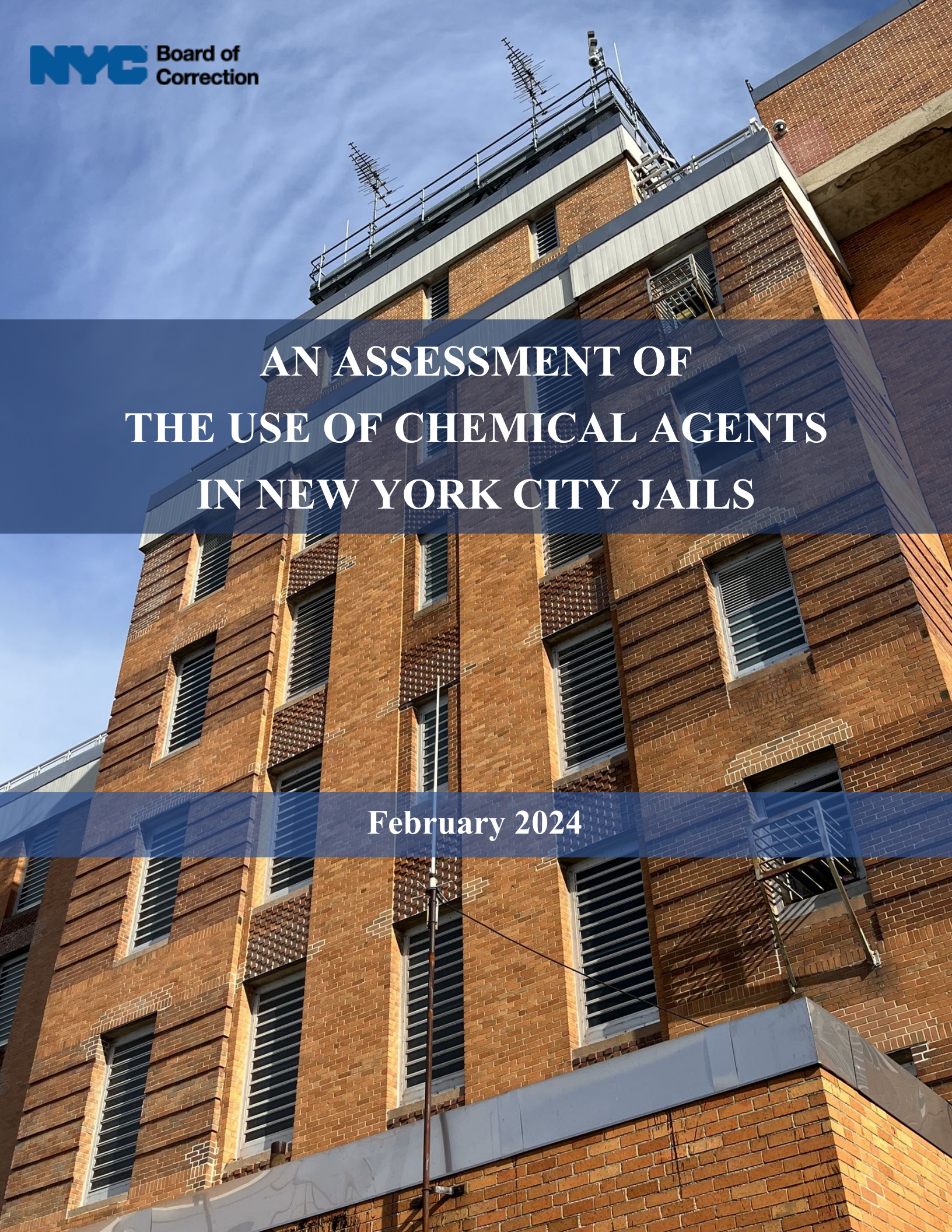
NYC Board of Correction



# AN ASSESSMENT OF THE USE OF CHEMICAL AGENTS IN NEW YORK CITY JAILS

**February 2024**

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# I. Executive Summary

The judicious use of chemical agents[1] in a manner consistent with existing New York City Department of Correction ("DOC" or "the Department") policy can be an effective means for disrupting violent behavior in New York City jails. However, the use of chemical agents on people in custody who are not engaged in interpersonal violence must be closely scrutinized and better understood.

This Board of Correction ("BOC" or "the Board") staff report analyzes 50 incidents from October 2023 during which Department uniformed staff deployed the chemical agent oleoresin capsicum ("OC"). In each of these incidents, people in custody—disproportionally individuals with mental illness[2] and emerging adults (age 18-21)—were sprayed with chemical agent because they passively resisted staff orders, argued with staff, or engaged in self-harm with a ligature.[3] Each of these incidents raise concern about the Department's use of chemical agents. The Department did not determine that any of these incidents was an anticipated use of force, despite clear evidence that such a determination was merited in many of the incidents.

This report also examines broader trends in the Department's use of chemical agents, which has increased significantly in recent years, and provides information regarding the types and strength of chemical agents that are most typically used.

Finally, this report provides greater context as to why people in custody refuse verbal orders, and the frequency with which DOC staff are following required protocols when they encounter passive resistance. If we hope to make the New York City's (the "City's") jails safer and less violent, we must understand the circumstances that may lead people in custody to passively resist orders from staff. We must also ensure that correction officers have the appropriate resources, support, training, and supervision necessary to de-escalate verbal conflicts and effectively resolve passive resistance when they encounter it, without relying—to the extent possible—on chemical agents.

[1] While the Department is authorized by the New York State Commission of Correction to use three types of chemical agents, oleoresin capsicum, also referred to as "OC" or pepper spray, is overwhelmingly the predominant kind used, and is the only chemical agent correction officers are authorized to carry daily throughout the jails. For this reason, this assessment will focus explicitly on the Department's use of OC.

[2] Here defined as individuals in custody with a housing history during their current incarceration that includes placement into specialized mental health units.

[3] In the "Third Report of the *Nunez* Independent Monitor," filed April 3, 2017, the Monitor described the misuse of chemical agents as generally falling into four categories, the first being: "Chemical agents deployed on a passively resisting Inmate, deployed as retaliation, or deployed precipitously or prematurely in situations where the use of force should have been an anticipated event." This category makes up the majority of the 50 incidents reviewed by Board staff. *See* https://tillidgroup.com/wp-content/uploads/2018/02/Third-Monitors-Report-04-03-17-Filed-with-Appendix-2.pdf

## A. Key Findings

### Increasing Use of Chemical Agents During Use of Force Situations

- As violence surged in the City's jails in the years following the outbreak of the COVID-19 pandemic, so, too, has the Department's use of chemical agents. The rate of chemical agent use per 1,000 people in custody was 109.4% higher over the first ten months of 2023 (n=49.2) than in the first ten months of 2018 (n=23.5). Over the first ten months of 2023, the Department averaged nearly 300 "use of force"[4] incidents involving chemical agents each month (n=297.0).
- Since 2018, the likelihood has increased that, when force is used by DOC, it will include the use of chemical agents. 53.5% of all uses of force over the first ten months of 2023 involved the use of chemical agents, compared to 41.0% in 2018, and 36.3% in 2019.

### Policy Violations and Other Practice Concerns

- BOC staff analyzed 50 use of force incidents that occurred throughout October 2023, during which staff deployed chemical agent despite the absence of interpersonal violence.[5] In 88.0% of the incidents reviewed (n=44), the use of force reports uniformed staff are required to complete following these incidents contain no required determination as to whether the use of force incident was anticipated by staff.
- In eight incidents (16.0%), DOC staff sprayed a person in custody who was engaged in self-harm with a ligature around their neck. The deployments occurred despite DOC policy[6] requiring staff to "immediately remove or cut the ligature" when encountering a person in custody with a ligature around their neck "that is attached to another object," as was the case in five of these eight incidents. In the remaining three incidents, it was unclear whether the ligature was attached to another object based on available records.
- In 16 incidents (32.0%), visual evidence suggests that correction officers deployed chemical agents from close distances prohibited[7] for safety reasons.
- In five incidents (10.0%), DOC staff sprayed an individual with MK-9, a very powerful form of OC that is designed for crowd management and is prohibited[8] from being used against a single individual presenting passive resistance. In four of these incidents, the person in custody was sprayed with MK-9 for refusing to obey direct orders. In the fifth incident, the person was sprayed with MK-9 for attempting to hang himself.
- In 11 of the 23 incidents (47.8%) that were captured on body worn camera with audio, uniformed staff were not heard issuing verbal warnings that chemical agent would be utilized prior to deployment, despite existing policy that requires such warnings.[9]

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[4] The Department's Use of Force Directive (5006R-D) defines a "use of force" as: "Any instance where Staff use their hands or other parts of their body, objects, instruments, chemical agents, electronic devices, firearms, or any other physical method to restrain, subdue, or compel an Inmate to act or stop acting in a particular way. The term 'Use of Force' does not include moving, escorting, transporting, or applying restraints to a compliant inmate."

[5] These 50 use-of-force incidents represent 14.8% of all chemical agent incidents that occurred in October 2023 (n=339).

[6] DOC Employee Rules and Regulations, 6.15.10(1)(a)

[7] Directive 4510R-H, V(A)(4)(e)

[8] Directive 4510R-H, V(A)(2)(h)(note)

[9] Directive 4510R-H, V(A)(4)(a)

- Of the 50 incidents, 48.0% (n=24) involved people in custody with a recent history[10] of being housed in specialized mental health units. Despite this, the deployment of chemical agents was not preceded by an actual or attempted mental health intervention in any of the incidents reviewed, despite policy[11] requiring DOC staff to consult with and summon a mental health professional to the scene prior to the deployment of chemical agents when force is anticipated.
- When DOC staff captured these incidents on body-worn cameras with audio, people in custody who were sprayed with chemical agent for passively resisting direct orders were frequently heard articulating important reasons for their resistance, including the desire to access medical care, mental health care, medication, and fears for their safety.
- For each of the 50 incidents analyzed, BOC staff reviewed the corresponding Rapid Review[12] conducted by DOC facility leadership of the incident. In 45 of the 50 incidents (90.0%), facility leadership determined the force used by staff was not avoidable. In none of these reviews did facility leadership determine that anticipated use of force protocols should have been followed given the preceding circumstances that made it apparent that staff would likely need to use force to address the situation.

## Challenges in Investigating Use of Force Incidents Involving Chemical Agents

- In 28 of the 50 incidents (56.0%) analyzed, Board staff identified false statements in the Use of Force Reports completed by DOC staff who participated in or witnessed the use of force.[13] Most often, persons in custody who were sprayed with chemical agent were accused of advancing towards staff at the moment of deployment (n=10, 20.0%), when in fact the video demonstrated otherwise.
- Despite DOC efforts[14] to ensure that all staff interactions with individuals in custody are recorded on body-worn cameras, less than half (46.0%, n=23) of the 50 incidents reviewed were captured on body-worn cameras. This was primarily because correction officers were not wearing cameras at the time of the incident. Most commonly, staff were not wearing body-worn cameras due to the facility not having "backings," or mounting plates which are worn on uniforms to hold the cameras (n=13).
- In all 50 incidents (100%), people in custody reportedly refused to provide DOC staff with a written or verbal statement following the use of force. This points to a broken process for collecting statements, while underscoring the significant barriers of mistrust the Department must overcome if it hopes to fully investigate uses of force and incorporate the perspective of people in custody into its use of force investigations and analyses.

[10] For purposes of this report "recent history" is defined as a placement into a specialized mental health unit during the current incarceration.
[11] Directive 5006R-D, VI (4); Directive 4510R-H, IV(a)(2)
[12] Operations Order 1/24 ("Facility Leadership Assessment of Use of Force Incidents") requires that facility leadership conduct thorough reviews of each use of force incident (called "Rapid Review") to understand why each use of force incident transpired, to determine whether procedural violations occurred, and whether remedial or corrective measures are called for, including retraining, counseling, referrals, or staff discipline.
[13] The absence of body worn camera footage in a significant number of these incidents prevented a review of the verbal interactions leading up to the deployment of chemical agents.
[14] Operations Order 1/22 ("Body Worn Camera")

- In 40 incidents (80%), DOC's Investigation Division determined that it was not necessary to attempt to interview the person in custody who was sprayed with chemical agent as part of their preliminary investigation into the use of force incident.

