Correctional Association OF NEW YORK

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2090 Adam Clayton Powell, Jr. Boulevard, Suite 200 New York, NY 10027
tel (212) 254-5700 fax (212) 473-2807 www.correctionalassociation.org

Correctional Association of NY Statement Opposing Reductions in NYC Jail Minimum Standards, and Calling for an End to the Torture of Solitary Confinement

Public Hearing of the NYC Board of Correction
December 19, 2014

The Correctional Association of NY (CA)'s Prison Visiting Project (PVP) would like to thank the Board of Correction ("Board") for the opportunity to comment at this public hearing on the Board's proposed rule to modify the minimum standards applicable to people incarcerated in the New York City (NYC) Department of Correction (DOC) jails. The CA has had statutory authority since 1846 to visit New York State's prisons and to report its findings and recommendations to the legislature, other state policymakers, and the public. Our access provides us with a unique opportunity to observe and document actual prison practices and to learn from incarcerated persons and staff. Although the CA does not have the authority to monitor conditions in the city jails, our findings from the state prisons provide us with direct insight into comparable conditions, services, programs, and housing unit options.

The New York City Jails are right now in crisis. In recent months, the federal Department of Justice, the New York Times, advocates and activists, and others have exposed and well-documented a pervasive culture and practice of staff brutality against incarcerated persons,[1] coupled with corruption and falsification of records.[2] At the same time, there have been repeated and devastating demonstrations of the ongoing and widespread use of the torture of solitary confinement in the city jails.[3] Directly connected to this staff abuse, overall culture of violence,

[1] *See, e.g.*, Preet Bharara, *CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island*, US Department of Justice, US Attorney, Southern District of NY, p. 58, Remedial Measure F(8), Aug. 4, 2014 ("*DOJ 2014 Report"*), *available at*: http://www.justice.gov/usao/nys/pressreleases/August14/RikersReportPR/SDNY%20Rikers%20Report.pdf; Michael Winerip and Michael Schwirtz, *Rikers: Where Mental Illness Meets Brutality in Jail*, The New York Times, July 14, 2014, *available at*: http://www.nytimes.com/2014/07/14/nyregion/rikers-study-finds-prisoners-injured-by-employees.html.

[2] Michale Winerip, Michael Schwirtz, and Benjamin Weiser, *Report Found Distorted Data on Jail Fights at Rikers Island*, The New York Times, Sept. 21, 2014, *available at*: http://www.nytimes.com/2014/09/22/nyregion/report-twisted-data-on-fights-in-a-rikers-jail.html; Michael Schwirtz, *Officer at Rikers Island is Charged with Lying in Inmate's Death*, The New York Times, Dec. 8, 2014, *available at*: http://www.nytimes.com/2014/12/09/nyregion/correction-officer-is-charged-in-case-of-inmates-death-in-a-hot-rikers-cell.html.

[3] *See, e.g.*, *DOJ 2014 Report*; *The Solitary Confinement of Youth in New York: A Civil Rights Violation*, New York Advisory Committee to the U.S. Commission on Civil Rights, Dec. 2014 (*NYAC 2014 Report*), *available at*: http://www.usccr.gov/pubs/NY-SAC-Solitary-Confinement-Report-without-Cover.pdf; *Voices from the Box: Solitary Confinement at Rikers Island*, The Bronx Defenders, Sept. 2014, *available at*: http://www.bronxdefenders.org/wp-content/uploads/2014/09/Voices-From-the-Box.pdf; Jennifer Gonnerman, *Before the Law*, The New Yorker, Oct. 6, 2014

systematic infliction of solitary confinement, and creation of an environment focused on excessive punishment, the city jails have also experienced violence by incarcerated persons.

The current crisis is thus primarily a product of failed policies and practices of the DOC and abusive staff actions. In turn, the response can not be further reductions in the rights of incarcerated persons, highly punitive and restrictive conditions that are likely to only exacerbate violence rather than reduce it, and greater discretion in the hands of the very security staff and DOC officials recently exposed to carrying out brutality and falsifying records to decide who is subjected to these deeply problematic and counterproductive conditions. Rather the response must address the main causes of the crisis.

As a result, the CA is strongly opposed to the Board reducing the minimum standards set forth in the proposed rule. The CA believes that these reductions and the creation of the highly restrictive Enhanced Supervision Housing (ESH) units violate the basic rights of incarcerated persons, are counterproductive to efforts to reduce violence in the jails, and ignore and do nothing to address staff brutality or the culture of violence in the city jails. Moreover, the CA is very concerned and disappointed that over a year after the Board took the positive step of initiating rule-making regarding the use of solitary confinement, it appears that the Board is desisting from promulgating any rule that would substantially address the ongoing torture of solitary confinement in the city jails. We urge the Board to withdraw the proposed rule and to take a more comprehensive approach toward ending the torture of solitary confinement and addressing violence in the jails, while protecting the fundamental rights of people incarcerated in the jails and creating the conditions that will best help them to thrive and prepare for their return to their home community.

Withdraw the Proposed Reductions in the Minimum Standards and the ESH

The proposed reductions in the minimum standards governing the treatment of incarcerated persons in the city jails and the concurrent creation of the ESH units would violate incarcerated person's basic rights and be counterproductive for reducing violence in the jails. The proposed rule would create ESH units that would inflict excessive punishment and warehousing, without meaningful programming, severe restrictions on basic services, and only allowance of seven hours of out-of-cell time each day. Moreover, these restrictions would be imposed in an arbitrary and potentially abusive manner on a broad category of people, without meaningful due process protections for avoiding or challenging ESH placements, or any mechanisms for obtaining release from the units. Also, while the proposed rule purportedly have been designed in order to create ESH units as part of the current DOC administration's initiatives to reduce violence, the amendments to the minimum standards will create permanent restrictions on the basic rights of incarcerated persons that will remain in effect regardless of what policies and practices are carried out by this and future jail administrations.

Lack of programs

Of deep concern, the proposed rule does not have any provision for programming of people held in the ESH units. Under the proposed rule, people can be held in the ESH with no programming whatsoever. While the proposed rule provides that individuals may spend time out of their cell for seven hours per day, there is nothing in the rule that indicates how that time will be spent. Particularly given all of the restrictions on the minimum standards discussed below with regard to basic services such as visiting, religious activities, and recreation, it seems clear that the ESH unit will be the most restrictive setting possible and thus is very likely to not include any programming for people held in the unit. It must be emphasized that people will purportedly be sent to these units solely for the purpose of reducing violence and not for punishment, and therefore, any restrictions on their rights must be measured in light of the likelihood that placement on the unit will significantly improve safety. Without an intervention that will result in significant reductions in violence, the restrictions imposed are punitive and consequently unwarranted.

If there needs to be separation of certain people from the general population in order to address violence, that separation should serve as an opportunity for effective interventions, not as pure punishment that will only lead to additional violence. As renowned psychiatrists, former prison administrator/staff, and experts on violence and incarceration, Dr. James Gilligan and Dr. Bandy Lee, conclude, "the more severely [incarcerated persons] are punished by the prison authorities, the more violent they become, and the more violent they become, the more severely they are punished, until they become so enraged and bitter that they do not care whether they themselves live or die, if only they can get back at their tormentors, or at any other target on whom they can vent their rage."[4]

Indeed, Commissioner Ponte indicated that the ESH will be staffed by an increased number of correction officers, and dedicated escorts and meal relief officers, but did not mention anything about having any program staff assigned to the unit.[5] Ponte's October 2014 letter, as well as the proposed Board rule change itself, also indicate that people held in the ESH are not going to "intermingle" with people in the general population and thus are not going to be programmed off of the unit.[6] The inability to program off the unit and the lack of program staff on the unit again indicates the DOC's intent that people in the ESH unit will remain idle without meaningful program opportunities, at best spending time in a day room. Commissioner Ponte's letter does indicate the possibility of people participating in "other program activities" in the day room of the ESH. However, neither the existing Board minimum standards nor the proposed rule changes to the minimum standards would require such activities. Moreover, in the context of all of the other restrictions being placed on the ESH unit, the lack of program staff assigned to the

[4] James Gilligan and Bandy Lee, *Beyond the Prison Paradigm: From Provoking Violence to Preventing It by Creating "Anti-Prisons" (Residential Colleges and Therapeutic Communities)*, Ann. N.Y. Acad. Sci. 1036: 300-324, 307 (2004) (*"Gilligan and Lee, Beyond the Prison Paradigm*").
[5] *See* Letter from DOC Commissioner Ponte to BOC Chair Gordon Campbell, p. 2, Oct. 22, 2014 ("*Commissioner October 2014 Letter*").
[6] *Ibid*.

unit, and the limitations of what can be done in a day room setting, "program activities" likely refer to at most independent cell study or the equivalent, rather than meaningful group educational classes or other programs. Similarly, while Commissioner Ponte's letter also contemplates the possibility that someone on the ESH unit could "participate in scheduled program activities even during periods when they are otherwise locked in," again the Board's minimum standards would not require this participation, and it is not clear to what type of programs the Commissioner is referring. Moreover, it seems unlikely in a context where people in the ESH are not going to be allowed to go to the law library or religious activities off of the unit that they would be able to participate in off-unit program activities. Even the proposed directive does not mention anything about educational or any other programming other than restricted religious and law library programs.

Commissioner Ponte has explicitly stated that there will be no additional training for staff working on the ESH units,[7] further indicating that the units will be focused purely on security supervision without any additional efforts to address underlying causes of the alleged threat posed by people held on the ESH units. Additionally disconcerting, the highly restrictive movement procedures also indicate that incarcerated persons are likely to be deterred from participating in any program opportunities available. The draft Directive indicates that people in the ESH unit will be subjected, *inter alia*, to strip searches and rear-cuffed mechanical restraints for any movement out of the housing area.

People who have allegedly engaged in the most egregious conduct or allegedly pose the greatest risk to others should not be subjected to inhumane and counterproductive conditions that will only exacerbate their needs or behaviors. Rather, these individuals need additional support, programs, and therapies that are both humane and effective at empowering them to address their underlying issues and reduce violence. It has long been recognized, including by the Department of Justice in its recent report on violence at Rikers, that providing meaningful program opportunities will reduce idleness, which itself can help decrease confrontations among incarcerated persons and between incarcerated persons and staff.[8] As Gilligan and Lee suggest, "To the all-too-limited extent to which prisons simply restrain people without punishing them, treat them with respect rather than contempt, and make available to them the tools (such as education, psychotherapy, employment, treatment for alcoholism, and so on) that can enable them to gain sufficient self-respect to outgrow their need to commit violent acts, prisons could (and sometimes do) actually prevent violence."[9] Thus, if there are people who are such a risk to others that they need to be removed from the general prison population, they should be provided with meaningful human interaction, programs, and therapy.

The failure to provide programs in the ESH is particularly disturbing in a context where many of the people incarcerated in the DOC's custody are being held pre-trial or on sentences of

[7] *Commissioner Nov. 14, 2014 Letter*, at 2.
[8] *DOJ 2014 Report*, at 58.
[9] *See* Gilligan and Lee, *Beyond the Prison Paradigm*, at 307.

less than one year, and thus may return to the outside community within relatively short time periods. It is essential not only for the safety of the jails and any prisons these individuals will go to, but also for the safety of the outside community as well as for the likelihood of success and decreased recidivism upon release, that people be provided with the skills and tools to address their issues, needs, and behaviors. Access to such programs as academic classes, anti-violence programs, cognitive behavioral therapy, and/or individual and group mental health treatment should be provided to individuals in the ESH depending on their needs in order to reduce violence. Such services would help to reduce violence, the proposed purpose for placing someone in the ESH, and help people to grow and thrive while incarcerated and upon their return to the community.[10] Ultimately, if the DOC and the Board were serious about trying to reduce violence, there must be more programs, not less, provided to people considered to be the most dangerous.

