE REPORT
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EXECUTIVE SUMMARY

This report documents an investigation by the Office of Inspector General of the Nebraska Correctional System (OIG) into complaints about the operations of “controlled movement units” within the Nebraska Department of Correctional Services (NDCS, or Department). These units include the Intervention/Improvement Unit (otherwise known as Housing Unit 2C) at the Tecumseh State Correctional Institution, and the Behavior Intervention and Programming Unit (BIPU) at the Nebraska Correctional Center for Women in York.

The Intervention/Improvement Unit (IIU) in Tecumseh is a maximum security, controlled movement unit for adult men who “have a demonstrated history of institutional behavior that is disruptive to the effective operation of the facility.”¹ It was established in 2019. The BIPU launched in summer 2021, replacing restrictive housing at the women’s prison in York. It holds women who would otherwise be in restrictive housing or an acute mental health unit, or who meet criteria similar to those for the IIU.

The investigation first began as a result of complaints from the IIU in early 2020. As the investigation proceeded, information was gathered about the planned operations of a 384-bed, high-security expansion at the Reception and Treatment Center (RTC) in Lincoln, which is expected to mirror conditions on the IIU in many ways. This report also contains information and recommendations related to the RTC expansion.

At the conclusion of this investigation, the following were found:

1. The IIU and BIPU are not general population units, nor do they operate similarly to general population units. The new 384-bed expansion at the RTC will not be a general population unit, either, if operated as anticipated.
2. The IIU has not operated in accordance with program guidance.
3. NDCS has not consistently provided the IIU with necessary resources and oversight.
4. NDCS has not met the statutory requirement in Neb. Rev. Stat. § 83-173.

¹ “Program Overview” for Intervention/Improvement Unit, Nov. 12, 2019 original.

The OIG understands there is a need to sequester certain incarcerated individuals from the general population and recognizes the Department’s recent attempts to reduce the use of restrictive housing. People suspected of threatening or coercing other incarcerated individuals, or engaging in drug trafficking or similar activities, can jeopardize the safety and order of NDCS facilities. However, the Department should be transparent about its use of these more restrictive settings and realistic about its needs in effectively managing these units, and should establish clear paths to transition these individuals to the general population or to society in accordance with the law. To that end, the following recommendations are made:

BIPU Recommendation

1. Establish a real “yard” adjacent to the BIPU.

RTC Recommendations

2. Develop clear processes for determining who should be assigned to live in the new RTC unit and when they should be released to the general population.
3. Move carefully and deliberately in filling the new RTC unit.
4. Assign at least one full-time mental health position to the unit.
5. Incentivize positive behavior on the unit.

Recommendations for BIPU and IIU

6. Issue body-worn cameras to all floor staff in the new unit.
7. Ensure that all staff working the unit have adequate experience.
8. Provide information on controlled movement units in reports to the Legislature.
9. Clearly define the goals of these units and study their effectiveness in accomplishing these goals.

BACKGROUND

The origins of the Intervention/Improvement Unit (IIU) at the Tecumseh State Correctional Institution and the Behavior Intervention and Programming Unit (BIPU) at the Nebraska Correctional Center for Women in York can be traced back to efforts by the State of Nebraska to reduce its use of restrictive housing. These are two controlled movement units that are limited movement units that is not as restrictive as a restrictive housing units.

In 2015 the U.S. Department of Justice helped fund a project by the Vera Institute of Justice to assist NDCS in reducing its use of restrictive housing. Vera issued a report titled “The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the Nebraska Department of Correctional Services” the following year which included these recommendations, among others:

- *“Improve the conditions of confinement in restrictive housing units to reduce the negative effects of segregation, including by increasing out-of-cell time and recreation, minimizing isolation and idleness, and providing opportunities for rehabilitative programming;” and*
- *“Create a step-down program to encourage and facilitate successful transitions from restrictive housing to general population.”²*

The Challenge Program

After the Vera report, in 2017, NDCS began establishing “close management units” as part of what is called The Challenge Program (TCP). The program, at that time, included four phases through which certain individuals who were in restrictive housing could eventually transition back to the general prison population. The first two phases took place in the restrictive housing unit at the Tecumseh State Correctional Institution (TSCI). It was estimated that the time in those two phases would range from 19 to 24 weeks, during which individuals would take a non-clinical program called Moral Reconnection Therapy. The third phase, in Housing Unit 2B at TSCI, was estimated to last 17 weeks and required individuals to complete two additional non-clinical programs. The fourth phase, in Housing Unit 4B at the Nebraska State Penitentiary, was estimated to last 21 weeks and also consisted of two additional non-clinical programs.

Several complaints about this program were received and investigated. Most complaints were directed at the third phase, due to the limited out-of-cell time offered, issues with timely access to the required programming, and the overall question of whether or not this was a general population setting. Many men refused to participate in TCP due to it resulting in extended stays in restrictive housing, and concerns that they were expected to provide information about their gang associates to NDCS (thus being labeled “snitches”). For example, on one day, only 22

² <https://www.vera.org/downloads/publications/safe-alternatives-segregation-initiative-findings-recommendations-ndcs.pdf>.

people were enrolled in the third and fourth phases, despite those units having a combined capacity of 104. Observations and recommendations regarding the program were shared in the 2017 and 2018 OIG Annual Reports as well as in a memorandum from the OIG to Director Frakes dated June 21, 2018.³ How TCP was offered was eventually modified by the Department in November 2019. It is now only provided in the restrictive housing unit at TSCI.

