



**BROOKLYN
DEFENDER
SERVICES**

November 28, 2017

Deborah Slack-Bean
Senior Attorney
New York State Commission of Correction
Alfred E. Smith Building
80 S. Swan Street, 12th Floor
Albany, NY 12210

Dear Ms. Slack-Bean:

My name is Lisa Schreibersdorf and I am the Executive Director of Brooklyn Defender Services (BDS). BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy in nearly 40,000 cases in Brooklyn every year. As part of our representation, BDS dedicates staff to provide direct services and advocacy for our clients while they are incarcerated in New York City jails in pre-trial detention, serving sentences of less than a year, or returning from New York State Department of Corrections and Community Supervision (DOCCS) prisons upstate for court appearances. I thank the New York State Commission of Correction (SCOC) for the opportunity to submit comments on the proposed new regulations regarding solitary confinement and the deprivation of essential services in local jails.

BDS appreciates the intent of the proposed regulations and recognizes the good-faith effort by SCOC to reduce the use of solitary confinement in local jails. However, we are concerned that the regulations, as written, may not have that effect and, in fact, would codify some of the most inhumane jail practices. Specifically, we believe the proposed protections are woefully inadequate and the exemptions are so broad as to render the regulations effectively meaningless. In short, these regulations would explicitly allow local jail administrators to hold teenagers, pregnant women, and any other New Yorker in solitary confinement 24 hours per day for endless, consecutive weeks, months, or even years with no clear way to challenge their isolation – all based on an determination by a jail official that such conditions are necessary for the “good order” of the facility. “Good order” is a politically and racially charged term in the community, and as a legal standard, it likewise allows for extreme discretion and intentional or unintentional

discrimination. These regulations therefore represent a step in the wrong direction.

Given the immense harm caused by the torture of solitary confinement, and its inefficacy as a tool to improve safety, BDS believes that SCOC must take bold and urgent action. We urge you to reformulate the regulations to align with the Humane Alternatives to Long-Term (HALT) Solitary Confinement Act (A.3080/S.4784) and, accordingly, to apply to both local jails and state prisons.

Crucially, the HALT Act was written by survivors of solitary confinement, family members of people in solitary, attorneys and social workers who serve incarcerated people, and mental health experts. It appears that SCOC's draft regulations were written without consulting directly impacted people and other experts. In addition, HALT establishes parameters for alternatives to solitary confinement that DOCCS and local jail administrators could use to more effectively preserve safety, security, and good order in their facilities.

Recommendations

1. **Establish a maximum limit of 15 consecutive days in solitary confinement, in line with the UN's Mandela Rules, the National Commission on Correctional Health Care, and Colorado's new policies, and cap solitary confinement at 20 days total in any 60 day period.**
2. **Stipulate that out-of-cell time must include congregate programming that promotes education, rehabilitation, and wellness.**
3. **Prohibit the use of solitary confinement for young people (21 and under), older adults (55 and older), people with mental illness or physical disabilities, pregnant women and new mothers.**
4. **Establish procedural protections in disciplinary or housing placement determinations so that incarcerated people may effectively challenge their placement.**
5. **Promote alternatives to solitary confinement that meaningfully and humanely address the root causes of any unsafe or otherwise problematic behavior.**

Background on Solitary Confinement in New York State

Solitary confinement is at the core of mass incarceration in the United States – and, in particular, New York. It is the center of the onion of our punishment system. Spreading throughout the country as a response to increasing tensions caused by prison and jail overcrowding and political organizing by incarcerated people, solitary, itself, became an epidemic in recent decades.

According to the most comprehensive study to date, an estimated 80,000 – 100,000 people in state and federal prisons are held in punitive or administrative segregation at any moment.¹ Importantly, this figure excludes local jails and juvenile, military and immigration detention

¹ Assoc. of State Correctional Administrators & The Arthur Liman Pub. Interest Program of Yale Law School, *Aiming to Reduce Time-In-Cell: Reports from Correctional Systems on the Numbers of Prisoners in Restricted Housing and on the Potential of Policy Changes to Bring About Reforms* (2016), <https://law.yale.edu/system/files/area/center/liman/document/aimingtoreducetic.pdf>.

