PUBLIC ADVOCATE FOR THE CITY OF NEW YORK
Letitia James

July 7, 2015

Stanley Brezenoff
Chair
New York City Board of Correction
51 Chambers Street, Ste. 923
New York, NY 10007

Re: Comments on DOC Request for Emergency Variance to BOC
Minimum Standard on Punitive Segregation § 1-17(d)(2)

Dear Mr. Brezenoff:

We write today in strong opposition to the Department of Correction's (DOC) request for an emergency variance to allow inmates to be held in solitary confinement for longer than the current 30 consecutive day maximum. I am concerned that DOC is attempting to roll back important reforms to the rules governing solitary confinement that were enacted just several months ago with wide support from this Board of Correction (the Board or BOC).

These recently-issued rules concerning solitary confinement clearly mandate a seven-day break from solitary confinement before an inmate may be placed back in solitary for another 30 days. The rules also set a limit of 60 cumulative days in solitary confinement during any six month period. The Board quite clearly created an override for the 60-day limit, and purposely did not create an override for the mandatory seven-day break period.

The solitary rules were the product of collaboration between several agencies. On September 9, 2013, this Board unanimously approved a motion to initiate rule-making on the issue of solitary confinement. The Board spent more than a year on fact-finding, holding a public forum and public hearing, and engaging in thoughtful deliberation and consultation with agencies and experts before issuing this regulation, which was unanimously approved by this Board on January 13, 2015.

The request put forward by DOC, which it styles here as an "emergency variance," is really a revision to the duly enacted rules. In fact, DOC attempted to effectuate the very same change sought by the subject emergency variance one month ago as a proposal through the City Administrative Procedure Act (CAPA) rulemaking process. As Board Member Bryanne Hamill noted at the June 9, 2015 board meeting where that request was put forward, the proposal sounded like a "motion for reconsideration" without a showing of "changed circumstances." Today, as was the case one month ago, there is no showing of any changed circumstance that would warrant a change to the very recently adopted solitary confinement rules, especially by means of an emergency measure.

DOC offers no valid justification for this emergency request. In his letter last week requesting an emergency variance, the DOC commissioner states that 572 people were released from solitary in March and April of this year, and that 3.8% (or 22 people) committed a violent

infraction within seven days of their release. This is the only stated basis for the emergency request to roll back the 30 day limit. Even if this statistic constitutes an emergency – which DOC does not demonstrate – as we elaborate below, DOC is failing to make use of Enhanced Supervision Housing (ESH), which is the actual recourse established specifically to address these circumstances.

It is important to bear in mind that the UN Special Rapporteur on Torture has stated that "any imposition of solitary confinement beyond 15 days constitutes torture, or cruel, inhuman or degrading treatment or punishment, depending on the circumstances."[1] This international guidance was explicitly discussed at the January 13, 2015 vote, and the 30-day rule was a product of compromise:

> [T]he committee, prior to November, was prepared to recommend to the entire Board that solitary confinement in any form be excluded for everyone 21 years old and younger, and that the maximum sentence for punitive segregation for any inmate at Rikers should be 15 days in light of the harm that it is known to cause …. [G]iven the harm created by extended solitary confinement, the Board has reached an agreement here to limit it initially – at this round of rulemaking – to 30 days maximum.[2]

The problem of inmate violence is a serious one, and DOC is duty-bound to protect inmates from harm, including the harm they cause each other. In light of this, at the January 13, 2015 board meeting, DOC was granted permission to create a novel 250-bed housing area for the most dangerous inmates named Enhanced Supervision Housing (ESH). DOC made clear when it requested permission to build the ESH that it was needed as a secure area for inmates who would otherwise need to be placed in solitary confinement due to acts of violence:

> The punitive segregation reform strategy that the agency has outlined previously requires Enhanced Supervision Housing in that a secure, suitable housing unit is needed for inmates who have shown a propensity for significant violence before they can be safely released from punitive segregation.[3]

DOC also made clear that ESH was for the most violent inmates in the jail system. According to the commissioner, the ESH was created to "control the activities of the most violent inmates" and so each ESH housing unit would be staffed with four officers (rather than one) in order to "maintain the maximum control over inmate behavior" and supervise "the inmate posing the most direct security threats."[4]

The Board made clear, via explicit regulatory language, that because ESH "consists of some of the Department's most dangerous inmates, the rule revisions provide for an increased

[1] Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment para. 76 (2011) U.N. Doc. A/66/268.
[2] Minutes of the January 13, 2015 Board meeting. Available at: http://www.nyc.gov/html/boc/html/meetings/2013_Minutes.shtml
[3] Letter from Commissioner Ponte to Board, describing ESH proposal, dated November 4, 2014.
[4] Letter from Commissioner Ponte to Board, describing ESH proposal, dated October 22, 2014.