As a result, some individuals continue to be recommended for TCP, including people who have been in restrictive housing for more than 2,000 days (more than five years). These men are told, “*Engagement in The Challenge Program is the pathway to a less restrictive housing assignment.*”⁴ More information on TCP is provided in a recent report on restrictive housing by NDCS.⁵

Move to IIU

When the delivery of TCP was modified in November 2019, NDCS continued to use the close management model by establishing the IIU to serve as a level between restrictive housing and general population units. It was placed in Housing Unit 2C at TSCI, which consists of 32 cells that can hold two individuals in each cell.

By establishing the IIU, NDCS was able to combine the two phases of TCP that were not being used to their capacity, as shared above. This made more efficient use of the department’s limited bed space, while also providing a transitional setting for those who were formerly in restrictive housing or about to be released from restrictive housing.

According to a memo from then-TSCI Warden Todd Wasmer, individuals would be placed in the unit for any of three reasons:

“An inmate is released from restrictive housing but is not ready to return directly to general population;

³ OIG memorandum to Director Frakes, June 21, 2018.

⁴ Long-Term Restrictive Housing review report for Inmate X.

⁵ https://nebraskalegislature.gov/FloorDocs/107/PDF/Agencies/Correctional_Services_Department_of/602_20220915-160524.pdf

“An inmate with behavioral problems that is in general population and is in need of a behavioral adjustment without the severity of being sent to restrictive housing; or

“Meets the criteria for placement in the IIU, as developed by NDCS and has been recommended for placement either by a Facility Warden or higher authority.”⁶

The memorandum also detailed who was able to approve a person’s placement in IIU, as well as how a person’s release from the program would be determined and carried out. In addition, it outlined activity restrictions on the unit, the feeding schedule (all meals in cells), and the unit’s daily operations.

At the same time Warden Wasmer also produced a “program overview” for the IIU.⁷ The overview included more detailed information on eligibility criteria, how movement within the unit would be controlled, requirements for staff in the unit (for example, that they have at least one year of correctional experience), a formal review process of inmate behavior, programming information and behavior expectations.

IIU in 2022

The original IIU overview has undergone numerous revisions since late 2019, the most recent of which was signed by current Warden Craig Gable in February 2022. Changes from the original 2019 document include:

- A sergeant position which was assigned to just the IIU/2C is now assigned to the entire housing unit;
- An extra staff member who worked on the 2C floor until 9 p.m. was removed;
- A second shift unit caseworker for 2C was removed;
- A second shift unit case manager for 2C and 2D was removed;
- The process of reviewing individuals on 2C was changed. Previously, a multi-disciplinary committee consisting of staff from 2C, mental health, program facilitators and TSCI administration was supposed to meet biweekly to review

⁶ November 21, 2019 Memorandum from Warden Todd Wasmer to TSCI staff.

⁷ “Program Overview” for Intervention/Improvement Unit, Nov. 12, 2019 original.

behavioral compliance and programming engagement of participants over the preceding 90 days. The new expectation is an informal review completed only by 2C staff, with no mention of the 90-day review period;

- A requirement that the multi-disciplinary committee retain meeting minutes (documenting challenges, solutions, and unresolved issues) was removed;
- Details of the unit incentive program, which were not originally included in the overview, were added; and
- More programs are listed as options for those living on the unit.

The removal of staff from the unit is a concern due to its impact on the existing staff in the unit and the difficulty of this population. The ending of the 90 day review component has caused confusion among staff and the incarcerated individuals in the unit, as well the deletion of established criteria for removal from the unit.

BIPU

In July 2021, NDCS changed the restrictive housing unit at the Nebraska Correctional Center for Women (NCCW) in York into what is now referred to as the BIPU. It remains the highest-security housing unit at that facility, and holds individuals who meet criteria similar to those for the IIU, as well as people in immediate segregation or who might otherwise be placed in restrictive housing or an acute mental health unit.

The most recent program overview, produced by NCCW Warden Angela Folts-Oberle, describes the BIPU as a controlled movement unit which provides for at least four hours out of cell each day, full property and canteen privileges, less physical restraints than in restrictive housing, meals in cells or the dayroom, and a weekly review by a multi-disciplinary committee and the warden or designee.⁸ The overview states the BIPU will house no more than 13 women. The unit consists entirely of single-person cells along a hallway, with a small dayroom which is the same size as a cell. The “yard” areas consist of three small, enclosed bays and will be discussed in greater detail later in this report. It is essentially the same as the restrictive housing unit with slightly more interaction and out of cell time for each individual should they choose to accept

⁸ “Program Overview” for Behavior Intervention and Programming Unit, Aug. 5, 2022 revision.

those opportunities. The unit is overseen on a day-to-day basis by a case manager who is also responsible for the adjacent mental health and protective management unit.

COMPLAINTS AND SCOPE

The OIG has received complaints about the IIU since soon after it opened in 2019. In general, the complaints alleged that the unit did not provide adequate out-of-cell time; that conditions were overly restrictive or did not comply with written guidance; that the units did not operate similarly to general population units, contrary to assertions by the Department; and that the processes for being assigned to or released from the unit were vague and opaque. A complaint from the BIPU in April 2022 raised similar allegations.

In investigating these complaints, it was the intent to determine whether the units were being operated in compliance with state statute and departmental requirements or guidance, to fully account for the use of these controlled settings, and to identify potential areas of improvement for the Department related to these units, should any exist.

The OIG visited both units (numerous times in the case of the IIU), spoke with incarcerated individuals and staff on several occasions, reviewed data and personal case files for many of the people housed in these units, examined video and reports from significant incidents on the IIU, and read meeting minutes from the former IIU multi-disciplinary committee, in addition to other valuable documents. In conjunction with this work, the Inspector General also offered a variety of ongoing feedback to facility and departmental administrators.