Severe Restrictions on Basic Services

The ESH units would inflict severe, unnecessary, and counterproductive limitations on basic services, including visiting, correspondence, packages, religious activities, and law library services.

With respect to visiting, the proposed rule would eliminate contact visits for all people on an ESH unit, regardless of any threat that may be posed by a visit for a particular resident. While a purported justification for such restrictions are to limit the ability of weapons and other contraband that contributes to violence from entering the prison, a recent Department of Investigation report made clear that a major source of smuggling of weapons and drugs came from DOC staff and not from visitors.[11] Moreover, the current Board minimum standards already allow the DOC to restrict contact visits in situations where it is determined, based on "specific acts" committed by the incarcerated person or "specific information received and verified" about an impending act on the next visit, that "such visits constitute a serious threat to the safety or security of a facility." The existing standard already limits contact visits in contexts where such visits pose a serious threat. By contrast, the blanket prohibition on contact visits under the proposed rule is not tied to any risk of harm and thus appears to be solely about punishment

[10] *See, e.g.*, Ross Homel and Carleen Thompson, *Causes and prevention of violence in prisons*, Corrections Criminology, p. 101-108, at 7 (2005) (finding that the literature tentatively concludes that "programs that implement violence alternative training or other forms of treatment such as drug rehabilitation within a supportive and 'opportunity enhancing' environment of a specialist or rehabilitative unit are more likely to be effective in reducing . . . violence"); John J. Gibbons and Nicholas de B. Katzenbach, Commission Co-Chairs, *Confronting Confinement: A report of the Commission on Safety and Abuse in America's Prisons*, June 2006, p. 28, *available at*: http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf (*"Report of the Commission on Safety and Abuse"*).

[11] *See* Michael Winerip and Michael Schwirtz, *Investigator Posing as Rikers Guard Smuggled in Contraband Inquiry Finds*, The New York Times, Nov. 6, 2014, *available at*: http://www.nytimes.com/2014/11/07/nyregion/rikers-island-undercover-investigator-contraband-inquiry.html?hp&action=click&pgtype=Homepage&module=second-column-region&region=top-news&WT.nav=top-news&_r=0.

rather than any reduction in violence. These restrictions on visiting, along with requiring approved visitor lists, can have damaging effects on incarcerated persons and their children and other family and community members, and can increase violence in the jails and after people are released.[12] It is well-known that maintaining family and community ties while a person is incarcerated, especially through contact visits, is essential to help with that person's and their family's well-being and also with their successful return to their home community.[13]

With respect to correspondence, the proposed rule would create policies that apply nowhere else in the jails other than the ESH units and would allow the DOC to monitor incoming and outgoing correspondence without notification of a determination to monitor such correspondence or the justifications for such monitoring. While the existing rules already allow for monitoring of correspondence where there is a "written order articulating a reasonable basis to believe that the correspondence threatens the safety or security of the facility, another person, or the public," so long as such notice is provided, the proposed rule essentially would eliminate the need for DOC staff to document facts and reasons connecting the need to monitor correspondence and any threat posed by that correspondence. Yet, again without any real nexus between safety and the monitoring, the proposed rule could lead to improper invasion of ESH residents' privacy in their communications as well as the potential for improper use of personal information by security staff.

Regarding packages, the proposed rule would limit people in the ESH units to only receive packages and publications that were purchased and mailed from appropriate companies. Such a policy will again have a negative impact on maintaining family ties, and create a

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[12] *See, e.g.*, *Testimony of the Correctional Association of NY*, Public Protection Committee Budget Hearing, Feb. 6, 2013, *available at*: http://www.correctionalassociation.org/wp-content/uploads/2013/02/cany-testimony-nys-budget-bayview-beacon-closures-feb-6-2013.pdf (reporting that "frequent visiting and strong family connections can reduce the trauma of having an incarcerated parent and provide the support they need to become healthy adults. For mothers, not receiving visits means not only the devastation of losing touch with their children but also sometimes losing their parental rights to their children forever. . . . Maintaining positive family connections also makes prisons safer, by providing incarcerated people with hope, comfort and incentive for good behavior, and communities safer, by providing people with the supports they need to stay out of prison once they are released").

[13] *See, e.g.*, *Lowering Recidivism through Family Communication*, Prison Legal News, April 15, 2014, *available at*: https://www.prisonlegalnews.org/news/2014/apr/15/lowering-recidivism-through-family-communication/; Ryan Shanahan and Sandra Villalobos Agudelo, *The Family and Recidivism*, Vera Institute of Justice, AMERICANJails, p. 17-24, Sept./Oct. 2012, *available at*: http://www.vera.org/files/the-family-and-recidivism.pdf; Jeremy Travis, *et. al.*, *Families Left Behind: The Hidden Costs of Incarceration and Reentry*, June 2005, p. 6, *available at*: http://www.urban.org/uploadedpdf/310882_families_left_behind.pdf; American Bar Association Letter June 19, 2013, in support of contact visits rather than only video visitation, *available at*: http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013june19_dcvisitation_l.authcheckdam.pdf, (citing ABA Standards for Criminal Justice: Treatment of Prisoners, Standard 23-8.5 cmt. At 260) (finding that "Maintaining personal connections through contact visits improves the lives of incarcerated individuals, their families, and the community in three important ways. First, people who receive visits from and maintain relationships with friends and family while incarcerated have improved behavior during their time in custody, contributing both to a safer and more rehabilitative atmosphere in the facility. . . . Second, individuals who maintain relationships have more successful transitions back to society than those who do not. Third, families and children who are able to visit their relatives in jail benefit greatly from maintaining family ties during a time that can often cause family trauma").

substantial burden on family members who would have to purchase new items to send to their loved ones rather than providing materials they already own. Moreover, particularly in the context where the city jails do not have general libraries and have fewer programs than prisons, limiting publications and thus reading material for incarcerated persons will likely increase idleness and potentially in turn violence inside the prisons. While the purported justification for these restrictions is again to limit contraband from entering the jails, the applicability of the rule is not tied to any threat of smuggling posed by a particular person on an ESH unit, and the burdens on family members outweigh the burden on staff to search incoming packages.

For religious activities, the proposed rule would allow for the same restrictions in the ESH units as in punitive segregation, whereby incarcerated persons will be allowed to participate in congregate religious activities "with appropriate security either with each other or with other [incarcerated persons]." While it is unclear what in practice is intended, the other proposed components of the ESH units would seem to make it very difficult to provide incarcerated persons with meaningful opportunities for congregate religious activities. Specifically, the facts people are likely not to be able to leave the unit, that the only space envisioned on the unit for potential congregate activity is the day room, and that only 25 people at a time on a given ESH unit will be out-of-cell,[14] it would appear to be challenging to provide opportunities for multiple people of the same religious faith to be able to carry out religious activities together and for the innumerable different faiths in the jails to all have the time and space to carry out their activities.

With regard to law library services, the proposed rule would allow the DOC to eliminate entirely the ability of incarcerated persons to go to the law library, and the Commissioner's intent for the ESH is to make precisely that exclusion and instead to supposedly provide law library services to individuals in their cells.[15] The inability to go to the law library, have access to books and materials as needed, and have the ability to type and photocopy documents as needed, and rather have access to any law library services be subject to the whim and goodwill of DOC staff,[16] places severe limitations on the ability of incarcerated persons to assert their legal rights and claims. Particularly in a context where the vast majority of people incarcerated in the city jails are still awaiting trial, this restriction on law library services could have a substantially negative impact on people's rights of defense.

Overall, all of these restrictions on basic services inflict serious harm to incarcerated persons, as well as their loved ones. At the same time, while they are purportedly intended to help reduce violence, particular restrictions are not tailored to individualized risks. Instead, all

[14] *See Commissioner October 2014 Letter*, at p. 2.
[15] *See Commissioner October 2014 Letter*, at p. 2; Proposed Directive, Enhanced Supervision Housing (ESH), Dec. 12, 2014, § III(K)(11) (providing for two hours a day, five days a week of law library services "within the housing area."
[16] For the difficulties accessing services subject to the control of corrections staff, see the Board's own report: *Barriers to Recreation at Rikers Island's Central Punitive Segregation Unit*, City of New York Board of Correction Staff Report, July 2014, *available at*: http://www.nyc.gov/html/boc/downloads/pdf/reports/CPSU_Rec_Report.pdf.

restrictions of all kinds are imposed on all people in the ESH units and there are no mechanisms in place to reduce or eliminate any of the restrictions during the person's time on the unit. In turn, these restrictions must be viewed as excessively punitive.

Particularly Vulnerable Groups

The lack of programs and services, and the highly restrictive conditions pose even more of a concern because the proposed rule does not make any exception to placement in the ESH unit for groups who may be particularly vulnerable to the effects of isolation, including young people other than adolescents and people with mental health needs.

With respect to young people, while it is crucial that 16- and 17-year-olds are never placed in these units, solitary confinement nor in adult prisons in jails at all, it is also essential that *no young person*, including those into their mid-twenties, be subjected to such restrictive confinement as in the ESH units. Brain and youth development research has recognized that young people continue to develop mentally, emotionally, and socially into their mid-twenties, and beyond.[17] Indeed, 16- and 17-year-olds will very quickly become 18-, and then 21- and then 25-year-olds. These individuals, at this important developmental stage, require more programming and services, not less.

With respect to people with mental health needs, one version of a proposed DOC directive for implementing the ESH explicitly states that people with the most serious mental health issues are *not* excluded from the ESH.[18] A more recent draft of the proposed DOC directive does specifically exclude people classified as "Seriously Mentally Ill" (SMI) from the ESH units, while still specifically indicating that other people with mental illness can be held in ESH units.[19] While it is positive that the DOC has recognized in the new draft Directive the need to remove people with SMI from the ESH units, without such limitations imposed by the Board's minimum standards, whether or not to exclude these patients from ESH units will be subject to the decisions of this and future administrations, as indicated by the changing of draft directive language itself. Moreover, the vast majority of people who have substantial mental health needs but do not receive an SMI designation will still remain in the ESH units. Indeed, Commissioner Ponte's Nov. 4, 2014 letter to the Board indicates that in fact he intended for people with mental health needs to be held in the ESH units.[20] As is well known by the Board, isolation has been shown to create or exacerbate pre-existing mental health conditions,[21] and increase the risk of suicide and self-harm. A recent study conducted in New York City jails, written by authors

[17] *See, e.g.*, Vincent Schiraldi, Commissioner, NYC Department of Probation, *What about Older Adolescents?*, p. 3-5, Nov. 19, 2013, *available at*: http://johnjayresearch.org/pri/files/2014/01/Vincent-Schiraldi-speech_11.19.13.pdf.
[18] Proposed Directive, Enhanced Supervision Housing (ESH), Aug. 14, 2014, § III(A), note.
[19] Proposed Directive, Enhanced Supervision Housing (ESH), Dec. 12, 2014, §§ III(A), note, III(H)(1).
[20] *Commissioner Nov. 4, 2014 Letter*, p. 4 (stating that residents of the CPSU and/or RHU will be moved into ESH units).
[21] *See* James Gilligan and Bandy Lee, *Report to the New York City Board of Correction*, p. 3-5, Sept. 5, 2013 ("Gilligan and Lee Report"), *available at*: http://solitarywatch.com/wp-content/uploads/2013/11/Gilligan-Report.-Final.pdf

affiliated with the New York City Department of Health and Mental Hygiene, and published in the American Journal of Public Health, found that people who were held in solitary confinement were nearly seven times more likely to harm themselves and more than six times more likely to commit potentially fatal self-harm than their counterparts in general confinement, after controlling for length of jail stay, serious mental illness status, age, and race/ethnicity.[22] While the ESH units are not pure solitary or isolated confinement, as discussed above, the highly restrictive ESH units do not contemplate meaningful group or individual mental health treatment, and are likely to exacerbate people's mental health conditions.