facilities, where nearly one-third of incarcerated people are held. The report found that 4,498 people, or 8.5% of the population in New York State prisons, were held in restrictive housing, defined as confinement for 22 hours per day or longer for 15 consecutive days. This is far higher than the national average rate of 4.9%, and orders of magnitude greater than the rates in states that have implemented meaningful reforms like Colorado.²

Solitary Confinement in Local Jails

There is currently no reporting requirement or mechanism to estimate the occurrence of solitary confinement in local jails. However, activism and organizing by the families of incarcerated people and local grassroots advocates, as well as recent lawsuits and subsequent press accounts, have shined a spotlight on widespread uses of solitary confinement and other related abuses in jails throughout the state. For example, a September 2016 lawsuit by the New York Civil Liberties Union (NYCLU) and Legal Services of Central New York (LSCNY) against the Onondaga County Sheriff's Office for mistreatment of detained 16 and 17 year-olds cited sexual harassment, disgusting conditions, denied education, and—horrifyingly—encouragement to commit suicide, often while the young people were held in solitary confinement for normal, harmless, youthful behavior. Young girls in solitary confinement were monitored by adult male guards as they showered without a curtain. The case resulted in a settlement, but any changes only affect this one county.³ In Auburn County's jail, Jermaine Gotham, a 16 year-old suffering from mental illness, was placed in prolonged solitary confinement for allegedly spitting spitballs and playing catch with another boy.⁴ In Broome County Jail, which has become infamous for a spate of preventable deaths in custody in recent years, LSCNY filed a lawsuit in August of this year alleging that young people in solitary confinement are held in putrid and inhumane conditions and denied a basic education.⁵

The tragic suicide by Kalief Browder, who had endured two years of solitary confinement while detained as a teenager on Rikers Island before all charges against him were dismissed, brought international attention to the degree of inhumanity in our criminal legal system. Jay-Z has called Kalief “a prophet.”⁶ In his case, as in many others, solitary confinement was coupled with other significant abuse by staff, including an apparent partnership between Correction Officers and incarcerated people to use violence as a tool of control, an operation historically nicknamed,

² Rick Raemisch, *Why We Ended Long-Term Solitary Confinement in Colorado*, N.Y. TIMES, Oct. 12, 2017, available at <https://www.nytimes.com/2017/10/12/opinion/solitary-confinement-colorado-prison.html>.

³ NYCLU, *Lawsuit: Syracuse Jail Is Harming Children With Abusive Solitary Confinement Conditions* (2016), <https://www.nyclu.org/en/press-releases/lawsuit-syracuse-jail-harming-children-abusive-solitary-confinement-conditions>.

⁴ Douglass Dowty, *Spitballs and Thrown Items = 50 Days in Solitary Confinement for Auburn Teen*, SYRACUSE.COM, July 19, 2016, available at http://www.syracuse.com/crime/index.ssf/2016/07/spitballs_and_throwing_items_50_days_in_solitary_confinement_for_auburn_teen.html.

⁵ Hannah Schwartz, *County Jail Sued for Solitary Confinement of Juveniles*, BINGHAMTON PRESS & SUN-BULLETIN, Aug. 24, 2017, available at <http://www.pressconnects.com/story/news/2017/08/24/county-jail-sued-solitary-confinement-juveniles/564773001/>.

⁶ Rahel Gebreyes, *Jay Z: Kalief Browder Was a 'Prophet' Who Taught Us 'How to Love Better'*, HUFFINGTON POST, Mar. 2, 2017, available at https://www.huffingtonpost.com/entry/jay-z-kalief-browder_us_58b8538fe4b02a4e8ddb0d00.

“The Program.” Kalief reportedly would not “get with The Program,” and defended himself as needed, so staff would write him up and send him to solitary. He also refused any plea deals involving an admission of guilt for a crime he did not commit, defying the immense pressure of the system. Indeed, the prevalence of solitary confinement in local jails, where most people are detained only because a prosecutor and judge set bail in a form and amount they cannot afford, only adds to the broader imbalances and unfairness in the criminal legal system. Many subjected to this torture, purportedly for the safety or good operation of the jail, are released directly to the community after accepting a plea deal. Kalief stood his ground through three years of hell on Rikers Island and paid the ultimate sacrifice. The scars of his experience tragically led him to take his own life shortly after his release.