EXAMINATION OF ISSUES

Out-of-Cell Time

Nebraska statute prohibits “solitary confinement,” which it defines as “the status of confinement of an inmate in an individual cell having solid, soundproof doors and which deprives the inmate of all visual and auditory contact with other persons.”⁹ However, the law provides for the use of “restrictive housing.” Restrictive housing is defined as “conditions of confinement that provide

⁹ Neb. Rev. Stat. § 83-170.

limited contact with other offenders, strictly controlled movement while out of cell, and out-of-cell time of less than twenty-four hours per week.” In order to be considered restrictive housing, a setting must meet each of those three criteria. However, the law does not define “limited contact” or describe what qualifies as “strictly controlled movement.”

The IIU and BIPU can avoid meeting the statutory definition of restrictive housing by providing at least 24 hours per week of out-of-cell time. This equates to an average of 3.43 hours per day.

In 2020, there were days and sometimes combinations of days in which the IIU failed to provide adequate out-of-cell time and weeks when they did not reach 24 hours per week. TSCI ultimately began tracking out-of-cell time on the unit on a weekly basis. This data indicated that most weeks, the facility was meeting the 24-hour statutory threshold; however, these reports regularly indicated that there were exactly 4.5 hours of out-of-cell time each day for the unit, despite the numerous incidents and staffing issues that took place within that unit and the facility. TSCI later made changes to expand out-of-cell time each day to six hours, and that is the current practice on the IIU.

Due to a staffing emergency in place since late 2021, TSCI has regularly operated on a consolidated schedule with essentially no movement out of their cell for three days per week. As a result, six hours per day of out-of-cell time was necessary in order to reach the 24-hour threshold over a four day period. Incarcerated individuals reported that the unit was frequently not reaching that six hour threshold. In August, TSCI began to expand their operations by one additional day so that they had movement five days a week rather than four days a week.

In the BIPU, which is a more restrictive environment than the IIU, the program overview states “a minimum of 4-6 hours per day of out-of-cell time shall be provided.”¹⁰ The incarcerated individual in the BIPU who filed the complaint wrote in early April that four hours is “ALL we get, no more and usually less.” Due to the physical layout and highly controlled operations of this unit, staff shared that they must adhere to a strict schedule in order to provide the necessary out-of-cell time, particularly when the unit is full.

¹⁰ BIPU program overview.

STATUTORY REQUIREMENT

State statute tasks the NDCS director with ensuring that electronic records are maintained for each person committed to the department, including “time spent in housing other than general population.”¹¹ This requirement was adopted in 2015 through LB 598. The introducer, Sen. Paul Schumacher, testified that the bill arose out of issues which included the practice of “removing people from the general population and putting them into one or more levels of confinement for, sometimes, their protection, sometimes the protection of the facility, sometimes for it's hard to tell what.”¹² Testifying in favor of LB 598, NDCS Director Scott Frakes said this requirement “is a concept that I fully support and feel is necessary for the department to ultimately be successful. I do, however, question the ability to comply with this language without first updating the department’s computer systems.” In the fiscal note for the bill, NDCS noted that its biennial budget proposal included \$100,000 for an initial analysis of the Department’s computer system by an outside consultant to begin this process. After further review of the Department’s budget request, it appears the consultant was going to be looking specifically at implementation of an electronic health records (EHR) system.¹³ The Legislature has since appropriated more than \$2 million to NDCS to provide for electronic health records.¹⁴ However, development of this system is still in its early stages, and it was shared that it will likely take several years to complete.

The Nebraska Inmate Case Management System (NICaMS) includes a specific dashboard which is used to track data and information related to people’s time in a restrictive housing setting. The Department also has implemented a separate feature within NICaMS for tracking daily, individual out-of-cell time for people in the Department’s higher-security mental health units.¹⁵ The tracking page does not include out-of-cell time data for people in restrictive housing or those

¹¹ Neb. Rev. Stat. § 83-173.

¹² Judiciary Committee hearing, Feb. 20, 2015. Transcript at <https://www.nebraskalegislature.gov/FloorDocs/104/PDF/Transcripts/Judiciary/2015-02-20.pdf>.

¹³ Operations and Aid Budget Request, Agency 46 – Department of Correctional Services, 2015-17 biennium. Available online at: <https://das-nebs.ne.gov/public/faces/brdIndex.jsp>

¹⁴ State of Nebraska FY2019-20/2020-21 Biennial Budget Report, Legislative Fiscal Office, <https://nebraskalegislature.gov/pdf/reports/fiscal/2019budget.pdf>; and State of Nebraska FY2021-22/2022-23 Biennial Budget Report, Legislative Fiscal Office, <https://nebraskalegislature.gov/pdf/reports/fiscal/2021budget.pdf>

¹⁵ Individuals in these units are generally members of “vulnerable populations” – e.g. people with serious mental illness – and may not be placed in restrictive housing according to Neb. Rev. Stat. § 83-173.03. The Department tracks out-of-cell time for these individuals as a means of monitoring statutory compliance.

in the IIU, BIPU, or other highly controlled settings. Group-level information from these units is often captured in handwritten log books or other files at various facilities, such as the weekly reports from TSCI.

Neb. Rev. Stat. § 83-4,114, which resulted from the passage of Legislative Bill 598, requires the NDCS director to submit an annual report to the Legislature and the Governor with information about incarcerated individuals who were held in restrictive housing during the prior year. The bill also created a state working group on long-term restrictive housing. Prior to the working group’s termination in 2021, its members discussed the idea of expanding the restrictive housing annual report to include information on other highly controlled units.¹⁶ However, this was not a formal recommendation and has not happened as of this report.