Overbroad Criteria for ESH Placement

Despite the fact that the ESH units are so restrictive in the manners discussed above and that they are purportedly designed to address serious threats to safety and security,[23] the Board's proposed rule would create very broad criteria for who can be placed on the units, encapsulating both people who pose a serious risk to others and those who do not. Particularly in a context, discussed further below, where the DOC staff and administrators – who have a history of abusing their discretion in imposing punitive conditions[24] – will have control over who is alleged and determined to be held in ESH units, the overbroad criteria would likely lead to arbitrary and/or improperly targeted and abusive placement. While no person should be subjected to the conditions imposed by the ESH units under the currently formulated Board's proposed minimum standards reductions, the fact that people who do not even pose any real threat to others could be assigned to these units raises additional serious concerns. Although Commissioner Ponte is currently suggesting that the DOC will create 250 ESH beds,[25] since the Board's proposed rule places no limit on the number of people in these units, the highly restrictive and abusive conditions could in the future be imposed by this or future administrations on larger portions of the people incarcerated in the city jails given the broad criteria.

More specifically, the most egregious examples of the broad and vague criteria likely to lead to abuse are the first and fifth criteria. The first criteria would allow ESH placement for any person identified as a "participant in a gang or substantially similar entity." The terms "gang", "substantially similar entity," "participant," and "leader" are not defined, allowing the possibility

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[22] Homer Venters, et. al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, American Journal of Public Health, Mar. 2014, Vol. 104, No. 3, *available at*: http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301742. A separate recent panel of scientists at the annual meeting of the American Association for the Advancement of Science also further reported on the harmful psychological and neurological effects of solitary. *See* Joseph Stromberg, *The Science of Solitary Confinement*, Smithsonian Magazine, Feb. 19, 2014, *available at*: http://www.smithsonianmag.com/science-nature/science-solitary-confinement-180949793/#.Uwoq5RsSWaQ.email.

[23] *See Commissioner October 2014 Letter*, at 1 (stating that the ESH units are aimed at reducing violence caused by the "comparatively small number of [incarcerated persons] involved in a disproportionate number of violent incidents").

[24] *See, e.g., DOJ 2014 Report*, at 46-47 (finding the imposition of punitive segregation to be "excessive and inappropriate").

[25] *See Commissioner November 2014 Letter*, at 1-2.

of unclear, overbroad, and arbitrary application of the criteria. In addition, according to the proposed Directive for the establishment of the ESH units, the information upon which this identification of gang participation is based can include "self-admission, confidential informants, officer observation, mail and phone monitoring." In other words, any line staff officer statement based on her/his "observations", any supposed confidential informant's presentation of secret evidence, or any purported confession – presumably at any time in the person's past history – could result in someone being held in restrictive ESH units. Given the well-documented long history of misconduct by DOC staff, including staff physical brutality resulting in disciplinary penalties for incarcerated persons, false and misleading reporting about use of force, and excessive use of restrictive housing,[26] such granting of discretion to staff members and the agency itself to identify someone as a gang member and hold them indefinitely in separate and restrictive housing is a recipe for abuse. Moreover, even if someone is in fact a part of a gang, that simple affiliation can and does apply to innumerable people who have not engaged in acts of violence who do not pose any real or substantial threat of violence to others. Even Commissioner Ponte's own initial justifications of the ESH to the Board had a more restrictive criteria of being an organizer or participant in a gang-related assault. The imposition of decades of solitary confinement based on alleged gang affiliation in California's prisons should give the Board pause before allowing such criteria.[27]

Similarly broad and vague, the fifth criterion for ESH placement includes an all-encompassing category of any person that "presents a significant threat to the safety and security of the facility if housed in general population housing." Again, particularly as discussed below without meaningful procedural protections, without the need for any alleged acts of wrongdoing, and with unfettered discretion by DOC staff, this criterion could encapsulate a wide range of people and be carried out in an arbitrary or abusive manner. While yelling, talking back to an officer or refusing a correction officer's order, reading certain political literature, having certain drawings or photographs may at times be viewed by corrections staff as a significant threat to safety and security,[28] these are not and should not be considered serious safety risks that require harsh and restrictive confinement.

Moreover, for all of the criteria in the proposed rule, there is no time limitation for the basis for information resulting in ESH placement. For the two criteria already discussed – gang participation and general threat – the DOC could potentially rely on acts or information from any period of time, during this or previous incarcerations, or even while in custody or while in the outside community. For criteria two through four, while acts in question must have taken place while in custody, there is no requirement for the acts to have taken place while in DOC custody, but could also include for example custody in state or federal prisons. More importantly, there is

[26] *See, e.g. DOJ 2014 Report*, at 3, 25, 46-47.
[27] *See, e.g., Asker et. al v. Brown*, 4:09-cv-05796-CW, Plaintiffs' Second Amended Complaint, paras. 91-95, May 31, 2012, *available at*: http://ccrjustice.org/files/Ruiz-Amended-Complaint-May-31-2012.pdf.
[28] *See, e.g., Asker v. Brown*. at paras. 102-119.

no restriction that the acts be confined to those committed during someone's current custody, but can include acts carried out years or decades before during previous incarcerations. In other words, DOC could rely on past acts as justification for restrictive ESH confinement, regardless of whether a person poses a current and ongoing threat of violence, and/or whether a person has developed, grown, or otherwise changed themselves or their behavior since the time of the alleged acts. Indeed, the Board's own proposed rule, discussed further below, that makes the elimination of solitary confinement for "old bing time" contingent upon the creation of the ESH units indicates that the Board and the DOC anticipate that individuals with owed solitary confinement will be held in the ESH units, meaning that people with infractions from past incarcerations will be held in ESH units regardless of the risks to the safety of others.

Lack of Meaningful Due Process to Avoid or Challenge ESH Placement

Compounding the overbroad criteria and the opportunity for arbitrary and abusive application of that criteria, the procedural protections for people facing or held in ESH confinement are woefully inadequate. The proposed rule only provides for a hearing if an incarcerated person requests such a hearing and only after a person has already been placed in an ESH unit. Particularly in a context where grievances often go unanswered, people report not being brought to scheduled hearings, and some incarcerated persons face literacy and language barriers, hearings should automatically occur prior to ESH placement without any request needing to be made.

In addition to limitations of the opt-in hearing provision, the rules do not provide any minimum standards for how the hearings should take place. The provisions, for instance, fail to specify that a person facing ESH has an opportunity to testify at the requisite hearing, obtain and present evidence, call witnesses, cross-examine adverse witnesses, or have access to legal representation,[29] basic rights that should be guaranteed for a meaningful hearing to take place. The draft directive provided by Commissioner Ponte indicates that the hearing will be conducted in accordance with existing Directive 6500R-B,[30] which does provide for a right to appear, make statements, present material evidence, present witnesses, and in limited designated circumstances have assistance from a DOC hearing facilitator. However, such protections are not contained in the Board's proposed rule and thus may or may not be contained in any finalized or future directive governing the ESH units. Moreover, the existing protections under Directive 6500-B in disciplinary proceedings do not provide any rights to cross-examine adverse witnesses or have independent representation.

The proposed Board rule also fails to denote any qualifications or characteristics of the designated hearing officer, failing to provide any guarantees of neutrality or independence. The

[29] *See, e.g.*, *Wolff v. McDonnell*, 418 U.S. 539, 563-71 (1974) (holding that in the context of disciplinary proceedings, the minimum constitutional requirement of due process requires, *inter alia*, a limited right to call witnesses and present documentary evidence at a hearing, and in certain cases the assistance of a counsel substitute).
[30] Proposed Directive, Enhanced Supervision Housing (ESH), Aug. 14, 2014, § III(C)(5).

draft Directive makes clear DOC's intent to have a Department Hearing Officer to adjudicate these proceedings.[31] To have a DOC staff person make a decision about ESH placement in a context where an incarcerated person may not even be able to present evidence or question witnesses, let alone have legal representation, paves the way for sham or rubberstamp proceedings. Also absent from the proposed Board rule, or the accompanying draft Directive, is any right to appeal an adverse decision placing someone in an ESH unit.[32] Additionally of concern is whether a person facing ESH detention will have the requisite ability and time to prepare a case challenging ESH designation, particularly if the person is held in the ESH unit prior to the hearing. Particularly given that, as discussed above, eligibility for placement in an ESH unit could be based on conduct from months or years prior, and from earlier incarcerations, individuals could face substantial difficulties in gathering and preparing the requisite evidence and arguments for challenging an ESH placement.

Moreover, it is not entirely clear what will actually take place during the hearing. According to Commissioner Ponte's letter to the Board, the hearing will only allow for challenging the underlying facts relied upon for assignment to the ESH, *not* necessarily challenging the determination that such facts warrant placement in the ESH.[33] On the other hand, the draft Directive does state that the purpose of the hearing does include a determination of whether the facts relied upon support placement in the ESH units.[34] Particularly in a context where the basis for assignment to the ESH is so broad and is not tied to a particular act or disciplinary infraction, it is essential that persons facing ESH have an opportunity to challenge both the underlying facts and the nexus between any alleged facts and assignment to ESH.

Ultimately, any procedures resulting in ESH should be conducted by non-DOC neutral-decision makers, provide meaningful due process including the right to call and cross-examine witnesses, and allow incarcerated persons to be represented by legal counsel. Commissioner Ponte's assertion that procedural protections will come from the limited number of beds in the ESH units in no way alleviates the concerns about the insufficient procedural protections. The Board's minimum standards do not place any limitations on the number of people who can be held in the ESH units, and Commissioner Ponte and any future Commissioner could expand the ESH units to any number of beds. Moreover, regardless of the number of people in the ESH units, particularly given the severe restrictions of the ESH units and the potentially devastating negative effects on those subjected to it, every individual facing the prospect of ESH placement must have sufficient and heightened procedural protections.

No Mechanisms for Release from ESH

[31] Proposed Directive, Enhanced Supervision Housing (ESH), § III(C)(3).
[32] *See* N.Y. Comp. Codes R. & Regs. tit. 7, § 253.8 (providing absolute right to appeal disciplinary hearings in New York State prisons).
[33] *Commissioner October 2014 Letter*, at p. 4.
[34] Proposed Directive, Enhanced Supervision Housing (ESH), Aug. 14, 2014, § III(C)(6).

