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**Testimony of Jared M. Trujillo, Esq. On Behalf of the New York Civil Liberties Union Before
the New York City Board of Corrections Regarding BOC's Proposed Rule on Restrictive
Housing in New York City Jails**

April 21, 2021

The New York Civil Liberties Union (“NYCLU”) respectfully submits the following testimony regarding a rule proposed by the Board of Corrections (“Board” or “BOC”) to end solitary confinement in New York City jails and create a new paradigm for restrictive housing through the creation of Risk Management and Accountability System (“RMAS”) units. The NYCLU is the New York affiliate of the American Civil Liberties Union. It is a not-for-profit, non-partisan organization with eight offices throughout the state and more than 180,000 members and supporters. The NYCLU’s mission is to promote and protect the fundamental rights, principles, and values embodied in the Bill of Rights of the U.S. Constitution and the New York Constitution.

The NYCLU is deeply committed to ensuring all humans in state custody are treated fairly and humanely. Importantly, this includes those placed in solitary and other forms of isolated confinement that have caused tremendous harm, mental decompensation, suicidal ideation, and even death. In 2013, the NYCLU sued the Department of Corrections and Community Services (“DOCCS”), challenging the constitutionality of their practices and policies that arbitrarily placed thousands of New Yorkers into solitary with no regard for how it would impact the individual’s wellbeing. While the *Peoples* settlement required DOCCS to make some reforms, inhumane treatment and arbitrary placement in solitary persist.¹

Fortunately, earlier this month the state legislature passed the Humane Alternatives to Long-Term Solitary Confinement Act (“HALT”), which severely limits the use of solitary confinement. When the new law is implemented next year, New York will be the first state to enforce the United Nation’s Mandela Rules for solitary, an important international standard to end torture in prisons and jails by banning the use of solitary confinement for periods longer than 15 days. This feat is the product of years of advocacy from advocates, survivors of solitary, and the families of those that did not survive.

With the historic passage of HALT, the Board has an opportunity to not only expedite its compliance with the new state law, but truly lead by eradicating other forms of inhumane

¹ *Trapped Inside: The Past, Present, and Future of Solitary in New York* (Oct. 28, 2019)

<https://www.nyclu.org/en/publications/trapped-inside-past-present-and-future-solitary-confinement-new-york>.

confinement. While the proposed rule is well-intentioned, the NYCLU believes that amendments are needed to enable the BOC to be a leader in eliminating harmful isolation practices. We strongly urge the board to implement the changes explained below to ensure the Board reaches its goal of ending solitary without recreating or exacerbating existing harms.

I. Programming

In order to end solitary, the proposed rule calls for the construction of new RMAS units, where incarcerated persons will be sent following disciplinary infractions. These units have three separate tiers, and incarcerated persons will be periodically reviewed to advance to the next tier with the goal of returning back to the general population. These units are modeled from existing units at North Infirmery Command (NIC) and George R. Vierno Center (GRVC). They are intended to give incarcerated people human contact, ten hours of “out of cell” time per day, and access to five hours of programming including congregate programming.

We urge the Board to amend the proposed rule and add needed clarity to ensure the RMAS units are therapeutic, trauma-informed, and aimed at harm reduction and rehabilitation. Importantly, “out of cell” is too vague in the proposed rule to give the Department of Corrections (DOC) adequate guidance. The proposed rule would permit “out of cell” placement into a slightly larger cell with possibly just one other person. Containing two adults in a double-cell is not a meaningful elimination of harmful isolation practices, and has been disastrous in other states.² Not only do people feel confined to a small space segregated from other humans, but feelings of paranoia and hostility can intensify.³ Further, it prevents normal human interaction, and is not a substitute to ensuring people are in a congregate setting with access to others.

