DISABILITY RIGHTS NEW YORK

New York's Protection & Advocacy System and Client Assistance Program

December 21, 2017

By email to: Deborah.Slack-Bean@scoc.ny.gov

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Re: Proposed Regulation 9 NYCRR Part 7075 – Inmate Confinement and Deprivation

Dear Ms. Slack-Bean,

Disability Rights New York (DRNY), the designated federal Protection and Advocacy (P&A) System for people with disabilities in New York State, is providing comments on the State Commission of Correction (SCOC)'s proposed regulations on segregated confinement. DRNY is an independent agency that provides protection and advocacy for New Yorkers with disabilities, including physical and sensory disabilities, developmental disabilities, and serious mental illness. DRNY has extensively monitored and investigated conditions affecting inmates with disabilities in New York's prisons and jails. DRNY recommends significant modifications to the proposed regulations to prevent risk of harm to inmates with serious mental illness and other disabilities in New York's county jails and New York City correctional facilities.

Strengthened standards for jails in New York, limiting confinement for inmates with mental illness or other disabilities, are long overdue. However, the SCOC's proposed regulations fail to provide any safeguards for individuals with mental illness, who are disproportionately subjected to disciplinary or administrative segregation, nor to other inmates with disabilities who are vulnerable to the effects of segregation. Considering the known health impact of solitary

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confinement on inmates with mental illness and the national and international attention to this issue, this absence is glaring. Moreover, the mental health risks to juveniles and pregnant women warrant a strengthening of the proposed standards for these vulnerable populations. DRNY therefore begins our comments with a discussion of the risks of solitary confinement on inmates with disabilities as well as juveniles, with reference to the protective standards that have been developed to safeguard these populations.

A. Risks of Segregated Confinement

National and international guidelines for the treatment of prisoners strictly limit segregated confinement for populations who are especially vulnerable to its effects. The National Commission on Correctional Healthcare's 2016 position statement on solitary confinement and isolation concludes that "juveniles[1], mentally ill individuals, and pregnant women should be excluded from solitary confinement of any duration."[2] Similarly, the United Nations Standards Minimum Rules for the Treatment of Prisoners state that solitary confinement should be prohibited in all cases for juveniles, and that it should be also prohibited in all cases for adults with mental or physical disabilities where segregation would exacerbate those conditions.[3]

In 2016, the United States Department of Justice ("DOJ") released a set of "Guiding Principles" concerning the use of restricted housing in jails and prisons ("DOJ Guidelines"), intending its guidance to be implemented by "correctional systems seeking direction on future reforms."[4] These principles should be the foundation for SCOC's revision of segregation practice standards for county jails. The DOJ Guidelines conclude that juveniles and women who are pregnant, post-partum, or who recently experienced a miscarriage or termination of a pregnancy "should not be placed in restrictive housing" (defined as cell confinement of 23 hours per day).[5] The DOJ Guidelines also recommend excluding inmates with serious mental illness from restrictive housing (defined as cell confinement of 23 hours or more per day), and set forth strict conditions that should apply, including out of cell time, in the event that an inmate with serious mental illness presents such a danger that the inmate must be in segregation.[6]

1. Risks of Segregated Confinement for Individuals with Mental Illness

[1] For the purpose of these comments, DRNY adopts the United State Department of Justice definition of juvenile as "a person who has not attained his eighteenth birthday." United States Department of Justice. (1998). Offices of the United States Attorneys' Criminal Resource Manual (§ 38).
[2] National Commission on Correctional Heath Care. (2016). Solitary confinement (isolation) (Position Statement).
[3] United Nations. (May 2015). United Nations standard minimum rules for the treatment of prisoners (the Mandela Rules) (Rule 45).
[4] United States Department of Justice. (January 2016). U.S. Department of Justice Report and Recommendations Concerning the Use of Restrictive Housing: Guiding Principles (p. 94).
[5] Id., p. 8-9.
[6] Id., p. 6. The DOJ guidelines provide stringent criteria for mental health evaluations and treatment in the rare and limited circumstances where it is appropriate for an inmate with SMI to be placed in restricted housing.