## OC Training and Re-Certification Concerns

- In January 2024, BOC staff reviewed chemical agent logbooks for one day in all the jails on Rikers Island, finding each jail distributed OC handheld units to uniformed staff who had not received required[15] annual OC re-certification training.
- OC certification lists, which identify all uniformed staff and their OC certification type, date, and expiration date, are required to be kept in the control room of every jail. Only one of the seven jails was able to produce such a list in its control room during BOC staff visits.
- DOC uniformed supervisors are required to participate in an annual, eight-hour training titled "Chemical Agent for Supervisors." In 2023, 34 captains, representing approximately 5% of uniformed leadership, received this mandatory training. No assistant deputy wardens, deputy wardens, or wardens received the training in 2023.

## Safety Concerns

- Correctional Health Services ("CHS") reported that, in October 2023, 30% of people in custody in the City's jails had chronic pulmonary conditions, such as asthma and chronic obstructive pulmonary disease (COPD).[16] Studies[17] have shown that such individuals can be disproportionately susceptible to decreased airflow, airway constriction, and adverse medical events when exposed to chemical agents. Nevertheless, there was no indication in the available records or videos that DOC uniformed staff consulted with medical staff or reviewed available records for contraindications to chemical agents as required by the anticipated use of force protocols[18] and New York State regulations[19] prior to deployment in any of the 50 incidents reviewed by Board staff.
- Handheld chemical agents (MK-3, MK-4, and MK-6) purchased and used by the Department are available in three formulations of strength. DOC only authorizes its correctional staff to carry the strongest (or "hottest")[20] of the three chemical agent formulations (level 3), regardless of the setting (e.g., an infirmary or mental-health unit) or the circumstances of deployment. A 2021

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[15] *See* New York State Commission on Correction Jail Minimum Standards of Local Correctional Facilities – Part 7063.5(c) https://scoc.ny.gov/system/files/documents/2023/11/jail-min-standards.pdf

[16] *See* "CHS Patient Profile for Individuals in the New York City Jail System." October, 2023. https://hhinternet.blob.core.windows.net/uploads/2023/11/correctional-health-services-patient-profile-metrics-october-2023.pdf

[17] *See* Hathaway, T. J., Higenbottam, T. W., Morrison, J. F., Clelland, C. A., & Wallwork, J. (1993). Effects of inhaled capsaicin in heart-lung transplant patients and asthmatic subjects. American Review of Respiratory Disease, 148(5), 1233-1237. doi: 10.1164/ajrccm/148.5.123; Capsaicin responsiveness and cough in asthma and chronic obstructive pulmonary disease. Thorax, 55(8), 643-649. doi:10.1136/thorax.55.8.643 Doherty, Mister, Pearson, and Calverley (2000), Hathaway, Higenbottam, Morrison, Clelland, and Wallwork (1993)

[18] Directive 5006R-D VI (A)(3)(d)(ii)

[19] *See* New York State Commission on Correction Jail Minimum Standards of Local Correctional Facilities – Part 7063.4(c-d) https://scoc.ny.gov/system/files/documents/2023/11/jail-min-standards.pdf

[20] As described in informational material provided by the Department's chemical agent manufacturer.

study[21] from the *International Journal of Policing* found "no clear evidence that more concentrated pepper sprays were more effective."[22]

## B. Summary of Recommendations

### Training

The Department should closely examine its current chemical-agent training program and re-certification process with a view to strengthening the program to prioritize the Department's anticipated use of force protocols and other safety issues identified in this report. Annual chemical agent refresher trainings should include a video review of incidents that demonstrate prohibited practices.

### Monitoring

The Department should implement several monitoring initiatives related to its chemical agent practices, including:

- Identifying incomplete or misleading use of force reports;
- Ensuring that officers with expired OC training certifications are not issued OC handheld units;
- Assessing the availability and response times of captains to calls for assistance by correction officers;
- Reviewing functional deficiencies of the current body-worn camera system;
- Reviewing the current processes for collecting statements from people in custody following use of force incidents.

### Policy

The Department and CHS (where applicable) should revise and improve current policies and practices related to the following concerns identified in this report:

- Anticipated use of force tracking and reporting;
- Authorization for the use of MK-9;
- Expansion of the use of body-worn cameras to always-on, full-shift recording;
- Attempting mental-health interventions prior to chemical agent deployment when the anticipated use of force protocols have been exhausted;
- Checking for medical OC contraindications in non-emergency situations prior to the deployment of chemical agents;
- A review of lower strength hand-held OC units.

[21] *See* Boivin, R., & Tanguay, C. (2020). The stronger, the better? A natural experiment on the effects of pepper spray concentration levels. Policing, 44(1), 106–117. https://doi.org/10.1108/pijpsm-07-2020-0122

[22] Effectiveness defined as: "sub[duing] resistant or aggressive subjects."

## II. Background

On October 3, 2023, following the settlement[23] of a lawsuit brought by the Board against the Department and the City, DOC fully restored the Board's direct access to video systems—direct access which had been terminated approximately nine months earlier, on January 10, 2023, by order of then Commissioner Louis Molina. During the nine-month period from January to October 2023, Board staff was unable to conduct comprehensive, confidential investigations into incidents of violence and staff uses of force in the jails.[24] With the restoration of direct video access, Board staff resumed their routine video review of use of force incidents and observed a concerning trend in the Department's use of chemical agents. This catalyzed a systematic assessment that has culminated in this public report.

For decades, the Board has urged caution and review regarding the Department's use of chemical agents. In 1975, the Board called for a moratorium on the Department's use of tear gas, following its investigation into the death of John Wesley Thompson, a person with serious mental illness, who died in custody after DOC staff sprayed chloroacetophenone, a type of chemical agent, into his cell in the Queens House of Detention. In more recent years, the Board has continued to focus on this issue, including in 2016, when it engaged a national expert on the health effects of OC, Dr. Michael D. Cohen, to review the Department's chemical agent policies and engage in joint reviews of policy and incidents with the Department.

The anticipated effects[25] of exposure to OC include: swelling of the mucous membranes; immediate involuntary closing of the eyes; uncontrollable coughing; gagging; gasping for breath; and the sensation of intense burning of the skin and mucous membranes inside the nose and the mouth. During their time in the academy, cadets are trained and certified to use chemical agents. Annually thereafter, uniformed staff are required to participate in an in-person one-hour refresher training to maintain their certification.

## III. Nunez v. City of New York

The 2015 Nunez Consent Judgement[26] required the City to address and correct unconstitutional patterns and practices of excessive and unnecessary force by DOC staff. In the years since, the Independent Federal Monitor appointed to assess the City's compliance with the Consent Judgment, Steve J. Martin, has consistently found the Department to be non-compliant or partially compliant in its efforts to reform its use of force practices and oversight.[27] In part because of this lack of progress, in 2024, Judge Laura Swain

[23] *See* "New York city Board of Correction Regains Full Access to Jails Video Footage Systems." September 28, 2023. https://www.nyc.gov/assets/boc/downloads/pdf/News/Board-statement-on-litigation-settlement-2023.09.28.pdf

[24] Section 626 of the New York City Charter establishes the Board's authority and mandates, among which include evaluating the performance of the Department and conducting investigations into any matter within the jurisdiction of the Department.

[25] *See* NYC DOC Directive 4510R-H (IV) (B) )(4)(a. – f.)

[26] *See* "Nunez V. City of New York Consent Judgement Master Settlement Document." July 1, 2015. https://www.justice.gov/opa/file/624846/download

[27] In the Nunez Monitor's recent Status Report, dated November 8, 2023, the Monitor reported: "The pattern and practice of unnecessary and excessive force that brought about the Consent Judgment remains pervasive." *See* "Status Report on DOC's Action Plan by the *Nunez* Independent Monitor." November 8, 2023. https://tillidgroup.com/wp-content/uploads/2023/11/2023-11-08-Monitors-Report.pdf

will determine whether to hold the Department in contempt and grant the exceptional remedy of appointing a Federal Receiver to manage the City's jails.

Hundreds of pages of publicly available records[28] have been devoted to meticulously analyzing the Department's inadequate use of force reform efforts, which position this assessment squarely within a long-standing and well-documented truth that DOC staff use force too frequently and too excessively, and that the accountability structures in place—jail leadership and DOC's Investigation Division—are partial and permissive in their responsibilities and fail to reliably discipline staff members when force is used inappropriately.[29] It is our hope that we can contribute to solving this intractable problem incrementally, by focusing on a specific type of force, the use of chemical agents, and the circumstances during which it is routinely deployed. By bringing these circumstances to the fore with the assistance of video footage and records, we aim to identify, highlight, and prevent unacceptable patterns of harm.

## IV. Methodology

BOC staff gathered and analyzed available aggregate Departmental data on the use of chemical agents since 2018 and reviewed all available DOC policies specific to chemical agents, use of force, use of body-worn cameras, and the prevention of self-harm. BOC staff also reviewed current chemical agent inventories, facility logbooks, OC certification lists, OC training course materials, and informational materials from the Department's chemical agent vendor.

Additionally, BOC staff reviewed the Department's daily "24 Hour Report," identifying 50 incidents of chemical agent deployment in October 2023 for analysis. BOC staff selected reported incidents of chemical agent use during which the person in custody was described as not being engaged in interpersonal violence at the time chemical agents were deployed. Once the 50 incidents were identified,[30] staff reviewed all available Departmental records relating to these incidents, including stationary video, body-worn camera video, hand-held video, use of force reports, use of force witness reports, statements from persons in custody, injury reports, and the incident reviews conducted by facility leadership and the Department's Investigation Division. BOC staff also developed a tool to collect information and data points uniformly across all 50 incidents under review.[31]

This report is also informed by BOC staff visits to the jails on Rikers Island, and interviews with people in custody and DOC staff.

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[28] *See* "Tillid Nunez Monitorship – Monitor Reports, Remedial Order Reports & Other Status Reports." https://tillidgroup.com/projects/nunez-monitorship/

[29] *See* "Status Report on DOC's Action Plan by the Nunez Independent Monitor," November 8, 2023. https://tillidgroup.com/wp-content/uploads/2023/11/2023-11-08-Monitors-Report.pdf: "The quality of the Investigation Division's work product deteriorated such that staff misconduct is not being properly identified and thus is not corrected or met with proper accountability measures or discipline. Facility Rapid Reviews of use of force incidents have deteriorated and do not reliably identify misconduct…For the past two years, at each turn, the Department's ability to properly identify staff misconduct has degraded and remains on a downward trajectory."

[30] The selected 50 incidents do not represent all incidents in October 2023 during which chemical agent was deployed despite the absence of interpersonal violence, but rather the first 50 identified by BOC staff.