Once someone is placed in an ESH unit, of deep concern, the proposed rule provides for no mechanisms of ongoing review of such placement. According to the proposed rule, someone could remain in an ESH unit indefinitely based on a determination made months or years before, without any assessment of whether the continued placement in ESH is necessary or justified. This lack of periodic review violates even the most stringent constitutional standard for administrative segregation, which requires meaningful periodic review.[35] Even to comply with the Constitution, there must be periodic review procedures that require the requisite decision-maker to not simply cite past justifications or behavior and instead provide a current justification for keeping someone in the ESH unit along with instructions on how to obtain release from the unit.[36]

Related to the lack of a review process, the proposed rule does not provide any mechanisms for how a person can be released from the ESH unit. For example, the proposed rules do not provide for the development of an individualized plan, access – as discussed above– to programs, treatment, or services that could allow someone to remove the conditions that resulted in ESH placement, benchmarks of good conduct that could result in release from ESH, or any time limits on ESH confinement. Again looking even at the Constitutional minimum requirements, courts have recognized that corrections departments utilizing segregation must have some mechanism for how a person held in segregated confinement can make progress towards release from such confinement.[37] By contrast, it appears that people may be held indefinitely in the ESH units. Indeed, Commissioner Ponte's Nov. 4 letter explicitly states that the ESH unit is intended to serve as a long-term holding area.[38]

Once someone is in an ESH unit, that person should be provided specific requirements for how s/he can earn release. Staff should work with the person to create an individualized plan for meeting those requirements and the DOC must provide access to whatever programs, treatment, or services are required to carry out that plan. In turn, there must be meaningful

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[35] *See, e.g., Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983) (requiring "some sort of periodic review" and stating that "administrative segregation may not be used as a pretext for indefinite confinement of an [incarcerated person]"); *McClary v. Kelly*, 87 F. Supp. 2d 205, 214 (W.D.N.Y. 2000), *aff'd,* 237 F.3d 185 (2d Cir. 2001); *Smart v. Goord*, 441 F. Supp. 2d 631, 642 (S.D.N.Y. 2006) (finding a due process claim based on allegation that review hearings were a "hollow formality" where officials did not actually consider releasing the individual in question).

[36] *See, e.g., Williams v. Hobbs*, 662 F.3d 994, 1008 (8th Cir. 2011) (citing *Hewitt*, 459 at 477, n. 9) (finding a lack of meaningful review where officials "failed to explain to [the incarcerated person], with any reasonable specificity, why he constituted a continuing threat to the security and good order of the institution"; and explicitly directed that officials could not simply cite a prison murder as a permanent disqualification from release from segregated confinement).

[37] *See, e.g., Toevs v. Reid*, 685 F.3d 903, 913 (10th Cir. 2012) (stating that a review of segregation "should provide a statement of reasons [for ongoing segregation] which will often serve as a guide for future behavior (*i.e.*, by giving the [incarcerated person] some idea of how he might progress toward a more favorable placement)") (citing *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005) (noting that the state's requirement for ongoing segregation "serves as a guide for future behavior"); *Anderson v. Colorado*, 887 F.Supp.2d 1133, 1152-53 (D.Colo. 2012) (finding reviews did not "provide meaningful input to [the incarcerated person] as to what he needs to do to make progress.").

[38] Letter from DOC Commissioner Ponte to BOC Chair Gordon Campbell, p. 4, Nov. 4, 2014 (*Commissioner Nov. 4 2014 Letter*).

mechanisms of review to determine whether an individual has completed the specified programs, treatment, or corrective action and/or whether – regardless of any completed tasks – there is any continued justification for holding the individual in the ESH. Moreover, there should be some outside time limits on ESH placement as a check on the review procedures.[39]

The latest version of the proposed directive for the implementation of the ESH units provides for some limited processes of review and possible release, namely that a unit captain will "explain the suggested steps necessary for an [incarcerated person's] release from ESH" and that there will be a review every 60 days of the appropriateness of the ESH placement. However, the directive does not provide any information as to what the necessary steps could be, who determines those steps, how they are determined, or how a person in the ESH unit would be able to comply with the steps while in the ESH unit. Similarly, the directive provides no protections for incarcerated persons during the 60-day reviews nor any information about what those reviews entail, raising serious concerns that they – like in other administrative segregation contexts – could amount to a rubber-stamp review. Moreover, like with many other aspects of the proposed directive, these provisions are not contained in the Board's proposed rule and are thus not mandatory, meaning that current and future administrations could or could not implement them.

The Need to Withdraw the Rule and the ESH Units

Overall, the proposed rule lowering the Board's minimum standards would allow a recently highly criticized agency and staff, based on secret evidence from any time in the past, to indefinitely hold almost any person in its custody in highly restrictive and abusive conditions without a meaningful opportunity to challenge the placement or obtain release from the unit. The Board can not grant this type of power to the DOC, must withdraw the proposed rule, and must prohibit the creation of the ESH units.

End the Torture of Solitary Confinement

At the same time that the Board should withdraw its proposed lowering of the minimum standards, it must also implement far more restrictions on the use of solitary confinement in the city jails. Solitary confinement remains pervasive in the city jails – primarily in the form of so-called punitive segregation. It is positive that the DOC and the Board have taken some minor steps to minimally limit the use of solitary. However, much more comprehensive reform is required.

The Torture of Solitary Confinement

On any given day, hundreds of people are held in solitary confinement in New York City jails, and will continue to do so regardless of whether the Board's proposed rule is promulgated and/or the ESH units are implemented. Between 2007 and June 2013, the number of solitary

[39] For an example of mechanisms for release from a unit of separation, *see* the proposed HALT Solitary Confinement Act, A. 8588A / S. 6466A at §137(l)(i-vi).

confinement beds increased 61.5% from 614 to 998, and from January 2004 to June 2013, the percentage of the total number of people – around 12,000 – held in city jails who were held in solitary confinement increased dramatically from 2.7% to 7.5%.

As the Board is well aware, people held in solitary confinement in the city jails spend 23 to 24 hours per day locked in a cell, without any meaningful human interaction, programming, or therapy. The sensory deprivation, lack of normal human interaction, and extreme idleness that result from such conditions have long been proven to lead to intense suffering and physical and psychological damage.[40] Such isolation has been shown to create or exacerbate pre-existing mental health conditions in the city jails, which is particularly problematic given that around 40% of all people in solitary in the city jails and over 80% of women in solitary in the city jails have pre-existing diagnosed mental health needs.[41] Also as noted above, solitary has also long been shown to increase the risk of suicide and self-harm, including in the city jails.[42]

The United Nation's Special Rapporteur on Torture has concluded that "any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment" and called for "an absolute prohibition" on isolation beyond 15 days for all people.[43] Yet, people in the city jails regularly remain in solitary confinement for months and even years.[44] These lengths of time in solitary confinement are incredibly far outside the norm of the international community and many other countries' practices. For example, the Netherlands legislatively prohibits anyone from being placed in solitary confinement for more than two weeks in an entire year, Germany has a similar limit of four weeks annually, and in

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[40] *See, e.g.*, Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, Journal of Law & Policy, Vol. 22:325 (2006), *available at*: http://law.wustl.edu/journal/22/p325grassian.pdf ("*Psychiatric Effects of Solitary*"); Craig Haney, *Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement*, 49 Crime & Delinq. 124 (Jan. 2003), *available at*: http://www.supermaxed.com/NewSupermaxMaterials/Haney-MentalHealthIssues.pdf; Stuart Grassian and Terry Kupers, *The Colorado Study vs. the Reality of Supermax Confinement*, Correctional Mental Health Report, Vol. 13, No. 1 (May/June 2011); Sruthi Ravindran, *Twighlight in the Box: The suicide statistics, squalor & recidivism haven't ended solitary confinement. Maybe the brain studies will*, Aeon Magazine, Feb. 27, 2014, *available at*: http://aeon.co/magazine/living-together/what-solitary-confinement-does-to-the-brain/; Joseph Stromberg, *The Science of Solitary Confinement*, Smithsonian Magazine, Feb. 19, 2014, *available at*: http://www.smithsonianmag.com/science-nature/science-solitary-confinement-180949793/#.Uwoq5RsSWaQ.email.

[41] *See* Gilligan and Lee Report at 3-5.

[42] Homer Venters, et. al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, American Journal of Public Health, Mar. 2014, Vol. 104, No. 3, *available at*: http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301742. A separate recent panel of scientists at the annual meeting of the American Association for the Advancement of Science also further reported on the harmful psychological and neurological effects of solitary. *See* Joseph Stromberg, *The Science of Solitary Confinement*, Smithsonian Magazine, Feb. 19, 2014, *available at*: http://www.smithsonianmag.com/science-nature/science-solitary-confinement-180949793/#.Uwoq5RsSWaQ.email.

[43] United Nations General Assembly, *Interim Report of the Special Rapporteur of the Human rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, p. 21, 23, Aug. 2011, available at: http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf ("*UN Rapporteur Report*").

[44] *See, e.g.*, *Voices from the Box: Solitary Confinement at Rikers Island*, The Bronx Defenders, p. 4-5, September 2014, *available at*: http://www.bronxdefenders.org/wp-content/uploads/2014/09/Voices-From-the-Box.pdf; Jennifer Gonnerman, *Before the Law*, The New Yorker, Oct. 6, 2014.

practice prisons in both countries rarely utilize any solitary confinement and only use it for *hours* at a time.[45]

Contrary to popular belief, solitary confinement is not primarily used to address chronically violent behavior or serious safety or security concerns, but often comes in response to non-violent prison rule violations, or even retaliation for questioning authority, talking back to staff, or filing grievances. Moreover, solitary confinement is imposed in a racially discriminatory manner. People of color are disproportionately subjected to solitary confinement in city jails if for no other reason than they are disproportionately impacted at every stage of the processes that ultimately result in solitary: from arrest, to sentencing, to incarceration.[46]

The DOC and Board's Minor Limitations on Solitary

It is positive that the DOC has reportedly made some minor reductions in the use of solitary in the past year and a half, and it is positive that the Board's proposed rule would memorialize a commitment made by the DOC to stop placing 16- and 17-year-olds in solitary confinement and in part memorialize a DOC commitment to end "old bing time." It is also positive that the BOC proposed rule makes reference to the possibility of limiting solitary confinement sentences to a maximum of 30 days, and that Commissioner Ponte has indicated some possibility of imposing maximum sentence lengths.

While these steps are positive, all of these provisions are very limited. With respect to ending solitary for adolescents, as discussed in further detail in other Correctional Association testimony for this hearing, while 16- and 17- year-olds should under no circumstances be held in solitary confinement, these children should not be in adult jails at all. It is also essential that *no young person*, including those into their mid-twenties and at least age 25, be subjected to solitary

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[45] Ram Subramanian and Alison Shames, *Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States*, p. 13, Oct. 2013, *available at*: http://www.vera.org/sites/default/files/resources/downloads/european-american-prison-report-v3.pdf.