It is well-established that isolated confinement exacerbates mental illness in inmates with existing mental health conditions.[7] The American Psychiatric Association (APA) recognizes that "placement of inmates with SMIs (serious mental illness) in settings with extreme isolation […] is contraindicated because many of these inmates' psychiatric conditions will clinically deteriorate or not improve. […] Prolonged segregation exposes individuals to potential psychological, physiological, and medical risk. Those with serious mental illness have special vulnerability to the adverse effects of social isolation."[8] Similarly, the United Nations Special Rapporteur on Torture, Juan Méndez, has stated that "solitary confinement often results in severe exacerbation of a previously existing mental condition" for inmates with mental illness, and that the use of solitary confinement should be prohibited for inmates with mental illness.[9]

The history of segregating inmates with serious mental illness in New York State's prison system illustrates similar problems many jails face today, and the need for heightened standards strictly limiting segregation in jails. Before reforms excluding prisoners with serious mental illness from segregated confinement were implemented statewide,[10] up to a third of inmates in New York's solitary confinement prison units were at the highest levels of mental health need. New York's jails, which have no such mandated state protections, are likely to also have high levels of inmates with serious mental illness in segregation. The DOJ's Bureau of Justice Statistics has found that in jails nationally, confinement in restrictive housing is significantly greater for inmates with mental illness.[11]

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[7] *See e.g.* American Psychiatric Association. (December 2012). Position statement on segregation of prisoners with mental illness; Scharff Smith, P. (2006). The effects of solitary confinement on prison inmates: A brief history and review of the literature. *Crime & Justice, 34*(1), 441-528.; Haney, C. (January 2003). Mental health issues in long-term solitary and "supermax" confinement, *Crime & Delinquency, (49)*1, 124-156.; Grassian, S. (2006). Psychiatric effects of solitary confinement. *Washington University Journal of Law & Policy,* 22, 325-383.; Kaba, F., et al. (2014). Solitary confinement and risk of self-harm among jail inmates. *American Journal of Public Health, 104*(3), 442-447.

[8] American Psychiatric Association. (2016). Special Applications of the Principles and Guidelines. *Psychiatric Services in Correctional Facilities, 3d ed.* 63-64.

[9] Méndez, J. (2011). Torture and other cruel, inhuman or degrading treatment or punishment. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment (p. 21).

[10] Statewide litigation brought against DOCCS and Office of Mental Health was settled in 2007, establishing criteria for the exclusion of state prisoners with serious mental illness from long-term keeplock and SHU confinement and placement into alternative therapeutic programs. *See Disability Advocates, Inc. v. NYS Office of Mental Health, et al.* The settlement of *Peoples v. Annucci* has further limited solitary confinement for disciplinary purposes in state prisons; its settlement provisions limiting confinement sanctions and providing alternative programs are just coming into effect. New York's SHU Exclusion Law, implemented in 2008, also limits segregated confinement for people with serious mental illness in New York's prisons and mandates minimum standards and treatment. The settlement of *Anderson v. Goord*, resulted in a DOCCS regulation requiring consideration of mental illness as well as intellectual disability in its disciplinary process.

[11] 22% of surveyed jail inmates with current symptoms of serious psychological distress had spent time in restrictive housing units in the past 12 months, compared with 18% of jail inmates overall. The statistics for prisoners show a higher use of restrictive housing overall, but similar to jails, prison inmates with mental illness are significantly more likely to have spent time in restrictive housing. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics: Use of Restrictive Housing in U.S. Prisons and Jails, 2011–12.

Individuals with serious mental illness comprise a substantial percentage of jail inmates. A June 2017 Special Report by the Department of Justice found that 44% of jail inmates had been diagnosed with mental illness, and that 26% of jail inmates had met the criteria for "serious psychological distress" in the 30-day period preceding the survey.[12] Other studies of jail populations have found rates of serious mental illness – conditions including major depressive disorder, bipolar disorder, and schizophrenia – to be around 15% for men and as high as 31% for women.[13] Individuals with serious mental illness have special difficulty conforming to correctional facility rules and requirements[14], which leads to disproportionate use of confinement sanctions on these inmates.[15] DRNY has found that jail inmates with serious mental illness receive repeated confinement sanctions for offenses related to their mental illness, with no consideration of their harmful impact – because there is no requirement to do so.

2. Risks of Segregated Confinement for Individuals with Intellectual and Developmental Disabilities

Prisoners with intellectual and developmental disabilities (ID/DD) are less likely than other inmates to be able to conform their behavior to the strictures of a jail environment, less likely to understand what is expected of them in jail, and more likely to face solitary confinement sanctions as a result. Further, once placed in solitary confinement, research shows that individuals with ID/DD are less able to cope with deprivation and more likely to develop some form of mental illness as a result of the deprivation.[16]

It is well documented that deprivation causes those with ID/DD to "regress and lose vitally important life skills they previously possessed."[17] The impact of solitary confinement on people with ID/DD magnifies their disability and results in much higher rates of mental illness in comparison to individuals without disabilities.[18] Individuals with ID/DD who are subjected to

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[12] U.S. Department of Justice. Bureau of Justice Statistics. (June 2017). *Indicators of mental health problems reported by prisoners and jail inmates, 2011-12*.

[13] Steadman, H.J., et al. (June 2009). Prevalence of serious mental illness among jail inmates, *Psychiatric Services, 60*(6), 761-765.

