Jails Action Coalition & #HALTsolitary Campaign
Public Comment

Presented before the New York City Board of Correction
Regarding Restrictive Housing Rulemaking
June 17, 2024

Board of Correction
Attn: Jemarley McFarlane
2 Lafayette Street, Room 1221
New York, NY 10007
BOC@boc.nyc.gov

Re: Rulemaking Concerning Restrictive Housing & Local Law 42

Dear Board of Correction,

Thank you to the Board of Correction for considering this public comment. The New York City Jails Action Coalition (JAC) and the #HALTsolitary Campaign present this public comment to urge the Board to adopt its proposed rules, with the modifications discussed below. We urge the rules' adoption to comply with Local Law 42 and end solitary confinement in all forms and by all names beyond four hours, while utilizing alternative forms of separation without isolation and with access to 14 hours of daily out-of-cell time with group programming and activities. Adopting these rules, fully implementing Local Law 42, and utilizing real alternatives scientifically proven to reduce violence and improve people's health, will stop torture, save lives, and improve safety for everyone.

It is long past time for New York City to end solitary confinement. Solitary confinement is torture. It causes devastating and deadly harm and worsens safety for everyone. In New York City, it is almost exclusively inflicted on Black and Latinx people. Alternative forms of separation have been scientifically proven to reduce violence and better protect people's health and well-being. In line with this longstanding evidence, Local Law 42 rightfully bans solitary beyond four hours and instead allows proven alternative forms of separation with access to 14 daily hours of real out of cell time with group programming and activities. The BOC should adopt its proposed rules, with the modifications discussed below, and the Department of

Correction must prepare now for implementation, bring in outside experts who have designed successful interventions like the RSVP program in San Francisco jails, and start operating effective, engaging programming.

The New York City Jails Action Coalition (JAC) is a coalition of activists that includes formerly incarcerated and currently incarcerated people, family members, and other community members who are working to promote human rights, dignity and safety for people in New York City jails. Since its formation in 2011, JAC has been at the forefront of the struggle to end solitary confinement in New York City jails.

The #HALTsolitary Campaign is a New York statewide campaign led by people who have survived solitary, family members who have or who have lost loved ones to solitary, and other leaders in the human rights, advocacy, health, and faith communities. Comprised of more than 400 organizational supporters, the #HALTsolitary Campaign aims to end the torture of solitary for all people and create more humane and effective alternatives. The #HALTsolitary Campaign also aims to build on these changes – and their pursuit – to dismantle the racial injustices and punishment paradigm that underpin the entire incarceration system.

Background on the Urgent Need to End Solitary Confinement in NYC

Solitary confinement is government torture that inflicts devastating and deadly harm. Solitary causes people to engage in self-mutilation. It causes heart disease. It causes anxiety, depression, and psychosis. In New York City, solitary confinement is almost exclusively inflicted on Black and Latinx people, who make up over 90% of all people in NYC jails.

Even after release from incarceration, a study of hundreds of thousands of people released from prison in North Carolina over a 15-year period found that people who had spent time in solitary were significantly more likely to die by suicide and other causes. Research shows that even only one or two days in solitary leads to significantly heightened risk of death by accident, suicide, violence, overdose, and other causes.

Solitary confinement killed Kalief Browder nine years ago and Layleen Polanco five years ago. On the day of her death in solitary confinement on Rikers Island, Layleen Polanco had been locked in her cell for two or three hours before she died.

Contrary to the purported justification for its use, solitary also makes jails and outside communities less safe for everyone by causing people to deteriorate and in turn increasing the risk of harmful acts. Numerous studies, such as the Zgoba, Pizarro, and Salerno study of recidivism post prison release and Wildeman and Andersen's research on recidivism outcomes,

show that people who have spent time in solitary or restrictive housing are more likely to be re-arrested after release from incarceration.

On the other hand, the evidence is clear: if a system is trying to reduce violence, what works much better than solitary is the exact opposite of solitary: pro-social, program-based interventions that involve full days of out-of-cell group programming and engagement, like the CAPS and PACE programs as originally operated in NYC jails, the Merle Cooper Program in NYS prisons, the MAN program designed by people incarcerated in NY prisons, and the RSVP program in San Francisco jails. For example, the RSVP program included people who had carried out acts of assault, sexual assault, other violent acts, and repeated "heinous" acts. It led to a precipitous drop in violence among participants to the point of having zero incidents over a one year period. People who participated in the program also had dramatically lower rates of re-arrest for violent charges after release from jail. Best practices in youth and mental health facilities limit isolation to minutes or hours at most, with positive impacts on safety and people's health and well-being.