Conditions and Standards

There are several differences between these units and typical housing units within NDCS. For example, men in the IIU receive all meals on the unit, may not access the TSCI gymnasium or larger outdoor yards, are allowed out of their cells only in groups of about 16, have limited work opportunities, may not attend religious services off the unit, do not have the same access to the facility library or law library, and have limited access to visitors. On the BIPU, people start out with similar restrictions and often no group interaction, then progress into three-person group settings, and can earn access to off-unit activities through an incentive program.

To provide additional context and background regarding the IIU, the chart below summarizes a petition that was signed by a majority of men on the IIU shortly after it opened, as well as the responses from then-Warden Wasmer. It provides further examples and detail about the complaints related to conditions on the unit in 2020:

PETITION COMPLAINT	WARDEN RESPONSE
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¹⁶ The Inspector General was not a member of the long-term restrictive housing work group, but was a regular participant in its meetings.

<p>Having to “earn” contact visits as an incentive.</p>	<p>Contact visits will remain as a behavior incentive</p>
<p>The lack of employment opportunities for those who reside in the unit. The petition pointed out that all general population inmates outside of their unit received \$1.21 per day, five days a week whether or not they have an assigned job and only four inmates in the unit have jobs and are paid this rate.</p>	<p>The jobs on the unit were increased from four jobs to eight jobs.</p>
<p>Having their cellmates chosen for them and the lack of televisions in some cells which is different than most individuals in restrictive housing.</p>	<p>Inmates have the ability to request different cellmates but safety concerns are taken under consideration and this may prevent some placements from taking place. A loaner television program will be implemented.</p>
<p>Being denied the opportunity to exercise their religion as other inmates in general population are allowed. The petition shared that they had no access to religious materials and were unable to spend one hour per week attending a religious service.</p>	<p>The current exercise/practice of religious beliefs was reviewed by the Religious Coordinator and found to be within the NDCS standards and guidelines. Individuals in the unit may have access to religious materials and individuals needing to adhere to a religious diet will be given that opportunity.</p>
<p>Canteen limits were lower than the general population canteen limits and additional canteen concerns.</p>	<p>Canteen limits were changed to mirror the general population limits of \$85 but no pop machine will be located on the unit and ice cream will continue to be an incentive.</p>
<p>Unit staff were abusing their power, authority and use of force options.</p>	<p>Staff will be held accountable for any violations of policy.</p>
<p>The mini-yard is a forced option for out-of-cell time, meaning that if someone wanted to be out-of-cell but their group time was in the mini-yard they either had to go to the mini-yard or stay in their room.</p>	<p>They will look at other options for times of inclement weather.</p>

Lack of a “body/entity” that resides directly over the unit and a lack of an explanation regarding the purpose and operation of the unit.	Unit Manager X is the Unit Manager that oversees the unit. In addition, when the unit was started every inmate within the unit was brought into an office and provided a memo and program overview that provided that information.
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Since the IIU opened, the OIG has communicated regularly with facility and departmental administration about similar conditions-related complaints and issues. Informal recommendations for how to address some of these complaints were offered during this time. The most common theme of the informal recommendations during this time was that the Department improve communication related to the unit. This included communication between departmental leaders, TSCI administration, unit staff and the people incarcerated in the unit. Other informal recommendations included following the guidelines for using seasoned and specially trained staff; properly recording interactions and having timely reviews between staff and incarcerated individuals; following through on the providing of programs and peer supports; addressing sanitation issues on the unit; and having staff comply with COVID mask policies.

Concerns were also expressed about the lack of body-worn cameras for unit staff. Body cameras can provide key audio and video evidence during incidents or interaction between staff and incarcerated individuals. The population in this unit and future units like it will consist of potentially violent and disruptive individuals and current staff expressed a need to capture these incidents with a body camera.

Craig Gable replaced Mr. Wasmer as TSCI warden in late 2021. In early May 2022, the Inspector General met with Warden Gable regarding ongoing questions about conditions and operations on Housing Unit 2C. During that meeting and in response to emailed follow-up questions, Gable confirmed the following:

- Law library access was available on Monday and Wednesday.
- There were two legal aids available to the IIU population, but only on Wednesdays if requested.

- Educational classes were provided Monday through Thursday for one hour each day, but only on the unit;
- One inmate was assigned as a teacher’s assistant to the IIU.
- Intentional Peer Support (IPS) specialists are incarcerated individuals who have been trained to be a type of peer mentor. The overview provides that individuals could request to meet with an IPS specialist but the program was not active at TSCI.
- Seven people on the IIU had work assignments, all cleaning porters.
- While NDCS policy states that individuals assigned to general population can attend group religious services, none of the individuals in the IIU are allowed to do so because their attendance would threaten the safety and good order of the facility.
- While some people on the unit were enrolled in in-cell, non-clinical programs (12 in Getting It Right, two in Hustle 2.0, and three in Courage to Change), no one on the unit was enrolled in the group programming options Thinking for a Change, 7 Habits on the Inside, or Wellness Recovery Action Plan. The IIU overview states these programs “will be offered ... based on availability of resources and subject to a sufficient number of participants.”¹⁷
- One person was participating in a clinical program as the result of a clinical recommendation.
- Two of the three unit staff had met the criteria in the overview for working on the unit, and no security staff assigned to the unit had met the criteria. The overview requires that staff assigned to the unit have one year of experience, above average performance evaluations, a minimum of four hours On-The-Job Training specific to the unit and “shall be encouraged to attend Motivational Interview Training.” (Information was provided that indicates that it is not uncommon for security staff to be assigned to the unit, one of the highest-security units in the system, almost immediately upon graduation from the Staff Training Academy.)