[46] *Criminal Justice Case Processing of 16-17 Year Olds*, New York State Division of Criminal Justice Services, Office of Justice Research and Performance, p. 3, Jan. 4, 2013 (documenting disproportionate arrests and sentencing to incarceration for black and Latino youth). Although we do not have current data on the imposition of solitary confinement in the city jails, even if people of color were subjected to solitary confinement at the same rates as white people once they are in the city jails, the disproportionate arrests, prosecutions, sentencing, and incarceration of Black and Latino persons means that these individuals face solitary confinement at a higher rate. Moreover, if the state prison system is any indication, people of color are even more disproportionately sent to solitary than their already disproportionate incarceration. *See, e.g.*, New York Civil Liberties Union, "*Boxed In – The True Cost of Extreme Isolation in New York's Prisons*", p. 24 (2012) *available at*: http://www.nyclu.org/publications/report-boxed-true-cost-of-extreme-isolation-new-yorks-prisons-2012 (documenting that people subjected to isolated confinement in New York State prisons are disproportionately African American, representing 60% of the people in SHU compared to the already vastly disproportionate 50% of people in NYS prisons and 18% of the total NYS population); analysis of NYS Department of Corrections and Community Supervision data 2014 (indicating that during at a snapshot of the major isolated confinement units in New York State that hold people in isolation for the longest periods of time – namely Southport and Upstate Correctional Facilities, which are entire prisons dedicated to isolated confinement (essentially supermax prisons), and the SHU 200s or S-blocks, which are 200-bed freestanding isolated confinement units – black youth represented an even more disproportionate 66% of the young people aged 21 or younger in isolated confinement, compared to 61% of all youth 21 and under in the DOCCS system).

confinement, as brain and youth development research has recognized that young people continue to develop mentally, emotionally, and socially into their mid-twenties, and beyond.[47] With respect to the restrictions on "old bing time," despite the Commissioner's public promises to end that practice, the Board's proposed rule would make its elimination contingent on the creation of the ESH units and would still allow for the imposition of "old bing time" for people who were admitted to DOC custody prior to the creation of the ESH units. Moreover, the minimal reductions made by the DOC and the Board provisions regarding children and old bing time are woefully inadequate to address the continued widespread use of solitary confinement for *all* people, as the vast majority of people subjected to solitary confinement will remain in such conditions.

Regarding maximum solitary confinement sentence lengths, the Board's and the DOC's reference to a 30-day maximum sentence is only that – a reference – it is not an enforceable rule. The DOC could choose to create that restriction or not, and the Commissioner has indicated that it might delay or even abandon such a restriction.[48] If the Board believes it is important that there be no sentence to segregated confinement longer than 30 days, then it should utilize its power to pass an amendment to the minimum standards in the treatment of incarcerated persons stating no person be sentenced to solitary confinement beyond 30 days, rather than relying on the future possible good faith of the present and future DOC Commissioners. Moreover, while a 30-day maximum punitive segregation sentence would be positive, people often accumulate additional solitary confinement time while in solitary.[49] Thus, even if there is a maximum 30-day segregated confinement sentence for one incident, it would appear an individual could still receive disciplinary infractions while in solitary confinement and still end up spending months or years in solitary.

The Need for Comprehensive Minimum Standards to End the Torture of Solitary

The Board needs to take much more substantial steps to end the torture of solitary confinement for all people. Others will be presenting testimony regarding the proposed minimum standards that the Jails Action Coalition (JAC) presented to the Board more than a year and a half ago. The CA supports that proposal and urges the Board to implement it. As another example of how the Board can end the torture of solitary confinement and create more humane and effective alternatives, the Board should look to proposed legislation in New York State, the Humane Alternatives to Long Term (HALT) Solitary Confinement Act, A. 8588A / S. 6466A,[50]

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[47] *See, e.g.*, Vincent Schiraldi, Commissioner, NYC Department of Probation, *What about Older Adolescents?*, p. 3-5, Nov. 19, 2013, *available at*: http://johnjayresearch.org/pri/files/2014/01/Vincent-Schiraldi-speech_11.19.13.pdf; *NYAC 2014 Report,* at 60.

[48] *Commissioner Nov. 4 2014 Letter* at 4.

[49] *See, e.g.*, *DOJ 2014 Report*, at 47 (finding that incarcerated persons in the city jail "often receive additional infractions while in punitive segregation, which further extends their time there.")

[50] Humane Alternatives to Long Term (HALT) Solitary Confinement Act, A. 8588A / S. 6466A, *available at*: http://assembly.state.ny.us/leg/?default_fld=&bn=A08588&term=2013&Summary=Y&Memo=Y&Text=Y.

as a model for reform. HALT would do five key things that the Board could adopt in its current or modified form:[51]

a) Mandate the creation of more humane and effective alternatives, which under HALT take the form of alternative residential rehabilitation units in which persons in need of separation from the prison population can be placed, where they will receive six hours of out-of-cell rehabilitative and therapeutic programming in addition to one hour of recreation each day;
b) Limit the length of time anyone can be placed in isolated confinement to at most 15 consecutive days and 20 days total in any 60 day period;
c) Restrict the criteria in determining whether a person can be sent to isolated confinement or an alternative therapeutic confinement setting to the most serious acts;
d) Exempt particularly vulnerable people from being placed in isolated confinement for any length of time; and
e) Enhance staff training, procedural protections, transparency through periodic public reporting, and accountability through independent, outside oversight.

a) More Humane and Effective Alternatives

There needs to be a fundamental transformation in how the city jails respond to people's needs and/or alleged problematic behaviors. People who have allegedly engaged in the most egregious conduct should not be subjected to inhumane and counterproductive isolation and deprivation that will only exacerbate their needs or behaviors. Rather, these individuals need additional support, programs, and therapies that are both humane and effective. Thus, if there are people who are such a risk to others that the DOC believes they must be removed from the general prison population, they should be separated, rather than isolated, into safe, secure, therapeutic and rehabilitative units that have substantial out-of-cell time and meaningful human interaction, programs, and therapy. The HALT Solitary Confinement Act would help create this fundamentally transformed response by requiring that any person separated from the general prison population for more than 15 continuous days must be placed in a separate, secure Residential Rehabilitation Unit (RRU).[52] The RRU would be a rehabilitative and therapeutic unit

[51] For a more thorough explanation of the provisions of the HALT Solitary Confinement Act and the reasons why those provisions are necessary, please *see, e.g.*, Report on Legislation by the Corrections and Community Reentry Committee and International Human Rights Committee, *New York City Bar*, A.8588-A/S.6466-A, *available at*: http://www2.nycbar.org/pdf/report/uploads/20072748-HALTSolitaryConfinementReport.pdf; Testimony by the Correctional Association of New York, Before the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Human Rights Reassessing Solitary Confinement, February 25, 2014, *available at*: http://solitarywatch.com/wp-content/uploads/2014/02/Correctional-Association-testimoney-for-Congressional-Hearing-2-25-14-with-attachment.pdf; Testimony by the Campaign for Alternatives to Isolated Confinement (CAIC), Before the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Human Rights Reassessing Solitary Confinement, February 25, 2014, *available at*: http://solitarywatch.com/wp-content/uploads/2014/02/Testimony-of-the-NY-Campaign-for-Alternatives-to-Isolated-Confinement-2014.pdf.

[52] Humane Alternatives to Long Term (HALT) Solitary Confinement Act, A08588 (Aubry) / S06466 (Perkins), §2(36).

aimed at providing residents with additional programs, therapy, and support to address the underlying causes of their behavior.[53] People in RRUs would work with an assessment committee upon entering an RRU to develop a rehabilitation plan,[54] and then would be required to receive six hours per day of out-of-cell programming, plus an additional one hour of out-of-cell congregate recreation, to carry out that plan.[55] In addition, people who are in segregated confinement for shorter periods of time would have their out-of-cell time increased to four hours per day, including at least one hour of congregate recreation, and all people who are in either segregated confinement or RRUs would have comparable access to services, property, and materials as in general population.[56]

b) Limit the length of time to 15 days

No person should ever be subjected to torture or cruel, inhuman or degrading treatment in the city's jails. Given that the UN Special Rapporteur on Torture has defined any use of solitary beyond 15 days to amount to torture or cruel, inhuman or degrading treatment, 15 days should be the absolute limit for isolated confinement. The HALT Solitary Confinement Act mandates that no person may be held in isolation more than 15 consecutive days, nor more than 20 days total in any 60 day period (the latter of which is to ensure that a person is not cycled in and out of solitary).[57] At these limits, a person must be released back to the general prison population or sent to an RRU.[58]

c) Restrict the criteria

The city needs to stop placing people in solitary confinement or at the very least drastically restrict the criteria that can result in solitary confinement or separation to the most violent or egregious conduct. Again at the very least, punishment, deprivation, and isolation, and even separation to alternatives to solitary, should no longer be the response to most purported acts that the DOC uses now to justify placement in solitary. If there are people who truly need to be separated because they pose such a risk to others, then the focus should be on those individuals who are actually in need of an intensive rehabilitative and therapeutic intervention in order to decrease the risk posed and help those individuals be better prepared to return to the general prison population and ultimately their home community. A person who talks back to an officer, for example, or indeed who engages in the bulk of non-violent rule violations that result in isolation, does not require an intensive intervention, so resources should be focused on those who need and could benefit from such an intervention.

[53] §2(36); §137(6)(i)(i-viii).
[54] §137(6)(i)(iv).
[55] §137(6)(i)(ii).
[56] §137(6)(i)(iii).
[57] §137(h), §2(35).
[58] §137(h).

The HALT Solitary Confinement Act would drastically restrict the criteria of conduct that can result in isolated confinement or placement in the Residential Rehabilitation Units (RRUs). HALT divides segregated confinement into three categories: emergency confinement, short term segregated confinement, and extended segregated confinement. People could be placed in emergency confinement for up to 24 hours if such placement is necessary to immediately diffuse a substantial and imminent threat.[59] People could be placed in short term segregated confinement for up to three days for a department rule violation if the penalty is proportionate to the violation.[60] Finally, people could be placed in extended segregated confinement for up to 15 days or be placed in an RRU for more serious acts of physical injury, forced sexual acts, extortion, coercion, inciting serious disturbance, procuring deadly weapons or dangerous contraband, or escape.[61] In addition to these restricted criteria, the HALT Solitary Confinement Act would make clear that persons may not be placed in segregated confinement for purposes of protective custody, and that any location used for protective custody must at least comply with the standards for RRUs.[62] Also of note, HALT would apply to all types and locations of isolated confinement beyond 17 hours, regardless of the name utilized, including punitive segregation or administrative segregation.[63]

d) Ban any length of solitary confinement of certain groups of people

Certain people should never be placed in isolation because either isolation itself can have more devastating effects on them or they are more vulnerable to abuse while in isolation. For example, as noted above, brain research has demonstrated that a young person continues to develop mentally and socially through their mid-20s and as such no person at least under the age of 25 should ever be placed in isolation because of the particularly negative effects on that person's psychological and social development.[64] Similarly, a person who has mental health needs or physical disabilities that are only going to be exacerbated by being placed in isolation should not ever be subjected to such confinement. In a similar but different way, members of the LGBTI community have often faced additional abuse by staff by being placed in isolation, even when placed in isolated confinement purportedly for their own protection.[65] The HALT Solitary Confinement Act bans any length of isolated confinement of people in such vulnerable groups,

[59] §137(6)(j)(i), §2(33).
[60] §137(6)(j)(ii), §2(34).
[61] §137(6)(j)(iii), §2(35). These restricted criteria for the maximum length of time in isolated confinement or placement in the RRUs was derived from the criteria put forward by James Austin during litigation in Mississippi that resulted in a settlement agreement and a dramatic reduction in the number of people in solitary confinement.
[62] §137(6)(j)(iv).
[63] §2(23).
[64] *See NYAC 2014 Report,* at p. 60.
[65] For greater explanation of the greater risk of harm to members of the LGBTI community by being placed in solitary, *see* Aviva Stahl, *Transgender Women in New York State Prisons Face Solitary Confinement and Sexual Assault*, Solitary Watch, August 7, 2014, *available at*: http://solitarywatch.com/2014/08/07/transgender-women-in-new-york-state-prisons-face-solitary-confinement-and-sexual-assault/.