In this op-ed, Dr. James Gilligan and Dr. Bandy Lee, who have decades of experience designing, operating, and evaluating violence prevention programs in jails and prisons, laud the City Council for taking a crucial step toward scientifically proven methods of violence prevention by passing Local Law 42 and document how – contrary to critics' claims – Local Law 42's ban on solitary and utilization of proven alternatives will stop torture, save lives, and *reduce* violence.

Despite repeated promises over many years to end solitary – invoking Layleen's and Kalief's names, the city jails have continued to lock people in solitary by many different names, with torturous and deadly results.

Brandon Rodriguez died after he was locked in solitary in a shower cage. The city jails locked Elijah Muhammad in solitary in those same shower cages to the point he was found with a ligature around his neck, and then placed Elijah in another form of solitary confinement that is supposed to be "de-escalation confinement", leading to his death. DOC initiated yet another form of solitary in 2022 through automatic lockdowns in general population in George R. Vierno Center (GRVC), and that is where Erick Tavira died after being locked in solitary.

A Columbia University Center for Justice report in December 2023 documents how NYC jails have continued to lock people in solitary confinement in various units by various names, with devastating and deadly consequences. People in the city jails have continued to be locked in solitary in: (1) so-called de-escalation units and decontamination showers, (2) so-called structurally restrictive housing in North Infirmary Command (NIC) and West Facility that is nothing more than solitary confinement by another name for 23 to 24 hours a day, (3) Enhanced Supervision Housing (ESH), (4) Rose M. Singer ESH (RESH), (5) GRVC automatic lockdowns

in supposed general population, (6) repeated lockdowns throughout the jails, and more. People are still locked in solitary for 23 to 24 hours a day for days, weeks, months and more. There are people who have been in solitary for nearly a year.

As discussed in this op-ed by Tamara Carter, while the Mayor falsely claims there's been no solitary in NYC since 2019, Tamara's son Brandon died in solitary in a shower cage in August 2021. Tamara talks about all of the continued various forms of solitary and their harmful impacts, and how her son would still be alive today if Local Law 42 had been in place. "I couldn't save my son's life, but if I can help save another person's life and make sure no other family has to go through what we have gone through, that is so important to me."

Summary of What Local Law 42 Does

The core of Local Law 42, and in turn the Board's proposed rules, is ending solitary confinement, in all forms by all names, beyond a maximum of four hours for de-escalation or emergencies, while instead allowing alternative forms of separation proven to better support people's health and safety for everyone.

To be clear, under Local Law 42 and the Board's proposed rules, if someone engages in violence, they can immediately be locked in a cell on an emergency basis for purposes of de-escalation in order to address the immediate situation, for up to four hours. After that immediate period, people can still be separated from the general facility population in alternative units. Local Law 42 would change the nature of that separation. Rather than isolation that is known to cause harm and increase the likelihood of violence, people who are separated would be placed in environments, like CAPS, Merle Cooper, and RSVP described above, that are better suited for actually reducing and preventing violence and keeping people more healthy.

To ensure that the ban on solitary confinement is real and to prevent the Department of Correction from imposing solitary confinement by a different name as it has repeatedly done, the law and the Board's rules provide very clear definitions of various terms, including "cell", "out of cell", and "restrictive housing." Although one might not think it necessary to define "cell" or "out of cell", given that the Department has in the past considered being locked alone in an extended cell as "out of cell", these definitions are imperative to ensure that people have access to actually being outside of a cell, in a shared space with other people and not, for example, subjected to being placed in individual locked cages.

Also to ensure that alternative units do not replicate the harms of solitary by another name and instead follow proven programs like CAPS and RSVP, the law requires that the forty-year-old basic minimum standard for out-of-cell time in NYC jails – namely access to 14 hours of daily out-of-cell time with people only involuntarily locked in for eight hours at night for sleep and

two hours during the day for count – applies to all people in the jails apart from when a person is in de-escalation confinement or an emergency lock-in, including people in alternative units. The law also requires people to have access to seven hours of daily out of cell group programming or activities, and limits the use of restraints, for example to prevent people from automatically being chained to desks during out-of-cell time.

The law also enhances fairness, transparency and accountability by enhancing due process protections, including access to representation, time limits on placement in restrictive housing, and public reporting on the use of solitary and alternatives.

Despite some critics' claims, as seen in this point-by-point response, the status quo has led to horrible cycles of abuse, violence, and death, and can not continue. Local Law 42 presents an opportunity for an alternative approach scientifically proven to reduce violence and better protect people's health.