A meeting took place in July 2022 with NCCW Warden Folts-Oberle after receiving the complaint regarding that unit. The OIG noted the minimal outdoor space available to people

¹⁷ When the IIU began operations, issues quickly emerged on the providing of non-clinical programs to the population.

housed in several of NCCW's mission-specific units, including the BIPU and the adjacent mental health unit. The BIPU's covered "outdoor recreation" area consists of three small, covered bays that are surrounded on three sides by concrete walls; the fourth side is fenced and faces the back wall of the BIPU a few feet away. The area is quite dark with limited exposure to sunlight or even the wind. In addition, during the winter or hot summer months there is no indoor recreation area connected to the BIPU.

In reality, the BIPU is just the past restrictive housing unit in which some cell space was altered so that individuals or small groups of individuals could use those converted spaces to be offered opportunities to be out of their cell at least four hours per day. It is still a sterile and dismal unit in which individuals, while not technically considered on a restrictive housing status, are still in an environment that shares many similarities of the past restrictive housing unit. The staff do their best to engage with the incarcerated individuals and provide out of cell opportunities but the environment is not well suited nor designed for such efforts.

Comparison with General Population

The program overviews for the IIU and the BIPU state that conditions on both units should be "similar" to those in general population. The overview for the IIU also states that the unit "is a general population mission specific housing unit."

This begs the question: What is general population?

State statute and American Correctional Association (ACA) standards each reference "general population" but do not define the term.¹⁸ ACA standards indicate that general population does not include protective custody, special housing for people with serious mental illness, "step down programs" or "special management housing." NDCS defines general population as "All inmate housing areas that allow out-of-cell movement without the use of restraints, a minimum of six (6) hours per day of out-of-cell time, and regular access to programming areas outside of the living unit."¹⁹

¹⁸ Neb. Rev. Stat. § 83-173.03 and "Performance-Based Standards and Expected Practices for Adult Correctional Institutions, Fifth Edition."

¹⁹ 72 Neb. Admin. Code, ch. 1 § 002.05.

There are times that the IIU and BIPU have struggled to provide the appropriate hours of out-of-cell time. And while people on the IIU can move around the unit without restraints, as can many people in the BIPU, they are rarely allowed to leave the unit itself.²⁰ When the IIU was started individuals were allowed to attend educational classes in the education building but this was later rescinded. On the IIU, access to off-unit programming is rare. In June Warden Gable shared that there was one individual who was receiving clinical programming outside of the housing unit. In the BIPU, residents can earn access to off-unit activities through an incentive program. Overviews for both units state that people assigned to these units “shall not have more than incidental verbal or other contact with any other segments of the facility population” except for specific activities.

By comparison, consider the department’s protective management units, which house incarcerated individuals assigned to protective custody (PC) due to risk of harm by others. The conditions for those in PC are significantly freer than those in the IIU or BIPU. People in protective custody have regular access to the main library, dining, and other common areas, albeit on a special schedule, while those in the IIU and BIPU do not. Despite this, the OIG is unaware of any attempts by the Department to categorize protective management as a form of general population.

In fact, NDCS data clearly distinguishes protective management, mental health units, the IIU and BIPU, and other “mission-specific” housing units from general population units.²¹ A common feature in most (but not all) of these units is separation from the prison population at large, and more restrictions on how and when they are able to access various services within the institutions.

Entering and Exiting Process

The processes by which people are placed and retained on these units, and the reasons someone might be assigned to live there, was also reviewed.

²⁰ TSCI currently only restrains individuals when they leave the unit if there is a security concern.

²¹ “Bed Reports,” NICaMS data accessed via Oracle Business Intelligence.

Assignment to the IIU can be based on “security threat group” (often gang) activity, a significant number of misconduct reports in the past year, or previous assignment to segregation within the past year for a “serious act of violent behavior,” “threats or actions of violence likely to destabilize the institutional environment,” and “incitement or threats to incite a group disturbance.”²² However, this is not an exhaustive list, and program guidance clearly states that other factors may be considered. Movement into the IIU from any housing assignment other than restrictive housing is made by the Warden after consultation with the Deputy Director of Prisons.

The stated reasons for assignment to the BIPU are similar, although the list does not include misconduct reports but does include “Serious and/or multiple incidents of PREA (Prison Rape Elimination Act) violations.”²³ The BIPU also serves as the York facility’s immediate segregation unit, and shift supervisors have authority to place anyone in the BIPU based on the listed factors. The warden or designee reviews all placements within 72 hours and on a weekly basis thereafter.

In interviews with staff, administrators and people housed in these units, the impression was gained that there are clear differences between the IIU and BIPU in the level of attention given to transitioning people back to the general population. With limited exceptions, people on the BIPU were held there for relatively short periods of time, or staff were consistently working with them with the explicit goal of helping them transition off the unit. For those on the IIU, likely due to the prevalence of suspected gang activity among men, lengths of stay on the unit stretched on for multiple months if not a year or longer, with limited communication from staff about when or how they might return to the general population.

For continued assignment to the IIU, “inmates ... shall have their custody level and assignment to the IIU reviewed in accordance with established classification procedures,” according to the program overview. Unit staff are also tasked with informally reviewing each person assigned to the IIU, and are supposed to communicate with individuals relative to their progress and document those reviews in the Nebraska Inmate Case Management System (NICaMS). A review

²² “Mission Specific Housing Overview” for Intervention/Improvement Unit, Feb. 15, 2022 revision.

²³ BIPU program overview.

of these “inmate contact notes” and interviews with staff and men living on the unit showed that this was not happening consistently, likely due to staffing issues. Unit staff have made steps to improve, but continue to grapple with persistent staff shortages at TSCI, along with the decreasing of positions assigned to the unit.

