

CORRECTIONS

THE COMMISSIONER

Inmate Discipline

Adopted Repeal and New Rule: N.J.A.C. 10A:4-2.3

Adopted Amendments: N.J.A.C. 10A:4-1.1, 1.3, 2.1, 4.1, 5.1, 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, 9.5, 9.11, 9.13, 9.14, 9.17, 9.18, 9.24, 9.25, 11.2, and 11.7

Adopted New Rules: N.J.A.C. 10A:4-3.3 and 10A:16-14

Adopted Repeals: N.J.A.C. 10A:4-1.2, 1.4, and 2.2

Proposed: July 20, 2020, at 52 NJR 1375(a).

Adopted: January 15, 2021, by Marcus O. Hicks Esq., Acting Commissioner, Department of Corrections.

Filed: April 15, 2020, as R.2021 d.046, **with non-substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 30:1B-6 and 30:1B-10.

Effective Date: May 17, 2021.

Expiration Dates: April 3, 2025, N.J.A.C. 10A:4; and
July 26, 2024, N.J.A.C. 10A:16.

Summary of Public Comments and Agency Responses:

The official comment period ended September 18, 2020, and comments were received from the following individuals and organizations:

1. Tess Borden for the ACLU-NJ.
2. Julius Boeglin, Northern State Prison.
3. Kevin Conley, East Jersey State Prison.
4. Sonny Corleone.

5. Anthony DeFazio, Northern State Prison.
6. Alonzo Hill, New Jersey State Prison for Inmate Legal Association Inc.
7. Kenworth Laurier, East Jersey State Prison.
8. James Ofeldt, New Jersey State Prison.
9. Martin L. Rogers, Northern State Prison.

A summary of the timely submitted comments and responses of the Department of Corrections (“Department” or “DOC”) follows. The comments on the amendments include a number of topics, many of which are addressed by one or more commenters. The Department has grouped related comments into major topics as they appear below and provided responses to each topic. The number(s) in parentheses following each comment identifies the commenter(s) listed above.

1. COMMENT: The commenter notes that it is evident that the Department intentionally left out a provision to place inmates found guilty of committing prohibited acts in Category C and D in the Restorative Housing Unit (R.H.U.) and appreciates it as a measured and just determination. (7)

RESPONSE: The Department appreciates the recognition by the commenter that its efforts implementing the requirements of the Isolated Confinement Restriction Act, N.J.S.A. 30:4-82.5 through 82.11 (the Act) have been measured as the DOC has taken steps to carefully interweave less restrictive sanctions and rehabilitative activities into the disciplinary process.

2. COMMENT: The commenter recommends adding “using removal of tablet or similar handheld device privileges” as a sanction for a period not to exceed five days to the list of on-the-spot corrections at N.J.A.C. 10A:4-7.3(a)5 in a manner similar to that included at N.J.A.C. 10A:4-5.1. The commenter states that this would be a sanction with real consequences that may actually result in more positive inmate behavior as inmates care most about access to, and use of, their radios, televisions, and tablets. (2)

RESPONSE: The Department appreciates the commenter's insight and recommendation and will add "loss of tablet or similar handheld electronic device" to the list of sanctions for on-the-spot corrections at N.J.A.C. 10A:4-7.3(a)5, as suggested.

3. COMMENT: The submissions from several commenters included complaints about the conditions of confinement, the contents of interoffice memoranda, individual inmate situations, specific events, individual correctional facilities, Department staff and inmate adherence to existing rules. Remarks were also included regarding the likelihood that the proposed rules will not be followed by correctional facility staff. (5,6, 8, and 9) One commenter submitted attachments including copies of inmate remedy system forms, inquiries, and grievances. (8)

RESPONSE: N.J.A.C. 10A:1-4.1 provides an opportunity for the submission of public comments on the rules, as proposed. Comments, complaints, or grievances about matters not included in the proposed rules or involving the conditions of confinement may be addressed using mechanisms in place, such as the Inmate Remedy System described at N.J.A.C. 10A:1-4.1 through 4.9 and in the inmate handbooks for reporting complaints and grievances to the Institutional Classification Committee (ICC) for consideration and remedy and are outside the scope of the rulemaking and, therefore, will not be addressed. Such complaints and grievances can be submitted to the ICC on paper forms or electronically from kiosks available throughout each correctional facility or through handheld tablets available by subscription. Illiterate inmates are aided with preparation of such submissions, as needed and described in the inmate handbooks.

4. COMMENT: The commenter commends DOC's proposed changes at N.J.A.C. 10A:4, which contain some important provisions. The commenter also states that the amendments contain significant omissions that risk violating the Act's substantive requirements, as well as introduce changes that may contravene the spirit of the Act. (1)

RESPONSE: The Department appreciates recognition that the amendments to the rules on Inmate Discipline contain important provisions but disagrees that there have been significant omissions risking violating the requirements of the Act's substantive requirements, and stands by the changes proposed and designed for implementation of the Act with integrity and in the best interests of the safety of the inmate population as a whole along with the safety of Department staff assigned to correctional facilities.

5. COMMENT: The commenter outlines what it deems to be omissions and offers modifications it feels are needed for both the amendments proposed at N.J.A.C. 10A:4, along with the corresponding provisions at N.J.A.C. 10A:9. It strongly urges the DOC to make changes to its rulemakings to reflect critical components of the Act, even if those changes are considered "substantial" and, therefore, in "variance" with the rulemaking, such that they require public re-noticing pursuant to N.J.A.C. 1:30-6.3(a) and/or (c).
(1)

RESPONSE: The Department disagrees that any perceived omissions and other modifications outlined by the commenters and others present changes considered "substantial" and in "variance" with the rulemaking in the Act, such that they require public re-noticing pursuant to N.J.A.C. 1:30-6.3(a) and/or (c). The Department has gone well beyond the requirements of the Act by, among other things implementing additional activities for the new Restorative Housing Unit and modifying the Close Custody units at N.J.A.C. 10A:1-4.1. In addition, this rulemaking added a new Drug Diversion Program, which will utilize only five to 15 days for sanctions in the Adjustment Unit (A.U.) when 20 are permitted and removed mandatory sanctions for Category A through D infractions. This adoption notice does include technical changes and language additions to clarify the meaning of the rule as proposed, but the notice of adoption is not in variance with the proposed rules published at N.J.A.C. 10A:1-4.1. Therefore, a new notice of proposal is not necessary as described at N.J.A.C. 1:30-6.3(a) and/or (c).

6. COMMENT: The commenter commends the DOC on the Chapter 4 rulemaking for limiting A.U. sanctions to Category A offenses only. This aligns with the spirit of the Act, which requires isolated confinement as a disciplinary sanction to be reserved for the most serious offenses and used sparingly. The commenter states that in practice, the availability of A.U. sanctions are still overly broad because it applies to an expansive Category A list and N.J.S.A. 30:4-82.11.b(2) specifically provides that isolated confinement “shall be limited to when an inmate commits an offense involving violence, escapes or attempts to escape, or poses a threat to institutional safety.” The commenter asserts that an A.U. sanction must meet this standard. It should not be available (but not mandatory) only for Category A offenses for the following five proposed Category A offenses because they are not violent or threatening to institutional safety:

- *.008 abuse/cruelty to animals;
- *.012 throwing bodily fluid;
- *.155 adulteration or tampering of food or drink;
- *.253 engaging in or encouraging group demonstration or work stoppage; and
- *.704 perpetrating frauds.

The commenter also states that A.U. sanctions should be available in some cases for the following five Category A offenses only when the Disciplinary Hearing Officer makes an explicit finding that the particular act poses a threat to institutional safety:

- *.006 extortion;
- *.009 misuse of electronic communication device capable of transmitting message that is not authorized at the facility;
- *.215 possession with intent to distribute prohibited substances or drugs;
- *.216 distribution or sale of prohibited substances or drugs; and
- *.360 unlawfully obtaining or seeking to obtain personal information pertaining to a victim. (1)

7. COMMENT: The commenter states that proposed prohibited act *.803, attempting or aiding another person in committing any Category A or Category B offenses, should only be eligible for A.U. sanctions for attempted Category A offenses and only if the underlying offenses and the attempt to commit them involve violence, escape, or a threat to institutional safety. (1)

RESPONSE TO COMMENTS 6 AND 7: While the criteria for placement in the A.U. is included at N.J.A.C. 10A:5-8.1, it appears that the rules associated with imposing (A.U.) sanctions could include the criteria as well, for added clarity. The Department will include the following language at the end of N.J.A.C. 10A:4-5.1(a) in this adoption notice to clarify criteria that must be applied when imposing A.U. sanctions. The imposition of a sanction involving A.U. time is not mandatory for Category A infractions and shall be:

- Based on clear and convincing evidence;
- Limited to infractions involving violence, escapes or attempts to escape, or posing a threat to institutional safety;
- Based on a finding of guilt;
- When less restrictive interventions would be insufficient to reduce the substantial risks of serious harm; and
- Approved by the correctional facility Administrator, or designee. (See N.J.S.A. 30:4-82.8.a(1).)