Similarly, the Board must strengthen the proposed rules around programming, and ensure that meaningful programming is offered in truly congregate settings. The five hours of daily programming in the proposed rule could take place almost entirely in solitude, in individual cells. As written, the DOC could simply give incarcerated individuals a crossword puzzle to fill out in solitude for 4 hours and 50 minutes of the day and still be in compliance with the proposed rule.⁴ Moreover it is unclear if incarcerated people will have any meaningful interaction with program staff. To meet the Board’s goal of providing programming that will aid in rehabilitation, the proposed rule must be clarified and made more specific. Programs like the Resolve to Stop Violence Program (“RSVP”) in San Francisco use restorative justice approaches to provide incarcerated people with meaningful services and stratagems to navigate life, while keeping them in congregate settings.⁵ Those who participated in RSVP had significantly lower rates of rearrest and

² Christie Thompson, *Doubling Up Prisoners in Solitary Creates Deadly Consequences*, NPR WNYC (March 24, 2016), available at <https://www.npr.org/2016/03/24/470824303/doubling-up-prisoners-in-solitary-creates-deadly-consequences>

³ *Id.*

⁴ Notably, HALT requires 7 hours of out of cell congregate programming for those placed in solitary. The Board should not require less time for those placed in restrictive housing units.

⁵ Harvard Kennedy School of Government, *Resolve to Stop Violence Program* (last visited April 15, 2021), <https://www.innovations.harvard.edu/resolve-stop-violence-program>

spent less time in custody.⁶ If New York City and the Board are to lead on ending solitary, they must use evidence-based approaches to changing behavior rather than locking people in cages for much of the day without meaningful programming or interaction.

II. Access to Counsel

It is imperative that incarcerated people have access to representation of counsel for hearings that can result in placement in RMAS units, and for placement review hearings. An attorney can help incarcerated people navigate what is a confusing process. Moreover, an attorney can advise incarcerated people of their right to testify, the risk of their testimony being used in a criminal trial, and of DOC processes. Being placed in an RMAS unit is a significant deprivation of liberty, and having the assistance of an attorney should be a floor to ensuring due process. Notably, HALT explicitly gives incarcerated persons access to an attorney at hearings that could result in them being placed in segregated confinement.

The entire process of placing individuals in restrictive housing is notably stacked against incarcerated individuals. The DOC writes tickets, investigates, and ultimately makes final determination. The DOC also controls access to information to when hearings will occur, which results in incarcerated people being given untimely information. While giving incarcerated people access to representation will not change this, it will make the process appear less opaque, and give incarcerated persons a chance to a substantive and robust defense. There have been notable high-profile cases where the DOC has been accused of malfeasance in practices regarding restrictive custody, from the case of Robert Hinton to Kalief Browder to Layleen Polanco. Including counsel will only shed light on the process, aid public trust, and aid incarcerated people.

Finally, ensuring incarcerated people have access to counsel should not be administratively difficult. The overwhelming majority of people incarcerated in New York City jails are there pre-trial or for parole violations, so they have assigned attorneys for their cases. The city's public defenders testified at this hearing that they would gladly take on this additional representation. This Board should accept their gracious offer, and codify the right to counsel in the proposed rule.

III. Conclusion

When the state fully enacts HALT it will drastically reduce the harms and torture individuals must try to survive in solitary confinement. However, it does not end solitary confinement, a practice that has caused immeasurable damage to countless people who have tried to survive it. The Board has an immense opportunity to build on the work of the state legislature and make New York City a leader in this country's approach to restrictive

⁶ James Gilligan and Bandy Lee, The Resolve to Stop the Violence Project: reducing violence in the community through a jail-based initiative, *Oxford J. of Public Health* (June 2005), available at <https://pubmed.ncbi.nlm.nih.gov/15820997/>. Incarcerated people who participated in RSVP had lower rearrest rates for violent crimes (-46.3 percent, $p < 0.05$) and spent less time in custody (-42.6 percent, $p < 0.05$). The decline in violent re-arrests increased with greater lengths of stay (-53.1 percent, $p < 0.05$ for 12 weeks or more; -82.6 percent, $p < 0.05$ for 16 weeks or more).

housing. With amendments and tweaks to the proposed rule, the Board can replace a harmful system with one that does not needlessly perpetuate human suffering.