Previous versions of the IIU program overview stated specific criteria people must meet in order to move off the unit. This information is no longer included in the manual, which likely contributed to the increase in complaints. Unit staff continue to review the past 90 days of behavior and use that as part of their recommendation for removal, even though that is not specifically spelled out in the current policy. Many men in the unit use the 90 days as a guidepost for their behavior and point to that when making their case for removal.

Typically the unit manager compiles a memorandum each week that includes a spreadsheet with specific information on the individuals being reviewed for removal from the IIU, including the number of days they have been in the unit, the number of misconduct reports they have received during that time, the reason they were placed on the unit, and the rationale for the recommendation to leave or remain on the IIU. A review of these documents from June showed 86 cases which were reviewed.²⁴ Of those, one was waiting for a bed to be available elsewhere within NDCS after being recommended for removal during a review the previous month. Of the remainder, 14 were recommended for removal by the unit manager. Of those 14 removal recommendations, 10 were overridden by the warden.²⁵ Of the four that were removed, one was actually leaving the custody of NDCS in the next week and ultimately discharged directly to the community from the IIU. Contrary to the program overview language, there appeared to be no connection between the classification process and the decisions to continue or discontinue assignment to the unit.

LB 598 required departmental rules and regulations to “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* [OIG emphasis added].” In other words, if the IIU is not a general population unit, it would appear that state statute requires NDCS to offer

²⁴ Some individuals are reviewed more than once a month due to their length of time in the unit.

²⁵ As previously shared the Warden has to consult with the Deputy Director of Prisons regarding his actions.

individuals housed there with personalized plans to transition off the unit. There has been no indication given that this is taking place in any substantive way. There is also no system set up for an individual to appeal his continued placement in the IIU, even if it stretches on for months or even beyond a year. If an individual is in a restrictive housing placement, there are regular reviews by a multi-disciplinary review team and the Director of NDCS has to sign off on extending individuals in those settings for more than a year.

FUTURE OF IIU

In 2019, NDCS requested and received \$49 million to build a separate unit that would contain 384 high-security beds at what was then called the Lincoln Correctional Center, now RTC. Director Frakes described the future use of these beds on a number of occasions to the Legislature, including in March 2019:

“This project will provide correctly designed general population [OIG emphasis added] living space for high-security inmates that demonstrate risk to others and cannot be safely housed in any existing general population living units within NDCS. This population engages in assaults, directs violence against others, introduces dangerous contraband, and/or other high-risk behaviors. Because of our current physical plant limitations, these are inmates who cycle in and out of restrictive housing with increasingly longer stays. High security general population housing will allow NDCS to offer meaningful programming, treatment, and other interventions that are difficult or impossible to achieve in a restrictive housing setting.”²⁶

It is anticipated the transfers to the new 384-bed unit at the RTC will begin to take place in October. The Department likely intends to move many (if not all) individuals from Housing Unit 2C into the new unit, and that it will be operated similarly to the IIU.

During a recent tour of the unit, RTC Warden Taggart Boyd said food service, programming, and medical and mental health assessments would be provided within the unit, and that only no-contact visits via live video would be allowed. While housed there these men will not leave the unit for any reason except in extreme circumstances, such as a medical emergency. The unit itself is divided into four separate galleries that will each house 96 individuals, with two outdoor

²⁶ Appropriations Committee hearing, March 18, 2019. Transcript available at: <https://www.nebraskalegislature.gov/FloorDocs/106/PDF/Transcripts/Appropriations/Agency%2046%20Dept.%20of%20Corrections%203-18-19.pdf>

“yards” consisting solely of a concrete slab with tables and chairs for seating and some recreational equipment. Each gallery will have two tiers of housing around a large open area or “dayroom.” Some of the cells will be individual cells, but a majority will be double-bunked. If fully occupied, the number of people housed in this single unit will be nearly half the population of the Omaha Correctional Center.

If the population of each gallery is divided into two groups, the result would be four groups rotating through each yard. At any given time, just one group would be in the shared yard, two groups would be in their respective dayrooms, and a fourth group would be locked down. If the unit is open 12 hours per day, including lockdowns for institutional “counts,” it has been shared that the most that any group could be out of their cells is six hours per day. However, with incidents or other delays or interruptions which regularly take place in a prison setting, that out-of-cell time would regularly be reduced. The out-of-cell time could potentially be increased if the unit is opened beyond 12 hours.

Policies are still being developed regarding eligibility for the unit and removal from the unit, but it is understood that it likely will be connected to a classification decision. The current classification process includes the use of a classification tool and a relatively new secondary tool used to determine a person’s “Factored Custody Level.” People are reclassified every six to 12 months, depending on proximity to their release date, and can ask for a special reclassification due to a significant event, such as the person completing a required clinical program. The current classification system provides for custody levels ranging from maximum security (1X) to community (4B, otherwise known as work or educational release). It is uncertain at this time whether NDCS will add an additional level of maximum custody which would result in placement in this specific unit.²⁷ The NDCS classification process is currently being studied by the Nebraska Center for Justice Research at the University of Nebraska at Omaha with a report expected in March 2023,²⁸ although it is unclear whether any classification changes related to the RTC expansion will be reflected in this report.

²⁷ As of July 26, 2022, a total of 1,214 people in NDCS custody were classified as maximum security. Additional information regarding how the new 384 bed unit will impact the maximum custody needs of NDCS was included in the 2022 OIG Annual Report.

²⁸ The report was originally planned to be completed by September 2022.