8. COMMENT: At proposed N.J.A.C. 10A:4-4.1(a)1, the commenter states that the rulemaking includes *.803, attempting or aiding another person in committing any Category A or Category B offense and it is unclear why the attempted offense is a higher category than the underlying offense. This should refer to attempted Category A offenses only, or else the offense should be downgraded to a Category B. (1)

RESPONSE: The existing language set forth for prohibited act *.803 in Category A and B has been in place since 2016 without incident. In this rulemaking, this language was simply proposed to be recodified

without change as a sequencing change at N.J.A.C. 10A:4-4.1(a)1xxiv and (a)2xxiv due to changes to other prohibited acts. Sanctions for prohibited act *.803 are applied to either Category A or B based on the underlying infraction. For example, Category A sanctions are not applied when an inmate is found guilty of attempting to commit, aiding another person to commit, or making plans to commit any Category B offense. In such instances Category B sanctions are applied.

9. COMMENT: A commenter suggests that the DOC might consider designating three subcategories of Category A offenses: 1) those that are eligible for Adjustment Unit (A.U.) sanctions in all circumstances because the charge necessarily involves violence, escape, or a threat to institutional safety; 2) those that may be eligible for A.U. sanctions upon an additional finding; and 3) those that are not eligible for A.U. sanctions. The commenter also states that it would be even better to downgrade offenses that are statutorily ineligible for A.U. time to Category B. (1)

10. COMMENT: The commenter states that the proposed rule at N.J.A.C. 10A:4-5.1(d), if it is retained, should be modified to clarify that repeat occurrences of specific Category B infractions that result in a Category A charge shall not be sanctioned with A.U. time. (1)

RESPONSE: The Department believes that the Response to Comment 6 and the criteria for imposing A.U. sanctions mitigate the need for the separation of Category A prohibited acts as suggested and mitigate the need for A.U. sanctions for infractions involving violence, escapes or attempts to escape, or poses a threat to institutional safety.

11. COMMENT: A commenter commends the DOC for limiting Restorative Housing Unit (R.H.U.) sanctions to offenses in Categories A and B, such that Categories C through E cannot be sanctioned with restorative housing unit assignments. However, the purpose of reserving A.U. and R.H.U. sanctions for the most serious charges is undercut by the DOC's change to upgrade the seriousness of over a dozen offenses, thereby significantly expanding Categories A and B. These upgrades are not justified by the

letter or spirit of the Act, undermine the rulemakings otherwise commendable purpose, and should be rejected. We suggest rejecting these proposed upgrades in both Chapter 4 and Chapter 9 provisions, although we identify them by their Chapter 4 citations for ease. (1)

RESPONSE: In the spirit of the Act, the Department voluntarily changed rules for Category A through D offenses with respect to removing the required minimum R.H.U. sanctions, as well as the length of those sanctions as follows to amend sanctions as follows:

- In Category A, the minimum of 181 days was deleted (the maximum of 365 days remains);
- In Category B, the minimum of 90 days was deleted, and the maximum of 180 days was reduced to 120 days;
- In Category C, the minimum of 31 days was replaced by the potential for no R.H.U. sanction (the maximum of 90 days remains); and
- In Category D, the minimum is no R.H.U. sanction (the maximum of 30 days remains).

In modifying or removing the more restrictive sanctions, the Department found that the remaining sanctions for some prohibited acts would not be significant enough to deter repeated or escalation of offenses to more serious infractions. In an effort to balance the seriousness of infractions with sanctions that will deter repeated or escalation of offenses to more serious infractions, certain offenses have been upgraded. The Department hopes the commenter can appreciate why these efforts to deter repeat or escalating infractions have been made for the safety and security of all individuals that work in or are assigned to correctional facilities.

12. COMMENT: At N.J.A.C. 10A:4-4.1(a)1, the commenter states that the DOC proposes upgrading a full 10 Category B offenses to Category A, meaning it has deemed isolated confinement a permissible disciplinary sanction for each of them. These upgrades are inappropriate. As an example, it is unclear why “cruelty to animals” is now considered among the most serious offenses possible, especially given the

dearth of animals in the prison setting and is classified as the same severity as killing (*.001), assault with a weapon (*.003), and sexual assault (*.050), which may trigger criminal liability. If anything, the DOC should narrow the Category A offenses to those the Act contemplates as appropriate for isolated confinement sanctions, as described above. It should not instead expand the list. (1)

RESPONSE: The cruelty to animals prohibited act applies to cruelty to dogs involved in special service dog programs at a very limited number of correctional facilities. The Department believes that the Response to Comment 6 and the criteria for imposing A.U. sanctions to infractions involving violence, escapes or attempts to escape, or poses a threat to institutional safety mitigates the need for the modification suggested.

13. COMMENT: The commenter states that at N.J.A.C. 10A-4.1(a)1, *.215 and *.216, possession with intent to distribute and distribution of drugs, are among the proposed Category A upgrades. In light of the creation of the Drug Diversion Program, these should be downgraded to Category F offenses at N.J.A.C. 10A:4-4.1(a)6, to make the person eligible for that program, as appropriate. (1)

RESPONSE: The Department recognizes that inmates that distribute addictive substances may also have a use disorder and voluntary substance disorder treatment is available outside of the disciplinary process. Inmates are made aware of such programs during initial orientation and in the inmate handbooks for all correctional facilities. The Drug Diversion Program is only available for inmates found guilty of the specified disciplinary infractions. That does not preclude any inmate from substance abuse disorder treatment at any time. N.J.A.C. 10A:16-14.2(b) states that; “Inmates may, at any time, request treatment for substance use disorder on a voluntary basis.” In addition, N.J.A.C. 10A:16-14.2(a)1 sets forth that, “The Department substance use disorder and addiction services staff and the healthcare provider will assess the inmate and develop an individualized treatment plan for each inmate referred by the Disciplinary Hearing Officer.” The treatment programs include the use of a number of different therapies or treatment options, including medication assisted treatment.

The Department established the Drug Diversion Program only for the prohibited acts listed at Category F, which may result in placement in a treatment program but has drawn a distinction between them and prohibited acts *.215 and *.216, which are not eligible for a treatment program recommended by medical staff because possession with intent to distribute or the distribution of drugs can exploit the vulnerabilities of other inmates with substance use disorders, which is very different from charges associated with substance abuse. Inmates possessing large quantities of addictive substances with the intent to distribute face harsher sanctions because they pose a greater security threat. Nonetheless, the Department Disciplinary Hearing Officer determines intent based on evaluation of the totality of the circumstances, including witness statements, as well as the results of the Special Investigation Division's investigations and opinions as to intent.

14. COMMENT: At N.J.A.C. 10A:4-4.1(a)2, the DOC proposes upgrading three Category C offenses and one Category D offense to Category B, meaning it has deemed up to 120 days in the R.H.U. a permissible sanction for each of them. Of particular concern, these include refusing to work or accept a program or housing unit assignment, and *.256, refusing to obey an order. We are concerned these charges may be used inappropriately, for example if a person reports feeling unsafe in their housing assignment. Additionally, consensual sexual acts, proposed upgraded *.051, should not expose a person to time in the R.H.U. In short, the DOC should not expand the list of Category B offenses by upgrading lesser offenses; it should do so only by downgrading certain Category A offenses. (1 and 5)

In addition to upgrading prohibited acts *.254 and *.256 without reason, the Department is also proposing to upgrade *.053, indecent exposure. Inmates have been charged with indecent exposure when female officers fail or forget to announce themselves on the floor and inmates are simply using bathroom facilities. All of these acts are not currently asterisk acts and upgrading them will not only carry harsher and unwarranted sanctions they will also result in a higher classification score from two or three points to

five points, which can negatively impact an inmate's eligibility for reduced custody status, housing, and programming. These changes have far reaching and unforeseen negative consequences. These infractions are not serious when compared to the other Category B infractions and by relocating them to Category B offenses they then are placed in the institution violence category for classification purposes and may even cause an inmate to be ineligible for reduced custody status in some cases. Given the Department's ability to sanction inmates at a higher level for repeated infractions, this upgrade is unnecessary and unwarranted. Relocating prohibited acts to higher categories is much more than rebalancing sanctions of the prohibited acts and under no circumstances should these prohibited acts be elevated from Category C and D to Category B, as proposed. (5)

Other commenters state that relocating prohibited acts *.254 and *.256 not only increases the severity of the offense and sanction but could jeopardize the inmate's parole release pursuant to N.J.S.A. 30:4-123.52, which states, "If the appropriate board panel determines that an adult inmate has seriously or persistently violated specifically defined institutional rules or has engaged in conduct indictable in nature while incarcerated, the inmate's parole eligibility date may be increased pursuant to a schedule developed by the board." They also state that increasing the severity and sanction of these offenses contravenes the meaning of less restrictive sanctions. (6 and 9)

RESPONSE: The concern expressed by the commenters with prohibited act *.254, refusing to work or accept a program or housing unit assignment, and *.256, refusing to obey an order, is that the changes may be used inappropriately, and do not address the upgrading of the changes from one category to another. The various comments seem to address a general concern with the charges and link the charges to inmates feeling unsafe in housing assignments. Inmates have available numerous processes through which they can request placement in Protective Custody should they feel unsafe.