In the wake of the attention to Kalief’s case, the New York City Board of Correction (BOC) implemented new minimum standards to dramatically curtail the use of solitary confinement in City jails and prohibit it altogether for young people. However, even these regulations, which are far stricter and more comprehensive than the SCOC’s proposal, left room for the New York City Department of Correction to create new units that indefinitely isolate the very people BOC sought to protect. BOC’s new standards failed to bring about the fundamental transformation of the punishment paradigm that is necessary to make our jails more effective and humane, and should serve as a lesson for SCOC about the paramount importance of getting it right.

Opposition to Solitary Confinement – From the 19th Century to Today

Opposition to solitary confinement has grown in recent years to include President Obama, the Pope, and the United Nations General Assembly.^{7,8,9} U.S. Supreme Court Justice Anthony Kennedy invited a constitutional challenge to its widespread practice.¹⁰ That said, scientific and legal understandings of the harm of solitary confinement are not new. In fact, judicial recognition that solitary confinement is inhumane and ineffective dates back at least to 1890, when the US Supreme Court found in *In Re Medley* that placement in solitary confinement caused extreme and long-term harm, writing that a “considerable number of the [people in solitary] fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.”¹¹

⁷ Barak Obama, *Why We Must Rethink Solitary Confinement*, *Wash. Post*, Jan. 25, 2016, available at https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?utm_term=.b442ca5915e7.

⁸ Jean Casella, *Why We Must Rethink Solitary Confinement – Pope Francis Denounces Solitary Confinement, Calls for Prison Conditions that “Respect Human Dignity”*, SOLITARY WATCH, Jan. 25, 2016, available at <http://solitarywatch.com/2014/10/26/pope-francis-denounces-solitary-confinement-calls-for-prison-conditions-that-respect-human-dignity/>.

⁹ The United Nations General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (The United Nations 2015) [hereinafter The Nelson Mandela Rules].

¹⁰ *Davis v. Ayala*, 576 U.S. ____ (2015), available at https://www.supremecourt.gov/opinions/14pdf/13-1428_1a7d.pdf.

¹¹ *In re Medley*, 134 U.S. 160, 168 (1890).

Racial Bias in Prison and Jail Discipline

Solitary confinement practices in New York reflect the systemic and interpersonal racism of our prisons and jails. *The New York Times* conducted an investigation last year and found Black people to be far more likely to be subject to solitary confinement in New York State prisons, which in turn exacerbates disparities in release determinations, as people in Special Housing Units (SHU) are far less likely to be granted parole.¹² Research by the New York City Department of Health and Mental Hygiene further found that Black and Latinx people incarcerated on Rikers Island or in the City's borough-based jails were less likely to receive appropriate mental health diagnoses and more likely to experience solitary confinement.¹³ Any meaningful reforms must significantly reduce or eliminate these disparities.

Catastrophic Health Impacts of Solitary Confinement

In 1993, correctional psychiatry expert Dr. Stuart Grassian identified what has been called SHU Syndrome, which includes the aforementioned symptoms. Physiological conditions brought on by solitary confinement include gastrointestinal and urinary issues, deterioration of eyesight, lethargy, chronic exhaustion, headaches and heart palpitations among others.¹⁴ Solitary is further shown to cause psychological trauma including severe depression, anxiety, insomnia, confusion, emotional deterioration, and fear of impending emotional breakdown.¹⁵ Studies have found that prolonged solitary confinement induces hallucinations and delusions, and bouts of irrational anger and diminished impulse control, leading to violent outbursts and invoking the very behavior it purports to manage.^{16,17}

A 2014 study revealed that **people subjected to solitary confinement in New York City jails were 6.9 times more likely to engage in acts of self-harm than those who were not.**¹⁸ **The suicide rate in DOCCS' SHU is nearly six times higher than that of the General Population (GP).**¹⁹ These tragic statistics confirm what mental health experts have long concluded, namely that solitary is "inherently pathogenic; [...] one of the most severe forms of punishment that can be inflicted on human beings short of killing them."²⁰ In fact, one man who has been held in

¹² Michael Schwartz, Michael Winerip, & Robert Gebeloff, *The Scourge of Racial Bias in New York State's Prisons*, N.Y. TIMES, Dec. 3, 2016, available at https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html?_r=0.

¹³ Fatos Kaba et al., *Disparities in Mental Health Referral and Diagnosis in the New York City Jail Mental Health Service*, 105 AM. J. PUB. HEALTH 1911-1916 (2015) available at <http://ajph.aphapublications.org/doi/full/10.2105/AJPH.2015.302699>.