including any person: (a) 21 years or younger;[66] (b) 55 or over; (c) with a physical, mental, or medical disability; (d) who is pregnant; or (e) who is or is perceived to be LGBTI.[67]

e) Enhancing staff skills, procedural protections, transparency, and accountability

In addition to all of the substantive changes in the use of solitary confinement described above, the environment and processes that surround the use of solitary confinement also need substantial reform, including with respect to the capabilities of staff to effectively work with incarcerated persons, protections during proceedings resulting in solitary, and transparency and accountability in the operation of isolation and separation.

i. Staff Skills, Tools, and Capabilities

As one important component, correction officers and other staff need additional skills, tools, and capabilities to work with people with serious needs, those who engage in problematic behavior, and all people who are incarcerated. Currently, staff too often use force, discipline, punishment, and isolation in response to problems that arise inside of prisons and jails. Staff need additional training, skills, and capabilities related to, for example, trauma-informed programs and care; the practices and goals of mental health treatment and cognitive and behavioral therapy; inter-personal and communication skills; and de-escalation techniques, dispute resolution, and methods to diffuse difficult situations and to interact in a diffusing, non-confrontational way. The HALT Solitary Confinement Act would require that all staff working in segregated confinement or RRU units receive 40 hours of initial training, and 24 hours of annual training, on such topics as trauma, dispute resolution, restorative justice, and the purposes and goals of a non-punitive therapeutic environment.[68] In addition, HALT requires all hearing officers to receive 40 hours of initial training, and eight hours annual training, on such topics as the physical and psychological effects of isolation, procedural and due process rights, and restorative justice remedies.[69]

ii. Procedural Protections

In addition, as discussed above with respect to the ESH units, there must be additional procedural protections in the hearings and administrative proceedings that result in solitary confinement. Such procedures should be conducted by neutral-decision makers, provide meaningful due process, and allow incarcerated persons to be represented by legal counsel. Similarly, once someone is in isolated confinement or otherwise separated from the general prison population, that person should be provided specific plans for how s/he can earn release, and there must be meaningful mechanisms of review to determine whether an individual must remain separated or should return to the general prison population. The HALT Solitary

[66] Again, no person under the age of 25 should be held in solitary.
[67] §137(g), §2(32).
[68] §137(m).
[69] §137(m).

Confinement Act would require that all hearings that could result in solitary confinement and all assessments to determine if someone is in one of the categories of vulnerable groups who are banned from solitary, must generally take place prior placement in solitary.[70] In addition, HALT would allow incarcerated persons to have legal representation by pro bono lawyers, law students, or approved paralegals or peer advocates during proceedings that could result in solitary.[71] Also, HALT would provide for various mechanisms of release from RRUs back to the general prison population, including the expiration of a disciplinary sentence, periodic reviews by different levels of reviewing committees, earning release through the completion of specified programs, treatment, and/or corrective action, and a one year maximum length of stay absent exceptional circumstances and approval by an independent outside agency.[72] Moreover, HALT provides that a person released from the RRU will have her or his good time restored if s/he had substantially completed the programmatic requirements in the RRU.[73]

iii. Transparency and Accountability

Moreover, there must be greater transparency and accountability for how isolation and separation are used. As discussed below, the recently passed City Council legislation requiring mandatory reporting on the use of segregated confinement is a very positive step. There should be mandatory, regular public reporting on how many people are isolated or separated, how long they have been isolated or separated, the demographics of who is being isolated or separated, the justifications for isolation or separation, and the impacts of the use of isolation and separation on costs, safety, self-harm, and recidivism. Also, there should be independent, outside oversight of the use of isolation and separation by entities independent of correctional agencies. The HALT Solitary Confinement Act would require state and local corrections departments to periodically report on the number of people in isolated confinement and the RRUs, the characteristics of people in such confinement (including related to age, race, gender, and mental health, health, pregnancy, and LGBTI status), and the lengths of stay in isolated confinement and RRUs. Moreover, HALT would require that independent, outside agencies monitor and issue public reports regarding compliance with all aspects of the use of segregated confinement and the RRUs described above.[74]

Overall, the interrelated components of the HALT Solitary Confinement Act – creating alternatives to solitary, restricting the criteria for isolation or separation, ending long-term solitary confinement, banning the solitary confinement of particularly vulnerable groups, and enhancing staff capabilities, procedural protections, and transparency and accountability – can serve as a model for the Board for ending the torture of solitary confinement and replacing it with more humane and effective alternatives. Although Commissioner Ponte has claimed that the

[70] §137(k)(i), §137(k)(ii).
[71] §137(k)(i).
[72] §137(l)(i-vi).
[73] §137(l)(vi).
[74] §401-a(4); §45(4-a).

DOC must get violence under control before it can reduce the use of solitary, such claims ignore the fact that the use of solitary confinement itself can lead to greater violence, rather than decrease violence, and that reducing the use of solitary confinement is itself a mechanism for reducing violence in the jails.

Promote a Comprehensive Approach to Addressing Jail Violence and Abuse

In addition to ending the torture of solitary confinement, if the Board and the DOC are serious about reducing violence in the city jails, they must both take a comprehensive approach toward addressing the violence that starts with ending the abuse carried out by DOC staff. At a minimum, in order to reduce violence and abuse in DOC jails, the Board and DOC and city officials must make substantial changes in the following additional key areas:

1) Policies and Practices Regarding Use of Force
2) Prison Culture
3) Empowerment of Incarcerated Persons
4) Transparency
5) Complaint Mechanisms
6) Accountability Mechanisms

Policies and Practices Regarding Use of Force

There must be a strictly enforced, no tolerance policy for improper and excessive use of force by staff in the city jails. The minimum standards and other policy directives on the use of force need to be strengthened to ensure that force by staff is used only in rare circumstances, with the least amount of force necessary, as a last resort method in response to imminent violence or harm to staff or other incarcerated persons.[75] More specifically, it should be made clear to staff that use of force in the circumstances such as the following is strictly prohibited: as punishment; as a response to verbal insults, threats, or failure to follow orders; or as retaliation.[76] It should also be emphasized that certain actions by staff are strictly prohibited, including verbal harassment, threats, racial and homophobic slurs, obscenities, humiliation or provocation of incarcerated persons, pressuring or coercing incarcerated persons or staff to not report a use of force incident, and utilizing certain types of force, such as headshots, or any excessive level of force.[77]

Furthermore, the Board's minimum standards and DOC directives must clarify and emphasize that use of any force – defined as broadly as possible – requires prompt, accurate,

[75] *See, e.g., Report of the Commission on Safety and Abuse* at 32-33; *DOJ 2014 Report* at 53.
[76] *DOJ 2014 Report* at 53.
[77] *Ibid*. at 53, Remedial Measure C(1)(c), 58, Remedial Measure F(7) (Remedial Measure C(1)(c) notes that "headshots are considered an excessive and unnecessary use of force, except in the rare circumstances where an officer or some other individual is in imminent risk of serious bodily injury and no more reasonable method of control may be used to avoid such injury.").

specific, detailed, and complete reporting, documenting, and investigating.[78] All staff who use force, witness a use of force incident, or provide medical or other attention following use of force must be responsible for such reporting and documenting, and all investigations should include reviewing video recordings and obtaining accounts of incarcerated persons who were involved in or witnessed the use of force.[79] There also must be mechanisms for staff to make reports confidentially about incidents that they witnessed, and there must be protections in place for staff to be free from retaliation by other staff for reporting incidents.[80] The DOC must have a zero tolerance policy with regard to non-compliance with these reporting and investigating requirements, taking necessary and appropriate responsive actions for those who do not comply.[81] In addition, the DOC must create and follow strengthened mechanisms for collecting, tracking, and publicly reporting use of force incidents and follow-up actions and outcomes.[82]

Moreover, the Board and DOC must create alternative mechanisms to the use of force, physical abuse and punishment/discipline to resolve conflicts that arise between staff and incarcerated persons, as well as among incarcerated persons. For instance, utilizing counseling, de-escalation techniques, crisis intervention methods, and restorative justice circles or panels could provide more effective means of addressing the core issues involved in conflicts and in turn reduce use of force, if properly established and built into prison operations.[83]

Cultural Changes

Perhaps most importantly in addressing violence and abuse, there must be a fundamental cultural shift within the city jails. The culture of brutality, violence, and excessive punishment must be replaced by a culture that prioritizes mutual respect and communication between staff and incarcerated persons; conflict resolution, transformation, and de-escalation; and individual autonomy, support, programs, empowerment, and personal growth for incarcerated persons.[84] Promoting the latter type of culture can improve relations between staff and incarcerated persons, increase safety and security for all, and improve staff morale and job performance,[85] not to

[78] *Ibid*. at 54-57 (specifying that the definition of the "use of force" should include "any instance where staff use their hands or other parts of their body, objects, instruments, chemical agents, electric devices, fire arms or any other physical method to restrain, subdue, intimidate, or compel an [incarcerated person] to act in a particular way, or stop acting in a particular way.").
[79] *Ibid*. at 56-57.
[80] *Report of the Commission on Safety and Abuse* at 93.
[81] *DOJ 2014 Report* at 54-55.
[82] *Ibid*. at 55.
[83] *See, e.g.*, James M. Byrne, *Myths and Realities of Prison Violence: A Review of the Evidence*, Victims and Offenders, Vol. 2, Issue 1, p. 82 (2007) (citing K. Edgar for the proposition that "building mechanisms" in prisons such as restorative justice panels "to resolve conflicts" is one method for promoting social order in prisons, along with "fulfilling [incarcerated persons'] basic human needs; working to ensure personal safety; providing opportunities to exercise personal autonomy").
[84] *See, e.g., Report of the Commission on Safety and Abuse* at 66.
[85] *Ibid*. at 66-67.

mention improving the lives of people while they are incarcerated and increasing their chances of success upon return to their home communities.[86]

The current culture of brutality, violence, and abuse self-perpetuates by inciting violence by incarcerated persons, which in turn leads to further brutality and abuse by correction officers, which continues a downward spiral of violence and abuse. At the psychological root of this downward cycle, Gilligan and Lee find "punishment stimulates feelings of shame and diminishes feelings of guilt, and those are precisely the conditions that stimulate violent behavior."[87] "[D]epriving someone of his freedom is likely to be experienced by most people as a form of punishment in itself, no matter how humanely it is done, and no matter how many efforts are made to mitigate the cruelty of it. To add further punishments to that, gratuitously, is not only needlessly cruel, but is also counterproductive: it only stimulates more violence on the part of the person who is subjected to it."[88] Similarly, many other experts and scholars espouse a similar "deprivation model" that emphasizes that "the prison environment and loss of freedom cause deep psychological trauma so that for reasons of psychological self-preservation [incarcerated persons] create a deviant prison subculture that promotes violence."[89]

To change the downward spiral, the paradigm, and in turn the outcomes, requires a fundamental change in culture and environment. Gilligan and Lee conclude that prisons and jails can never provide the appropriate environment for positive change and reducing violence.[90] Still, their ideas for what should replace institutions like Rikers can also serve as models for what the city jails should move toward so long as they exist. As Gilligan and Lee describe:

> *If we want to facilitate the ability of violent people to regain their humanity, or to gain it for the first time, so that after their return to the community they will behave constructively rather than destructively, it is essential that the setting in which they are temporarily separated from the community at large be as dignified, humane, and homelike as possible, and that it be a kind of microcosmic example of the kind of health-promoting and non-violent community that we would hope they could help create and maintain after they return to the community.*[91]

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[86] *See* Byrne at 88 (noting that "improvements in the everyday quality of life of staff and [incarcerated persons] will ultimately affect the 'moral performance' of incarcerated persons when they return to the community.").
[87] *Ibid*. at 309-310.
[88] *Ibid*. at 306.
[89] *See* Ross Homel and Carleen Thompson, *Causes and prevention of violence in prisons*, Corrections Criminology, p. 101-108, at 1 (2005) (citing Farrington & Nuttal, 1980; Sykes, 1958; Wortley, 2002).
[90] *Ibid*. at 310-311 (finding that prisons "are so irredeemably flawed, their most basic premises are so incorrigibly mistaken, that they can only be abolished and replaced with a qualitatively different kind of approach." They term their alternative approach an "anti-prison", which would be "reserved exclusively for those who have committed (or credibly threatened) a serious act of violence"; would aim to be a "human development center," "behavioral health center," or "comprehensive education center"; and would start the process of habilitation and socialization from the beginning).
[91] *Ibid*. at 311.