Inmates are not permitted to expose themselves or engage in sexual activities consensually, or otherwise, and if such actions were left without a significant consequence, such behavior would escalate and could become a serious security or health consideration in addition to being a disciplinary matter.

Before the proposed rule change, prohibited acts *.051 and *.053 were classified as Category C infractions with mandatory sanctions of no less than 30 days and up to 90 days in Administrative Segregation without the possibility for a suspended sanction. The other Category C sanctions have been downgraded to only include one or more of the sanctions listed at N.J.A.C. 10A:4-5.1(j) and no time in the R.H.U. Because prohibited acts *.051 and *.053 pose significantly more systemwide safety risk, they should have more serious consequences, which is why they have been upgraded to Category B offenses. The upgrade of prohibited act *.051 to Category B carries a possible sanction of up to 120 days in the R.H.U., which is a less restrictive environment than Administrative Segregation, but it also includes the possibility of no R.H.U. time or a suspended sanction as determined by the Disciplinary Hearing Officer and based upon the inmate's disciplinary history.

Commenter 5 made note that inmates have been charged with indecent exposure (*.053) when female officers fail or forget to announce themselves on the floor and inmates are simply using bathroom facilities. While the Department recognizes unusual circumstances may on occasion exist, there are mechanisms in place to address specific details associated with disciplinary changes. These rules cannot address every potential situation, which is why considerations such as this can be presented during disciplinary hearings or by using the Inmate Remedy System.

The Department cannot merely downgrade certain Category A offenses as suggested given all the reforms that have been voluntarily proposed in the rule changes to close custody and inmate discipline. The Department must balance the categorization of prohibited acts with the seriousness of offense and modified sanctions in each category. The Department hopes this additional information demonstrates its intentions with the amendments are to implement less restrictive sanctions to the extent possible while maintaining a safe and secure environment for all inmates as well as Department staff.

In response to the language cited by commenter 9 regarding parole consideration, the Department must note that the citation is incomplete and appears to be taken out of context. While the severity of offense is likely considered by the Parole Board, the Parole Board's rules are outside the purview of the

Department of Corrections. However, the Department acknowledges that its own rules can affect certain determinations of the Parole Board. N.J.S.A. 30:4-123.52 states, “If the appropriate board panel determines that an adult inmate has seriously or persistently violated specifically defined institutional rules or has engaged in conduct indictable in nature while incarcerated, the inmate's parole eligibility date may be increased pursuant to a schedule developed by the board.” The Department believes that increasing prohibited acts *.254 and *.256 to Category A offenses will not directly impact the determination with regard to whether an inmate has persistently violated rules. Nor does the Department believe that a single violation of either *.254 or *.256 is likely to be the sole cause of any Parole Board panel determining that the inmate has seriously violated institutional rules. Therefore, the Department does not think that upgrading those offenses will, in and of themselves, result in later parole eligibility dates.

15. COMMENT: The commenter states that the Department has also proposed to escalate prohibited acts *.006, *.008, *.010, *.102, *.155, *.201, *.215, *.216, *.253, and *.704 *.010, *.102, *.155, *.201, *.215, *.216, *.253, and *.704 from Category B to A, which is completely arbitrary, increasing not only the length of R.H.U. sanctions but adding an A.U. sanction and negatively increasing classification scoring with seven points instead of five points. The commenter further stated that these prohibited acts were never considered the most severe and there is no reason to elevate them from Category B to A, especially since, if left in Category B, they will escalate to Category A if an inmate repeatedly commits the same offenses. (5)

RESPONSE: The commenter is referred to the Response to Comment 6 with regards to prohibited acts *.010, *.102, *.201, *.253, and *.704, since they are included in the Act as permissible criteria for placing an inmate in isolated confinement, or in the A.U. If it is found that prohibited acts *.006, *.008, or *.155 are associated with any of that same criteria, they too may be sanctioned with A.U. time. If, on the other hand, those prohibited acts are not associated with the criteria requiring violence, escapes or attempts to

escape, or posing a threat to institutional safety, the A.U. time would not be a sanction. The commenter is referred to the Response to Comment 13 with regards to prohibited acts *.215 and *.216.

16. COMMENT: The commenter states that at N.J.A.C. 10A:4-4.1(a)2, the DOC has also proposed new Category B offenses, *.055 and *.056, making sexual threats and “sexual contact, involving the intentional touching, directly or indirectly, through the clothing,” respectively. The rulemaking states that these are meant “to sanction behaviors that are not in compliance with Prison Rape Elimination Act (PREA) standards.” 52 N.J.R. 1385. At a minimum, the commenter recommends that *.056 be modified to specify the sexual contact is unwanted and that the term “indirectly” be clarified or deleted. (1)

RESPONSE: The commenter mentions prohibited act *.055 making sexual threats to another in their submission but does not present an issue regarding that particular act. Prohibited act *.056 involves a more explicit explanation than cited by the commenters including “sexual contact, involving the intentional touching, directly or indirectly through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, excluding contact incidental to a physical altercation.” The Department thanks the commenters for the recommendation but believes the full description of the prohibited act is clear as it was proposed. Should the Department find it is confusing as suggested, the option to modify the language at a later time is available.

17. COMMENT: At N.J.A.C. 10A:4-4.1(a)2, the commenters state that the DOC has proposed a new offense altogether, *.900 in Category B, for failure to complete the new proposed Drug Diversion Program and notes this should not be a separate offense. As the DOC proposed, failure to complete the program already results in the imposition of Category B sanctions for the underlying offense, including up to 120 days in the R.H.U., without consideration for the time served in the program. See proposed N.J.A.C. 10A:4-5.1(o) and 10A:16-14.2(a)(3) (providing “Inmate noncompliance with all components of the prescribed treatment plan shall result in removal from the Drug Diversion Program and referral to the

Disciplinary Hearing Officer”). To make non-completion of a drug treatment plan a separate offense risks punishing a person for failing to overcome a drug addiction, where relapse is expected by medical professionals as part of the normal course of recovery. The creation of this new offense risks rendering the program more coercive than it may otherwise be under the rulemaking and is bad public policy. (1)

Another commenter stated that the inmate is subject to Category B sanctions and an additional sanction is unfair and unwarranted. (5)

The commenters also suggest that N.J.A.C. 10A:4-5.1(o) should be modified to provide that a person who fails to meet the requirements of the treatment program during the 60-day suspension period will receive credit for time served in that program if Category B sanctions are imposed. Such credit is in line with the medical and public policy concerns described in other comments. Otherwise, the program risks penalizing a person for relapsing as part of their recovery process. (1)

RESPONSE: If a medical professional or substance use disorder professional determines that an inmate has relapsed during the 60-day interventional period, the inmate will be treated for the relapse.

It must be noted that the voluntary Drug Diversion Program includes a 60-day interventional pathway for drug rehabilitation in a non-punitive, general population setting during which the sanction is suspended. It is a non-punitive period provided by the Department for assessment purposes and to encourage program completion. Credit for time served in a general population setting cannot be provided.

Only a medical professional or substance use disorder professional can determine if the inmate has failed the program during the 60-day period in order to avoid any potential perception that inmates are punished for relapses. Similarly, only these professionals can determine if the inmate has failed to abide by the program beyond the 60-day period, which may result in a *.900 charge. Prohibited act *.900 is not punishment for a relapse, it is an internal mechanism to encourage completion of the treatment program after the 60-day intervention, if needed.