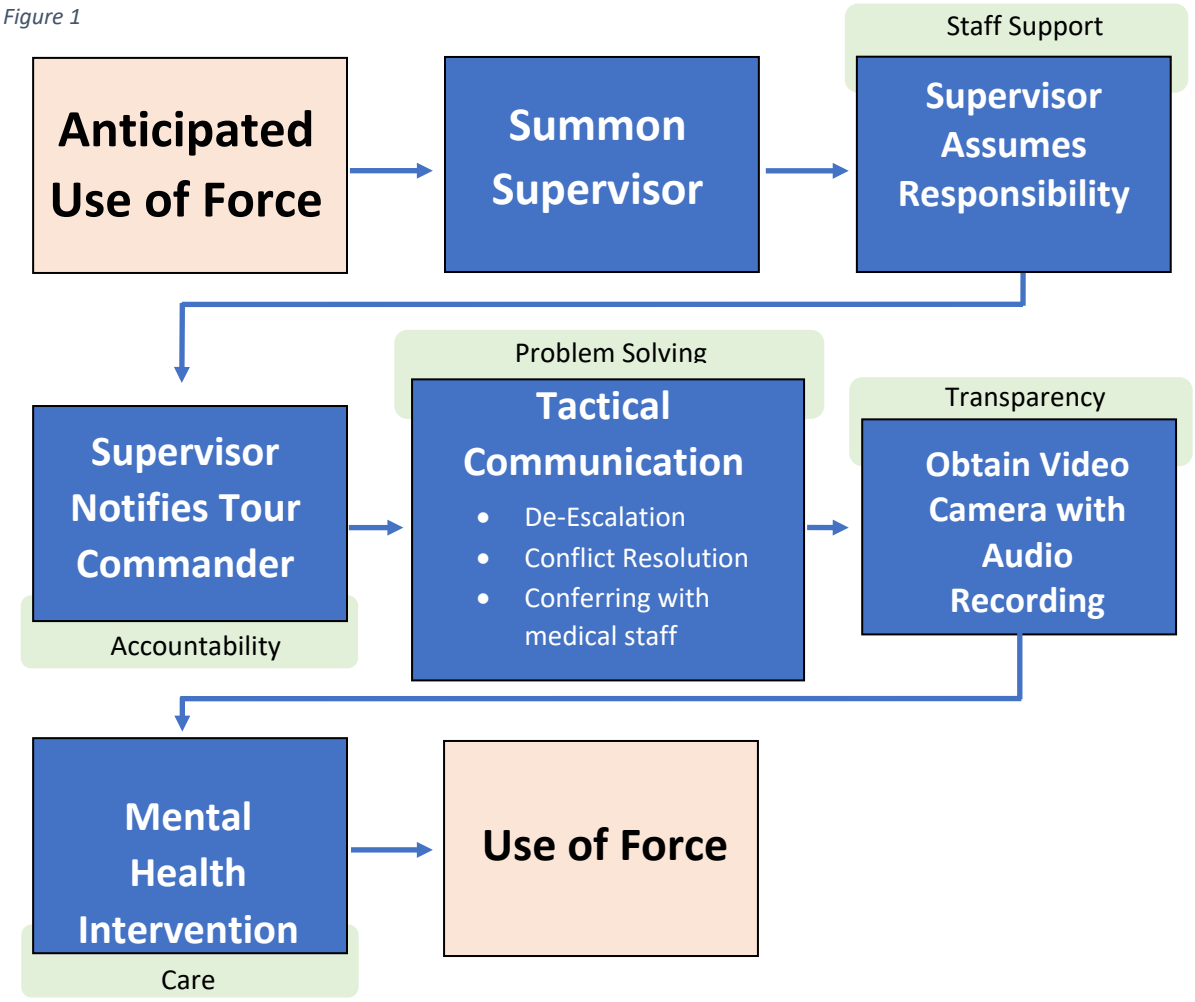
[31] *See* Appendix A

## V. Anticipated Use of Force Protocols

A critical component of the Department's Use of Force Directive is the requirement that, when possible and practical, staff follow anticipated use of force protocols. Not all incidents of force can be anticipated—particularly when violence between people in custody erupts—but many can be. For example, in October 2023, the focus month of this report, DOC reported that 29.4% (n=199) of the 677 use of force incidents that occurred in the month were the result of a person in custody refusing direct orders[32]—a situation in which the use of force can often be anticipated. Yet BOC staff only identified two instances among the 677 uses of force (.003%) in October 2023 where DOC designated the use of force as anticipated.

The following flow chart depicts the protocols for anticipated uses of force, as necessitated by the Department's Use of Force Directive[33]:

*Figure 1*




[32] In his "Twelfth Report on the Monitoring Period January 1, 2021, to June 30, 2021," the Nunez Federal Monitor found that 24% of use of force incidents during the sixth-month period were primarily caused by people in custody refusing direct orders, which was reflective of "historical trends." *See* https://tillidgroup.com/wp-content/uploads/2021/12/12th-Monitors-Report-12-06-21-As-Filed.pdf

[33] *See* https://www.nyc.gov/assets/doc/downloads/directives/Directive_5006R-D_Final.pdf

The anticipated use of force protocols in place are robust and call for support for correction officers, accountability for supervisors, problem solving, transparency, and mental health interventions for people in custody. These protocols have largely been in place since 2008, with a modification in 2017 that expanded the opportunity for mental health interventions in all anticipated use of force situations.

BOC staff's assessment of 50 chemical agent incidents in October 2023 found that Department staff routinely disregard these protocols. Perhaps nothing brings this disregard into sharper focus than the following written statement by an officer who witnessed an anticipated use of force involving a person with serious mental illness who refused to exit an intake holding cell: "It was apparent that staff would need to use force to address the situation because said inmate refused all direct orders. There was no time to prepare a plan of action prior to using force."

"It was apparent that staff would need to use force to address the situation because said inmate refused all direct orders. There was no time to prepare a plan of action prior to using force."

The correction officer acknowledges an anticipated use of force, and yet characterizes the use of force as spontaneous and unavoidable. Moreover, in this instance, the person in custody refused to exit the intake holding cell because he wanted to speak with mental health staff—a request that is directly in line with anticipated use of force protocols. However, DOC staff proceeded with control holds and the deployment of chemical agents, without any documented effort to first contact mental health staff in the jail.

## Who Determines When a Use of Force is Anticipated?

Ultimately, the discretion to determine whether use of force is anticipated in a particular situation rests with the correction officer or uniformed supervisor who is confronted with "a situation in which it is apparent that Staff Members will likely need to use force to address the situation and there is time to prepare a plan of action prior to using force."[34] If a supervisor is notified per the protocols, it is then the supervisor's responsibility to follow the remaining protocols. In 2018, the Nunez Independent Monitor found that DOC staff regularly fail to "recognize anticipated force situations and summon a supervisor."[35] Responsive to these concerns, that same year, the Department revised its Use of Force Report Form to include a field for correction officers to identify whether the use of force was anticipated. This field reads: "Explain in detail the sequence of events leading up to the incident based on your own observations, including whether the force was anticipated."

Despite this requirement, in 44 of the 50 (88.0%) use of force incidents reviewed by BOC staff, the reports for each incident contain no determination with respect to whether the use of force was or was not anticipated. The determination, in other words, was not made by DOC staff.[36] By comparison, in five of the 50 cases, a correction officer who took part in or witnessed the use of force explicitly determined its use was not anticipated. And in the sixth case, while one officer used the words "…anticipating a use of

[34] *See* NYC DOC Directive5006R-D (VI)(A)(3)(a.)

[35] *See* "Fifth Report of the *Nunez* Independent Monitor." April 18, 2018. https://tillidgroup.com/wp-content/uploads/2018/04/5th-Monitor-Report-04-18-18-As-Filed.pdf

[36] In zero of the 50 incidents was BOC staff able to identify corrective action taken by jail supervisors to address uniformed staff who failed to make an anticipated use of force determination in their respective use of force reports.

force," another officer involved in this incident wrote: "There was no time to prepare a plan of action prior to using force."

In total, 23 incidents (46.0%) involved an officer deploying chemical agent without the presence or approval of a uniformed DOC supervisor. Out of these 23 incidents, 17 occurred in housing areas. New York State Regulation[37] explicitly prohibits the deployment of chemical agents outside of the supervision of a supervisory staff member, "except in emergency cases when a delay in the use of such agents presents an immediate threat of death or serious injury or severely threatens the safety or security of the facility." In 13 of the aforementioned 24 incidents, the cause for the use of force as reported by the Department was related to the person in custody refusing direct orders.

## Who Reviews and Documents Anticipated Use of Force Determinations?

When a use of force incident occurs, captains are required to provide tour commanders with a synopsis of the incident within two hours. Tour commanders must then notify Central Operations Desk ("COD"), the Department's unit tasked with recording and disseminating reportable incidents in all Department's facilities.

During the initial call between the tour commander and COD, basic information about the use of force incident is relayed, including the identities of the people in custody and staff involved, the type of force used (e.g., control holds), and a brief description of the incident. COD then enters this information into the Department's Incident Reporting System.

The Incident Reporting System includes a field for tracking whether a use of force was anticipated or not. COD enters this information based on its review of the brief description of the incident, not what the correction officers involved write in their use of force reports. In practice,[38] however, COD only records a use of force as being anticipated if it involves a "cell extraction."[39] The Department reported four such cell extractions in October 2023, with two categorized as "anticipated" uses of force.

Jail leadership is required to conduct a "Rapid Review" of all use of force incidents to identify any procedural violations and determine whether the incidents were "avoidable." An incident may be assessed as avoidable if the uniformed staff involved "fail[ed] to follow anticipated UOF protocols." BOC staff reviewed all 50 Rapid Reviews conducted by facility leadership for each of the 50 chemical agent incidents analyzed in this report. Not one of the Rapid Reviews (0%) determined that DOC staff failed to follow the anticipated use of force protocols. In total, five incidents (10%) were deemed to be avoidable for reasons unrelated to the anticipated use of force protocols.

[37] *See* SCOC 7063.4 (c) https://scoc.ny.gov/system/files/documents/2023/11/jail-min-standards.pdf

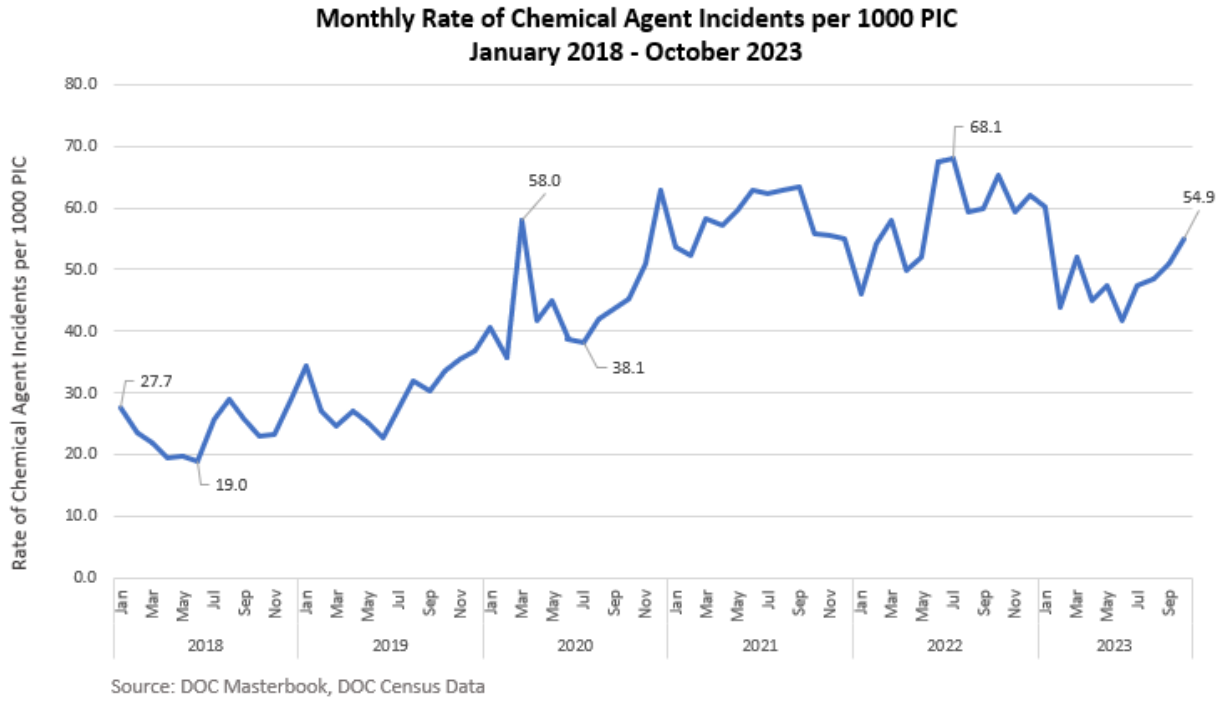
[38] This information was relayed to BOC staff by COD staff during an in-person visit to COD on Rikers Island on December 5, 2023.

[39] A cell extraction is a particular type of force that is highly coordinated and involves specially trained correction officers.

# VI. Findings

**From January 2018[40] through October 2023, the monthly rate of chemical agent incidents (per 1,000 people in custody) has increased 98.9%, from 27.7 to 54.9.**[41] Over the first ten months of 2018, there were 1,986 chemical agent incidents. By contrast, over the first ten months of 2023, there were 2,972 chemical agent incidents, a 49.7% increase, despite an average monthly census that was 28.6% smaller in 2023 (6,042 v. 8,465).