[14] Metzner, J.L. & Felner, J. (March 2010). Solitary confinement and mental illness in U.S. prisons: A challenge for medical ethics. *Journal of the American Academy of Psychiatry & the Law, 38*(1). 104-108, 105.

[15] *See e.g.* Ridgeway, J. & Casella, J. (2010). Locking down the mentally ill. *The Real Cost of Prisons*. (Finding that up to 76% of inmates in segregation in Wisconsin state prisons are mentally ill, and that these sanctions were often the consequence of inmates' inability to comply with strict prison rules.)

[16] Endicott, O. (1991). Persons with intellectual disability who are incarcerated for criminal offenses: A literature review. *Correctional Services of Canada Report.* 34-34.; Haney, C. (2003). Mental health issues in long-term solitary and supermax confinement. *Crime & Delinquency, 49*(124).

[17] Ellis, J.W. & Luckasson, R.A. (1985). Mentally retarded criminal defendants. *George Washington Law Review*, 53(414). 482-85. For additional citations to the scientific literature documenting institutional regression, see Ferleger, D. (1983). Anti-institutionalization and the Supreme Court. *Rutgers Law Journal, 14*(3), 596-636, 603 n. 37.; Teitelbaum, L.E. & Ellis, J.W. (1978). The liberty interest of children: Due process rights and their application. *Mental Disability Law Reporter, 2*(5). 582-603.

[18] *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 7 (1981) (Pennhurst I); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 127-28 (1984) (Pennhurst II) (Stevens, J., dissenting); *New York State Ass'n for Retarded*

solitary confinement are uniquely vulnerable to harm and become less able to reintegrate into the community once they are released from jail or prison.

3. Risks of Segregated Confinement for Individuals with Physical and Sensory Disabilities

Prisoners with physical disabilities and serious medical conditions are frequently at risk of physical and mental deterioration when held in solitary confinement due to issues obtaining adequate medical treatment, the effects of long-term sedentary conditions, and the loss of access to durable medical equipment, such as wheelchairs and canes, while segregated.[19] People who require physical therapy, occupational therapy, and/or daily medical treatment find that these services are disrupted or even cut off when they are placed in solitary confinement.[20]

Inmates with sensory disabilities are also at risk in isolated settings. Segregated confinement "inflicts acute harm on prisoners who are deaf or hard of hearing"[21] because it increases the sense of isolation and communication barriers experienced by deaf inmates. When deaf inmates in solitary confinement lack access to sign language interpreters, they are effectively left in total sensory and communicative isolation, with predictably devastating consequences.[22] Similarly, inmates who are blind or have low vision suffer from extreme isolation in solitary confinement, and without appropriate auxiliary aids and services, such as Braille books and audiobooks, are unable to occupy their time in solitary in the same way as sighted inmates, increasing the inmates' idleness and deprivation in a way that can cause deleterious psychological effects.[23]

For inmates with communication barriers – including inmates who are deaf or blind, or who have language impairments – solitary confinement can be extremely dangerous, as inmates may be unable to communicate their need for urgent medical attention or help with other crises. The New York City Board of Correction therefore excludes inmates with serious physical

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Children v. Rockefeller, 357 F. Supp. 752, 756 (E.D.N.Y. 1973); Haney, *supra* note 11, at 124; Endicott, *supra* note 11, at 32.

[19] The American Civil Liberties Union. (January 2017). Caged In: Solitary confinement's devastating harm on prisoners with physical disabilities (p. 26-27).; National Commission on Correctional Health Care. (2016). Solitary Confinement (Isolation) (Policy Statement).

[20] *See e.g.*, *Hightower v. Tilton*, No. C08-1129-MJP, 2012 WL 1194720 at *2 (E.D. Cal. Apr. 10, 2012) ("Following his assignment to Ad-Seg, his seizure, heart, pain, and stomach medications were confiscated; no replacement medications were issued for several days. A month later, his medications were confiscated again."); *Torres v. Doe*, No. 2377 C.D. 2010, 2011 WL 10858421, at *1 (Pa. Commw. Ct. Aug. 2, 2011) (prisoner alleged being denied access to asthma medications while in the restricted housing unit).

[21] Caged In, p. 32.

[22] *See* 2d Amend. Compl., *Ulibarri et. al. v. City & Cnty. Of Denver*, 07-cv-01814-WDM-MJW (D. Colo. Feb. 25, 2008). (23-year old deaf inmate committed suicide after being held in solitary confinement for one month and denied access to a sign language interpreter for the duration of his confinement.)