18. COMMENT: The commenter stated that as a matter of policy, it recommends deleting proposed N.J.A.C. 10A:4-5.1(d), which provides that repeat occurrences of Category B, C, and F offenses may be sanctioned at the next highest level. The Disciplinary Hearing Officer already considers institutional disciplinary history in imposing sanctions. This additional charge upgrade is unnecessary and overly punitive. At a minimum, it should never result in A.U. time. (1)

RESPONSE: The Disciplinary Hearing Officer does consider institutional disciplinary history in imposing sanctions, but has no tool available to increase the sanction when the inmate repeatedly commits the infraction. N.J.A.C. 10A:4-5.1(d) provides that tool for use when other interventions fail. Please see the Response to Comment 6 and the rule text changes at N.J.A.C. 10A:4-4.1(a) that clarify the imposition of A.U. standards.

19. COMMENT: The commenter commends the DOC for proposing that the Disciplinary Hearing Officer or Adjustment Committee may now suspend sanctions in all categories of offenses for 60 days. However, N.J.A.C. 10A:4-9.18(c) and/or (d), which the DOC has not proposed amending, should be modified to state that, if no further violations of the rules or regulations occur during the suspension period, the sanctions will not be enforced. (1)

Another commenter recommends allowing hearing officers to suspend sanctions for A and B offenses at N.J.A.C. 10A:4-5.1(f) and (h). The current version creates a perverse scenario where the hearing officer (DHO) may give too much R.H.U. or no R.H.U. at N.J.A.C. 10A:4-9.17(a) and it should provide for the DHO to impose a just sanction under the totality of the circumstances. Hearing officers must justify all sanctions and should be given all tools at their disposal, including the ability to suspend sanctions in all categories. (4)

The commenter commends the Department for adding the requirement at proposed N.J.A.C. 10A:4-4.1(a)1, regarding Category A offenses, that “[t]he Disciplinary Hearing Officer and/or the

Administrator shall consider a less restrictive sanction based on the nature of the offense and the inmate infraction history.” (1)

Another commenter states there is some ambiguity in the Summary section of the notice of proposal and the rule text at N.J.A.C. 10A:4-9.18(a) and (b), as well as N.J.A.C. 10A:4-5.1(f) and (g). (5)

RESPONSE: The Department would like to clarify that as a matter of practice, sanctions suspended by Disciplinary Hearing Officers are not generally enforced unless the inmate commits further infractions. For consistency and clarification with N.J.A.C. 10A:4-9.17(a) and 5.1(j), (l), and (n), the Department will change language at N.J.A.C. 10A:4-5.1(f) and (h), to set forth that the DHO or Adjustment Committee may suspend sanctions in Category A and B. The Department is hopeful that any ambiguity perceived in the rulemaking is clarified in changes upon adoption.

The Department appreciates the commenters commending the Department’s efforts to implement the less restrictive interventions requirements of the Act.

20. COMMENT: The language at N.J.A.C. 10A:4-4.1(a)1 regarding Category A offenses, stating that the Disciplinary Hearing Officer and/or the Administrator shall consider a less restrictive sanction based on the nature of the offense and the inmate infraction history, appears to contradict the language in that paragraph that requires that a finding of guilt shall result in a sanction of five to 15 days in an Adjustment Unit and up to 365 days in a Restorative Housing Unit. This required A.U. and R.H.U. time should be modified to be permissive instead of mandatory by replacing the term “shall” with “may.” Substitution of “shall” with “may” should also be made with respect to Category B offenses at N.J.A.C. 10A:4-4.1(a)2 regarding the sanction of up to 120 days in a Restorative Housing Unit.

The commenter also recommends that N.J.A.C. 10A:4-4.1(a)6, regarding the proposed new Category F, be amended along the same lines to replace “shall” with “may” as follows: “If the Disciplinary Hearing Officer offers a substance abuse treatment program/Drug Diversion Program, the Disciplinary Hearing Officer may also impose sanctions consistent with Category B, which may be

suspended for 60 days if the inmate agrees to participate ... If the inmate fails to adhere to the requirements of the Drug Diversion Program during the 60-day suspended sanction period, the Disciplinary Hearing Officer may impose the suspended sanctions. If the prescribed Drug Diversion Program is not completed the inmate may be subject to the Category B sanction(s) without consideration for time served in the Drug Diversion Program.” (1)

RESPONSE: The Department agrees that the language at N.J.A.C. 10A:4-4.1(a)1 and 2 should be modified from “shall” to “may” for clarification as it will then be consistent with the concept that the Disciplinary Hearing Officer (DHO) will take into considerations all factors involved and impose fair and just sanctions based on specific and individual circumstances. The Department does not agree with making similar changes at N.J.A.C. 10A:4-4.1(a)6 because Category B sanctions are intended to be imposed if inmates do not agree to voluntarily participate in the Drug Diversion Program. In the first sentence at N.J.A.C. 10A:4-4.1(a)1 and 2, the word “shall” will be changed to “may.”

21. COMMENT: The commenter urges the DOC to consider setting the maximum term limit in the R.H.U. at 180 consecutive days, rather than 365 for a single prohibited act or acts resulting from a single incident. We recognize that some of the offenses in Category A are extremely serious, but those offenses likely trigger criminal liability already and can be prosecuted in that forum, with all the attendant rights. As proposed by the DOC and addressed in more detail in the ACLU-NJ’s Chapter 5 comments, the R.H.U. remains a very restrictive close custody unit.

The commenter commends the DOC for capping R.H.U. time for Category B offenses at 120 days and suggests that 180 days for a single incident is sufficient for Category A, in particular because it may follow a period of time in the A.U. already. The commenter states that while the DOC has proposed the R.H.U. to serve as a less restrictive housing assignment than the A.U., some people may not consider 365 days in the R.H.U. less restrictive than five days in the A.U.

To ensure that the R.H.U. does not become more punitive than a short period in the A.U., the DOC should not only implement the changes the commenter recommended in comments on Chapter 5; the DOC should also set the maximum R.H.U. sanction at fewer than 365 days at N.J.A.C. 10A:4-4.1(a)1 and 5.1(a) and (e). (1)

RESPONSE: The Act does not require the Department to modify disciplinary sanctions but in the spirit of the Act, the Department has removed the required minimum sanctions in both Category A and B. When confronted with the most serious disciplinary infractions, the Department believes that the sanctions set forth in the Act are based on sound corrections practices and will help the Department to maintain safe and secure correctional facilities. The Department agrees that the offenses in Category A are extremely serious, and that they, in many instances, will likely trigger criminal liability and will be prosecuted in that forum, with all the attendant rights and that process may result in extending the inmate's term of incarceration. However, that will not provide any measures necessary to influence improved inmate behaviors within the correctional facility or to operate the facility with an appropriate level of safety and security when faced with extremely serious disciplinary infractions. The Department acknowledges the commenters recommendations and suggestions submitted in connection with a separate rulemaking involving Department rules at Chapter 5 but will not address them again in this rulemaking.

22. COMMENT: The commenter notes that N.J.A.C. 10A:4-5.1(e) properly provides that time in the A.U. is not to exceed 30 days in a 60-day period as required by the Act. However, this subsection should be clarified to include that up to five to 15 days in the A.U. per incident, not to exceed 30 days in a 60-day period even in instances of prohibited acts arising from multiple separate incidents. (1)

RESPONSE: N.J.A.C. 10A:4-5.1(e) allows for no more than 30 days in a 60-day period as required by the Act. The Department recognizes that sanctions for multiple incidents cannot amount to more than 30 days in the A.U. in a 60-day period and believes that is clearly stated in the rule at N.J.A.C. 10A:4-5.1(e).

23. COMMENT: The commenter suggests that N.J.A.C. 10A:4-5.1(a) be modified to provide an analogous maximum number of days permissible in the R.H.U. during a set period. The commenter proposes that in no case should an “R.H.U. term” exceed 365 days for multiple incidents, the commenter recommends no more than 180 consecutive days for a single incident and no more than 270 total in a 365-day period for multiple incidents, with any remaining time suspended, as appropriate, to effectuate those limitations. (1)

RESPONSE: The Act does not require that multiple incidents be handled in any specific manner, with the exception of confinement in a unit(s) considered to be isolated confinement, which must be restricted to 30 days in a 60-day period. The Act does not require the Department to modify disciplinary sanctions but in the spirit of the Act the Department has removed the required minimum sanctions in both Category A and B. When confronted with the most serious disciplinary infractions the Department believes that the sanctions set forth in the rulemaking are based on sound corrections practices and will help the Department to maintain safe and secure correctional facilities. The Department agrees that the offenses in Category A are extremely serious, and that they, in many instances, will likely trigger criminal liability and will be prosecuted in that forum, with all the attendant rights and that process may result in extending the inmate’s term of incarceration. However, that will not provide any measures necessary to influence improved inmate behaviors within the correctional facility or to operate the facility with an appropriate level of safety and security when faced with extremely serious disciplinary infractions. The Department acknowledges the commenters recommendations and suggestions submitted in connection with a separate rulemaking involving Department rules at Chapter 5 but will not address them again in this rulemaking.