¹⁴ Sharon Shalev, *A SOURCEBOOK ON SOLITARY CONFINEMENT* (London: Manheim Centre for Criminology, London School of Economics, 2008), p. 15.

¹⁵ Craig Haney, *Mental health issues in long-term solitary and "Supermax" confinement*, 49 CRIME & DELINQUENCY 133-136 (2003).

¹⁶ *Id.*; see also Stuart Grassian, *Psychopathological effects of solitary confinement*, 140 AM. J. PSYCHIATRY 1452 (1983).

¹⁷ Haney, 2003, p. 133; Grassian, 1983 p. 1453; James Gilligan & Bandy Lee, *Report to the New York City Board of Correction*, p. 6, Available at <http://solitarywatch.com/wp-content/uploads/2013/11/Gilligan-Report.-Final.pdf>.

¹⁸ Fatos Kaba et al., *Solitary confinement and risk of self-harm among jail inmates*, 104 AM. J. PUBLIC HEALTH 445.

¹⁹ Statistics provided by DOCCS.

²⁰ Gilligan & Lee, *Report to the New York City Board of Correction*, p. 6.

solitary confinement at Elmira prison for approximately thirty years, William Blake, described his long-term isolation as a “sentence worse than death.”

As New York State Assembly Health Committee Chair Richard Gottfried has said in a press release by the Campaign for Alternatives to Isolated Confinement, “Solitary confinement has catastrophic long-term effects on physical and mental health. No responsible medical professional could stand for this, and New York State shouldn’t either.”

Violations of United Nations Rules, Professional Association Standards, and New York State Law

The United Nations Standard Minimum Rules for the Treatment of Prisoners, the “Mandela Rules,” expressly prohibit prolonged solitary confinement beyond 15 days as a form of torture or cruel inhuman or degrading treatment. Nevertheless, New York State prisons hold a disturbing number of people in solitary confinement beyond that limit, at a much higher rate than the national average, with more subjected to the practice in county jails across the state.²¹ New Yorkers are regularly isolated for months, years, and even decades.

Contrary to clear direction from the National Commission on Correctional Health,²² healthcare staff in prisons and jails are generally complicit in subjecting people to the harms of solitary confinement. Worse, healthcare staff are too often complicit in cases where solitary is clearly being used to cover up brutality. Once someone is placed in solitary confinement, the problems of access to care are exacerbated. Officers have even more control over access to sick call and emergency referrals, and securing escorts from high security units to appointments is increasingly difficult. More generally, the Commission has stated that “Juveniles, [people with mental illness], and pregnant women should be excluded from solitary confinement of any duration.”²³

Equally troubling, a recent report by Disability Rights New York uncovered rampant abuse of people with mental illness in Residential Mental Health Units (RMHU) at Attica State Prison. These units were intended to protect people with serious mental illness from the harms of solitary confinement under the SHU Exclusion Law. Instead people in RMHU were subjected to the same kind of punitive isolation without input from mental health staff, and in direct violation of the law. Horrifying accounts of specific incidents of verbal and physical abuse in the unit make the report even more disturbing.²⁴ This report reaffirms that **New York must adopt comprehensive legislation prohibiting prolonged solitary confinement in any form.** The

²¹ The Liman Program, Yale Law School & of State Corr. Administrators, *Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison* (2015), https://law.yale.edu/system/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf.

²² See United States National Commission on Correctional Health Care (2016), Position Statement: Solitary Confinement (Isolation), [online] (available at: <http://www.ncchc.org/solitary-confinement> [accessed 25 October 2017]).

²³ The Nat'l Comm'n on Corr. Health Care, *Solitary Confinement (Isolation)*, <https://www.ncchc.org/solitary-confinement>.

²⁴ Disability Rights New York, *Report and Recommendations Concerning Attica Correctional Facility's Residential Mental Health Unit*, available at <http://new.drny.org/docs/reports/attica-rmhu-report-9-12-2017.pdf>.

draft regulations would not bring our local jails into compliance with any of these standards or laws.