[23] Caged In, p. 35.

disabilities or medical conditions from punitive segregation altogether.[24] When segregated confinement is imposed on an individual with a physical disability for any duration, the jail must ensure that the individual continues to receive whatever medical treatment, therapies, and assistive technologies they require in order to communicate effectively and to avoid deterioration while in confinement.[25]

4. Risks of Segregated Confinement for Juveniles, Young Adults and Pregnant Women

a. Juveniles

Juveniles who are incarcerated have a dramatically increased risk of self-harm compared to adult inmates.[26] Even when not in segregated housing, juveniles who are incarcerated are uniquely vulnerable to psychological harms and risks of self-injury or suicide. This is due to developmental stage and to the fact that a high proportion of incarcerated youth "have experienced severe physical, sexual, and emotional abuse and neglect leading to trauma-related anxiety and depressive disorders, especially PTSD."[27] When juveniles are placed in segregated confinement, their already-elevated risk of self-injury and suicide is multiplied precipitously.[28]

A study finding that youth with serious mental illness aged eighteen or younger accounted for the majority of acts of self-harm at the jails resulted in the New York City Department of Correction removing all juveniles from solitary confinement, and the New York City Board of Correction adopting regulations excluding all juveniles from punitive segregation.[29] The DOJ Guidelines recommend against placing juveniles in restrictive housing, and only separating juveniles briefly from others when their behavior poses a serious and immediate risk of harm to others, in consultation with a mental health professional.[30]

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[24] Rules of the City of New York, Minimum Standards, § 1-17(b)(iii).
[25] DOJ Guidelines, p.10; Caged In, p. 57-58.
[26] Kaba, F., et al. (2014). Solitary confinement and risk of self-harm among jail inmates. *American Journal of Public Health, 104*(3), 444. While the placement of juveniles in county jails should be significantly diminished by the year 2020 as a result of New York's "Raise the Age" law, the law provides that juveniles may be detained pre-trial in adult facilities in limited cases with approval by New York's Office of Children and Family Services and the State Commission of Correction. 2017 Sess. Law News of N.Y. Ch. 59 (A. 3009C), Sec. 36 (NY Crim Proc § 510.15) & Sec. 59 (NY Fam Ct § 304.1) (2017).
[27] American Psychiatric Association. (2016). Special Applications of the Principles and Guidelines. *Psychiatric Services in Correctional Facilities, 3d ed.*, 53.
[28] Kaba, F., et al. (2014). Solitary confinement and risk of self-harm among jail inmates. *American Journal of Public Health, 104*(3), 445. Placement in solitary confinement multiplies the risk of self-harm for inmates of any age. "Inmates punished by solitary confinement were approximately 6.9 times as likely to commit acts of self-harm after we controlled for the length of jail stay, SMI, age, and race/ethnicity."
[29] Rules of the City of New York, Minimum Standards, § 1-17(a) & (b)(1)(i).
[30] DOJ Guidelines, p.8.

The American Correctional Association (ACA) recently proposed new limits on segregation of juveniles in juvenile commitment and detention facilities, and to reduce the risk of harms when confinement absolutely must be imposed in emergency circumstances.[31] Civil rights advocates and professionals have commended much of the ACA proposal, but caution that isolation should rarely extend beyond four hours, and should be prohibited beyond six hours "because of the serious risk of self-harm associated with isolation – especially for youth with mental illness."[32] After six hours, facilities must attempt alternative interventions, such as the development of specialized individual programming, referral to a mental health professional, or transfer to a different facility.[33] Accordingly, the SCOC's proposal, which would permit segregation beyond six hours, would still permit harmful levels of isolation for juveniles.

While the Raise the Age law in New York State will increase the age of criminal responsibility from 16 to 18, and will prohibit the detention of juveniles in adult jails, these provisions will take several years to be fully implemented.[34] In the meantime, it is imperative that jails take into consideration the unique needs and vulnerabilities of juvenile detainees.

b. Young Adults

The DOJ recommends limiting the use of restrictive housing with young adults age 18-24 as much as possible.[35] According to the DOJ, developmental research shows that the age of 18 cutoff between juveniles and adults "is a somewhat arbitrary demarcation," because the brain continues to develop, particularly with respect to impulse control and reasoning, through a person's 20s.[36] Because risks persist beyond the age of 18, the New York City Board of Correction extends a presumptive exclusion for inmates age 18 through 21, dependent on staffing and necessary alternative programming.[37]

c. Pregnant and Postpartum Women

[31] In 2017 the ACA proposed changes to solitary confinement rules that would permit solitary confinement only in emergency circumstances, only for so long as the emergency exists. The proposed rules would eliminate the use of punitive separation for juveniles entirely. American Correctional Association. (September 2017). Proposed Expected Practices & Definitions – Use of Separation with Juveniles.

[32] RE: Youth Justice and Civil Rights Professionals, Experts, and Advocates - Comments on the American Correctional Association's Proposed Expected Practices and Definitions for the Use of Separation With Juveniles (2017).