Widespread Support for Local Law 42 to End Solitary in NYC

After all of the failed promises in the names of Kalief and Layleen, now is the moment for the Board to adopt rules and the Department of Correction to carry out practices to implement Local Law 42 to finally end solitary confinement.

A large veto-proof supermajority of the City Council passed Local Law 42 on December 20, 2023, by a vote of 39-7 and then an even larger number of Council Members voted to override the Mayor's veto, 42-9 on January 30, 2024, thereby enacting Local Law 42.

Polling data shows the vast majority of voters across the country support ending solitary specifically in line with the provisions of Local Law 42, by a +32-point margin, with 78% of Democrats, 61% of Independents, and 51% of Republicans supporting it.

Every member of the NYC Democratic U.S. House delegation urged NYC to fully end solitary. Over 160 leading civil rights, racial justice, and human rights organizations urged New York City to fully end solitary confinement. 74 state legislators said DOC's policies and practices violate the state HALT Solitary Law and urged Council action. 1199SEIU United Health Care Workers East endorsed Local Law 42 and urged the City Council to pass it.

In this op-ed, Haydeth and Amariliz Torres Tavira, whose son and brother, Erick Tavira, died in solitary on Rikers in 2022, praised the Council for passing Local Law 42. Similarly, in this op-ed, Akeem Browder, whose brother Kalief Browder was killed by solitary and whose mother subsequently died of a broken heart, urged enactment of Local Law 42.

Coverage of the Council's vote to ban solitary was in nearly every major news outlet in New York and across the country, including in The Hill, NPR, New York Magazine, NYT here and here, NBC, PBS, Gothamist, Reuters, AP, Daily News, Black Enterprise, El Diario, City Council, NY1, AMNY, Brooklyn Daily Eagle, Queens Daily Eagle, Truthout, ABC 7 NY, ABC 10 News, CBS, News12, Pix11, Independent, and more.

With the years-long deadly crisis plaguing Rikers and the city jails, ending solitary and providing people with access to real out-of-cell time and programming is one concrete and urgent step to save lives, better support people's health, and reduce violence. With the prospect of receivership looming and the possibility of closing Rikers and operating jails with a different approach, it is more urgent than ever to implement Local Law 42 to ensure that solitary confinement is no longer practiced in New York City.

Summary of Key Positive Components of Board's Proposed Rules

The law requires BOC to update its rules to comply with Local Law 42's requirements, and the Board's proposed rules, if amended in the ways discussed below and adopted, will fulfill that requirement. For example, the Board's rules rightfully:

1. Place a four hour limit on de-escalation confinement and emergency lock-ins, and provide for additional protections during those four hours to better protect people's health and well-being.
2. Require that outside of such confinement everyone in the city jails must only be locked in for eight hours at night for sleep and two hours during the day for administrative reasons and thus must have access to 14 hours of real daily out-of-cell time.
3. Require that people in restrictive housing have access to at least 14 hours of real daily out of cell time with group programming and activities, with clear definitions of "cell" and "out of cell" to prevent solitary by another name.
4. Place appropriate restrictions on restraints.
5. Restrict the type of conduct and/or circumstances that can result in placement in de-escalation confinement, emergency lock-ins, or restrictive housing.
6. Add due process protections, including representation at hearings and time limits on alternatives to solitary.
7. Ban the use of locked decontamination showers.
8. Ensure that young people have access to trauma-informed, age-appropriate programming and services on a consistent, regular basis.
9. Provide data reporting requirements on solitary and alternatives, with oversight by BOC.
10. Make clear that the DOC can not request variances from Local Law 42 requirements.

Proposed Amendments to the Board's Proposed Rules

In order to ensure the Board's rules are fully in compliance with Local Law 42 and carry out its provisions, the Board should make the following amendments to its proposed rules.

Section 1-05

We recommend that the Board revisit the changes to section 1-05, to make sure that all provisions are as explicit as they are in Local Law 42, including that: a) all people in the jails, other than while people are in de-escalation confinement or emergency lock-ins, must have access to at least 14 hours of daily out-of-cell time; and b) the minimum out-of-cell requirements under the rules still apply to people in contagious disease units, with appropriate caveats in Local Law 42 for how such out-of-cell time can take place in line with appropriate medical protections and treatment.