24. COMMENT: The commenter acknowledges that the sanction of lost commutation time is non-mandatory at N.J.A.C. 10A:4-5.1(e)2, (g)2, (i)2, (k)2, and (m)2, and takes the opportunity to emphasize what a significant sanction this is. Although it does not technically extend the statutory incarceration term, in practice, the result of “lost commutation time is that a person’s prison term becomes longer than it

otherwise would be.” The DOC has not proposed modifying N.J.A.C. 10A:4-5.1(e)2, which allows up to 365 days lost commutation time as a sanction for Category A offenses, that is, a practical extension of a prison term for a full year. Indeed, some people would not consider this a “less restrictive sanction” than five to 15 days in the A.U., as the DOC suggests it is at subsection (e).

Given the extraordinary impact of lost commutation time, the commenter commends the DOC for reducing the maximum number of days from 365 to 180 days for Category B offenses. See proposed N.J.A.C. 10A:4-5.1(g)2 (reducing the number of days). However, the commenter notes concern about the proposed increase from 60 days to 90 days for Category C offenses. See proposed N.J.A.C. 10A:4-5.1(e)2 (increasing the number of days).

The commenter urges the DOC to consider making lost commutation time available as a “less restrictive sanction” for Category A offenses only, where the full panoply of hearing rights under the Act must attach. It also urges the DOC to make the maximum limit fewer than 365 days for the reasons described above. If lost commutation time is retained for any, or all, of the other categories of offenses, it is suggested that the maximum limits should be reduced to less than the 180, 90, 60, and 30 days proposed for Categories B through E, respectively. The commenter also recommends changes at N.J.A.C. 10A:4-5.1(e)2, (g)2, (i)2, (k)2, and (m)2, accordingly. (1)

RESPONSE: The Department disagrees that commutation time sanctions for Category A and C infractions should be further reduced. The Act is focused on limiting the use of isolated confinement, both as to when it can be imposed, and for how long. The Department has worked to comply with those mandates and, additionally, to enhance the variety of types of recreation and educational opportunities available. However, these changes still leave the need for alternative sanctions that are significant enough to deter infractions of a very serious nature, which is why the Department has retained lost commutation time as a potential sanction.

25. COMMENT: The commenter states that DOC has proposed almost no substantive changes to N.J.A.C. 10A:4-9 and 11, regarding disciplinary procedures and appeals of disciplinary decisions. The DOC has not proposed any change at N.J.A.C. 10A:4-9.15 regarding the evidence required for a finding of guilt at a disciplinary hearing and suggests that subsection (a) of this section, as well as corresponding N.J.A.C. 10A:4-11.4(e), should be modified to replace “substantial evidence” with the higher standard of “clear and convincing evidence.” The DOC’s Chapter 5 rulemaking acknowledged this is the requisite standard for prehearing disciplinary housing (PHDH) and emergency confinement at N.J.A.C. 10A:4-4. See 52 N.J.R. 1321(b). For consistency, the DOC should adopt the clear and convincing evidence standard for all disciplinary hearings. At a minimum, the Act requires it for Category A offenses, or when A.U. time may be imposed. N.J.S.A. 30:4-82.8.a(1). Thus, existing N.J.A.C. 10A:4-9.15(a) and 11.4(e)’s substantial evidence standard violates the Act at least with respect to A.U. sanctions and must be revised.

(1)

RESPONSE: The Act does not require the Department to utilize a clear and convincing evidentiary standard for disciplinary hearings and more importantly it is not required for all disciplinary hearings, as recommended. The Act does, however, require that standard for the placement of inmates in permissible isolated confinement units. The Department requests that the commenter also see the Response to Comment 6 and the rule text changes upon adoption.

26. COMMENT: The Act requires additional findings before A.U. sanctions may be imposed. At a minimum, for any hearing at which A.U. sanctions are imposed, N.J.A.C. 10A:4-9 and 11 must be revised to provide the following:

- The Disciplinary Hearing Officer must make an explicit finding that “the inmate would create a substantial risk of serious harm to himself or another, including but not limited to a correctional police officer or other employee or volunteer in the facility[.]” N.J.S.A. 30:4-82.8.a(1).

- The Disciplinary Hearing Officer must cite evidence of “recent threats or conduct” in making the above finding. N.J.S.A. 30:4-82.8.a(1).
- The Disciplinary Hearing Officer must make an explicit finding that the particular offense involved “violence, escapes or attempts to escape, or poses a threat to institutional safety[.]” N.J.S.A. 30:4-82.11.b(2).
- The Disciplinary Hearing Officer must make an explicit finding that the person is not a member of a vulnerable population. N.J.S.A. 30:4-82.8.b. (1)

RESPONSE: The Department requests that commenter see the Response to Comment 6 and the changes upon adoption regarding A.U. sanctions with respect to the first three bullet points. It should be noted that the Disciplinary Hearing Officer is not responsible for determining if an inmate is a member of a vulnerable population. That determination is not a component of the disciplinary hearing; it is made prior to placement in the A.U. by a healthcare professional based on the requisite medical and or mental health examination and/or as a matter of record in instances such as age-related reasons.

27. COMMENT: Proposed N.J.A.C. 10A:4-9.17(e) provides that “the Disciplinary Hearing Officer and/or the Administrator shall consider a less restrictive sanction based on the nature of the offense and the inmate infraction history” for Category A and B offenses. This is a good start, but it must go farther, at least for Category A offenses in which A.U. sanctions are imposed. The Act requires an explicit finding that a less restrictive intervention would be insufficient to reduce the substantial risk of serious harm. N.J.S.A. 30:4-82.8.a(1). (1)

RESPONSE: While the criteria for placement in the A.U. is included at N.J.A.C. 10A:5-8.1, it appears that the rules associated with imposing (A.U.) sanctions could include the criteria as well, for added clarity. The Department will include the following language at the end of N.J.A.C. 10A:4-5.1(a) in this adoption notice to clarify criteria that must be applied when imposing A.U. sanctions. The imposition of a sanction involving A.U. time is not mandatory for Category A infractions and shall be:

- Based on clear and convincing evidence;
- Limited to infractions involving violence, escapes or attempts to escape, or posing a threat to institutional safety;
- Based on a finding of guilt;
- When less restrictive interventions would be insufficient to reduce the substantial risks of serious harm; and
- Approved by the correctional facility Administrator, or designee. (See N.J.S.A. 30:4-82.8.a (1).)

28. COMMENT: Proposed N.J.A.C. 10A:4-9.17(f) should be modified to provide “[a]ll sanctions/placements in the Adjustment Unit and/or Prehearing Disciplinary Housing shall be reviewed and approved by the facility Administrator, or designee, prior to placement,” not “within 24 hours” as the DOC has proposed. See N.J.S.A. 30:4-82.8.a(5) (requiring the final decision to place a person in isolation be made by the facility administrator). (1)

RESPONSE: The Department agrees, in part, with the suggested modification and will remove the words within 24 hours from the rule. Placement in close custody units is addressed at N.J.A.C. 10A:5.

29. COMMENT: The rules also impose specific hearing requirements within 72 hours of initial placement in isolation. N.J.A.C. 10A:4-9 already provides a disciplinary hearing process with some of the statutorily required rights. Rather than requiring another hearing with an independent hearing officer, the right to appear, and the right to a written statement of reasons within 72 hours of A.U. placement, we recommend the regulations be revised to incorporate into the existing process the additional rights required by the Act – most notably, the right to be represented by counsel. N.J.S.A. 30:4-82.8.a(4).

Specifically, N.J.A.C. 10A:4-9.12(a), which the DOC has not proposed amending, must be modified to provide that the person shall have the right to representation by counsel, at least when a person is charged with a Category A offense in which A.U. time may be imposed. N.J.S.A. 30:4-82.8.a(4). This statutory requirement does not mean that the person is entitled to appointed counsel or that the DOC is obligated to provide counsel, but the person is entitled to representation by a lawyer if they have one.