[33] Id.

[34] 16-year-olds will be phased out of adult jails beginning on October 1, 2018; for 17-year-olds the date is October 1, 2019. A-3009c/S-2009c, Part WWW. (2017).

[35] Id., p.9.

[36] United States Department of Justice. (January 2016). U.S. Department of Justice Report and Recommendations Concerning the Use of Restrictive Housing: Final Report, p.59; Schiraldi, V. et al. (2015). Community-based responses to justice-involved adults. *New Thinking in Community Corrections*, p. 3-4.

[37] Rules of the City of New York, Minimum Standards, § 1-17(b)(1)(ii).

Inmates who are pregnant and postpartum have heightened vulnerability to the stress of incarceration, which can lead to increased risk or exacerbation of mental illness, particularly depression.[38] The use of segregation for pregnant and postpartum inmates should be limited similarly to the use of segregation for inmates with mental illness. The DOJ recommends that women who are pregnant or post-partum should not be placed in restrictive housing, except as a temporary measure in response to behavior that poses a serious and immediate risk of physical harm to others, and in consultation with a medical review.[39]

B. Recommendations for Amendment to Proposed Regulations

1. Imposing Segregation on Vulnerable Populations Must be Limited, and Include Medical and Mental Health Assessments Prior to Imposing Segregation

Section 7075.3

The SCOC should amend the policy statement to include language that segregation of inmates with disabilities; juveniles; young adults, and pregnant and postpartum women must be prohibited, unless there is clear danger to others, with heightened monitoring in place.[40] Additionally, facilities must implement medical and mental health screening prior to and throughout segregation.

Section 7075.4(e)

The SCOC should amend this section to prohibit the segregation of inmates under the age of 18 years unless they present a clear danger to others. Inmates under the age of 18 must not be segregated for more than three hours unless the inmate presents an immediate and serious danger to others and there is no reasonable alternative. The inmate may be segregated only so long as such danger persists. Under no circumstances may segregation exceed six hours. Segregation may not be imposed as discipline or punishment. Additionally, the inmate must be provided with a copy of the documentation within 24 hours of issuance.

This subsection should further require that all inmates under the age of 18 for whom segregation is to be imposed must be assessed by a mental health professional, including administering a suicide prevention screen prior to being placed in segregation. Segregation must

[38] National Commission on Correctional Healthcare. (2014). Special needs and services. *Standards for Health Services in Jails.* (p. 121). "[D]uring pregnancy and following birth some women are more vulnerable to depressive and other mental health disorders […] incarceration may bring on or exacerbate perinatal or postpartum mental health problems."
[39] DOJ Guidelines, p. 9-10.
[40] National Commission on Correctional Healthcare. (2015). Segregated inmates. *Standards for Mental Health Services in Correctional Facilities.* (p. 87).

not be imposed unless the mental health professional determines that such placement is not clinically contraindicated. Such assessment must occur prior to segregation, unless a delay would present a clear and immediate danger to others. In such instances, the assessment must be completed as soon as possible after segregation is imposed, and must include a suicide prevention screen. While in segregation, inmates under the age of 18 must be closely supervised by correctional staff, by monitoring at staggered intervals no greater than fifteen (15) minutes, and must include one to one observation if clinically indicated. Mental health staff must also assess periodically for psychological deterioration.

Proposed § 7075.4(f)

The SCOC should amend this section to explicitly restrict segregation of all vulnerable inmates. This section should be enlarged to prohibit the segregation of inmates who are known by security, health or mental health personnel to be: pregnant or postpartum; to have medical conditions requiring active treatment or monitoring; mental illness; sensory disabilities; intellectual disabilities, and all inmates age 18-21; unless such inmate poses a clear and immediate danger to others. All such inmates for whom segregation is to be imposed shall be seen by a mental health professional who shall determine that such placement is not clinically contraindicated. Such assessment shall occur prior to segregation, unless delay would present a clear and immediate danger to others. In such instances, assessments shall be completed as soon as possible after segregation is imposed. All assessments shall include a suicide prevention screen.

This section should also require that the inmate be provided with a copy of the written documentation to deny out of cell time within 24 hours of issuance.

The section should also require that correctional staff inform healthcare and mental health staff prior to placing an inmate in segregation. Healthcare and mental health staff must ensure that segregation is not clinically contraindicated.[41] Medical or mental health staff should immediately notify the chief administrative officer or his or her designee of all reasonable accommodations required or continued during segregation. All medical and mental health services received by inmates prior to segregation shall be continued and maintained in segregation. All reasonable accommodations received by inmates with disabilities prior to segregation shall be continued and maintained in segregation.