Safety and Security Concerns

For men coming from Housing Unit 2C, conditions in the new RTC unit will likely be comparable to what they currently experience. The same will not be true for people coming from other units and facilities within NDCS. For example, those living in housing units 2 and 3 at the Nebraska State Penitentiary are accustomed to being out of their cells throughout the day, with access to a grass yard, a gymnasium, group religious services, contact visitation, a library, separate program space and other services available to people in the prison's general population. Virtually all of this would be unavailable to them at the RTC. Several NDCS staff members and administrators who would almost certainly be involved in the process of transferring individuals into the new unit have acknowledged the potential safety and security issues that could arise during this transition.

Previously, NDCS attempted to turn a restrictive housing gallery at TSCI into a maximum custody general population unit. The 2016 OIG Annual Report described what happened with that attempt:

“However, the change did not succeed for a number of reasons. The primary reason was that inmates were told that they were in a general population setting yet it was known to them as a restrictive housing unit. There were significant differences between SMU West and other general population areas, including day room space, yard space, access to such items as ice machines, and other definite differences. This upset the inmates who were residing there which resulted in continuous difficulties between inmates and staff. The population was eventually decreased, but it was still a restrictive housing unit that was housing general population inmates. After many months and many staff assaults, the unit was converted back to restrictive housing on April 19, 2016. Director Frakes acknowledged the lack of success of their plan in an April 21, 2016 letter to then-Senator Les Seiler and stated that “I will not risk any further injuries to staff by continuing to manage a maximum custody population at SMU-W.”²⁹

The staff members said they did not know the plans for transferring people into the new unit. The understanding is that many of these details are still being ironed out. The RTC has begun selecting the staff who will manage and otherwise be assigned to the new unit. It also continues

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https://nebraskalegislature.gov/FloorDocs/104/PDF/Agencies/Inspector_General_of_the_Nebraska_Correctional_System/600_20160915-141014.pdf (page 51).

to incorporate an influx of new staff who were hired following significant pay increases that were enacted at the start of 2022. Nonetheless, the RTC and TSCI remain under staffing emergencies, with limited movement up to three days per week.

Warden Boyd said his intent is to staff the new unit with some of the more experienced correctional officers available to him. However, seasoned staff are limited in number due to the high turnover NDCS has experienced for many years, particularly in 2021.³⁰ The RTC also requires seasoned staff to help run its other units, which currently include a restrictive housing unit, a high-security mental health unit, and nine intake units which house incarcerated individuals who are all technically classified as maximum security.

FINDINGS

1. The IIU and BIPU are not general population units, nor do they operate similarly to general population units. The new 384-bed expansion at the RTC will not be a general population unit, either, if operated as anticipated.

NDCS rules and regulations define general population as “All inmate housing areas that allow out-of-cell movement without the use of restraints, a minimum of six (6) hours per day of out-of-cell time, and regular access to programming areas outside of the living unit.” The BIPU does not typically offer this much out-of-cell time; and while the IIU has made attempts to offer six hours per day, this is generally the maximum on that unit, not the minimum. Residents of these units (although not all in the BIPU) may have the ability to move within the units without restraints, but have essentially no ability to move throughout the institution. Access to off-unit programming is very limited – based on incentives at the BIPU, and virtually nonexistent in the IIU.

In the new unit at RTC, as previously explained, providing a consistent schedule of six hours out of cell per day may prove to be a challenge. In addition, NDCS has indicated that any programming, and all other out-of-cell movement, will occur within the unit. Therefore, it is

³⁰ Issues with high turnover at NDCS have been documented in numerous OIG reports, including the 2021 Annual Report.

clear that the unit will not be a general population setting as defined by NDCS. However, it is also not a restrictive housing unit as defined by state law or NDCS. It is rather somewhere in-between and may ultimately end up with most of the men being locked down around 18 hours each day.

2. The IIU has not operated in accordance with program guidance.

In part due to poor communication, planning and internal oversight, the IIU has rarely met the standards established on paper. Conditions, programming, out-of-cell time, and the process for determining who should remain on the unit – each of these aspects of the IIU have differed (at times significantly) in practice compared with written guidance. A complaint from the BIPU in April 2022 raised similar allegations.

3. NDCS has not consistently provided the IIU with necessary resources and oversight.

Staff on the IIU and BIPU are faced with significant challenges every day due to the nature of these units and the populations living there. Over time, written guidance for the TSCI program has whittled away at staffing levels and procedural protections on the IIU, creating further difficulties for unit staff.

RTC leadership appear to understand the issues they will face in opening the new unit. However, this is a large expansion of the type of high-security environment already in place on the IIU. Presuming that individuals who are currently in general population units will be moved into the new RTC unit, this enhances the importance of effective security, communication and smooth operations.

4. NDCS has not met the statutory requirement in Neb. Rev. Stat. § 83-173.

State statute tasks the NDCS director with ensuring that electronic records are maintained for each person committed to the department, including “time spent in housing other than general population.”³¹ Currently, NDCS does not maintain electronic records of out-of-cell time data for people in the IIU, BIPU, or other highly controlled settings.

³¹ Neb. Rev. Stat. § 83-173.

RECOMMENDATIONS

BIPU Recommendations and NDCS Response

1. Establish a real “yard” adjacent to the BIPU. This unit houses women with serious mental illnesses. While they should be encouraged to transition off the unit and into a less-restrictive environment, this can be a time-consuming process and is not an option for everyone on the unit. The covered, enclosed “outdoor” spaces available to them currently may be considered inhumane by some observers and participants, particularly for those with long stays. NDCS should request funds for this purpose in the upcoming biennial budget.

NDCS Response: NDCS Engineering will be tasked with determining the scope and estimated costs of renovating the enclosed outdoor space outside of the NCCW BIPU.