N.J.A.C. 10A:4-9.12 should be further modified to provide a short, reasonable postponement upon request to allow the person to contact their counsel of record or to obtain counsel should they wish. We recommend N.J.A.C. 10A:4-9.13 and 9.14 be modified to reflect “counsel or counsel substitute,” accordingly. If the person is not assisted by counsel at a hearing at which A.U. sanctions are imposed, the DOC should implement a form that ensures the person was informed of their right to counsel and knowingly waived that right. We suggest modifying the regulations to reflect a form for this purpose analogous to the Inmate Disciplinary Hearing Attendance Refusal Notice provided at N.J.A.C. 10A:4-9.11(b). Such notice will be critical for compliance with the Act if A.U. time is imposed upon an uncounseled person.

Although we recognize the Act does not explicitly require it, we urge the DOC to extend the right to counsel to all categories of offenses – or at a minimum to Categories A, B, and any charge in which confidential information is relied upon. Adjudicating a person guilty of a disciplinary offense based on confidential evidence they and their counsel substitute are not entitled to review, let alone challenge, raises serious due process concerns and prevents them from meaningfully confronting the evidence against them or mounting a proper defense. Allowing people to call upon their lawyers, who can enter into consent protective agreements to view the evidence as “attorneys eyes only,” relieves some of these constitutional concerns. (1)

RESPONSE: The Act did not provide a new right to be represented by legal counsel. N.J.S.A. 30:4-82.8.a(4) provides for the right to be represented at the hearing and the Department’s administrative rules

already provide for representation by a member of the DOC staff who is selected by the inmate, or an inmate paralegal. The Act does not modify or change those rights and, therefore, the Department declines to make the proposed change. All inmates are informed of the right to representation at disciplinary hearings, not just those that may result in an A.U. sanction and whether they accept or decline representation is noted on each inmate disciplinary hearing report.

30. COMMENT: The commenter provided extensive comment on the medical and mental health evaluation requirements imposed by the Act in our Chapter 5 comment. To reflect those requirements, N.J.A.C. 10A:4-9.5(d), which the DOC has not proposed amending, should not simply provide that the “Disciplinary Hearing Officer/Adjustment Committee shall determine the need to obtain a psychological/psychiatric evaluation.” In every case in which A.U. sanctions are imposed, a clinician must conduct a personal and comprehensive medical and mental health examination before a person is placed in the A.U. N.J.S.A. 30:4-82.8.a(3).

Relatedly, at proposed N.J.A.C. 10A:4-4.1(a)1, the “medical or mental health professional” language should be deleted, because it may be that a person is inappropriate for placement as a member of a vulnerable population based simply on their classification file (for example, because of their age). The following language is more descriptive of the statutory requirements: “unless a medical or mental health professional determines that the inmate is not appropriate for A.U. or R.H.U. placement.” (1)

RESPONSE: The Department agrees that a healthcare examination must be provided prior to placement in the A.U. as it appears at N.J.A.C. 10A:5-8.1, as proposed, and has addressed comments on that rulemaking separately. This rulemaking includes rules for inmate discipline, such as prohibited acts, sanctions for infractions and disciplinary procedures but not placement of an inmate in the A.U., or other close custody unit. The commenters are, however, encouraged to see the Response to Comment 26, which may clarify the role of the Disciplinary Hearing Officer and healthcare professionals in determining inmates that are members of a vulnerable population.

31. COMMENT: The commenter states that the last sentence at N.J.A.C. 10A:4-4.1(a)1 should read “Disciplinary Hearing Officer and the Administrator shall each consider[,]” because the final decision must be made by the facility administrator. N.J.S.A. 30:4-82.8.a(5). For continuity and as a best practice, this should also be implemented for the related paragraphs regarding other categories of offenses at N.J.A.C. 10A:4-4.1. (1)

RESPONSE: The last sentence at N.J.A.C. 10A:4-4.1(a)1 is “The Disciplinary Hearing Officer and/or the Administrator shall consider a less restrictive sanction based on the nature of the offense and the inmate infraction history.” N.J.S.A. 30:4-82.8.a(5) is ... “the final decision to place an inmate in isolated confinement shall be made by the facility administrator.” The Department believes that language proposed in the last sentence at N.J.A.C. 10A:4-4.1(a)1 encompasses the less restrictive intervention component at N.J.S.A. 30:4-82.8.a(1). The commenter is urged to see the Response to Comment 6.

32. COMMENT: At N.J.A.C. 10A:4-1.3, Definitions, the DOC proposes eliminating “Administrative Close Supervision Unit” and adding “Drug Diversion Program” only. This section should be comprehensively modified to reflect the relevant definitions in the Act, N.J.S.A. 30:4-82.7. In particular, it must include the Act’s definitions of “less restrictive intervention” and “member of a vulnerable population,” as those terms are or should be invoked in the chapter. (1)

RESPONSE: The Department does not usually repeat definitions in each individual chapter of the rules. If it applies to all chapters, the definition is generally included at Chapter 1, otherwise it is included in the most appropriate chapter. The definition of “member of vulnerable population” has been proposed at N.J.A.C. 10A:5-1.2 in relationship to placement in close custody units. Since the term “less restrictive intervention” is not used in the rules it is not needed in the definitions subchapter. It should, however, be noted that the Department uses the term “less restrictive sanctions” in the rules in a context in which the meaning is self-evident.

33. COMMENT: At N.J.A.C. 10A:4-2.1, Notification of inmates about rules and regulations, it is unclear why the DOC proposes deleting subsections (d) and (e), which ensure accessibility for foreign language speakers, people who are illiterate, or people who are otherwise unable to read or write due to a disability. The deletions appear unrelated to implementation of the Act, and these critical protections should remain in the regulations regardless. (1)

RESPONSE: Inmates are notified about rules in the inmate handbooks as described at N.J.A.C. 10A:4-2.1 and as provided at N.J.A.C. 10A:8-3. In the case of inmate discipline additional information is provided in the inmate handbook on discipline, as well as the unit specific handbooks. The commenters are correct in stating the changes at N.J.A.C. 10A:4-2.1(d) and (e) are not related to the Act. These particular amendments are being made to Chapter 4 because the information appearing at N.J.A.C. 10A:4-2.1(d) and (e) appears elsewhere in the rules and in inmate handbooks. Deleting this information does not infringe on notification of rules by inmates. Inmate handbooks are available in foreign languages and inmates unable to read are assisted by social services and inmate paralegals, as applicable.

34. COMMENT: The DOC has not proposed amending N.J.A.C. 10A:4-3.1, Notification of inmates of their rights and responsibilities. Subsection (a) should be modified to include the right not to be placed in isolated confinement, except under limited circumstances (only in cases of facility-wide lockdown, emergency confinement, medical isolation, or protective custody and, if a person is not a member of a vulnerable population, in Prehearing Disciplinary Housing Unit (P.H.D.H.) or as an A.U. sanction not to exceed 15 consecutive days or 30 days in a 60-day period) and the right to contest any placement in isolated confinement at a hearing at which the person has a right to appear and to be represented by counsel. (1)

RESPONSE: The Act does not specify inmate rights; it restricts the use of isolated confinement and the Department specified those restrictions in the proposed rules. Prior to the start of any disciplinary hearing,

the hearing officer informs the inmate of their rights, as required in internal management procedures.

Inmates are informed of their rights prior to all disciplinary hearings, during orientation, and in the inmate handbook as specified at N.J.A.C. 10A:8-2 and 3.

35. COMMENT: The commenter states that in its Chapter 5 rulemaking, the DOC proposed a repeal of N.J.A.C. 10A:4-10.2 through 10.18 for P.H.D.H. and recodification of N.J.A.C. 10A:4-10.1 as 10A:5-6.1. The commenter finds this confusing and potentially misleading because there is no mention of N.J.A.C. 10A:4-10 in the DOC's Chapter 4 rulemaking. 52 N.J.R. 1375(a). As a result, interested persons seeking to provide comment on that rulemaking would not know that the DOC plans to recodify or repeal all sections relating to P.H.D.H. Instead, they might reasonably conclude the DOC proposes to leave those sections unchanged. We recommend clarification and cross reference to the Chapter 5 rulemaking, should the DOC re-notice Chapter 4 as we have recommended. (1)

RESPONSE: The Department has relocated P.H.D.H. from Chapter 4 to Chapter 5 since it is a close custody unit and regrets that the commenter finds it confusing and potentially misleading. The repeal and recodification of N.J.A.C. 10A:4-10.2 through 10.18 as N.J.A.C. 10A:5-6.1 with changes was clearly identified as required by the Office of Administrative Law rulemaking procedures.