2. Denial of Out of Cell Time Must be Significantly Restricted

Section 7075.4(c)

[41] American Psychiatric Association (2016). Special Applications of the Principles and Guidelines. *Psychiatric Services in Correctional Facilities, 3d ed.*, p. 64; DOJ Guidelines, p. 8.

Inmates who are subject to segregation must be allowed the four hours out of cell time pursuant to §§ 7075.4(c), (d)[42] and (e). However, the exception to this rule is as broad as the standard for imposing segregation in the first place. Proposed § 7075.4(c) requires that disciplinary or administratively segregated inmates "be allowed out of their cells for a minimum of four (4) hours a day," *unless* allowing this out of cell time is deemed by the jail's chief administrator to "pose a threat to the safety, security or good order of the facility, or the safety, security, or health of the inmate, staff or other inmates." Under this broad exception, the very threat that caused the jail to impose segregation will always justify withholding the required out of cell time.

Consistent with the DOJ Guidelines, the SCOC should amend the proposed exceptions to the four hours out of cell time under 7075.4(e) for "threat to safety, security or good order," so as to limit these exceptions to circumstances when such out of cell release would pose a clear danger to others. Thus, this section should require that the administrative officer restrict the four hours out of cell time in cases where the inmate would pose a clear danger to the safety of other inmates or staff. The out of cell time shall be restricted only to the degree necessary to preserve safety, and no longer than necessary to address the specific reasons for the determination.[43]

The SCOC should also amend this section to include language that determinations to deny out of cell time may not be issued as discipline or punishment for inmate conduct. Further, the inmate must be provided with a copy of the written documentation within 24 hours of issuance.

Section 7075.4(d)

The SCOC should amend this section to include language that renewed determinations must be based on circumstances at the time of the renewal and shall not be imposed as discipline or punishment. The inmate must be provided with a copy of the written documentation within 24 hours of issuance.

Proposed New Sections

The SCOC should also include the following in proposed § 7075.4 to ensure that restrictive conditions end as soon as possible: **For every segregated inmate whose out of cell time has**

[42] For inmates under the age of eighteen and inmates who are pregnant (post-partum should also be included), the proposed rule allows a minimum of four hours a day out of cell time "exclusive of entitled exercise periods," defined for these inmates to be two hours of exercise seven days per week. 9 NYCRR § 7028.2(d). However, the out of cell time is subject to the same broad exception for "safety, security or good order." Furthermore, inmates over the age of eighteen, and who are not pregnant, would also sacrifice the exercise period if deemed to threaten safety, security, or good order, and would be confined for 24 hours a day.

[43] DOJ Guidelines, p.1.

been removed or restricted, correctional staff must develop a plan for returning the inmate to less restrictive conditions as promptly as possible.[44]

For inmates with serious mental illness and/or intellectual disability, the restriction must be even more limited, due to the increased risks from such restrictions on such inmates. A subsection should be added requiring: **An inmate with mental illness, intellectual disability, or serious medical condition or physical disability must not have out of cell time removed or limited "unless the inmate presents such an immediate and serious danger that there is no reasonable alternative."**[45]

Moreover, the decision to exempt the inmate from out of cell time should not be made by the jail administrator alone, but rather in consultation with medical and mental health clinicians as recommended by the DOJ Guidelines.[46] For inmates with mental illness, the chief administrative officer should be required to consult with a qualified mental health practitioner to ensure that the inmate is not a suicide risk, is not actively psychotic, or otherwise experiencing acute mental health symptoms. If a qualified mental health practitioner is not available, the inmate should be hospitalized for such evaluation pursuant to New York Correction Law § 508(1). For inmates with known serious medical conditions or physical disabilities, or who are pregnant or post-partum, the chief administrative officer should be required to consult with a medical professional to ensure that restricting out of cell time is not clinically contraindicated, and that necessary treatment and monitoring is in place during the restricted period.

Since inmates should remain under restrictions for no longer than necessary to address the specific reasons for placement,[47] correctional staff should be required to notify the interdisciplinary team to conduct the review of the out of cell restrictions as soon as possible once the inmate has met the conditions set in the plan for returning to less restrictive conditions.

3. Medical and Mental Health Staff Must Monitor Inmates in Segregation, With Support from Correctional Staff

It is critical that mental health and medical staff monitor and assess all inmates in segregated confinement. Segregated inmates are vulnerable to mental illness and often experience depression and anxiety.[48] Should out of cell time be reduced or removed altogether, these

[44] DOJ Guidelines, p.2.
[45] DOJ Guidelines, p.6.
[46] The DOJ Guidelines recommend that, in all cases where an inmate is placed in restrictive housing, the inmate's "initial and ongoing placement" should be "regularly reviewed by a multi-disciplinary staff committee, which should include not only the leadership of the institution where the inmate is housed, but also medical and mental health professionals." DOJ Guidelines, p.2.
[47] DOJ Guidelines, p.1.
[48] National Commission on Correctional Healthcare. (2015). Segregated inmates. *Standards for Mental Health Services in Correctional Facilities.* (p. 87).

assessments must be increased in frequency to monitor and mitigate harm. This is consistent with DOJ Guidelines, APA Standards, and NCHHC standards.

