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**BY EMAIL & MAIL**

New York State Commission on Correction  
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ATTN: Deborah Slack-Bean, Senior Attorney

**RE: Proposed Rule Making I.D. No. CMC-44-17-00012-P  
Inmate Confinement and Deprivation**

We write to offer comments on Proposed Rule Making I.D. No. CMC-44-17-00012-P relating to Rules on Inmate Confinement and Deprivation in New York jails and local correctional facilities. We agree that increases to time out-of-cell and limits on the use of segregation (isolated or solitary confinement) in jails and local correctional facilities are needed. However, the toxic impact of segregation on incarcerated individuals requires strong regulations which set clear limits on the use and duration of segregated confinement. The proposed regulations do not contain these necessary measures to ensure that New York jails and local correctional facilities are both safe and humane.

**INTRODUCTION:**

The Prisoners' Rights Project ("PRP") of the Legal Aid Society has been a leading advocate for constitutional and humane conditions of confinement for prisoners incarcerated in the New York City jails and New York State correctional system since it was established in 1971. PRP assists individuals incarcerated in the City jails and State prisons, their families, and their defense lawyers. In addition to pursuing the protection of rights through litigation, we advise prisoners, provide written self-help legal materials, and intervene administratively on behalf of incarcerated individuals with the New York City Department of Correction, the New York State Department of Corrections and Community Supervision, the New York City Health and Hospitals Corporation, the New York State Office of Mental Health ("OMH"), and other medical providers and agencies. Through litigation, legislation and policy practice, PRP has experience in working to establish policies and other mechanisms that implement systemic changes to improve conditions and services inside prisons and jails. Our daily contact with those in the criminal justice system, and our decades of experience in addressing conditions of confinement in the City jails and state prisons, inform our remarks today.

We commend the New York State Commission on Correction (SCOC) for taking a step toward regulating the use of segregation (isolated or solitary confinement) and other deprivations in jails and local correctional facilities. However, the proposed rules neither require measures that are necessary to limit the dangerous use of solitary confinement nor reflect current evidence-based best practices to improve behaviors and to humanely confine incarcerated individuals. New York must adopt minimum standards that reflect current understanding of the dangers of segregation and solitary confinement and current best-practices regarding other restrictions and deprivations, so as to adequately protect incarcerated individuals housed in jails and local correctional facilities from resultant harm. Moreover, the requirements in the proposed rules regarding record-keeping are short-sighted and inefficient, and do not provide for the collection and public dissemination of data that will ensure adequate oversight and evidence-based development of humane, safe and cost-effective corrections policies in our state.

We understand that the SCOC is setting the minimum requirements for jails and local correctional facilities around the State, each of which confronts different obstacles and has different resources available. Therefore, it is critical for the SCOC to make clear that these are baseline minimum standards and that local regulatory agencies and jail systems can determine what additional requirements—such as further limitations on the duration of segregated confinement or additional recreation time—may be required in their facilities to best create a safe and humane environment for incarcerated individuals and staff.

We recommend that the SCOC refrain from passing the proposed rules and instead engage in further fact-finding, including through a public hearing where stakeholders including directly affected individuals, their family members, advocates, correctional experts, health and mental health experts, may participate and inform the process to develop humane alternatives to, and limitations on, the use of segregation and other deprivations and restrictions. Given the importance of these regulations to the lives of New York State citizens, a full participatory process is appropriate.

We provide below our initial comments and recommendations that are offered to strengthen the proposed changes and to bring them in line with current standards.

## **GOVERNING PRINCIPLES FOR REGULATIONS**

Current evidence-based best practices in jail and prison management focus on the risk-need-responsivity model of rehabilitation – the identification of risks of criminal behavior and the needs that must be targeted to improve behaviors and reduce recidivism.<sup>1</sup> Research has shown that concentrating programming on the individuals who may be most difficult to manage (and most likely to reoffend) has the greatest impact.<sup>2</sup> Yet, the proposed SCOC regulations do the precise opposite: they implement control and punitive responses to the individuals who

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<sup>1</sup> See, e.g., Justice Center, Council of State Governments, *Reducing Recidivism*, (2014); Justice Center, Council of State Governments, *The National Summit on Justice Reinvestment and Public Safety*, (2012); Polaschek, *An Appraisal of the Risk-Need-Responsivity (RNR) Model of Offender Rehabilitation and Its Application in Correctional Treatment*, *Legal and Criminological Psychology* (2012), 17, 1-17; Gornik, *Moving from Correctional Program to Correctional Strategy: Using Proven Practices to Change Criminal Behavior*, *ICCA Journal on Community Corrections*, 24 (2002).