36. COMMENT: The commenter stated that the Department has not provided for less isolation, it has instead increased sanctions and imposed more punitive sanctions in opposition to legislative intent. (6)

RESPONSE: The commenter is referred to the Response to Comments 11 through 16 with respect to increasing the category of some prohibited acts and balancing against changes that reduce sanctions for other proposed changes to inmate disciplinary rules.

37. COMMENT: The commenter asked when and where the Drug Diversion Program would be established within a specific correctional facility. (6)

RESPONSE: The Drug Diversion Program has been implemented along with Category F prohibited acts. It should be noted that it is a program and not a unit or separate area within a correctional facility. The voluntary Drug Diversion Program is offered as an alternative to Category B sanctions in a non-punitive setting during the 60-day suspended sanction period and is an intervention pathway for drug rehabilitation and related behavioral modification with the intention of enrollment in a clinical Drug Diversion Program. During the 60-day interventional pathway the inmate is assessed, and an individualized treatment plan is developed.

38. COMMENT: The commenter asked 1) “Why has the resolution of the new [ICA] Isolated Confinement Restrictions Act [be] increased punishment?” and 2) “Why has the resolution of the new [ICA] Isolated Confinement Restrictions Act restricted individuals’ connection with their loved ones?” (6)

RESPONSE: The commenter is referred to the Response to Comments 11 through 16. The Department finds it difficult to address the second question posed as these rule changes have done nothing to negatively impact inmate family connections. The Department has taken steps to interweave less restrictive sanctions and rehabilitative activities into the disciplinary process and in some cases modified the categorization of some sanctions that may in some instances result in increased sanctions. The Department is of the firm belief that inmate family interactions are important to inmate rehabilitation and assumes the commenter may have confused visitor restrictions associated with the prevention of spreading COVID-19 as punishment, but that restriction has nothing to do with inmate discipline and hopes visitor restrictions can soon be eased or eliminated.

39. COMMENT: The commenter asked for an explanation as to “why the sanction for prohibited act *.004 fighting with another person which carried a sanction of 90 days to 180 administrative segregation now becomes” ... “a sanction up to 120 days,” which if it is a repeated infraction will be increased to a

Category A offense with a sanction of 365 days in the Restorative Housing Unit and five to 15 days in the Adjustment Unit. (6)

RESPONSE: Prohibited act *.004 was in Category B and remains in Category B. Prior to the proposed change this offense carried a minimum sanction of 91 days and a maximum of 180 days but with the proposed change there is no minimum sanction. There is a 60-day reduction of the maximum from 180 to 120 days. If the commenter's reference to an increased sanction of 365 days in the R.H.U. and five to 15 in the A.U. refers to N.J.A.C. 10A:4-5.1(d) and sanctions at the next highest level for repeat infractions, this regulation is not new, but has been in place prior to the proposed amendments and read as follows: "Repeat occurrences of a specific infraction(s) in separate incidents, may be considered for sanctioning in the next highest category of the current offense at the discretion of the Disciplinary Hearing Officer."

40. COMMENT: The commenter stated several concerns about the loss of tablet proposed at N.J.A.C. 10A:4-5.1(e)8, (g)8, (i)8, (k)8, and (m)8 with respect to loss, storage, damage, or destruction of a tablet while confiscated, remedies for 30-day tablet lockouts, when the sanctions will be imposed and restrictions on tablet searches for personal information while confiscated. (6)

RESPONSE: The loss of tablet is actually loss of use of the tablet and not confiscation of the device itself, which hopefully addresses the commenters' concerns.

41. COMMENT: The commenters stated that the language in the second sentence at N.J.A.C. 10A:4-5.1(d) is confusing and that repeat occurrences of Category D or E infractions could potentially be sanctioned as Category B offenses. (3 and 5)

RESPONSE: In order to clarify the intent of N.J.A.C. 10A:4-5.1(d), the Department will modify the second sentence to include Category D offenses and to delete "in the next highest category of the current offense."

42. COMMENT: At N.J.A.C. 10A:4-4.1(a)5, the commenter states that the Department failed to remove the sentence “Administrative segregation does not apply to Category E” and suggests the Department add a sentence stating that R.H.U. does not apply to Categories C, D, and E at the end of each of the respective Categories. (5)

RESPONSE: The Department appreciates the commenter’s diligence and the pointing out of the oversight at N.J.A.C. 10A:4-4.1(a)5 and will remove the sentence noted. But the Department feels that the references to the sanctions that actually apply to Categories C, D, and E at N.J.A.C. 10A:4-5.1(j), (l), and (n) clearly set forth the applicable sanctions in each of those three categories.

43. COMMENT: The commenter states that at N.J.A.C. 10A:4-1.1(a), that Department proposes deleting the following phrases from the purpose of the subchapter, “encourage future voluntary acceptance of certain behavior limitations”... and “Build and maintain morale among inmates and between staff and inmates by providing impartial and fair procedures throughout the disciplinary process,” which implies the changes to the rules are not intended to reduce infractions and are inconsistent with the purpose of disciplinary system. The commenter further stated that the changes are inconsistent with the purpose of the ICRA. (5)

RESPONSE: The Department notes that the language cited by the commenter does not appear at N.J.A.C. 10A:4-1.1(a)3, but remains in the rules at N.J.A.C. 10A:4-1.1(a)5 and 6. Reducing inmate infractions and encouraging inmate rehabilitation is of utmost importance to the Department.

44. COMMENT: The commenter states that at N.J.A.C. 10A:4-1.2(a)2, the name Avanti, cited in the rule, does not contain the letter “i” at the end. (5)

RESPONSE: The Department disagrees because the change was made to correct an apparent printer’s error made some time prior to 1996. The commenter is referred to New Jersey Supreme Court decision 67 *N.J.* 496 (1975).

45. COMMENT: The commenter stated that the Department should “delete the proposed excessive punitivity change of five to 15 days in an Adjustment Unit ... as this is a veiled attempt to hatch a new PHD” at N.J.A.C. 10A:4-4.1(a)1 and 5.1(e). (5)

RESPONSE: The Department disagrees and refers the commenter to N.J.S.A. 30:4-82.8.a(9) in which the Act permits up to 20 consecutive days or 30 days in a 60-day period in isolated confinement. By setting the maximum at 15 days, the Department has reduced the penalty to below what the Act allows.

46. COMMENT: The commenter states that, at N.J.A.C. 10A:4-4.1(a)1viii and xiii, the use of “secured facility” is subjective, vague, and meaningless and suggests it be changed to a “prison or correctional facility name” or just state “in any NJDOC facility.” (5)

RESPONSE: In this context the words “secured facility” is used to differentiate between an actual prison and a facility, such as a residential community program, so that the rule does not apply to inmates in the latter type of facility.

47. COMMENT: The commenter stated that use of the words guilt and offense at N.J.A.C. 10A:4-5.1(o) is “non-rehabilitative, improper, and anachronistic” and likened prison rules to “violations or infractions akin to liability violations like parking tickets” and stated they need to be removed or replaced with the words violations or infractions. (5)

RESPONSE: The Department disagrees with the commenter regarding the language at N.J.A.C. 10A:4-5.1(o) and elsewhere in the rules.

48. COMMENT: The commenter states that removal of the form names and numbers is illegal, violating N.J.S.A. 52:14B-3(2), which states “each agency shall ... adopt rules of practice ... including a

description of all forms...” The commenter also states that removal of the forms is prejudicial to Open Public Records Act (OPRA) requests. (5)

RESPONSE: N.J.S.A. 52:14B-3(2) does state that “each agency shall ... adopt rules of practice including a description of all forms” but goes on to state “and instructions used by the agency, and if not otherwise set forth in an agency's rules, a table of all permits and their fees, violations and penalties, deadlines, processing times, and appeal procedures.” This implies the forms are used by the general public with the agency and involve a fee or service between the agency and public uses of the forms. The forms previously mentioned at N.J.A.C. 10A:4-1.4, 5.1(p)10, 7.1(a), 7.2(b), (c), and (d), 7.4(a), 7.5(b), 7.6(b), 9.5(d)1, 9.11(b)2, 3, 4, and 5, 9.13(e), 9.14(f), 9.25, 11.2(b) and (f), and 11.7(a)2 are for internal Department use only and are not used by inmates or the general public to communicate with the Department. They are, therefore, better suited for internal documentation and management procedures. The forms typically used by inmates appear in the inmate handbooks. Individuals requesting information through OPRA requests can utilize the descriptions to request copies.

