



April 21, 2021

Jennifer Jones Austin, Chair
Margaret Egan, Executive Director
Members of the Board of Correction
New York City Board of Correction
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New York, NY 10007
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SUBMITTED VIA EMAIL

Dear Chair Jones Austin and Executive Director Egan:

New York County Defender Services (NYCDS) is a public defender office that represents thousands of indigent people accused of crimes every year, many of whom are subjected to the state-sanctioned torture that is solitary confinement. The Board of Correction's proposed rules will not end solitary confinement in our jails. Instead, they will perpetuate the grim practice but under a different name. That is why we join with a diverse coalition of advocates and directly impacted communities to call on the Board to adopt more stringent rules that truly eliminate this human rights offense.

Despite record low numbers of people in DOC custody last year, the Department's use of solitary confinement remained robust. According to NYCDS records, 63 of our adult incarcerated clients were put in punitive segregation at some point between March 1, 2020 and March 1, 2021. Our clients spent anywhere from 1 to 67 days in segregations, with a median stay of 19 days. The middle 50% of these clients spent between 9 and 28 days in solitary. This translates into thousands of hours in solitary confinement. We calculated, for example, that in September 2019 alone, eleven of our clients incarcerated in city jails spent a combined 2,784 hours in solitary confinement.

As detailed below, NYCDS's unique insight into the abhorrent past and present DOC conditions, especially with respect to punitive segregation, informs two primary concerns with the Board's 2021 proposed rules. First and foremost, the rules proposed would not end the torture our city. Instead, they promise to perpetuate the existing harsh system through the creation of the Risk Management and Accountability System ("RMAS"). This system would ensure that people remain isolated from others, even during their "out-of-cell" time, for potentially indefinite time periods. These rules stand at odds with the recently enacted HALT Solitary Confinement Act, which prohibits segregated confinement beyond 15 consecutive days. Second, the proposed rules perpetuate due process violations by failing to affirm an incarcerated person's right to obtain counsel. New York County Defender Services staff are ready to support our incarcerated clients as they attempt to avoid the torture of solitary confinement without due process. But the proposed rules do not even ensure that existing counsel be notified when an incarcerated person faces

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disciplinary infractions resulting in punitive segregation. This is a major failing of the proposed rules that must be amended.

I. Specialized Expertise in Jails and Prisons

NYCDS possesses specialized expertise in jail and prison conditions thanks to decades of in-depth representation of incarcerated clients. Our organization includes multiple units dedicated to improving conditions of confinement and gathering data on client experiences in DOC custody. Our Corrections Specialists Unit serves clients to limit pre-trial detention by assisting with bail and sentencing issues, along with careful tracking of in-custody incidents and human rights violations. Corrections Specialists monitor all clients placed in punitive segregation and conduct interviews with each of these clients regarding their time in solitary. Additionally, our re-entry unit is committed to helping clients reintegrate into their communities following release from confinement. The re-entry unit has observed that many of our clients' harrowing experiences in solitary confinement have yielded persistent detrimental effects on their mental health, thereby representing a major obstacle to successful societal reentry.

As a result, NYCDS as an organization has accumulated a wealth of knowledge on the protocols, execution, and impact of solitary confinement. Put very simply: the practice is cruel, ineffective, and harmful to both incarcerated people and the communities they ultimately rejoin. When put into solitary confinement, incarcerated people are abruptly moved from their housing areas, forced to leave many or all personal items behind, and put into a cell that they may not leave for days or weeks on end, depending on security designations. This subhuman treatment reinforces notions of shame, isolation, and worthlessness in incarcerated people, and the internalization of these lessons decreases the likelihood of later successful reentry. Many of our incarcerated clients emerge from solitary confinement with an increased need for mental health support and resources. This trauma can limit an incarcerated person's potential for independence after release, thereby jeopardizing all rehabilitation efforts.

II. How Isolated Confinement Is Currently Imposed by DOC

DOC staff regularly impose punishment involving isolated confinement with little concern for existing regulations. As the Board repeatedly concedes in Notice of Rulemaking Concerning Restrictive Housing in Correctional Facilities (2021), the rules and guidelines surrounding solitary confinement in DOC directives describe a system far different from the punitive process actually encountered by our clients on a daily basis. Regardless of what DOC ultimately establishes regarding its rules, without a mechanism for impartial enforcement or auditing, abuse of these rules will remain commonplace and difficult to remedy.

Alarming, incarcerated people subjected to solitary confinement are rarely extended the right to due process. Though individuals are theoretically guaranteed a hearing and documentation explaining the reasoning for their punishment, a majority of our clients placed in solitary are never provided with either and can spend days or weeks in isolation wondering why they ended up there.