*Figure 2*

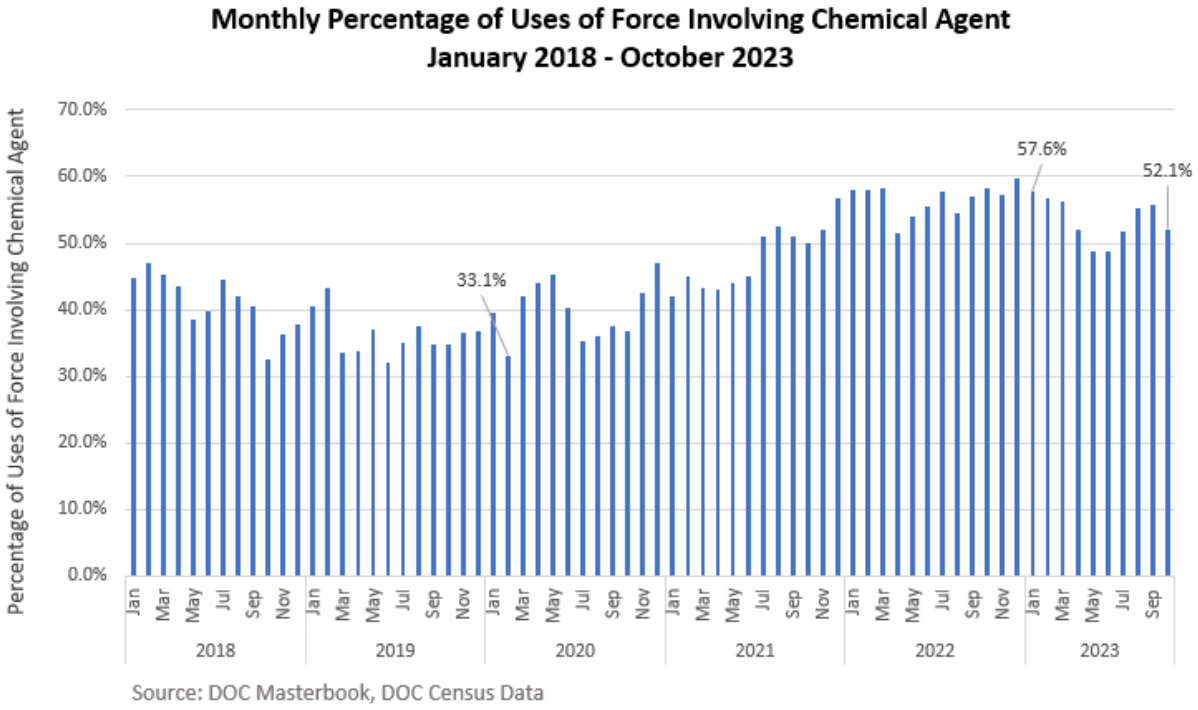



**Since 2018, it has become increasingly likely that, when force is used by DOC staff, it will involve or include the deployment of chemical agents.** In 2018, 41.0% of all use of force incidents involved or included the deployment of chemical agents. In 2019, this figure dropped to 36.3%. Over the first ten months of 2023, 53.5% of use of force incidents involved or included the deployment of chemical agents.

[40] BOC selected an approximate five-year lookback for the purposes of this report, to capture both pre-COVID-19 chemical agent trends, as well as trends following the outbreak of the COVID-19 pandemic.

[41] In his March 16, 2022, Special Report, the Nunez Independent Monitor wrote that the 2016 average monthly use of force rate, which was 40.2 (per 1000 people in custody ("PIC")), represents the "de facto baseline" for the Consent Judgement, "given that the many protections and practices required by *Nunez* had not yet been implemented." In October 2023, the rate of use of force was 105.3, or 161.9% higher than the 2016 average rate.

*Figure 3*




**BOC staff analyzed 50 incidents of chemical agent deployment in October 2023, selecting incidents during which chemical agent was deployed despite the absence of interpersonal violence. DOC categorized none of these incidents as anticipated uses of force.** The Department reported via its Incident Reporting System that the reason for these 50 uses of force were:

*Table 1*

| Reason for Use of Force - As Reported by DOC | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| **Refuse Direct Orders** | | **Prevention of Infliction of Harm** | | **Resist Restraints/Escorts** | | **Other** | | **Assault On Staff[42]** | |
| **Total** | **%** | **Total** | **%** | **Total** | **%** | **Total** | **%** | **Total** | **%** |
| 32 | 64.0% | 9 | 18.0% | 4 | 8.0% | 3 | 6.0% | 2 | 4.0% |

[42] Based on Board staff's observations of available video footage, neither of the two incidents categorized as "Assault on Staff" appear to demonstrate an actual assault prior to the deployment of chemical agent. In one case, a person in custody walked past a correction officer's outstretched hand, making slight contact (which was the alleged assault), and he was sprayed with OC approximately 30 seconds later, for refusing verbal orders to re-enter a housing unit. In the second incident, a person in custody was sprayed after he pointed his hand in the face of a correction officer, but, in the video of the incident, it is unclear whether physical contact was made, and the correction officer, in his use of force report, did not claim physical contact had occurred.

None of the 50 incidents were categorized by the Department as anticipated uses of force (a determination that sets in motion a series of required responses prior to the application of force as discussed above). Yet the Department reported that 64% of these incidents (n=32) were precipitated by a person in custody refusing to follow verbal commands from uniformed staff.

**In eight cases (16.0%), DOC staff sprayed a person in custody who was engaged in self-harm with a ligature around their neck.** The Department's Employee Rules and Regulations contains explicit instructions for correction officers who encounter a person in custody with a ligature around their neck that is attached to another object: "The officer shall immediately remove or cut the ligature or, if unable to remove it, disable it, e.g., loosening it, to stop the inmate from hanging/strangling himself/herself."

In the eight cases reviewed by BOC staff, available records indicate that the ligature was attached to another object when the correction officer deployed chemical agent. In three cases, the correction officer was not wearing a body-worn camera and the description of the incident did not provide enough detail to determine whether the ligature was attached to an object.

**In 16 cases (32.0%), visual evidence suggests that the correction officer deployed chemical agents from close distances prohibited[43] for safety reasons.** There are significant health risks associated with the use of OC at a distance of less than three feet for MK-3/4/6 and from less than six feet for MK-9. OC is deployed and propelled via a pressurized cannister, and direct deployment to the face at a range of less than three feet can potentially cause serious injury to the eyes, sinuses, throat, or lungs.

BOC staff identified 14 instances where visual evidence suggests that a person in custody was sprayed with MK-4 from a distance of less than three feet, and an additional two instances where it appears that MK-9 was deployed at a distance less than six feet. In an additional 24 cases (48.0%), the available video is not conclusive enough to make a determination as to whether the officer deployed chemical agent from a prohibited distance.

Each of these incidents were reviewed by DOC facility leadership, and only six[44] of the 13 incidents were identified as involving procedural errors related to the deployment of chemical agent from a prohibited distance.

**In five cases (10%), DOC staff targeted and sprayed an individual with MK-9.** MK-9 is a very powerful form of OC designed for crowd management and its use is prohibited[45] against a single individual passively resisting an order. In four of the cases, the person in custody was sprayed for refusing to obey direct orders. In the final case, the person was sprayed with MK-9 for attempting to hang himself. In three of the five incidents, a DOC supervisor deployed the MK-9.

**In 11 incidents of the 23 incidents (47.8%) that were captured on body-worn camera with audio, uniformed staff were not heard issuing verbal warnings that chemical agent would be utilized prior to deployment, despite existing policy that requires such warnings.** The Department's Use of Force

[43] *See supra* at Executive Summary, Key Findings

[44] In one additional incident during which MK-9 was deployed from a distance less than six feet, facility leadership noted the policy violation, but wrote that the person in custody "stepped into the spray." The video of this incident does not demonstrate this, but it does demonstrate that, from the point of activization of the body worn camera, the captain who deployed the MK-9 issued no verbal warning to the person in custody prior to deployment.

[45] *See supra* at Executive Summary, Key Findings

Directive leads with the following policy: "The best and safest way to manage potential Use of Force situations is to prevent or resolve them without physical force." By first warning people in custody about the potential use of chemical agents, an opportunity is created to compel compliance with verbal orders and avoid the use of force altogether. In four of these incidents, beyond the lack of warning about the potential use of chemical agents, there was no clear instruction or verbal order given to the person in custody—that is, the person in custody was sprayed without warning and without DOC staff articulating an order of any kind.

**Nearly half of these incidents (n=24) involved a person with a recent history of being housed in specialized mental health units, and roughly a quarter (n=13) involved emerging adults (age 18-21).** The Department's anticipated use of force protocols require that DOC staff attempt to summon a mental health professional to the scene to persuade the person in custody to cooperate with uniformed staff. This step is to be taken once all other measures[46] have been exhausted. While the Department cannot require clinic staff to respond to the scene of an anticipated force situation if none are reasonably available or if an intervention poses a physical threat to mental health staff, this review identified no documented effort by DOC staff to summon a mental health professional prior to the deployment of chemical agent in any of the incidents reviewed by BOC staff.

**Of the cases reviewed by BOC that were captured on body-worn camera video (n=22), people in custody who were sprayed with chemical agent for passively resisting direct orders did so for a variety of important reasons, including the desire to gain access to medical care, mental health care, and medication, and seeking protection from harm.** A number of illustrative cases from these categories will be examined in greater detail in the case description section of this report. However, generally, it is unnecessary[47] and punitive for DOC staff to deploy chemical agent on a person in custody who is refusing direct orders in an attempt to gain access to the medical clinic. It is also paradoxical, because the use of chemical agents on a person in custody requires that the person be transferred to the clinic for injury evaluation. Far from preventing a person in custody from gaining access to the clinic, the use of chemical agents creates a greater need for access, while significantly increasing demand on staff resources in the form of use of force reporting and subsequent investigations.

**BOC staff identified misreporting in Department staff's use of force reports in more than half (56.0%, n=28) of the incidents reviewed.** In each of the 50 incidents, BOC staff reviewed all the available reports and witness statements that DOC staff are required to complete following a use of force incident. These forms provide crucial information about DOC staff perceptions and other factors contributing to the use of force and are an integral component of any credible use of force investigation. While minor misreporting errors can be anticipated and understood given the inextricable confusion and stress present in physical force incidents, serious reporting errors negatively affect the integrity of investigations, perpetuates the practice of excessive and unnecessary force, and erodes public trust.

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[46] *See* Figure 1

[47] The Federal Monitor identified a myriad of ways that DOC uniformed staff performance routinely creates or contributes to the need to use force, including the failure to "address reasonable grievances (e.g., individual inmate issues, group inmate issues, medical problems, access to privileges)." *See* "Fifth Report of the *Nunez* Independent Monitor," April 18, 2018. https://tillidgroup.com/wp-content/uploads/2018/04/5th-Monitor-Report-04-18-18-As-Filed.pdf

The most common inconsistency observed in the 50 incidents reviewed by Board staff comprises claims that, at the time of deployment of chemical agent, a person in custody was advancing towards a DOC officer. However, video shows that the person in custody stood stationary or moved only slightly in an unprovocative manner, or retreated from staff (n=10, 20.0%).

Body-worn camera footage with audio makes it possible to ascertain verbal interactions between people in custody and DOC staff preceding the use of force incident. Because there was no body-worn camera footage for more than half of the incidents reviewed, it was not possible to verify the verbal interactions leading up to the chemical agent deployment described in the use of force reports in a significant number of these cases (n=28). An additional seven incidents that were not captured on body-worn camera occurred within jail cells, outside the view of stationary surveillance cameras, making it impossible to visually review them for misreporting.

**DOC reported that all the people in custody (n=50, 100%) who were sprayed with a chemical agent refused to provide a verbal or written statement to DOC facility staff following the incident.** Currently, there is no way to verify whether or how statements were sought or to verify refusals. While the refusal forms contain a date, they do not contain an entry for the precise time and location of the refusal, making independent video confirmation impossible. At minimum, the definitiveness of this pattern suggests that the Department faces significant levels of mistrust. In combination with the reporting errors in more than half the incidents, this finding also underscores the indispensability of video records, and, in particular, of body-worn camera video with audio as evidence of use of force incidents.

Aside from their investigational value, statements from people in custody following a use of force incident can be useful to better understand why people are resisting orders from staff. The statements can inform evidence-based strategies to reduce use of force incidents.

For its part, the Department's Investigation Division, which is responsible for conducting preliminary investigations of all use of force incidents, determined that it was not necessary to interview people in custody in 80% (n=40) of these incidents. The most frequently cited cause for their determinations to not interview people in custody was the presence of video evidence and absence of a physical injury[48] associated with the use of force incident.

**Despite the demonstrable importance of video and audio records to the evaluation of use of force incidents, and despite an ongoing DOC effort[49] to "record all interactions with individuals in custody" on body-worn cameras, less than half (46.0%, n=23) of the incidents reviewed were captured on body-worn camera, either because staff were not wearing a camera (n=26), or failed to activate it (n=1).** Uniformed staff are routinely not wearing body-worn cameras in the jails, as evidenced by this finding. Following each use of force situation, facility leadership reviews the incident to determine whether it was captured on body-worn camera, and, if not, the reason. For the 27 incidents that were not captured on body-worn camera, the most common reason (n=13, 41.8%) was that the facility lacked "backings" or mounting plates that officers wear on their uniforms, which the body-worn cameras are fastened to.