SCOC's Draft Regulations Codify the Practice of Torture

As noted above, the draft regulations may in fact be used by local jail administrators and personnel to justify existing uses of solitary confinement or deprivations of essential services rather than serve to mitigate the harm caused to incarcerated people. Already, existing SCOC regulations generally permit solitary confinement in local jails, subject to individual facility rules. Disciplinary sanctions may include “confinement to a cell, room, or in special housing for a period consistent with the facility rules of inmate conduct for the particular offense(s),” among other forms of punishment. However, these regulations do not specify any parameters for time out-of-cell or other standards of treatment.²⁵ On the contrary, the proposed regulations explicitly establish processes for holding even teenagers and pregnant women in solitary confinement indefinitely through the duration of their incarceration. Moreover, they contain no special protections for people with mental illness or developmental disabilities—a major oversight. In 1995, Chief Judge Thelton E. Henderson wrote in his ruling *Madrid V. Gomez*: “For [incarcerated people with mental illness or developmental disabilities], placing them in the SHU in the mental equivalent of putting an asthmatic in a place with little air to breathe.”²⁶ The SCOC should redraft its regulations in light of the wealth of evidence that solitary confinement is not safe for anybody, and that it is so cruel and dangerous to particularly vulnerable groups that it should be prohibited altogether.

A Way Forward – The HALT Solitary Confinement Act

BDS supports the efforts of New York State legislators and our grassroots partners in the Campaign for Alternatives to Isolated Confinement to **enact the Humane Alternatives to Long Term (HALT) Solitary Confinement Act (S.4784-Parker/A.3080-Aubry)** and bring an end to the torture of solitary confinement in New York State. The Corrections Commissioner in Colorado, Rick Raemisch, has already successfully implemented solitary reforms that mirror HALT.²⁷ These reforms include: A hard limit of 15 consecutive days in solitary confinement, with most serving far less; the use of therapy to address seriously problematic behavior; and a dramatic reduction in the overall use of solitary. In 2011, 1,500 people in Colorado prisons, or 7% of the prison population, were held in solitary; the state’s prison commissioner now reports that number has dropped to 18 people, or far less than 1%. These reforms mark a new era of compliance with the UN’s Nelson Mandela Rules for the Treatment of Prisoners. It is absolutely and urgently necessary that New York follows suit.

There are many examples of alternatives to solitary confinement, in addition to Colorado’s, that New York should seek to emulate. After visiting Halden, a maximum-security prison in Oslo,

²⁵ 9 CRR-NY 7006.9

²⁶ *Madrid v. Gomez*, 889 F.Supp. 1146 (1995)

²⁷ Rick Raemisch, *Why we ended long term solitary confinement in Colorado*, N.Y. TIMES, Oct. 12, 2017, available at <https://www.nytimes.com/2017/10/12/opinion/solitary-confinement-colorado-prison.html>.

Norway with the Prison Law Office, Leann Bertsch, the Director of North Dakota's Department of Corrections and Rehabilitation, implemented a series of reforms in her own system that dramatically reduced the use of solitary confinement.²⁸ Right here in New York, the Merle Cooper Program at Clinton C.F., a popular therapeutic, community-intensive, long-term counseling series proved to be remarkably effective at improving behavior and a creating a sense of accountability before it was shut down in 2013.²⁹ In a letter of support for the HALT Solitary Confinement Act, Dr. Bandy X. Lee, Assistant Clinical Professor of Psychiatry at Yale and an internationally-recognized expert on correctional psychology and the prevention of violence, wrote: "It has now become evident that the opposite of solitary confinement—that is proper socialization, interaction, and training—is what brings about the result we all desire." That is why a true transformation of the punishment paradigm is needed. The modest protections envisioned in SCOC's proposed regulations, particularly in light of the overbroad exemptions, will not accomplish this goal – and could set us back.

Thank you for your time and consideration of our comments. We look forward to further discussing these and other issues that impact our clients. If you have any questions, please feel free to reach out to Jared Chausow, Senior Policy Specialist, at 718-254-0700 ext. 382 or jchausow@bds.org.

Sincerely,



Lisa Schreibersdorf
Executive Director
Brooklyn Defender Services

²⁸ Dashka Slater, North Dakota's Norway Experiment, Mother Jones , <http://www.motherjones.com/crime-justice/2017/07/north-dakota-norway-prisons-experiment/>.

²⁹ Felicia Krieg, Prison Program to Be Eliminated, The Press-Republican, June 23, 2013.