level of supervision and control in order to ensure the safety and security of inmates and staff."[5] The regulation makes clear: "ESH is designed to separate from the general population those inmates who pose the greatest threats to the safety and security of staff and other inmates."[6]

It bears noting that the ESH rules were not issued in a vacuum or without awareness of the recent changes to the rules governing solitary confinement. ESH regulations were promulgated by this Board *simultaneously* with the solitary reform's new 30 consecutive day limit because the Department was expected to release inmates from solitary who remain dangerous into the ESH units for enhanced supervision. But despite the Board's clear intent to use ESH for this purpose, DOC has not properly utilized it for its intended purpose. Instead, the Board recently reported the following:

> We expected to see a lot of movement and rapid turnover in ESH due in part to inmates receiving a seven-day respite from punitive segregation, and then returning to punitive segregation to complete their infraction sentence. However, there has been very little movement out of ESH and, through April 30, 2015, only five inmates transferred into ESH from punitive segregation.[7]

Despite the clear intent of the Board, DOC did not try to release those 22 inmates to ESH, where they could have been locked in cell for all but seven hours a day, and watched very closely for the seven hours out in supervised programming.

No explanation is given for why the Department cannot or will not make the ESH work as intended, or whether a good faith effort to implement the ESH as a place to house the most dangerous inmates has been made. Instead, surprisingly, the commissioner now states in his June 12, 2015 letter that ESH is "a rehabilitative unit" and not intended for "an inmate who has recently engaged in violent behavior."[8] This simply flies in the face of how the unit was described by the Commissioner when it was initially requested and the statutory purpose clearly articulated in the regulations.

The case has simply not been made for the granting of this emergency variance.

Last month, I asked the commissioner to withdraw his CAPA petition which sought to roll back solitary reforms. The Commissioner has declined to do so. Therefore, I am introducing

[5] Statement of Basis and Purpose, Notice of Adoption of Rules, Minimum Standards §1-16, dated January 13, 2015.
[6] Minimum Standard § 1-16(a).
[7] *Follow-up Report on Enhanced Supervision Housing as of April 30, 2015*. Staff Report from Ashley D'Inverno, Director of Research and Compliance, to Members of the Board of Correction, dated May 6, 2015.
[8] In fact, six categories of violent inmates are supposed to be held in ESH: (1) the inmate has been identified as a leader of a gang and has demonstrated active involvement in the organization or perpetration of violent or dangerous gang-related activity; (2) the inmate has demonstrated active involvement as an organizer or perpetrator of a gang-related assault; (3) the inmate has committed a slashing or stabbing, has committed repeated assaults, has seriously injured another inmate, visitor, or employee, or has rioted or actively participated in inmate disturbances while in Department custody or otherwise incarcerated; (4) the inmate has been found in possession of a scalpel or a weapon that poses a level of danger similar to or greater than that of a scalpel while in Department custody or otherwise incarcerated; (5) the inmate has engaged in serious or persistent violence; or (6) the inmate, while in Department custody or otherwise incarcerated, has engaged in repeated activity or behavior of a gravity and degree of danger similar to the acts described in paragraphs (1) through (5) of this subdivision, and such activity or behavior has a direct, identifiable and adverse impact on the safety and security of the facility, such as repeated acts of arson. § 1-16 (b).

legislation at City Council which would change the City's Administrative Code to codify the existing BOC regulations on solitary confinement reform. Minimum Standard § 1-17.

As I have stated to the commissioner, there is a better direction. DOC staff spent a good deal of time at the June 9, 2015 BOC meeting describing the positive behavioral changes seen in inmates who have access to programming during the day, and conceding that the presence of programming has been very helpful to minimizing violence in the ESH. In fact, rather than functioning as a place to hold the most dangerous inmates, as was its original design, DOC staff described the ESH as a place inmates "volunteer" to be placed because it is so much better than general population – it has programming. And as Commissioner Ponte stated to the New York Times in January, "[T]he idea we lock people up for any length of time and don't provide them with programs or treatments" does not lead to good outcomes … "It seems to defy logic."

We urge this Board to reject the request for an emergency variance. Instead, this Board should focus on reducing idle time and bringing programming to all inmates in our city jails, including those in general population and more secure housing areas, as a proven and effective means to reduce violence. The Department has already been provided with the ESH to account for the so-called emergency that it claims justifies a rolling back in the solitary confinement rules. Furthermore, DOC has security tools such as enhanced restraints, escorted movement, and close supervision, which could be used in the ESH for the few inmates they have identified who pose serious dangers after release from solitary. Please do not allow the Department's meager evidence and justification to roll back vitally important progress that this Board has made to improve our City's policy on solitary confinement. We strongly urge this Board not to consider the request for an emergency variance to roll back solitary confinement reform.

Sincerely,

Letitia James

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Public Advocate of the City of New York