[48] It is relevant to note here that for 23 of these incidents (46%), the persons in custody who were sprayed with chemical agent reportedly refused medical evaluations, meaning there was no medical confirmation as to whether the person was injured or uninjured due to the force used by DOC staff.

[49] DOC Operations Order 1/22 regarding Body Worn Cameras, effective May 13, 2022

BOC staff visited each control room[50] on Rikers Island. During these visits, control room captains and officers unanimously reported that the magnetic backings purchased by DOC were of poor design and quality, were prone to break or fail, and that the magnets used with the devices were too strong and led to officers experiencing finger injuries. BOC staff inspected both broken and functional backings, which confirmed the reports from DOC staff.

**In January 2024, BOC staff reviewed chemical agent logbooks for one day in all the jails on Rikers Island, finding each jail distributed OC devices to uniformed staff who had not received their required annual OC re-certification training.** The New York State Commission on Correction requires[51] that all facility staff who have the authority to use or order the use of chemical agents receive annual training "to ensure continued proficiency in chemical agent issues." To measure compliance with this requirement, BOC staff visited the control rooms[52] of each of the seven jails on Rikers Island and cross-referenced the OC logbooks, which document the daily distribution of OC handheld units to uniformed staff, to the OC re-certification list provided by the Department's Training and Development Division. BOC staff found that, on the day reviewed, all the jails had distributed OC devices to uniformed staff who had not completed their annual OC training. RNDC had the highest number of uniformed staff with expired OC certifications who were assigned chemical agents, at 89. For these 89 officers, the average date of prior re-certification was June 25, 2022 (or 18 months from the date of the review).

**Only approximately 5% of DOC uniformed supervisors received the annual "Chemical Agents for Supervisors" training in 2023.** Departmental training data indicates that 34 captains (out of approximately 571) took part in the required 8-hour annual training. No uniformed supervisors higher than the rank of captain participated in the training in 2023. Just four captains from the Otis Bantum Correctional Center ("OBCC") received the training. As of January 2023, OBCC had the largest census of all jails, with approximately 1,450 people in custody living in 31 units, including six mental health units and eight maximum custody units. Approximately 80 captains are assigned to OBCC.

**Recourse to chemical agents also entails health risks, not only to people in custody against whom such agents are deployed, but to others indirectly exposed.** During the focus month of this report (October 2023), CHS reported that 30% of people in custody in the City's jails experience chronic pulmonary conditions, including asthma, COPD and other lung diseases.[53]

Studies have found that people with certain underlying chronic pulmonary conditions can be disproportionately susceptible to decreased airflow, airway constriction, and adverse medical events when exposed to aerosolized capsaicin. For example, in their 1993 study, Hathaway, Higenbottam, Morrison, Clelland, and Wallwork found clear indication of bronchoconstriction for some asthmatic patients exposed to capsaicin.

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[50] Each jail as a control room from which chemical agents and body-worn cameras are issued to officers who are starting their shifts.

[51] *See supra* at Executive Summary, Key Findings

[52] The control room in a jail is the location from which OC devices are distributed to uniformed staff. Policy requires each control room to maintain a list of all uniformed staff and their OC certification type, date, and expiration date. This list can be used by control officers to ensure that OC handheld units are not distributed to staff who are not certified. Of the seven control rooms visited by BOC staff, only one was able to produce such list, which was approximately one month old.

[53] *See supra* at Executive Summary, Key Findings

According to Dr. Michael D. Cohen, the 1993 Hathaway study offers "clear evidence that certain asthmatic experience significant airway narrowing when exposed to very low doses of inhaled capsaicin."[54]

Despite these risks, there was no indication in the available records or video that DOC staff consulted with medical staff directly or reviewed available records for contraindications to chemical agents prior to their deployment in any of the 50 incidents reviewed, despite the requirement to do so in the anticipated use of force protocols.

In addition to the 50 individuals under assessment here who were directly sprayed with chemical agent—and among whom it is reasonable to assume as many as three out of ten may have had preexisting chronic pulmonary conditions—many more individuals (people in custody, uniformed staff, non-uniformed staff, and medical staff) who played no direct role in the use of force were exposed to the chemical agents indirectly.

**The chemical agent or OC products purchased and used by the Department have three levels of intensity: level one (.33% MC)[55], level two (.67% MC), and level three (1.3% MC). The Department, however, only authorizes its uniformed staff to carry the highest-intensity products (level three).** A study[56] published in 2021 in *Policing: An International Journal* compared the effectiveness and health risks associated with the three levels and found that evidence for increased effectiveness of level three products is weak, and that their use is associated with a higher probability that medical treatment will be required. "Consequently," the study concluded, "our advice to police organizations is that level 1 and level 2 sprays are comparable in terms of effectiveness, and we did not find empirical reasons to pay more for a 'stronger' pepper spray."

DOC necessarily reduces operational flexibility by only authorizing its uniformed staff to carry level three products. This practice results in the deployment of the strongest chemical agents in environments such as infirmaries and mental health units that house vulnerable populations. Moreover, DOC officers who experience chronic pulmonary disease are only authorized to carry level three products, despite the potential risks of indirect exposure.

[54] *See* "The Human Health Effects of Pepper Spray - A Review of the Literature and Commentary." Dr. Michael D. Cohen. Journal of Correctional Health Care 1997 4:1, 73-88

[55] MC stands for "major capsaicinoids," which is a uniform measurement of the strength of OC or pepper spray.

[56] *See* supra at Executive Summary, Key Findings

# VII. Case Descriptions

This section of the assessment will provide ten narrative examples that will demonstrate, in detail, the Department's overreliance on chemical agents and lack of reliance on the prescribed anticipated use of force protocols. The cases were selected[57] from the 50 analyzed by BOC staff, and they are divided in two sections: access to health and mental health care, and fear for safety. All identifying information related to people or places has been removed. All quotes are taken directly from body-worn camera footage. All descriptions are based on available Departmental records.

## A. Access to Health and Mental Health Care

**Incident #1**

On October 1, 2023, at 5:45 PM, an individual in bed in a mental health unit (Unit A) was suddenly attacked by another individual in custody. He was dragged out of bed by the person in custody and his mattress and belongings were thrown on the floor by other people before he was escorted to the front of the unit by the housing area officer.

About ten minutes later, a captain arrived and attempted to rehouse the individual in another mental health unit (Unit B), but he resisted. "I can't go up there," he said. "They're going to beat me up." Because the captain noted the individual was at times incoherent and "started something with someone outside right when I was bringing him to" [Unit B], the captain moved him to the main intake, where he instructed the correction officers to keep him "until things calm down."[58]

The individual was placed in a holding cell in the main intake at 6:01 PM. He was removed from the intake cell for approximately 10 minutes by two DOC supervisors, from 11:26 PM to 11:36 PM.[59]

At 2:03 AM, eight hours into his intake placement, an intake captain, an escort captain, and a correction officer approached the individual's holding cell, and both captains activated their body-worn cameras. Ordered to turn around and put his hands behind his back, the individual responded: "I'm not going nowhere, I'm going out the building. I

> "I want to speak to my psychiatrist… Leave me alone… I didn't hit nobody; I didn't hurt nobody."

[57] These cases were selected both because they were representative of trends highlighted in this report, and because they were captured on body-worn camera footage with audio recording, which allows for a review of the verbal interactions between uniformed staff and people in custody that precede chemical agent deployments.

[58] On September 12, 2022, Mayor Eric Adams issued Emergency Executive Order No. 201, which brought the Board's Minimum Standard §6-05 Confinement for De-Escalation Purposes back into effect. This standard prohibits the Department from using a jail's intake area for de-escalation confinement and post-incident placement. Despite this, the Department still routinely uses its jail intake areas for de-escalation placements, as demonstrated in this narrative.

[59] DOC staff did not activate their body-worn cameras during this period, so it was not possible to determine what was discussed.

want to speak to my psychiatrist in the [mental health unit] to come over here and transfer me out of here because there's no space... I already got kicked out, I got beat up and everything in there." He continued verbalizing at times disorganized thoughts and refused to follow the escort captain's direct orders to turn around and place his hands behind his back. "I'm going to stay right here," he said. "I have the right to stay here."

At that point, the intake captain turned to the escort captain and said: "This is an anticipated use of force?" The escort captain responded: "Yeah, no problem," and said to the correction officer present: "Come here. Cuff him."

The intake captain then turned back to the person in custody and said: "Listen, you have to exit this cell. Turn around and place your hands behind your back, sir, or they're going to spray you."

At 2:06 AM, the correction officer and the intake captain entered the holding cell. The person in custody, increasingly agitated, raised his hands in the air, with both index fingers pointing upwards—a pose he maintained until the chemical agent was deployed. As the officer reached up to take hold of one of his upraised arms, the person in custody, while apparently trying to hide his face behind his arms, repeatedly shouted: "Leave me alone." Ordered again to let himself be cuffed, he protested: "If you spray me, I'm going to go crazy by accident…I didn't do nothing, I didn't hit nobody... Leave me alone."

At 2:07 AM, the correction officer reached up and took hold of the person in custody's wrist. The escort captain said: "If he pulls away, he's going to get sprayed." As the officer struggled to draw the wrist down, the person in custody raised it up again and, as he stood with both hands near his head and his index fingers pointing upwards, the intake captain deployed the chemical agent towards his face from a distance that appeared to be less than three feet.

Three minutes and 20 seconds elapsed between when the escort captain gave his first direct order to the person in custody and when the intake captain deployed the chemical agent. In the use of force reports submitted later by staff, the correction officer present in the cell wrote that the person in custody was "attempting to evade the immediate area" before the intake captain deployed the chemical agent. The escort captain wrote that the person in custody "continued to take a fighting stance while balling up his fists."

Following the deployment of the chemical agent, DOC staff and the person in custody rushed out of the cell. A physical struggle ensued, which reportedly did not result in any injuries. Once the person in custody was placed in rear restraints, he was taken to the decontamination shower, then escorted by staff to the main clinic at 2:19 AM. He entered a treatment cubicle at 2:28 AM and exited at 2:36 AM. He was then escorted out of the clinic in restraints and, with no shoes on his feet, he was escorted to a new mental health unit at 2:39 AM.

Three days later, the individual was assaulted in the mess hall. He was subsequently transferred to a mental health housing unit in a new jail. Five days later, he was transferred to the hospital, where he was admitted into the forensic psychiatric unit.

**Incident #2**

On October 23, 2023, at 10:42 AM, the lawyer of a person in custody e-mailed the Department's Office of Constituent and Grievance Services[60] to complain that their client repeatedly requested mental health services and did not receive them. The lawyer also wrote that the client's legal team recently submitted a mitigation report to the court documenting the client's mental health issues, which had gone untreated for years. The lawyer requested that their client be transferred to a mental health unit and be given the opportunity to speak with a therapist.

About six hours later, at 4:32 PM, the person in custody exited his housing area, a general population dormitory, as a correction officer was providing commissary services. The door to the unit was open, and the commissary officer stood on the threshold. The person in custody approached and attempted to walk by the commissary officer. The officer extended his arm to block him, but he continued past, making minimal physical contact with the officer's outstretched hand as he entered the area directly outside the dormitory.

> "I want to speak with a captain."

In response, the commissary officer activated his body-worn camera, removed the chemical agent cannister from his duty belt, and stepped in front of the person in custody, who stood with his hands at his sides. Ordered by the commissary officer to return to the dormitory, the person in custody replied: "I want to speak with a captain," to which the officer responded: "That's not how we do it... Step inside." At that point, the person in custody raised both his hands in the air, with his palms open. The officer said: "You can put your hands up all you want. I'm going to tell you one more time to step inside." To this, the person in custody replied, "I want to see the captain."

The commissary officer then approached the person in custody, placing one hand on the individual's stomach and pushing him towards the dormitory door. The person in custody, with his hands still in the air, took a half step backwards. The commissary officer then took three steps backwards and, as the person in custody said: "Big man, big man, I want to see the captain," sprayed chemical agent in the person in custody's face from approximately three feet[61] while his hands were still in the air above his shoulders at 4:33 PM.

Twenty-two seconds elapsed between when the commissary officer gave his first direct order for the person in custody to step back inside the dormitory and when the officer deployed the chemical agent. At

[60] The Department's website describes the Office of Constituent and Grievance Services ("OCGS") as a " bridge between the Department and the community at large, providing a final resolution point for concerns regarding conditions of confinement, dissemination of useful and timely information, building community relationships, enhancing public awareness, promoting fairness, and fostering respect for all while supporting the Department's goals."