A major component of transforming the culture in the city jails involves changing the attitudes, practices, and cultural norms of staff. One part of this component requires a clear desire and articulation of this shift from top DOC and city officials.[92] The Board and DOC administrators and city officials must work toward creating a culture that prioritizes resolving conflict and supporting and respecting incarcerated persons, does not tolerate staff violence and abuse, and holds staff accountable.[93] The Board and high level DOC administrators, and more elected representatives, should make additional periodic unannounced visits to the city jails to assess conditions. In addition, the Board should require and the DOC should develop a stronger system for tracking, identifying, and appropriately responding to patterns of misconduct.[94]

Additionally important, the DOC needs to prioritize recruiting, hiring, and retaining staff – including correction officers, captains, lieutenants, superintendents, and deputy superintendents for security – with higher levels of qualifications and experience, as well as racial, cultural, and gender diversity.[95] According to a Human Rights Approach to Prison Management handbook,

> *It is essential that the staff should be carefully selected, properly trained, supervised and supported. Prison work is demanding. It involves working with men and women who have been deprived of their liberty, many of whom [may have mental health needs], suffer from addictions, have poor social and educational skills and come from marginalized groups in society.*[96]

Security staff qualifications should focus more on skills related to communication, resolving conflicts, empathy, and de-escalating difficult situations.[97] DOC should prioritize hiring more staff specialized in counseling, conflict resolution, and de-escalation to work in the city jails.[98]

Beyond recruitment, there must be additional and enhanced periodic training of staff that utilizes interactive and realistic role plays and demonstrations of specific skills and techniques.[99] These skills and techniques should focus on alternatives to the use of force, conflict resolution,

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[92] *See, e.g., Report of the Commission on Safety and Abuse* at 70 ("efforts to improve the institutional culture must come from the top.").
[93] *See, e.g., DOJ 2014 Report* at 62, Remedial Measures H(9), J(1).
[94] *See, e.g., DOJ 2014 Report* at 63, Remedial Measures J(3-4).
[95] *See, e.g., Report of the Commission on Safety and Abuse* at 15, 70-72 (concluding that "correctional facilities cannot operate safely and effectively without a qualified, stable, and diverse corps of officers"); Byrne at 83 (linking higher levels of prison violence and disorder with staffing levels, quality, and experience); Homel and Thompson, at 9 (summarizing support for "approaches to recruitment and training to screen out inappropriate staff, to equip staff to recognize and deal with conflict, and to improve supervision.")
[96] Andrew Coyle, *A Human Rights Approach to Prison Management*, Handbook for prison staff, 2nd ed., p. 15 (2009).
[97] *See, e.g., Report of the Commission on Safety and Abuse* at 147 (noting that in an alternative model, "[n]egotiation and communication become more important staff skills than brute strength").
[98] *See, e.g., DOJ 2014 Report* at 49, Remedial Measures F(10, 12, 13).
[99] *See Report of the Commission on Safety and Abuse* at 33 ("officers need guidance, inspiration, and a repertoire of effective, non-forceful responses so that the use of force is naturally limited to those rare situations where it is required to prevent serious harm.").

crisis intervention, trauma-informed practices, and de-escalation techniques, along with training on use of force policies, reporting requirements, and investigations.[100] All security staff should also receive additional and enhanced interactive training on mental illness and working with people with mental health and medical needs.[101] Moreover, staff should undergo additional training on how to work respectfully and effectively with people of different races, cultures, and backgrounds.[102]

Empowerment of Incarcerated Persons

In addition to transforming the staff component of the culture, part of the necessary changes in prison culture must also involve greater empowerment of incarcerated persons to help build a more effective culture and environment. Incarcerated persons themselves can play a powerful role to decrease violence and abuse inside the city jails by affecting the culture of the jails, reducing violence by incarcerated persons, empowering incarcerated persons about their rights and ability to raise complaints, and more generally serving as peer leaders, mentors, and facilitators of peer-led programs. Providing greater autonomy to incarcerated persons and fostering a sense of community among incarcerated persons and staff has been proven to help reduce in-custody violence.[103] As one part of this component, joint training of staff and incarcerated persons can help empower both, and improve relationships between staff and incarcerated persons.[104] Similarly, increasing use of the so-called "direct supervision" model, whereby staff and incarcerated persons have constant and continuous direct interaction in common, non-cell areas, can help reduce violence if implemented properly and effectively with adequately skilled, trained, and culturally competent staff.[105]

In addition, as discussed in part above, there needs to be a renewed focus in the city jails on programs, habilitation, and transformation. College programs have long been documented to reduce violent behavior among participating students and empower those individuals.[106] In

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[100] *See, e.g., DOJ 2014 Report* at 59-60, Remedial Measures G(1, 3, 5); *Report of the Commission on Safety and Abuse* at 11 ("teaching and modeling non-forceful ways for officers to resolve conflict is crucial because the unnecessary or excessive use of force and weapons provokes broader violence").

[101] *See, e.g., DOJ 2014 Report* at 60, Remedial Measure G(7).

[102] *See, e.g., Report of the Commission on Safety and Abuse* at 33 (finding that "careful screening of staff at the time of employment and ongoing, in-depth training are necessary to ensure that an understanding of and respect for cultural differences shapes how staff relate to [incarcerated persons]").

[103] *See* Homel and Thompson, at 9 (citing the example of the Barlinnie Special Unit for people convicted of violent offenses in Scotland as a successful example of violence reduction based on "a sense of community involving both [incarcerated persons] and staff, greater than usual [incarcerated person] autonomy, and distinctive incentives and disincentives."); Coyle, at 15 (noting that "the key to a well managed prison is the nature of the relationship between [staff and incarcerated persons]").

[104] *Ibid*. at 9 (citing example of a "Pennsylvania conflict resolution program that jointly trains officers and [incarcerated persons and] is successful in improving staff-[incarcerated person] relationships").

[105] *See, e.g., DOJ 2014 Report*, at 52; Gilligan and Lee, *Beyond the Prison Paradigm*, at 150; *Report of the Commission on Safety and Abuse* at 29-31.

[106] *See, e.g.,* Jack Beck, *Correctional Association Testimony*, Educational and Vocational Programs in NY Prisons, p. 27, Nov. 29, 2012, *available at*: http://www.correctionalassociation.org/wp-content/uploads/2013/02/testimonu-prison-ed-voc-progs-nov-2012.pdf (*"Beck, Educational and Vocational Testimony"*). Gilligan and Lee, *Beyond the*

addition, expanding general academic and vocational programs to create more opportunities for incarcerated persons will help to reduce idleness and in turn confrontations with staff.[107] Moreover, the Board and DOC should enhance and expand specialized programs aimed at reducing violence that help incarcerated persons better address some of their underlying issues and help them grow, including anti-violence programs.[108] Moreover, incarcerated persons can play an important role in expanding program opportunities, empowering other incarcerated persons, and in turn reducing peer violence and confrontations with staff.

Examples of an Alternative Prison Culture and Empowerment

Some prisons and jails in various parts of the country – including certain individual facilities in California, Oklahoma, Oregon, Maryland, and Massachusetts – as well as those in other economically privileged countries have received praise for reportedly making substantial efforts at transforming their institutional culture and experiencing successful outcomes.[109] According to the Commission on Safety and Abuse in America's Prisons (*hereinafter "Commission on Safety and Abuse"*), the correction systems "leading those reforms understand that an 'us versus them' mentality endangers [incarcerated persons] and staff and, over time, harms the families and communities to which [incarcerated persons] and staff belong."[110]

One powerful example of the positive impact of a shift in culture and an emphasis on programs that the Board is aware of, comes from a system developed and tested in a project at the San Francisco County Jail called the Resolve to Stop the Violence Project (RSVP). RSVP aimed to reduce violent behavior of people while they are held in jail and after they return home by changing the culture of the jail and changing the interrelated character of the individuals in the jail. RSVP utilized "an intensive, 12-hours-a-day, 6-days-a-week program consisting of group discussions, academic classes (including some emphasizing nonviolent forms of self-expression, such as art and creative writing), theatrical enactments and role-playing, counseling sessions, and presentations by and discussions with victims or survivors of rape, murder, and other serious violence."[111] Three main components of RSVP include: 1) group discussions utilizing a cognitive behavioral approach; 2) a victim impact program where survivors of extreme violence participate in sessions in which they describe the pain they have endured; and 3) a process in which each participant writes and acts out a play based on a traumatic or turning

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Prison Paradigm, at 314-316; *Education From The Inside, Out: The Multiple Benefits of College Programs in Prisons*, Correctional Association of New York, 2009; Laura E. Gorgol, Brian A. Sponsler, *Unlocking Potential: Results of a National Survey of Postsecondary Education in State Prisons*, May 2011.

[107] *See, e.g.*, Homel and Thompson, at 7-8 (finding that "academic and vocational education help decrease prison rule violations and violence"); *Report of the Commission on Safety and Abuse* at 27-28.

[108] *See, e.g.*, Homel and Thompson, at 7 (finding that the literature tentatively concludes that "programs that implement violence alternative training or other forms of treatment such as drug rehabilitation within a supportive and 'opportunity enhancing' environment of a specialist or rehabilitative unit are more likely to be effective in reducing . . . violence"); *Report of the Commission on Safety and Abuse*, at 28.

[109] *See, e.g., Ibid*. at 65.

[110] *Ibid*. at 15.

[111] Gilligan and Lee, *Beyond the Prison Paradigm*, at 316.

point event in his life.[112] The program showed dramatic declines in violence in the jail. Specifically, after the program was initiated, there was only one violent incident in the first quarter of the program and zero violent incidents for the subsequent year, representing a 96.5% decline in violence incidents from the period prior to the program.[113] The program also led to greater reductions in recidivism, as RSVP participants were "significantly less likely to be rearrested on violent charges, remained longer in the community before being re-arrested, and spent less time in custody during follow-up."[114] This type of intensive program could be incorporated by the city jails, particularly for working with groups of individuals who have engaged in violent conduct in the past or while incarcerated.