To that end, we recommend the following:

1. We recommend that subdivision (a) *Policy* end after the first sentence and the newly added language regarding out-of-cell time, congregate engagement, and programming be new additional subdivisions.
2. For the exceptions in this section, we recommend that the rules make explicit which specific provisions the exceptions apply to.
    a. Specifically, the rules should be explicit that the exceptions for de-escalation confinement and emergency lock-ins apply to the involuntary lock-in provisions. Local Law 42 explicitly states in section 167(b) and section 167(i) that the lock-in provisions – namely that people are only able to be locked in at night for sleep for up to eight hours and during the day for count for up to two hours, and in turn that people have access to at least 14 hours of daily out-of-cell time – apply to everyone in the city jails other than during de-escalation confinement and emergency lock-ins.
    b. Relatedly, the exception listed for contagious disease units should be removed from this section, not be listed as an exception to the lock-in provisions nor the out-of-cell time requirements, and instead remain as written in section 6-30. Local Law 42 explicitly states that all housing for people in contagious disease units must comply with subdivisions (b), (c), (e), (i), (j) and (k) and paragraphs 4, 5, and 6 of subdivision (h) of section 167 of the law, which includes for example the prohibitions on involuntary lock-ins, the 14 hour minimum daily out-of-cell requirements, and programming requirements. Rather than create an exception to these requirements, Local Law 42, as included in section 6-30 of the Board's rules, instead provides caveats for how such requirements should be carried out

for people in contagious disease units in a way that can be done with appropriate medical protections and treatment.

3. Finally related to this section, we recommend adding the explicit Local Law 42 provision that "All incarcerated persons must have access to at least 14 out-of-cell hours every day except while in de-escalation confinement and during emergency lock-ins." While the Board's rules have a provision requiring that all people in restrictive housing have access to at least 14 hours of daily out-of-cell time, in addition the rules should also be explicit – as Local Law 42 is – that this 14 hour daily out-of-cell requirement applies to everyone in the city jails other than while a person is in de-escalation confinement or an emergency lock-in.

Section 6-05

We recommend that the rules make more explicit all of the time limit requirements in Local Law 42 for de-escalation confinement. Specifically, section 6-05(j)(1) currently prohibits de-escalation confinement for more than four hours in any 24-hour period and more than 12 hours in any seven day period. In addition to those requirements, Local Law 42 also requires that de-escalation confinement "not exceed four hours immediately following the incident precipitating such person's placement in such confinement", and we recommend that the rules also explicitly add this requirement.

Section 6-06

We recommend the Board add the following Local Law 42 restrictions on the scope of emergency lock-ins, namely that "Emergency lock-ins must be confined to as narrow an area as possible and limited number of people as possible."

Section 6-19

We recommend that the Board revisit the changes to section 6-19 to make clear that a) for the seven hour programming requirement, everyone is entitled to such programming outside of a cell in a group setting; and b) all programming time shall be led by therapeutic staff, programming staff, outside community groups, or peers. To that end, we recommend the following:

1. In section 6-19(b), we recommend that the term "out-of-cell" be added between "daily" and "congregate" in both instances where that phrase appears in that subdivision. We would recommend the same change in section 6-19(f) and anywhere else that phrase appears in the Board's rules. Local Law 42 is very explicit that people in restrictive housing have "access to at least seven hours per day of *out-of-cell* congregate programming or activities with groups of people in a group setting all in the same shared

space without physical barriers separating such people that is conducive to meaningful and regular social interaction," with the law and the Board's rules specifically defining out-of-cell (and not defining "congregate"). As such, section 6-19 should use the same "out-of-cell" language requirement as in Local Law 42.

2. We recommend that the Board either amend section 6-19(d) or add another provision under section 6-19 to state that "all programming to fulfill the seven hour programming requirement shall be led in-person by therapeutic staff, programming staff, outside community groups, or other peer incarcerated persons." While section 6-19 rightfully requires that people receive access to seven hours of daily congregate programming, section 6-19(d) currently states that the Department must provide in-person therapeutic programming for only one hour per day. The rules are silent about the remaining six hours. The Board should make explicit who can lead the remaining six hours of daily programming, again namely therapeutic staff, programming staff, outside community groups, or other peer incarcerated persons.

Section 6-23

We recommend that the Board add specific requirements for how the Department shall carry out the legal representation requirement as detailed in the public comments by public defender organizations, who will be providing much of that legal representation, including processes for notifying defense offices, rules for providing discovery, options for both in-person and virtual hearings and how each would work, and timelines for the entire process. To that end, we recommend the following for all people charged with any infraction that could result in a sentence to restrictive housing, Enhanced Restraint Status, Red ID Status, or Central Monitoring Case Restraint Status.