[61] The officer, who was standing face-to-face with the person in custody, took three steps backwards, but then fully extended his arm prior to deployment. The camera angle does not provide a conclusive indication as to whether the officer deployed the OC from a distance less than three feet. As such, this case was not categorized by BOC staff as having violated the three-feet policy.

no point was the person in custody warned that chemical agent would be used, although the officer wrote in his use-of-force report that he issued a verbal warning regarding the use of chemical agent.

Following the incident, the person was escorted to the decontamination shower pen in the main intake. He arrived at the decontamination shower area at 4:42 PM, nine minutes[62] after the deployment of chemical agent. He remained in the shower area until 5:23 PM, at which point he was escorted out of the area and taken to the main clinic, where he was presented for medical attention at 5:30 PM.

Two days following the incident, the person in custody was transferred to a specialized mental health unit.

**Incident #3**

On October 27, 2023, a person in custody exited his mental health housing unit early in the morning for a court date. On his way to the court bus, he stopped at the medication window in the main corridor, where fixed-camera video showed him being handed a small white cup. In the main clinic several minutes later and after looking into the cup, he returned to the medication window, which was closed. He then appeared to search the floor, seemingly for dropped medication. He exited the facility at about 6:30 AM and returned from court later in the afternoon.

Following the evening meal, the person in custody persuaded a correction officer stationed in the corridor to allow him to enter the main clinic. As the individual approached the medication room window at about 7:15 PM, three officers activated their body-worn cameras. The cameras showed him in an agitated state and speaking loudly while an officer attempted to de-escalate the situation. “Who brought him here?” the captain stationed in the clinic asked the officer, whereupon the person in custody responded: “I want to get my medicine. I went to court today.” “You didn’t go to court today,” the captain said. The person in custody was adamant: “Yes, I did... I went out to court this morning... I need my [medicine] now. I’m diabetic. My sugar is high. Please give me my medicine. Captain, can you talk to the lady [in the medication room]?”

> “Stop playing with me. I need my medicine. They’re lying to you. I went to court today.”

While one of the correction officers present entered a treatment cubicle with a member of clinic staff to discuss the matter, the person in custody continued demanding his medication, growing increasingly angry and at one point shouting: “Stop playing with me. I need my medicine. They’re lying to you. I went to court today.” He then asked the captain to investigate the reason he was not getting his medication, before exiting the clinic on his own at 7:19 PM.

About 15 minutes later, at 7:34 PM, a captain stationed in the corridor activated his body-worn camera as he responded to the person in custody, who appeared to be refusing orders to return to his housing unit. “I need my medicine,” he said. The captain responded: “Come on, man, you just got your meds.” The person in custody agitatedly disputed this. At 7:41 PM, after trying to de-escalate the situation, the captain escorted him back to the medication window, where he asked a group of correction officers: “Did he get

[62] The Department’s Chemical Agent Directive requires that decontamination occurs “as soon as feasible, not to exceed a period of five (5) minutes.”

his medication?" An officer responded: "He doesn't want to wait for his medication to come to his house. He's in [a mental observation] house. The medication comes to him."

At this point, the captain deactivated his body-worn camera and—as shown by fixed-camera video—walked away, effectively ending his supervision of the person in custody without a resolution.

At 7:42 PM, the person in custody approached the medication window. After an interaction with the staff person behind the window and a DOC officer, he sat down on the steps adjacent to the window at 7:44 PM. At 7:45 PM, a correction officer present activated his body-worn camera, approached the person in custody seated on the stairs, and said: "I'm giving you a direct order to go back to your house, or OC will be utilized. Are you going back to your house?" The person in custody responded: "No." Still seated, he was trying to put on a surgical mask when the correction officer deployed the chemical agent in his face from a distance of approximately three feet.[63]

The correction officer who deployed the chemical agent later wrote in his use of force report that he had no radio with which to contact a supervisor. However, a second correction officer at the scene issued a radio transmission four seconds after witnessing the deployment of the chemical agent.

The individual who was sprayed was escorted to the decontamination shower area in the main intake, arriving at 7:49 PM. He remained in this area until 8:07 PM. At 8:10 PM, while still in the intake, the person in custody had a five-second interaction with an officer who was standing next to a clinician. Following this brief interaction, the clinician returned to the clinic.[64] The person in custody was then escorted out of the intake by multiple officers and, as he passed by the door to the clinic, the person in custody stopped and lifted his shirt, demonstrating his stomach area to the officers. However, the person was not allowed in the clinic, and was instead escorted to a housing area. On his way to the housing area, at 8:13 PM, the person in custody stopped for a moment at the shuttered medication window, knocking multiple times on the glass.

### Incident #4

On October 17, 2023, at 8:30 AM, correction officers entered a mental health unit and began packing up the belongings of a person in custody. A correction officer told the person in custody to get ready to go to another housing area, but the person refused. "I'm not going to that housing area," he said. "I gotta see the psych and mental health." A captain told the person in custody he was going to a general population housing area, not a mental health unit. The person in custody responded: "I don't know what you're trying to pull... I deal with mental health. That's why I'm here in the first place."

The captain then told the person in custody he would be taken, not to the general population unit, but to the main intake (where he could presumably wait to be seen by mental health staff). The individual agreed and began gathering his property.

[63] The camera angle does not provide a conclusive indication as to whether the officer deployed the OC from a distance less than three feet. As such, this case was not categorized by BOC staff as having violated the three-feet policy.

[64] A clinician reported that this person in custody refused medical attention at 8:30 PM.

> "What kind of games [are you] playing? Why [are you] lying? I need to see the psych."

The person in custody walked downstairs into the corridor with DOC staff and, at 8:34 AM, they arrived at a point where the corridor split in two directions: one towards the main intake and the other towards the general population housing unit. When a correction officer pointed the person in custody in the direction of the general population housing unit, he balked: "I'm going to intake." The correction officer responded: "You're not going to intake." The person in custody responded: "I'm not going to [general population]. I just told y'all that I need to see the psych... What kind of games [are you] playing? Why [are you] lying? I need to see the psych." When he continued to balk, one of the correction officers unholstered his can of chemical agent. This appeared to antagonize the person in custody even more. "I don't care about none of that," he yelled. "I need to see the psych."

At 8:35 AM, a correction officer ordered the person in custody to turn around. The person in custody again yelled, "I need to see the psych right now." The captain ordered the person in custody to "stop balling [his] fist or chemical agent will be utilized." The person in custody complied with the order and opened his palms. His hands remained at his sides, with his palms open. As the individual took a slow half-step sideways, the correction officer deployed the chemical agent to his face from approximately three feet.[65]

The person in custody was then escorted to the decontamination shower area, arriving at 8:37 AM, and exiting this area at 8:47 AM. He was then escorted to the clinic, arriving at 8:49 AM.

Five correction officers and the captain later stated in their use of force reports that the person in custody "advanced" on one of the officers. Four of the correction officers also stated that the person in custody balled his fists when he advanced on them.

**Incident #5**

On October 6, 2023, at 5:50 AM, a person in custody entered the rear dayroom area of his general population housing unit, where he was seen smoking an unknown substance. At 5:53 AM, he appeared unsteady as he exited the dayroom area and, at 5:56 AM, he collapsed on the floor.

After struggling to his feet, he stumbled towards the front of the housing area, where a correction officer was seated at a desk. The officer rose while the person in custody, who appeared disoriented and distressed, shuffled around the desk, and knocked on the window of the "A" station.[66]

The correction officer attempted to speak with the person in custody, but the person walked off towards an exit and then stumbled back toward the correction officer. The correction officer reached out his arm and made contact with the person in custody, resulting in the person falling to the floor.

[65] The camera angle does not provide a conclusive indication as to whether the officer deployed the OC from a distance less than three feet. As such, this case was not categorized by BOC staff as having violated the three-feet policy.

[66] The "A" station, colloquially known as the "bubble," is the housing area's secured control room and cannot be accessed by people in custody.

At that point, at 5:58 AM, the correction officer activated his body-worn camera and unholstered his chemical agent cannister and radio, although he did not appear to make a radio transmission. At the moment the camera was activated, the correction officer can be heard saying: "You lunged at me."

While the person in custody remained on the floor, appearing disoriented and in distress, several other persons in custody approached and asked the correction officer why he hit the man. The correction officer ordered them to back away while the person in custody, still on the floor, said: "Medical. Medical. Hold on, listen. I'm telling you to take me to the hospital. Why you don't want to call it in?...I'm telling them I need medical, and they don't want to give me medical."

> "I'm telling you to take me to the hospital. Why you don't want to call it in?"

The person in custody then crawled on his knees towards the correction officer and appeared, in falling forward, to make contact with the correction officer's radio, which dropped to the floor. The correction officer's immediate response, at 5:59 AM, was to deploy his chemical agent in the face of the person in custody from a distance of approximately three feet.[67]

While the correction officer used his radio to report the deployment of the chemical agent, the person in custody remained on the floor, screaming, and flailing about. When the person began shouting for help and water, at 6:01 AM, another person in custody approached and handed him milk. The affected person in custody remained on his knees while the correction officer who sprayed him stood near the housing area door. Another person in custody can be heard saying: "If you're afraid to be around men in [custody], then you shouldn't put the uniform on. We told you something's wrong with him. We told you he can't breathe. He got chest pains."

At 6:06 AM, a captain arrived at the unit and, while the correction officer attempted to describe the sequence of events to him, a person in custody interrupted them. "Captain, the officer was standing right there," he said. "[The individual sprayed] came up and asked him for medical assistance. He said he couldn't breathe. [The officer got nervous] and he punched him. Then, after that, he maced him. [The officer] did what he wasn't supposed to do. That's the bottom line. Run the cameras back... That's what happened. That was unnecessary. Completely."

> "[The officer] did what he wasn't supposed to do. That's the bottom line."

At 6:15 AM, seven officers and a captain, all wearing protective gear, including helmets, vests, and shields, arrived at the unit. The person in custody was rear-cuffed and escorted out of the unit at 6:18 AM, arriving to the decontamination shower area in the main intake at 6:33 AM, 34 minutes after he was sprayed with

[67] The camera angle does not provide a conclusive indication as to whether the officer deployed the OC from a distance less than three feet. As such, this case was not categorized by BOC staff as having violated the three-feet policy.

chemical agent. He was removed from the decontamination area at 6:35 AM and placed into a holding pen.

At 7:55 AM (one hour and 56 minutes after being sprayed), the individual was escorted into the clinic for his medical examination. The injury report initiated by DOC staff contains no mention of the medical event that precipitated the use of force and the examining clinician notated "pain medication as needed" for the treatment provided.

**Incident #6**

Following a brief hospitalization and an eight-day placement in an infirmary unit on Rikers Island, on October 26, 2023, a person in custody was transferred to a new facility at 2:16 PM on a Friday. He remained in intake holding cells until 7:03 PM, when he was escorted to the general population medication window. He was returned to an intake holding cell at 7:14 PM.

At 2:14 AM, three correction officers and a captain activated their body-worn cameras and entered the holding cell. As they approached him, the person in custody was seated and can be heard saying: "I'm not going nowhere... I'm not doing nothing illegal. I just want medical attention." A correction officer reached for the person's wrist, but the person pulled it away. "Don't touch me," he said, whereupon the captain unholstered a cannister of MK-9 and pointed it directly at him. In response, the person in custody, who held an inhaler in his hands, lifted his shirt to show something on his upper side. "I want medical attention," he said. "Look how I am. I just came from the hospital."

> "They were supposed to have my medication in the medication line. They didn't have my meds."

A correction officer then ordered the person in custody to stand and put his hands behind his back, to which the person responded that he had a medical order that prohibited him from being cuffed behind his back.[68] He continued to request medical care: "I've been [in the intake] since early. I asked nicely to see medical. I haven't done nothing wrong... All I'm trying to do is see a doctor. That's all I'm trying to do. Call Deputy Warden [name omitted] for me. Tell him [person in custody] has a problem down here... All I want to see is medical. That's all I'm asking for. I'm trying to get my meds right. If I don't see them, I'm not going to see them tomorrow... I call them from Monday to Friday and hope to see medical, and nobody comes and gets me in the unit. That's why I got sick and I went to the hospital… I went today to the medication line, and they didn't have my meds… They were supposed to have my medication in the medication line. They didn't have my meds. They were talking about how they had all my [meds] in the computer, but that they didn't have my meds. It's Friday. If I don't see them, I'm not going to see them until Monday."