Proposed New Sections

Provisions should be added to § 7075.4 to require medical and mental health staff to assess inmates placed in segregated confinement in a private setting at the time of placement and weekly, and perform daily rounds in segregated confinement areas.[49] Mental health staff should conduct face to face mental health assessments as needed on a daily basis in a private setting, and security staff should be required to conduct enhanced supervision of all segregated inmates.

Further, the section should require that correctional staff be trained in identifying signs of mental health decompensation, and monitor inmates on cell confinement multiple times a day to observe for signs of psychological deterioration. Mental health staff also should provide clear guidelines to all facility staff for when a mental health referral is warranted.[50] Should such signs be evident, staff should immediately refer the inmate for evaluation by mental health staff. This referral must be documented in writing and placed in the inmate's correctional, health and mental health files. At the conclusion of their review, mental health staff should recommend whether the inmate requires immediate transfer to a medical facility or other treatment center, as well as whether the inmate should receive enhanced mental health services and/or should be referred to a clinically appropriate alternative form of housing.[51] This determination must also be in writing and placed in the inmate's correctional, health and mental health files.

The SCOC should require, as a part of correctional staff training, training on the effects of segregated confinement on all the identified vulnerable populations, and training in the signs of psychological deterioration from restrictive housing.

4. Protections Are Necessary for Inmates Subject to Confinement that is Not Defined as Segregation

The recommended monitoring and screening requirements should also apply to inmates who are segregated for any purpose that is more than temporary, including the types of confinement that are excluded from SCOC's proposed definition at 7075.2(e). As the APA recommends, "[w]hen an inmate is segregated – for any reason – from the general population, the

[49] DOJ Guidelines, p.7; National Commission on Correctional Healthcare. (2015). Segregated inmates. *Standards for Mental Health Services in Correctional Facilities.* (p. 87), recommending segregation rounds.
[50] DOJ Guidelines, p.8. *See* National Commission on Correctional Healthcare. (2015). Segregated inmates. *Standards for Mental Health Services in Correctional Facilities.* (p. 87), recommending that mental health staff provide medical and custody staff clear guidelines regarding behaviors, verbal statement, medication refusals, and cell conditions that require a mental health referral.
[51] Id.; National Commission on Correctional Healthcare. (2015). Segregated inmates. Standards for Mental Health Services in Correctional Facilities. (p. 87).

correctional facility staff's responsibility to address serious mental health needs remains in effect. Indeed, because of the stressful nature of segregation housing, facilities should make special efforts to assess and address mental health treatment needs in these settings."[52]

Inmates confined for medical observation and treatment should receive as much out of cell time as can be appropriately and safely provided. The same out of cell time should be available for inmates subject to confinement for mental health reasons. Even inmates who are subject to constant supervision for suicide prevention purposes will benefit from time spent in the dayroom and out of the cell, as clinically indicated.[53]

5. The Disciplinary Process Must Provide Due Process and Protect the Rights of Inmates with Disabilities & Juveniles

Most jail inmates in segregation are confined as a result of disciplinary violations. Disciplinary segregation is imposed "based upon the inmate's past record and the severity of the offense" for a period "consistent with the facility rules of inmate conduct for the particular offense(s)." 9 NYCRR § 7006.9(a)(5). As discussed above under Section A.1., it is highly likely that inmates with mental illness are disproportionately represented in disciplinary segregation in the jails; the same is likely true for inmates with intellectual disabilities. The SCOC should amend its disciplinary regulations at 9 NYCRR § 7006.8-9 to accommodate inmates with disabilities, ensure due process of law, and prevent disciplinary segregation of inmates with disabilities when such segregation places them at risk of harm. These measures will help prevent unnecessary segregation of inmates with disabilities and reduce the risk of harm from disciplinary segregation.

Section 7006.3(d)

Accommodations may be necessary to assist inmates with disabilities with understanding rules of conduct. Title 9 NYCRR § 7006.3(d) provides that "Non-English speaking and illiterate inmates shall be assisted to understand the rules of inmate conduct." This section should be expanded to include individuals with intellectual disabilities who may need assistance in understanding facility rules, and ensure that facility rules are provided to inmates with sensory disabilities in accessible formats.

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[52] American Psychiatric Association (2016). Special Applications of the Principles and Guidelines. Psychiatric Services in Correctional Facilities, 3d ed., p.64.