1. In order to ensure the right to legal representation is realized in practice, we recommend the Board include subdivisions under section 6-23(d)(6)(i) that require the DOC to provide notice of the right to legal representation at least 48 hours prior to a scheduled hearing, videotape any refusal of representation, notify the designated contact for each defense office and attorney of record, and provide a list of eligible legal representatives and advocates.
2. We recommend the Board amend section 6-23(d)(6)(ii) to require DOC to inform a person charged of their right to appear at their disciplinary hearing and the right to adjourn the hearing so that they may appear and to establish that a person who does not appear had knowingly and voluntarily waived their right to appear (with an infraction dismissed if it is not established or if there is not video evidence of a refusal).
3. We recommend the Board also amend section 6-23(d)(6)(ii) to require that a legal representative or advocate may elect to represent an individual at a hearing *either*

in-person or virtually and in either case shall be provided the ability to privately confer with their client both before and during a hearing.

4. We recommend the Board amend section 6-23(d)(6)(v) to ensure that a charged individual has a right to receive any evidence or information related to the grounds for which DOC seeks to charge them, including but not limited to: a) Surveillance footage video and surveillance footage stills; b) Body-worn camera footage; c) Notices of infraction; d) Facility reports; e) Staff reports; f) Use of force reports; g) Injury reports; h) Medical documentation; i) Witness list; j) All statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to the allegations being relied upon by DOC; (k) Any evidence of an alleged refusal, including body-worn camera footage or evidence that the charged individual knowingly and voluntarily waived their right to appear, or their right to access to legal counsel.
    a. We recommend the Board provide protections to ensure the credibility of any redacted evidence presented as from a confidential informant.
    b. We recommend the Board require appropriate remedies for failure to comply with these evidentiary requirements, specific remedies for lost or destroyed evidence, and the remedy of dismissal of the charges if relevant body worn camera footage is lost or destroyed, or the officer fails to turn on body worn camera when required by DOC policy.
5. We recommend the Board amend section 6-23(d)(8)(ii) to designate additional grounds for granting an adjournment of a hearing, including reasonable time for both the legal representative or advocate and client to be notified, to review discovery, and to confer with their client, and any other basis justifying the need for an adjournment.

Section 6-25

We recommend in section 6-25(c) that the Board require DOC to submit to the Board its progress in reducing to zero the punitive segregation population and any other population in conditions that do not comply with either restrictive housing or general population requirements under Local Law 42 and the Board's proposed rules, including PSEG I/Central Punitive Segregation Unit (CPSU), PSEG II, Restrictive Housing Unit (RHU), Enhanced Supervision Housing, West Facility, NIC Structurally Restrictive Housing and any other units that do not comply with the law's and the rules' restrictive housing or general population requirements. The Board's proposed rules seem to leave out subdivision (c) in this section and we would recommend putting it back in with these proposed modifications of adding additional units that do not comply with restrictive housing or general population requirements.

Section 6-26

We recommend that the Board make explicit requirements to ensure that the proposed Restorative Rehabilitation Units (RRUs) comply with requirements for general population and protections for restrictive housing. It is positive that participation in the RRUs is voluntary and that people can transfer from RRUs to general population whenever they make that decision, and the rules should be even more explicit about such voluntariness and about the conditions in the RRUs. To that end, we make the following recommendations.

1. We would recommend modifying section 6-26(b)(4) to read as follows: "A person in custody can request to be discharged from a RRU at any point during their placement, *and shall be discharged to general population upon such request*."
2. We would recommend adding additional subdivisions under 6-26(c) to explicitly state that conditions in RRUs shall comply with section 6-15 and 6-16(a), (b), (c), (e), and (j) and all provisions regarding conditions, services, and programs for people in general population.

Section 6-27

We recommend the Board include Local Law 42's explicit requirement that "The department shall not place an incarcerated person in restraints unless an individualized determination is made that *restraints are necessary to prevent an imminent risk of self-injury or injury to other persons*." Section 6-27 does require an individualized determination, section 6-27(d) states that restraints may be used no longer than necessary to abate such an imminent risk, and section 6-27(g)(4) requires that any continued use of restraints must be discontinued when there is no longer such an imminent risk. The rules should also add in the general explicit requirement of Local Law 42 that from the outset restraints are only used when necessary to prevent such an imminent risk of self-injury or injury to other persons.

Conclusion

Solitary confinement is torture. It causes devastating and deadly harm. It worsens safety for everyone. It is long past time for it to end in New York City. Now that an overwhelming supermajority of the City Council enacted Local Law 42, the Board should build off of its longstanding work reducing the use of solitary by adopting its proposed rules with the modifications discussed throughout this comment, in order to comply with and implement Local Law 42. Moreover, the Department must act now to begin implementation of the law, including by bringing in outside experts to design and operate real alternatives that have been proven to reduce violence and better protect people's health. Adopting these rules and fully and properly implementing Local Law 42 will stop torture, improve safety for everyone, and save lives. Thank you for your consideration.