The clinic to which the person in custody was attempting to gain access was close by, directly adjacent to the main intake. A correction officer suggested that once the person in custody was placed in a housing unit, he could sign up for sick call. The person in custody expressed disbelief, based on his 14 months in

[68] BOC staff obtained a copy of this document, which confirms that CHS notified DOC on September 26, 2023, that the individual should be "Front cuff[ed] only, allow access to self-administered medication, no chemical agents."

custody, that he would be seen by medical staff via sick call. Told by a correction officer that he could not stay in the intake, the person in custody requested that they call in a medical emergency. A correction officer responded: "I'm not calling a medical emergency. There's no medical emergency here." The person in custody then responded that he was not going anywhere and that he had "chest pains."

At that point, two correction officers approached him and attempted to gain control of his wrists. "Don't touch me," he protested. "I don't disrespect… Let me just see medical." A correction officer, growing agitated, shouted back: "It's not me. The doctor don't want to see you. We spoke to him… They don't want to see you. They said you'll get seen at sick call."

The two correction officers then took control of the person in custody's wrists, but in standing up, he broke free from their hold. A correction officer took hold of his wrist again and, when he continued to resist, another correction officer deployed chemical agent in his face from a distance of approximately three feet at 2:18 AM.

Following the deployment of the chemical agent, the person in custody dropped down into a seated position on the bench. Again, uniformed staff ordered him to put his hands behind his back. He responded by saying: "I'm not putting my hands behind my back." Approximately 10 seconds after the first deployment, he was sprayed in the face a second time from a distance of approximately three feet.[69] "You sprayed me. Now I have to see medical," he said. Told to turn around, he responded: "I can't turn around. I can't even see—you see I'm [expletive] blind [motioning to an eye patch he wears]."

Rear-cuffed, he was taken to the decontamination shower at 2:21 AM and then brought into the main clinic, where he was examined by a CHS clinician at 3:20 AM. The clinician ordered him to be transported to the hospital via Emergency Medical Services ("EMS") to rule out acute coronary syndrome.

**Incident #7**

A person in custody called 3-1-1 to file a complaint that CHS clinic staff in the infirmary unit he was assigned to had not helped him with his high blood pressure in two weeks. The following day, October 11, 2023, upon returning from the recreation yard, he sought to follow a CHS clinician he encountered into an office. The person in custody, who uses a wheelchair, refused to allow a correction officer to wheel him into his cell, whereupon, at 3:09 PM, several correction officers and a captain present activated their body-worn cameras.

"I'm staying right here, I'm waiting for the [clinician]," the person in custody said, despite being told the clinician would not be coming out of the office to see him.

The captain then sent a radio transmission for a de-escalation team to respond to a person in custody refusing to return to his cell.

"I'm not going nowhere," the person in custody continued to insist. "I ain't seen a doctor yet and ain't nothing been done and my blood pressure is still sky high."

[69] The camera angle does not provide a conclusive indication as to whether the officer deployed the OC from a distance less than three feet. As such, this case was not categorized by BOC staff as having violated the three-feet policy.

Asked about a hospital appointment he was taken to the day before, he replied that he was returned to Rikers Island from the hospital with specific orders, and that he had yet to be seen by a doctor regarding those orders.

“I ain’t going to keep accepting this every day,” he said. “I’m just going to handle this the way I got to handle it.”

After confirming with the correction officer that the person in custody’s leg was shackled to the wheelchair, the captain ordered the correction officer to place restraints on the man’s arm. The man resisted all ensuing efforts to cuff him over a 45-second period. At 3:12 PM, the captain ordered a correction officer to “spray him.” The correction officer deployed chemical agent in the person in custody’s face at a distance of less than three feet.[70] The correction officer then radioed a request for a “probe team” to report to the scene.

> “I got asthma. I can’t breathe.”

Within seconds of the deployment of the chemical agent, the person in custody and all present DOC staff members were coughing, gagging, and choking. The captain, who had difficulty speaking, said to a correction officer: “I have asthma.” The person in custody, the only person sprayed directly, also said: “I got asthma... I can’t breathe.”

At 3:16 PM, after telling a correction officer he needed his albuterol inhaler, the person in custody collapsed from his wheelchair onto the floor. Asked where his inhaler was, he was unable to answer, but another correction officer found it in his cell and brought it to him where he was seated on the floor, his legs beginning to shake. The captain was also visibly in distress but refused advice to go out into the fresh air. “I gotta supervise,” the captain said. To which a correction officer responded: “You can’t supervise if you can’t see.”

At 3:19 PM, the captain implored the person in custody to use his inhaler. The person in custody, still seated on the floor with his back against a wall and his legs and body shaking, appeared unable to raise the inhaler to his mouth. At that point, on the captain’s orders, a correction officer called in a medical emergency. A second correction officer approached the person in custody, who was still struggling with the inhaler, and said: “I’m going to help you.” The correction officer then took the inhaler from him and discharged multiple doses into his mouth. “You gotta breathe when you take it,” the officer said.

At 3:20 PM, a correction officer entered the clinic office located only a few feet from the scene just described. The correction officer informed the clinician who encountered the person in custody earlier that the latter “can’t breathe—somebody gotta do something, I called a medical emergency… I just sprayed him.” When the clinician said he was afraid of being assaulted, the officer replied: “He’s not going to beat you up. He can’t even move. He can’t breathe. I’m not going to let him beat you up. I’m right here.”

“Where is he?” the clinician asked.

“He’s right here, on the floor,” the correction officer said.

[70] As confirmed in the Rapid Review conducted by the jail’s leadership.

“I can’t see him,” the clinician said.

“It’s a medical emergency,” the correction officer repeated. “He can’t breathe. Look at him.”

The correction officer then returned to the person in custody, who was still on the ground. The captain had him shifted onto his side, and another correction officer had tucked a sweatshirt under his head. The captain verbalized that she was worried the man may be having a seizure, because of the shaking of his body. Told by the correction officer who emerged from the clinic office that the clinician was refusing to provide treatment because he was afraid of being beaten up, the captain used her radio to report that a doctor was refusing to afford a person in custody medical attention. The captain then approached the clinic office and, at 3:22 PM, shouted at the doctor: “You have to come and give this man medical attention. You gotta come and see him.” At that point, the clinician emerged from the office and appeared to attend to the person in custody.

From 3:24 PM through 3:32 PM, two clinicians attended to the person in custody while he lied on the floor. No effort was made to get him up off the floor and onto a gurney. At 3:33 PM, he was able to struggle back into a seated position and, at 3:35 PM, he was helped by officers into his wheelchair and reportedly taken to a decontamination shower.

The CHS clinician who initially hesitated to treat the person in custody later wrote in the injury report that the man refused medical examination, though no visual evidence suggested this. The clinician provided no disposition order and, in the treatment field, wrote: “Follow up as needed.”

## B. Fear for Safety

**Incident #8**

On October 18, 2023, at 10:44 AM, in a housing area unit, a person in custody was attacked in a cell. Pursued by several other people in custody, he fled the cell and, as he ran down the tier, another person attempted to punch him in the head. When he reached the front of the housing area, no correction officer was present. The correction officer on duty had exited the unit four minutes earlier. With his attackers closing in on him, the person in custody appeared to alert two correction officers in the vestibule outside the housing area door and, at 10:45 AM, the door opened and he exited into the vestibule.

> “Don’t spray him. Just cuff him.”

Unrelatedly, according to staff use of force reports, a probe team was just then responding to an incident in an adjacent housing area. The probe team’s captain, seeing the person in custody in the vestibule, ordered him to return to the unit in which he had just been attacked. The person in custody refused the order. Fixed-camera video shows the probe team’s officers pointing MK-9 cannisters at him. Although probe teams are required to include a correction officer assigned to film uses of force, the correction officer present with a hand-held camera did not film the interaction. However, a nearby captain who was not part of the probe team had her body-worn camera on. She can be heard telling the probe team: “Don’t spray him. Just cuff him.” She quickly exited the area when an MK-9 cannister was deployed against the person in custody. “Oh my god,” she can be heard saying, and: “Ah, Jesus.”

The fixed camera captured the moment the person in custody was sprayed from approximately six feet.[71] He was standing still, with his eyes closed and his arms crossed on his chest. About 50 seconds had elapsed between his leaving the housing unit to escape his attackers and the moment when he was sprayed with MK-9 for passively resisting orders. A correction officer present reported that the person in custody was advancing on staff when he was sprayed with chemical agent.

Following this incident, the person in custody was escorted to the decontamination shower area in the main intake at 10:52 AM. The person in custody remained in the enclosed decontamination shower cage (which dimensions are approximately three feet by three feet) until 11:41 AM, or 49 minutes later. As he was removed from the shower cage, officers activated their body-worn cameras, capturing the person in custody still in distress over the effects of the MK-9. A nearby person in custody can be heard yelling, "That [expletive] is hot," to which the captain responds: "It is hot."

At 11:46 AM, the person was placed into an intake holding pen and he appears to attempt to decontaminate using the small sink. The injury report related to this incident includes a notation from a CHS clinician that the person was presented for medical attention at 2:10 PM. The examining clinician reported observing no physical injuries and noted that the person in custody refused the evaluation at 2:38 PM. However, available video demonstrates that the person in custody remained in the holding pen until 5:10 PM and was never brought to the clinic. BOC staff did not identify any clinical staff approaching or interacting with the individual between 2:00 PM and 3:00 PM while he was in the holding pen. At 5:19 PM, the person in custody was transferred out of the building to another jail.

### Incident #9

Over the course of several days, a person in custody was involved in multiple violent incidents in mental observation housing units in the same jail. On one occasion, while eating breakfast in the dayroom, he was punched in the head by another person, without provocation. A few days later, on October 23, 2023, following the evening meal, he refused to return to his housing area, and was taken to the main intake, where he was placed in a holding cell at 5:50 PM.

Shortly after midnight, a group of five correction officers and one captain approached the holding cell and activated their body-worn cameras. As they approached, the person in custody, who appeared highly agitated, can be heard repeatedly saying: "No," and: "I'm not going." He then began rubbing an apple on the lock of the cell, in an attempt to jam it, and told the correction officers: "Y'all are crazy. Who want to go up there [to the housing area]? I told you them [expletive] tried to jump me and kill me. Get the [expletive] away from me."

"Sir, we need you to comply, or chemical agents will be deployed," a correction officer warned him. "Turn around and put your hands behind your back."

At 12:05 AM, a correction officer entered the cell. Multiple officers shouted, "Turn around!" at the person in custody, who can be seen waving his hand and then dropping it to his side. Two seconds later, the

[71] The camera angle does not provide a conclusive indication as to whether the officer deployed the MK-9 OC from a distance less than six feet. The officer present who was assigned to film did not activate the handheld camera until after the MK-9 was deployed. As such, this case was not categorized by BOC staff as having violated the six-feet policy.

correction officer sprayed the person in custody directly in the face, from a distance of what appeared to be less than three feet, as the person in custody stood still.

In his report, the correction officer who deployed the chemical agent wrote: "Said inmate then begin [sic] to walk towards this writer still non complaint [sic] and irate screaming hes [sic] not going anywhere. This writer attempted to crate [sic] space in between us, but couldnt [sic] because the holding cell was small in size which prevented this writer to [sic] from stepping to the side futhermore [sic] DOC staff were directly behind me which prevented this writer to take a step back. This writer then utilized one two second burst of chemical agents in which [sic] had its desired effect."

After being sprayed, the person in custody was rear-cuffed and escorted to the decontamination shower. He was then taken to the main clinic to be evaluated for injuries. He entered the examination cubicle at 12:15 AM, still in rear restraints, and exited it at 12:16. At no point were his restraints removed, nor was he allowed privacy with the clinician, as DOC staff remained present throughout. The clinician reported that the person in custody refused the examination.

The person in custody was next returned to a mental observation housing unit and, as he was escorted down the corridor, he can be heard saying: "You are taking me back to that area to get jumped."

The following day, he was transferred to the hospital, where he was admitted to the psychiatric unit.