OIG Response: Modification accepted. The OIG will request an update on this at the end of 2022.

RTC Recommendations

2. Develop clear processes for determining who should be assigned to live in the new RTC unit and when they should be released to the general population. These processes should be written in policy, should be in place prior to the unit’s opening, and should be followed. Individuals currently housed in the IIU and other settings within NDCS should be reviewed according to the new process before being moved to the RTC unit.

NDCS Response: Reject: The new 384 bed unit at RTC is designated as maximum custody housing. Department administrative/management team members retain the right to determine facility and unit assignments consistent with an individual’s custody classification and established agency policy.

3. Move carefully and deliberately in filling the new RTC unit. The Department should consider gradually opening one or two galleries at a time before moving people into the third and fourth galleries. Particular caution and consideration should be exercised in moving individuals into this unit who are currently housed in the general population. The unit should be fully and consistently staffed from the beginning.

NDCS Response: Accept: This is an industry standard, best practice.

4. Assign at least one full-time mental health position to the unit. This unit will be about half of the capacity of the Omaha Correctional Center, and the population has many challenges that are likely to need more consistent mental health care and observation than the normal population. This may assist with reducing significant incidents in the unit.

NDCS Response: Reject: Allocated mental health positions are assigned at the discretion of the department chief psychologist for mental health services under the supervision of the department medical director.

5. Incentivize positive behavior on the unit. One goal of these controlled movement units is to reduce the state's reliance on long-term restrictive housing. However, placement in restrictive housing is essentially the only alternative if someone engages in serious misconduct on the IIU. One way to limit misconduct is to create a sense of positive progress within the unit.

Specifically, the OIG recommends that the number of porter positions per incarcerated individual be increased in the new RTC unit compared with the IIU, and people housed in the new unit be able to access further incentives based on compliance with departmental rules and participation in programming and other pro-social, positive activities.

NDCS Response: Reject: Positive behavior is recognized in a variety of ways throughout the agency. Wardens have discretion to implement incentives consistent with the nature of their facility and established department policy.

6. Provide for an appeal process for placements in the new RTC unit that extend beyond six months. Unlike restrictive housing placements where there is policy that has established a system for regular reviews and an appeal process, there is not a clear process set up for appealing one's continued placement in the IIU. As part of the policies for the new RTC unit, a documented appeal process should be established whereby an individual who has been in the new RTC unit for six months or longer can file a placement appeal to either the Deputy Director of Prisons or the Director of NDCS.

NDCS Response: Reject: Facility/unit assignment is not a classification decision and not subject to appeal.

Recommendations for BIPU and RTC Units

7. Issue body-worn cameras to all floor staff in the new unit and the BIPU. Security and unit staff who work in these units are or will be interacting with high-risk individuals, including some who have previously assaulted or had negative interactions with staff. Body-worn cameras would help the Department ensure accountability among incarcerated individuals and staff.

NDCS Response: Reject: Expanding the use of body worn cameras is subject to negotiation and funding.

8. Ensure that all staff working the units have adequate experience. This should include, at a minimum, six months of correctional experience and additional training specific to the unit.

NDCS Response: Reject: Post assignments are completed consistent with department policy and applicable labor contracts.

9. Provide information on controlled movement units in reports to the Legislature. NDCS is already required to track data on individuals who spend time in housing other than the general population. This information is helpful context related to the Department's activities and

should be included in future quarterly reports to the Legislature and in the Restrictive Housing Annual Report.

NDCS Response: Reject: Neither the NCCW BIPU or the RTC 384 unit are designated as restrictive housing.

10. Clearly define the goals of these units and study their effectiveness in accomplishing these goals. Written overviews for the IIU and BIPU indicate these units are intended to serve as more than just “restrictive housing light.” If that is the case, NDCS should commit to thorough, ongoing review of outcomes from these units, utilizing the Department’s internal research capabilities or external research entities. Any review should examine impact on residents’ institutional behavior and successful transition into the community, or the general population for those serving life sentences.

NDCS Response: Reject: As with all department facilities and housing units, routine monitoring of the NCCW BIPU and the RTC 384 will be done by various administrative/management team members.

In the final paragraph in the NDCS response Director Frakes wrote:

“As a point of clarification, both of these units are designated as mission specific housing. As of this writing, the new 384 bed unit at the Reception and Treatment center is designated as maximum custody housing, not as a mission specific housing unit.”

A primary point of this report is that while the Department can call the new unit a maximum custody unit it is different than a regular maximum custody unit that is considered general population. As shared earlier in the report, ACA standards indicate that general population does not include protective custody, special housing for people with serious mental illness, “step down programs” or “special management housing.” Although the Department is stating that the RTC 384 unit is not a step down program or anything other than a maximum custody unit it definitely seems to be the case that it will be a setting between restrictive housing and general population. The Department defines general population as “All inmate housing areas that allow out-of-cell movement without the use of restraints, a minimum of six (6) hours per day of out-of-

cell time, and regular access to programming areas outside of the living unit.”³² The Department has been quite clear that the individuals in the RTC 384 unit will not move outside of that unit which indicates that this unit will not meet their own definition of general population. It is hoped that the NDCS answer to this concern is to not just redefine the definition of general population to meet what is taking place in this new high security unit.

The OIG has recognized that there is a potential need and use of the RTC 384 unit. However, it is different from other settings and this should be acknowledged by the Department. Their refusal to do this is puzzling. It also is likely to set up a situation in which the individuals assigned to this unit take issue with their placement, treatment and lack of a pathway out of the unit.

³² 72 Neb. Admin. Code, ch. 1 § 002.05.