[53] Lindsay Hayes, a nationally recognized expert on suicide prevention in correctional facilities, recommends that "[h]ousing assignments be based on the ability to maximize staff interaction with the inmate, not on decisions that heighten depersonalizing aspects of confinement." Hayes, L.M. (2013). Guide to developing and revising suicide prevention protocols within jails and prisons. *National Center on Institutions and Alternatives*, p. 3. An effective suicide prevention strategy creates more interaction between inmates and correctional, medical and mental health personnel. Hayes, L.M. (2011). Guiding principles to suicide prevention in correctional facilities. *National Center on Institutions and Alternatives*, p. 2.

Section 7006.8

Inmates with disabilities may need reasonable accommodations to participate in disciplinary hearings. Section 7006.8 should be amended to ensure accommodations similar to those required in the state prison system are provided, including assistants or interpreters as needed.[54] For inmates who cannot participate even with assistance, hearings should be postponed until such time that the inmate can be participate.[55] This may be necessary, for example, if the inmate has serious mental illness and is in crisis or has been hospitalized. As a matter of due process, inmates with serious mental illness or intellectual disabilities must be competent to participate in the disciplinary hearing.

Section 7006.8 should be further amended to require hearing officers to consider the inmate's responsibility for the infraction, and his or her ability to tolerate a sanction of segregation if that is within the range of possible dispositions. In the state prison system, DOCCS regulations require such considerations at disciplinary hearings when an inmate's "mental state or intellectual capacity is at issue."[56] Mental health clinicians are required to provide input and recommendations on issues of fitness to proceed, culpability, mitigation and duration of and suitability for disciplinary housing.[57] DOJ Guidelines recommend precisely these measures: that a qualified mental health practitioner determine whether, for inmates with serious mental illness, there is a lack of responsibility for the misconduct due to mental illness, and whether the mental illness otherwise mitigates or contraindicates disciplinary segregation.[58] As in the state prison system, disciplinary segregation for inmates with serious mental illness should be prohibited in all but the most exceptional circumstances.[59]

Section 7006.9

The SCOC proposes amending § 7006.9 to provide discretion to the chief administrative officer to suspend disciplinary confinement sanctions in order to assess behavioral adjustment of

[54] DOCCS regulations require the provision of assistance to individuals with sensorial disabilities who are involved in disciplinary proceedings. 7 NYCRR § 254.2. In addition, hearing officers are required to consult with an Office of Mental Health clinician if the inmate's mental health is at issue, and with a correction counselor or educator as may be available, concerning the inmate's intellectual capacity. The hearing officer must determine whether the inmate understands the disciplinary charge and the hearing procedures and can participate in the proceedings. If it is determined that the inmate is able to participate in the hearing process but is in need of assistance, the inmate is offered an assistant, who may be required to be present at the hearing. 7 NYCRR § 254.6 (c) & (e).

[55] 7 NYCRR § 254.6 (d).

[56] 7 NYCRR § 254.6(b). The hearing officer must consider evidence concerning the inmate's mental condition or intellectual capacity at the time of the incident. 7 NYCRR § 254.6(d). *See also Anderson v. Goord Settlement providing revisions to disciplinary rules.*

[57] *Memorandum of Understanding between* the New York State Office of Mental Health and the New York State Department of Corrections and Community Supervision (September 14, 2016), p. 21.

[58] United States Department of Justice. (January 2016). U.S. Department of Justice Report and Recommendations Concerning the Use of Restrictive Housing: Final Report, p. 97.

[59] *See* NY CORRECTION LAW § 401(5).

the inmate. This is an important step toward reducing the risk of harmful segregation. We strongly recommend that SCOC adopt our recommendations that mental health assessments be regularly conducted of all inmates in segregation, including inmates subject to disciplinary confinement sanctions. Section 7006.9(d) should require that the chief administrative officer consult with qualified mental health staff concerning the behavioral adjustment of the inmate, and suspend a sanction of confinement that results in harm to the inmate. Reinstatement of the sanction should only be done in consultation with qualified mental health staff and if clinically appropriate.

Section 7006.7(c)

This section should require that the inmate be provided with a copy of the written documentation within 24 hours of issuance.

Finally, we strongly recommend that SCOC adopt the ACA position and New York City jail regulations prohibiting disciplinary segregation of juveniles altogether.[60]

Conclusion

Thank you for considering DRNY's comments addressing how SCOC can appropriately meet the needs and safeguard the rights of individuals with disabilities in New York jails. We are available to answer questions and provide further input at your request.

Sincerely,

Amanda Pearlstein
Staff Attorney

Nina Loewenstein
Supervising Attorney

[60] Rules of the City of New York, Minimum Standards, § 1-17(b)(1)(i).