49. COMMENT: The commenter states that the Department should add the words “by the inmate or inmate paralegal after a copy has been made” at the end of N.J.A.C. 10A:4-11.2(b) since “the rule is vague, meaningless, and subjective, not specifying who or how the prisoner, who is in an isolation unit can’t walk to the traffic control to drop off an appeal.” (5)

RESPONSE: N.J.A.C. 10A:4-11.2(b) reads as follows: “Upon submission of Form 256-I, the person accepting the appeal form shall sign, date, and note the time on the original and copies in the inmate's presence. A copy of the form shall be given to the inmate.” When this rule is taken in context, it is clear that the inmate is submitting the form to another individual who will submit the form on behalf of the inmate. The person accepting the form is not specified in order to provide some flexibility as to who may submit the form on behalf of the inmate. Such individuals could potentially include the Courtline Officer

or Sergeant or other Custody staff. It is clear that the inmate is not expected to submit the appeal form to the Administrator, or designee.

50. COMMENT: The commenter states that “[T]he proposal and the changes to 10A Chapter 4 are clearly in violation of the Act and of our due process rights and need to be redrafted.”... “Per the Act please change the text of the proposal to define Close Custody including the R.H.U., as isolated confinement, please redact all reference to the Adjustment Unit, and change the text of 10A Chapter 4 so that the prohibited acts reflect their individual severity.” (8)

RESPONSE: The proposed rules at N.J.A.C. 10A:4 are not in violation of the Act since the Act does not address inmate discipline or prohibited acts. The Act addresses restrictions on the use of isolated confinement. The Department has proposed changes to inmate discipline because there is a relationship between sanctions for violations of prohibited acts and housing assignments in some close custody units that might be considered isolated confinement. The commenter is referred to the definition of Close Custody at N.J.A.C. 10A:1-1.3 and to the rule action on close custody or the Act regarding the reference to the R.H.U. The commenter is also asked to see the changes upon adoption at N.J.A.C. 10A:4-5.1(a), which provide clarification on the manner in which R.H.U. and A.U. sanctions may be imposed.

Federal Standards Statement

The amendments, new rules, and repeals are adopted under the authority of the rulemaking requirements of the Department of Corrections as established at N.J.S.A. 30:1B-6 and 30:1B-10. The rulemaking is not subject to any Federal statutes, requirements, or standards; therefore, a Federal standards analysis is not required.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisk ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

10A:4-4.1 Prohibited acts

(a) An inmate who commits one or more of the following numbered prohibited acts shall be subject to disciplinary action and a sanction that is imposed by a Disciplinary Hearing Officer or Adjustment Committee with the exception of those violations disposed of by way of an on-the-spot correction. Prohibited acts preceded by an asterisk (*) are considered the most serious and result in the most severe sanctions (see N.J.A.C. 10A:4-5, Schedule of Sanctions for Prohibited Acts). Prohibited acts are further subclassified into six categories of severity (Category A through F) with Category A being the most severe and Category E the least severe and Category F containing an opportunity for inmates found guilty of specified infractions to participate in a substance-use disorder treatment program known as the Drug Diversion Program, if eligible. These categories correspond to the categories of sanctions at N.J.A.C. 10A:4-5 and the categories in the severity of offense scale at N.J.A.C. 10A:9-2.13.

1. Category A: A finding of guilt for any offense in Category A *[shall]* ***may*** result in a sanction of five to 15 days in an Adjustment Unit and up to 365 days in a Restorative Housing Unit (R.H.U.) per incident and one or more of the sanctions listed at N.J.A.C. 10A:4-5.1(e), unless a medical or mental health professional determines that the inmate is not appropriate for R.H.U. placement. Where a medical or mental health professional has made such a determination, the inmate may receive one or more of the less restrictive sanctions listed at N.J.A.C. 10A:4-5.1(e). The Disciplinary Hearing Officer and/or the Administrator shall consider a less restrictive sanction based on the nature of the offense and the inmate infraction history.

i.-vi. (No change from proposal.)

(Agency Note: The text of existing N.J.A.C. 10A:4-4.1(a)1v was inadvertently recodified as both (a)1vii and (a)1viii. Upon adoption, OAL is deleting the first rendition of subparagraph (a)1vii and reserving the paragraph to maintain the remaining codification.)

vii. (Reserved.)

viii.-xxii. (No change from proposal.)

xxiii. (No change from proposal.)

xxiv. *.803 attempting to commit, aiding another person to commit or making plans to commit any Category A *[and or B]* offense

2. Category B: A finding of guilt for any offense in Category B *[shall]* ***may*** result in a sanction of up to 120 days in a Restorative Housing Unit (R.H.U.) per incident and one or more of the sanctions listed at N.J.A.C. 10A:4-5.1(g), unless a medical or mental health professional determines that the inmate is not appropriate for R.H.U. placement. Where a medical or mental health professional has made such a determination, the inmate may receive one or more of the less restrictive sanctions listed at N.J.A.C. 10A:4-5.1(f). The Disciplinary Hearing Officer and/or the Administrator shall consider a less restrictive sanction based on the nature of the offense and the inmate infraction history.

i.-xxxv. (No change from proposal.)

xxxvi. *.803 attempting to commit, aiding another person to commit or making plans to commit any Category *[A and/or]* B offense

3.-4 (No change from proposal.)

5. Category E: A finding of guilt for any offense in Category E may result in a sanction of one or more of the sanctions listed at N.J.A.C. 10A:4-5.1(n). *[Administrative segregation does not apply to Category E.]*

(Agency Note: The notice of proposal inadvertently recodified N.J.A.C. 10A:4-4.1(a)5iii at (a)5iv with amendments. Contrary to the recodification, the proposed amendments were intended to occur at existing N.J.A.C. 10A:4-4.1(a)5viii, which was properly recodified as N.J.A.C. 10A:4-4.1(a)4ix. The text improperly shown in the notice of proposal as subparagraph (a)5iii should have been shown as recodified subparagraph (a)5ix and, upon adoption, will be properly reflected. There is no proposed or adopted change at subparagraph (a)5iii, recodified as (a)5iv.)

i.-viii. (No change from proposal.)

ix. use of abusive or obscene language to a staff member

x.-xvii. (No change from proposal.)

6. (No change from proposal.)

10A:4-5.1 Schedule of sanctions for prohibited acts

(a) The maximum Restorative Housing Unit (R.H.U.) sanction for any prohibited act or acts resulting from a single incident shall not exceed 365 days. The maximum Adjustment Unit sanction for any prohibited act or acts resulting from a single incident shall be for five to 15 days. ***The imposition of a sanction involving A.U. time is not mandatory for Category A infractions and shall be:**

- i. Based on clear and convincing evidence;**
- ii. Limited to infractions involving violence, escapes, or attempts to escape, or poses a threat to institutional safety;**
- iii. Based on a finding of guilt when less restrictive interventions would be insufficient to reduce the substantial risks of serious harm; and**
- iv. Approved by the correctional facility Administrator, or designee. (See N.J.S.A. 30:4-82.8.a(1)). ***

(b) (No change)

(c) *[Administrative segregation]* ***Restorative Housing Unit*** sanctions for all charges received as the result of a single incident shall be served concurrently.

(d) Repeat occurrences of a specific infraction(s) in Category B, C, and F, in separate incidents, may be considered for sanctioning in the next highest category of the current offense at the discretion of the Disciplinary Hearing Officer. Repeat occurrences of an infraction(s) in Category D or E, in separate incidents, may be considered as a Category C ***or D*** offense for sanctioning *[in the next highest category of the current offense]* at the discretion of the Disciplinary Hearing Officer.

(e) (No change.)

(f) In addition to imposing one or more of the sanctions in Category A, the Disciplinary Hearing Officer may refer an inmate to the Mental Health Unit for appropriate care/treatment as may be necessary and appropriate. The *[Administrator or designee]* ***Disciplinary Hearing Officer or Adjustment Committee*** may suspend one or more of the sanctions in Category A for 60 calendar days.

(g) (No change.)

(h) In addition to imposing one or more of the sanctions in Category B, the Disciplinary Hearing Officer may refer an inmate to the Mental Health Unit for appropriate care/treatment as may be necessary and appropriate. The *[Administrator or designee]* ***Disciplinary Hearing Officer or Adjustment Committee*** may suspend one or more of the sanctions in Category B for 60 calendar days.

10A:4-7.3 Sanctions

(a) The following are authorized sanctions for on-the-spot corrections:

1. – 4. (No change.)

5. Loss of radio*,* *[or]* television*, **tablet or similar handheld electronic device*** privileges for a period of no more than five days; and/or

6. (No change.)

10A:4-9.17 Disciplinary sanctions

(a) – (e) (No change)

(f) All sanctions/placements in the Adjustment Unit and/or Prehearing Disciplinary Housing shall be reviewed and approved by the facility Administrator, or designee*[, within 24 hour]*.