Other client rights are also often violated. Many clients in solitary report that they are not brought

to doctors' appointments or are not distributed prescribed medications. Those who suffer from conditions such as depression, anxiety, or paranoia often find that their symptoms worsen while in solitary, yet few are provided with assistance from mental health staff when requested. Those who can speak with therapists are often limited to conversations lasting just a few minutes, often conducted through the cell door. Counsel visits and personal visits may be arbitrarily cancelled, again with no explanation. More minor incidents of neglect also demonstrate how DOC systematically dodges its own rules. One client reported that the guaranteed "reading material" distributed each day in his housing area consisted of one English newspaper and one Spanish newspaper, which were expected to be circulated to all 30 incarcerated people in the housing wing. Our client never received a newspaper, and had no books or radio in his cell, leaving him with no way to occupy himself for days on end.

Existing restrictions on isolated confinement are already ignored. For example, one of our young adult clients, aged 21, was placed in solitary confinement despite a 2015 ruling banning solitary confinement for individuals under 22.¹ Our underage client was held in solitary for twelve days, in spite of our consistent intervention, and was only removed once an advocacy group became involved. The overarching theme of DOC's negligence regarding solitary confinement, as demonstrated through issues minor to serious, raises significant cause for concern regarding the capacity of DOC to enforce newly proposed regulations.

At NYCDS, we have witnessed decades of efforts by DOC staff to obscure the realities of disciplinary confinement for incarcerated people, and the consistent patterns of cruel treatment occurring under their authority remain concealed from the public.

III. Problems with the Proposed Regulations

The proposed regulations are deeply problematic and will not result in a meaningful end to isolated confinement in city jails. Of particular concern is the fact that people may be held in RMAS Level 1 indefinitely based on broad and vague "documented intelligence" that the person would engage in violence in Level 2. This is a step backward from current rules that limit isolated confinement to 30 days, in most cases, and 60 days in cases alleging assault on DOC staff.

While in RMAS Level 1 and Level 2, our clients will face conditions of isolated confinement under the proposed rules. In Level 1, "out-of-cell" time means that people are moved from their cell to another, slightly larger, cage. As noted by our colleagues at the Jails Action Coalition, "the rules only allow for there to be one other person, also alone, in a separate somewhat nearby cage."² People in Level 2 are also only allowed to interact with other caged people, albeit more than one other person. These high-level restrictions cannot be understood as anything other than the perpetuation of solitary confinement in our city jails. We urge the Board to ensure that all people facing disciplinary proceedings while in DOC custody have meaningful access to other people that does not involve them being put in cages.

¹Michael Winerip & Michael Schwartz, "Rikers to Ban Isolation for Inmates 21 and Younger," N.Y. Times, Jan. 13, 2015, available at <https://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html>.

² See Jails Action Coalition Comments.

NYCDS is also extremely concerned by the absence of due process in the proposed regulations. We call on the Board to extend incarcerated people the right to obtain counsel in restrictive housing hearings. This includes meaningful notice to counsel and adequate time for the accused and counsel to prepare for the hearing. Most of the people incarcerated in city jails already have appointed counsel for their pending criminal case or parole hearing. Offices like NYCDS are willing to support our existing clients and can envision a number of ways in which we could seamlessly ensure that our clients are afforded due process protections in these restrictive housing hearings, all at minimal cost to the city. Indeed, the new state HALT Solitary Confinement Act ensures that people at hearings are permitted to be represented by lawyers, paralegals, law students, or another incarcerated person. At a minimum, the BOC regulations must be amended to comport with state law.

IV. The HALT Solitary Confinement Act

Earlier this year, the New York State legislature passed the HALT Solitary Confinement Act. In addition to proposing a 15-day limit on solitary confinement in accordance with mainstream international conventions on torture, the HALT Act also limits time spent in isolated confinement for at-risk groups, including young adults, the elderly, and those with physical and mental disabilities. The increased vulnerability of these populations makes them more likely to sustain long-term physical and emotional damage from time spent in solitary confinement. The current proposed rules do not take into account the letter or the spirit of the new state law. We urge the Board to amend the proposed regulations to bring NYC's jails into compliance with the HALT Solitary Confinement Act.

V. Conclusion

DOC has shown over the course of decades that they cannot be trusted to protect the rights of incarcerated people. Layleen Polanco and Kalief Browder are only two of the most prominent examples of people who died as a direct result of brutal abuse or cruel indifference of DOC staff. Rules and regulations will not protect incarcerated people unless there is a mechanism in place to ensure accountability. Defenders play a crucial role in preventing unnecessary confinement, protecting incarcerated people's rights, and exposing DOC inaction or malfeasance when it occurs. These rules, as proposed, will only perpetuate existing harms including the torture of solitary confinement. For these reasons, we call on the Board of Correction to amend the 2021 rules and propose new ones that end solitary confinement once and for all.

Sincerely,

Sergio De La Pava
Legal Director