### Incident #10

On October 21, 2023, at 12:41 AM, a DOC officer in the main intake spoke to a person in custody in a holding cell. At 12:42 AM, a captain and another correction officer joined the conversation, at which point the person in custody removed his sweatshirt and began tying one of its sleeves to a bar of the cell. DOC staff then activated their body-worn cameras. One of the correction officers approached the cell and removed the sweatshirt from the bar. While this occurred, the captain can be heard saying to the person in custody: "I will use my MK-9 this time. I'm not using anything else." As he said this, the captain unholstered his MK-9 cannister from his leg.

A correction officer then informed the person in custody: "You are going to a [housing area]. You cannot stay in intake."

The captain reaffirmed this. "We got you a house already, and you're going."

"What house is that?" the person asked. After ordering him to step up to the gate to be cuffed, the captain informed him that he was being transferred to Unit A (his previous housing area, a general population unit).

"I just had an incident there,"[72] the person in custody responded. "I'm not going there."

At 12:46 AM, a correction officer unlocked the cell. The two correction officers and the captain entered it and ordered the person in custody to turn around to be cuffed. The person in custody repeatedly asked: "For what?" as he slowly backed away. DOC staff continued to order him to turn around. When he was stopped by the wall from backing up any farther, a correction officer reached out and took control of the

[72] DOC records indicate that this person in custody was involved in an "assault" in the unit 12 hours earlier.

person in custody's wrist. As he applied a cuff to the person's wrist, the second correction officer pointed the chemical agent at the person in custody. "No, let him turn around first," the captain said. But the correction officer proceeded to spray the person in custody directly in the face from a distance that appeared to be less than three feet. The captain then ordered the person in custody to place his hands behind his back. The cuff dangled from his right wrist as he did so.

As the person in custody was escorted in rear-cuffs to the decontamination shower at 12:47 AM, he can be heard asking a correction officer: "Why, bro? Just why?" He was escorted out of the decontamination shower area at 1:05 AM and taken to the clinic at 1:07 AM.

Three days after this incident, he was transferred to a mental observation housing area in a different jail.

# VIII. Conclusion and Recommendations

Based on the Board's assessment, DOC officers are routinely bypassing anticipated use of force protocols and precipitously deploying chemical agents. And, following these incidents, correction officers and uniformed supervisors rarely document whether the force they used was anticipated or not.

Compounding this problem, COD makes its own independent assessment about which use of force incidents are anticipated by DOC staff—a determination based on an incorrect interpretation of policy: that anticipated use of force incidents only occur during cell extractions. DOC facility leadership is not demonstrating a commitment to holding staff accountable to the anticipated use of force protocols in their reviews of use of force incidents.

Until a practical distinction is made between anticipated and spontaneous uses of force, uniformed staff will continue to treat instances of passive resistance as calls for the use of force, rather than as occasions for verbal de-escalation, problem solving, and conflict resolution.

## A. Recommendations

**Training**

1. All uniformed DOC staff should receive specialized and recurrent training on the Department's Anticipated Use of Force Protocols. To maximize attendance, these trainings should occur at pre-existing congregate staff meetings within the jails, such as roll call trainings and facility leadership meetings.
2. DOC should closely examine current chemical agent trainings and re-certification trainings to determine areas for improvement. Trainings should be interactive and should include a review of video incidents that demonstrate prohibited chemical agent practices highlighted in this report. The mandatory eight-hour annual training for supervisors should be condensed in an effective manner towards the goal of significantly increasing the training completion rate of uniformed supervisors.

## Monitoring

1. DOC should develop and implement a plan to promptly review and identify for completion each use of force report that does not contain a determination with respect to whether the force was anticipated. DOC should consider adjusting the use of force report form, so that the determination can be made by checking a box, rather than descriptively writing the determination, as is currently the case.
2. The Department should implement action steps necessary to ensure that its uniformed staff who are not qualified to use OC devices based on expired annual training re-certifications are not distributed OC handheld units until such time as they are re-certified.
3. The Department should conduct an assessment, to be shared with the Board, which reviews the availability and response times of captains to calls for assistance by correction officers. This assessment should include a survey of officers who regularly work in housing areas, to measure the perceptions of these officers with respect to the availability and support of their supervisors.
4. DOC should review and improve the current mounting or "backing" system for its body-worn camera devices, based on findings in this report.
5. The Department should improve its practices for collecting statements from people in custody following use of force incidents and should record refusals to provide statements via body-worn camera and include the time and location where the refusal occurred on the form.

## Policy

1. DOC should improve its anticipated use of force reporting and tracking. Towards this goal, DOC should change existing policy to require that facility leadership, during the Rapid Reviews of use of force incidents, make an explicit determination as to whether each use of force incident should have been anticipated. This determination should be called into the Central Operations Desk ("COD") and tracked in the Incident Reporting System. COD staff should cease making these determinations.
2. DOC should immediately end its practice of using chemical agents on individuals found attempting to hang themselves with a ligature around the neck that's attached to another object. The Department should revise its Chemical Agent Directive to explicitly prohibit this practice.
3. DOC should require that uniformed staff first seek and receive the approval of the Tour Commander of the facility prior to deploying MK-9. This approval should be documented in writing following the incident.
4. DOC and CHS should create an improved practice around mental health interventions for people in custody in cases where DOC staff has exhausted the anticipated use of force protocols and are unable to gain voluntary compliance from people in custody with direct verbal orders.
5. Since June 2020, CHS provides DOC Custody Management and Jail Operations a daily list of persons in custody whose medical conditions may put them at higher risk for adverse reactions to certain security-related actions (e.g., restrictive housing or chemical agents). DOC should maintain this list in its control rooms and tour commander offices, and it should be electronically accessible to all facility captains.

6. DOC should require all uniformed staff working in housing areas or any area where people in custody are held or congregate to wear activated body-worn cameras at all times, with limited[73] exceptions. The expectation should be full-shift recording for all officers who are assigned to directly supervise or work around people in custody.
7. DOC should conduct a review of lower strength handheld OC units and, based on the findings of the review, design a plan to introduce the use of lower strength chemical agents in the jails. Additionally, all DOC uniformed staff, but in particular staff who experience chronic pulmonary conditions, should have the option to be assigned lower strength handheld OC units.

[73] For example, when uniformed staff are conducting strip searches of people in custody or making security rounds in bathroom areas.

## Appendix A – Chemical Agent Incident Review Tool

| Chemical Agent Incident Review Tool | |
|---|---|
| **Data Point** | **Source** |
| Last Name, First Name | Incident Reporting System |
| UOF # | Incident Reporting System |
| Date of Incident | Incident Reporting System |
| Injury Classification (A/B/C) | Incident Reporting System |
| Book & Case Number | Incident Reporting System |
| Facility | Incident Reporting System |
| Self-Harm/Ligature (Y/N) | Incident Reporting System |
| DOC 24 Hour Report Language | Incident Reporting System |
| DOC "Reason for UOF" | Incident Reporting System |
| DOC "Anticipated Force" (Y/N) | Incident Reporting System |
| Age | Inmate Information System |
| MH Housing (Y/N) | Inmate Information System |
| PACE/CAPS/Suicide Watch | Inmate Information System |
| Race | Inmate Information System |
| Classification Score | Inmate Information System |
| Specific Injuries Diagnosed | Injury Report |
| Injury Documentation or Injury Evaluation Refusal? | Injury Report |
| PIC Statement (Y/N) | PIC Voluntary Statement Form |
| DOC Anticipated UOF Determination (direct language in UOF Report) | Use of Force Reports |
| False Reporting - BOC Assessment (Y/N) | Use of Force Reports/Video Review |
| Nature of False Report - BOC Assessment | Use of Force Reports/Video Review |
| Anchored Ligature (Y/N) | Use of Force Reports/Video Review |
| Genetec/Body Worn Camera/Handheld Video Available | Use of Force Reports/Video Review |
| Reason for refusing staff orders, as articulated by PIC | Use of Force Reports/Video Review |
| OC verbal warning by staff (Y/N) | Use of Force Reports/Video Review |
| Less Than 3 Feet? Or 6 Feet if MK9 - BOC assessment (Y/N) | Use of Force Reports/Video Review |
| MK-9? (Y/N) | Use of Force Reports/Video Review |
| If passive resistance to verbal orders, reason articulated by PIC | Use of Force Reports/Video Review |
| If no BWC, reason per Rapid Review | Use of Force Reports/Video Review |
| Probe Team? (Y/N) | Use of Force Reports/Video Review |
| Supervisor Present (Y/N) | Use of Force Reports/Video Review |
| Supervisor Deployed OC (Y/N) | Use of Force Reports/Video Review |
| Supervisor Ordered OC Deployed (Y/N) | Use of Force Reports/Video Review |
| Rapid Review - Avoidable? (Y/N) | Rapid Review |
| Rapid Review - Avoidable Description | Rapid Review |
| Use of Force - Avoidable? | DOC ID Preliminary Report |

| | |
|---|---|
| Use of Force - Unnecessary? | DOC ID Preliminary Report |
| Discipline (Rapid Review or DOC ID) | DOC ID Preliminary Report |
| If discipline, why? | DOC ID Preliminary Report |
| Missing Use of Force Reports? | DOC ID Preliminary Report |
| Misleading Reports? | DOC ID Preliminary Report |
| Closed or referred for full investigation? | DOC ID Preliminary Report |

The Department has carefully reviewed the Board's January 2024 report entitled "An Assessment of the Use of Chemical Agents in New York City Jails," giving particular attention to the ten cases highlighted at pages 20 to 32 of the Report. We have these comments:

1. In many of the cases, the Department agrees that the use of chemical agent was unnecessary and that other steps should have been taken to de-escalate the situation. For example, in some cases an individual in custody was refusing to follow an officer's order but did not pose a threat to the officer's safety or the safety of anyone else or the facility. The incarcerated individual in several of the cases was housed in a mental observation unit, and their conduct was erratic. That may account for the officers' frustration and concern, but does not justify using OC spray. Additional training, including a review of the videos from the ten incidents, is needed. (The Training and Development Division has already begun revisions to the one-hour OC supervisor training.)

2. In at least one of the ten incidents, MK-9 chemical agent was sprayed at an individual, and in other instances, its use was threatened. Under Department policy, MK-9 is to be used for crowd control and not on an individual who is disobeying an order. Training to underscore the point is also needed.

3. As the report notes, there were instances in which the use of force was anticipated, but the Department did not follow its use of force protocols, including seeking medical and mental health intervention. The officer sprayed first and then sought medical treatment. That said, we believe that the Board has interpreted the phrase "anticipated use of force" too broadly. An anticipated use of force exists when (i) it is clear to a responding officer that the incident seems likely to result in a use of force, including a possible use of a chemical agent; (ii) there is sufficient time to enlist a supervising officer and consult with medical staff and mental for assistance and contraindications; and (iii) the delay in using force will not exacerbate the situation. The paradigmatic case is a cell extraction where an individual refuses to leave their cell but does not pose a threat to any individual or the security of the facility. The mere fact that an officer recognizes that force may be necessary if they cannot gain control of a situation by interpersonal communication skills or other non-force means, does not make it an anticipated use of force. It is clear, however, that officers need additional training on anticipated use of force protocols, and the Department intends to provide it.

4. The Report recommends that the Department "immediately end the practice of using chemical agents on individuals found attempting to hang themselves with a ligature around the neck that's attached to another object." The Department recognizes that spraying an individual who is already struggling to breathe is exceedingly problematic. A per se rule may be needed. There are instances, however – one occurred recently — where an individual appears to feign hanging as a ploy to lure an officer into a cell so that the officer can be attacked. An officer must be alert to the possibility, even if it is not likely.

5. The Report notes that the Department uses the "strongest (or 'hottest') of the three chemical agent formulations" and cites to a 2020 article which supposedly found "no clear evidence that more concentrated pepper sprays were more effective." The article does not say that. Rather, it concludes that level 3 sprays (the highest concentration) are "more likely to have an immediate effect but were also related to higher chances that decontamination was needed after use." Because situations often require a chemical agent that has an "immediate effect," carrying the highest concentration spray is a reasonable policy. We intend, however, to survey other New York counties as well as other comparable jail systems to learn what concentration sprays they are using.

6. Other findings in the Report are concerning and require further attention, including (i) whether a lack of mounting plates has resulted in the underutilization of body-worn cameras; (ii) whether officers have not received their required annual OC recertification; (iii) whether properly updated certification lists are being maintained in the control room of each facility; (iv) and whether Captains and above are receiving the required supervisor training. If deficiencies exist, they will be rectified.

7. As the Board is aware, the Monitoring Team has weighed in on some of the Board's recommendations, and we will continue to discuss these issues with them before finalizing any changes in our policies.