Transparency

To ensure that any policies or practices regarding the use of force, and cultural and programmatic changes, there first needs to be greater transparency in the operations of the city jails. The passage by the City Council earlier this year of a measure requiring public reporting on the use of segregated confinement is a substantial and positive first step. Greater transparency is needed in order to shine a light on the abuses taking place, allow members of the public and policy-makers to know what is happening behind the walls, and prevent and deter violence and abuse.[115] In addition to the data required under the recent City Council legislation, the DOC should make publically available, in easily accessible formats, various categories of data relevant to violence and abuse.[116]

In addition to public reporting of data, the Board and the DOC should continue and expand access to the city jails to the media, policy-makers, advocates, and other members of the public. As epitomized by the horrific Abu Ghraib abuses documented in photographs, media coverage of prison abuses can help spur much needed public debate, public scrutiny, and ultimately government accountability for what takes places inside prisons.[117] Members of the press should have greater ability to tour city jails, interview and correspond with incarcerated

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[112] *Ibid*. at 317-319.
[113] Bandy Lee and James Gilligan, *The Resolve to Stop the Violence Project: Transforming an in-house culture of violence through a jail-based programme*, Journal of Public Health, Vol. 27, No. 2, p. 149-155, at 152 (*"Lee and Gilligan, RSVP: In-House Culture"*).
[114] James Gilligan and Bandy Lee, *The Resolve to Stop the Violence Project: Reducing Violence in the Community Through a Jail-Based Initiative*, Journal of Public Health, Vol. 27, No. 2. p. 143-148, at 145 (2005).
[115] *See, e.g.*, Byrne at 84 (finding that "it is essential . . . to implement an external review system of the prison experiences as a mechanism for informing the public about the detrimental effects of prison violence on both individuals and neighborhoods.").
[116] *See, e.g.*, John J. Gibbons and Nicholas de B. Katzenbach, Commission Co-Chairs, *Confronting Confinement: A report of the Commission on Safety and Abuse in America's Prisons*, June 2006, p. 16, *available at*: http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf (*"Report of the Commission on Safety and Abuse"*).
[117] *See, e.g.*, Susan Sontag, *Regarding the Torture of Others*, The New York Times, May 23, 2004, *available at*: http://www.nytimes.com/2004/05/23/magazine/23PRISONS.html?pagewanted=all; Paul Starr, *The Meaning of Abu Ghraib*, The American Prospect, June 2004, *available at*: http://www.princeton.edu/~starr/articles/articles04/Starr-MeaningAbuGhraib-6-04.htm; Jameel Jaffer and Amrit Singh, *Commentary: Photos key to exposing prisoner abuse*, CNN, May 20, 2009, *available at*: http://us.cnn.com/2009/POLITICS/05/19/jaffer.detainee.photos/index.html.

persons freely and confidentially, and utilize photographs and videos inside of the jails. As the Commission on Safety and Abuse recommended, "every prison and jail should allow the press to do its job," including through "access to facilities, to [incarcerated persons], and to correctional data."[118]

Directly connected to public reporting, and as an independent mechanism of transparency, the DOC must increase the number of cameras in the city jails and create better mechanisms for preservation and dissemination of visual and audio recordings.[119] Such recordings can provide evidence of specific incidents of violence and abuse, and can also serve as a means of refuting alleged misconduct by staff or incarcerated persons.[120] Cameras can also serve as a deterrent to misconduct,[121] and to the extent recordings are disseminated as a mechanism of public transparency.

Individual Complaint and Grievance Mechanisms

In addition to fostering greater transparency, the DOC must strengthen mechanisms to allow incarcerated persons to raise complaints about violence and abuse. The DOJ report documented serious concerns about the grievance system at Rikers.[122] The grievance system must be strengthened by the Board and the DOC, including by, at a minimum, allowing people to file grievances confidentially, implementing vigorous protections from retaliation, and taking appropriate remedial action against any staff who engage in retaliation.[123] In addition, the city should explore the possibility of implementing a confidential telephone hotline, where incarcerated persons can call to report staff abuses to an independent outside agency. An example outside of the prison context that could serve as a model for such a hotline is the hotline in state institutions other than prisons for reporting abuse against people with disabilities to the Justice Center.[124] PREA standards also encourage, though do not mandate, the use of toll-free independent external hotlines for incarcerated persons to report sexual abuse.[125] PREA does require that each correction department provide at least one mechanism for incarcerated persons to report sexual abuse to an external entity that is not part of the department and is wholly independent.[126]

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[118] *Report of the Commission on Safety and Abuse*, at 16.
[119] *Ibid*. at 11, 34. *See also DOJ 2014 Report* at 52.
[120] *Report of the Commission on Safety and Abuse* at 34.
[121] *Ibid*.
[122] *DOJ 2014 Report*, at 39.
[123] *See Report of the Commission on Safety and Abuse*, at 93.
[124] *See* NYS Justice Center, *Contact Us, Report Abuse*, *available at*: http://www.justicecenter.ny.gov/about/contact-us.
[125] *National Standards to Prevent, Detect, and Respond to Prison Rape*, United States Department of Justice, 28 CFR Part 115, §§ 115.51(b), 115.53, Overview Comments at p. 101, May 16, 2012, *available at*: http://ojp.gov/programs/pdfs/prea_final_rule.pdf (*"PREA Regulations"*).
[126] *Ibid*. at §115.51(b), Overview Comments at p. 101.

As another essential complaint mechanism, there must be reforms to strengthen the ability of incarcerated persons to bring cases through the judicial system. The courts can provide an important mechanism for raising complaints and bringing accountability, although the efficacy of litigation by incarcerated persons is substantially impaired due to stringent judicial interpretations of the constitutional rights of incarcerated persons as well as restrictions on litigation imposed by the 1996 Prison Litigation Reform Act (PLRA).[127] Reform of the PLRA at the federal level is essential for making judicial oversight more effective.[128] In the meantime, the Board and DOC can also play a role in improving access to the courts, for instance, by increasing – rather than decreasing – access to the law library and enhancing law library capacity.

Accountability Mechanisms

As essential as providing various effective opportunities for raising complaints, staff must be held accountable for any of those complaints that are substantiated. As seen by the impact of the powerful DOJ investigation and report, there must be a variety of complementary accountability mechanisms in order to provide multiple avenues of relief and checks and balances on the alternative mechanisms,[129] including: internal DOC staff disciplinary processes, greater Board oversight, other state and federal investigations, and an independent outside oversight and monitoring body.

Internal staff disciplinary measures must be strengthened to ensure greater accountability for misconduct. There must be more effective remedial measures taken for any violations of the policies and practices proposed above.[130] Certain staff violations should result in employment termination, such as hitting incarcerated persons already in restraints, kicking incarcerated persons on the ground, unnecessarily hitting incarcerated persons in the head, using unnecessary or excessive use of force that results in serious injury, intentionally filing a false use of force report or failing to report serious incidents involving use of force.[131] Furthermore, supervisory staff should be subjected to equally strict remedial sanctions for improper conduct of the staff they supervise.[132]

Beyond internal accountability mechanisms, there needs to be greater investigations and enforcement efforts by the Board and other city, state, and federal bodies, including the DOJ. The Board must have increased capacity to promptly and thoroughly respond to complaints, carry out investigations, and take appropriate remedial action to both protect incarcerated

[127] *See Report of the Commission on Safety and Abuse* at 84-85.
[128] *Ibid*. at 85-87.
[129] *See Ibid*. at 78 (calling for a variety of accountability mechanisms including "independent inspection, litigation and court oversight, and direct inquiry from the public and the press . . . auditing, professional accreditation, and internal investigations," and concluding that such mechanisms "must be mutually supportive, pointing to the same goals and being comprehensive without being redundant or overly burdensome."
[130] *See, e.g., DOJ 2014 Report* at 61, Remedial Measures H(1).
[131] *See, e.g., DOJ 2014 Report* at 61, Remedial Measures H(2).
[132] *See, e.g., DOJ 2014 Report* at 62, Remedial Measures H(8).

persons raising complaints and more effectively address abuses in the jails.[133] Similarly, the DOJ should continue to closely monitor conditions in the city jails and take appropriate next steps to enforce dramatic change.[134]

In addition to these governmental accountability and enforcement mechanisms, there should be periodic independent outside inspection, oversight, and monitoring of city jails by a wholly independent governmental or non-governmental entity.[135] As concluded by the Commission on Safety and Abuse:

> *Every public institution – hospitals, schools, police departments, and prisons and jails – needs and benefits from strong oversight. Perhaps more than other institutions, correctional facilities require vigorous scrutiny: They are uniquely powerful institutions, depriving millions of people each year of liberty and taking responsibility for their security, yet are walled off from the public. They mainly confine the most powerless groups in America—poor people who are disproportionately African-American and Latino. And the relative safety and success of these institutions have broad implications for the health and safety of the public.*[136]

There must be an independent and effective oversight body addressing violence and abuse, the use of solitary confinement, the use of the ESH units if it is implemented, and any other restrictive confinement units imposed. Either such an independent oversight body should be provided with independent enforcement capabilities or at least the DOC should be required to, in writing, publicly respond to the body's findings and indicate its intention of compliance or non-compliance with its recommendations.[137]

Conclusion

There are critical moments in history when certain people have the opportunity and the power to address an ongoing injustice. This present time is one of those moments for the Board of Correction and the Department of Correction. Advocates and activists, psychiatrists and medical professionals, media and policy-makers, and even conservative pundits have expressed the increasing realization that solitary confinement is torture. At the same time, the media, advocates and activists, and the Department of Justice have also documented the pervasive culture and practices of staff brutality and violence, as well as the widespread use of solitary, in the city jails. In this context, adopting the proposed reductions in the minimum standards and establishing the ESH units – without substantially restricting solitary confinement, limiting staff

[133] *See, e.g.*, *Report of the Commission on Safety and Abuse* at 84.
[134] *Ibid.*
[135] *Ibid.* at 16 (concluding that "the most important mechanism for overseeing corrections is independent inspection and monitoring" by an entity "sufficiently empowered and funded to regularly inspect conditions of confinement and report findings to lawmakers and the public.").
[136] *Report of the Commission on Safety and Abuse*, at 77.
[137] *Ibid.* at 81.

abuse, or comprehensively addressing violence – would continue and endorse an approach claiming that isolation, warehousing and control are the appropriate and effective mechanisms for reducing violence. The Board and DOC must reject that approach and instead listen to the evidence and the pain and suffering of the hundreds of people in solitary and thousands more in general population in the city jails. Specifically, the Board and DOC must reject the ESH units, withdraw the proposed rule, replace solitary confinement with more humane and effective alternatives, and adopt a comprehensive approach toward ending violence and abuse.

The Board and DOC have an opportunity and the power to end the torture of solitary confinement for all people and create greater protections against violence and abuse in the city jails. The moment is ripe. The public and the media are behind progressive reform. The Correctional Association urges the Board to recognize its power and rise to its mandate to protect the rights of people incarcerated in the city jails. It is time for the Board to take ownership of this moment and work with the community of people here today to end the torture of solitary confinement, help make the city's jails safer and more humane, and create conditions that will empower people incarcerated in the jails to thrive and successfully return to their home communities.