<sup>2</sup> See, e.g., *Reducing Recidivism*, *Id.* at p. 4.

actually require more targeted services. Increasing authority and control is counter-productive; such “[p]unitive methods of controlling behavior all too often reinforce modes of thinking that were responsible for the initial anti-social behavior.”<sup>3</sup>

Evidence-based best practices include positive reinforcement, and the implementation of individualized plans that permit individuals to gain privileges and incentives for good behavior. The current proposed SCOC rules fail to emphasize these practices. The SCOC should aim to incorporate elements that will ensure that jail segregation, deprivations and restrictions represent these evolving standards of decency in custodial management. The SCOC regulations should incorporate standards that will improve the fairness, reasonableness and due process protections for incarcerated individuals. Jail and prison standards concerning the use of segregation, limitations on out-of-cell time, use of restrictions and deprivations, and the need for oversight and data collection to inform the evidence-based development of humane and safe corrections policies, at a minimum require the following elements:<sup>4</sup>

- Limitations on time in restrictive housing or under imposition of deprivations and other limitations on rights;
- Limitations on criteria for placement into restrictive housing, imposition of deprivations and other limitations on rights;
- Policy that time spent in restrictive housing or under imposition of deprivations and other limitations on rights will be for the shortest time necessary;
- Presumption that time limitations will not be extended;
- Strong due process protections;
- Exclusion of vulnerable populations;
- Treatment, programming and individualized plans that include positive responses, earned incentives, and enumerated benchmarks for movement to less restrictive housing and/or less deprivations and limitations on rights;
- Data collection and publication of data.

## **DISCUSSION:**

### Limitations on the Basis, Duration and Restrictions Imposed in Solitary Confinement

The proposed SCOC regulations require a minimum of four hours out-of-cell time for all individuals in segregation and six hours out-of-cell for 16 and 17 year olds and pregnant women.<sup>5</sup> However, they grant overbroad discretion to jail officials to abrogate these minimums. The chief administrative officer may reduce out-of-cell time for *all populations* without exception (including individuals with mental and physical disabilities, young people and pregnant women). The only curb on that discretion is that the denial of out-of-cell time be for the

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<sup>3</sup> Gornik, cited in footnote 1 at p. 6.

<sup>4</sup> The provisions of the Humane Alternatives to Long-Term (HALT) Solitary Confinement Act, A. 3080/S. 4784 provide a model for regulation changes that would include humane and effective alternatives to isolation, restrictions and deprivations.

<sup>5</sup> Proposed SCOC regulation §§7075.4 (c), (e) and 7028.2.

purpose of maintaining the “safety, security, or good order of the facility.” This is a phenomenally overbroad standard, guaranteed to be the exception that swallows the rule. It risks outcomes that are unfair, lack process, lack consistency, reflect personal bias and create frustration and dangerous conditions for individuals subjected to the unfettered power to punish them with unlimited cell confinement for 24 hours per day. Instead the regulations need to allow for restrictions only if there is a compelling need, and then the limits on out-of-cell time must be for the shortest duration possible, with the duration and rationale documented.

Moreover, while minimum standards for out-of-cell time are certainly a step in the right direction, they are insufficient to alleviate the harmful impact of isolation when there is no time limit on that isolation,<sup>6</sup> no provision of meaningful access to programming and human interaction during out-of-cell time, and no limitations on added deprivations such as being subject to mechanical restraints during that out-of-cell period. The regulations also are silent on what is a sufficient basis to impose segregated confinement on an individual and there is no mechanism in the proposed regulations for an individual to achieve movement to a less restrictive setting.

The failure to limit this discretionary ability to use solitary confinement in any way, for any population, is a striking departure from standards that limit the use of solitary confinement elsewhere, and needs to be rectified here. The need for such limitations was acknowledged by Judge Lynch, when he approved the settlement in the case *Disability Advocates, Inc. v. New York State Office of Mental Health*, No. 1:02-cv-04002 (S.D.N.Y. 2007) (*DAI v. OMH*)<sup>7</sup> he stated:

[G]reater attention should probably be paid to the problem of extremely lengthy SHU confinement even to those who are not mentally ill. As we learned during the trial, New York does not have a formal Supermax prison, but when numerous lengthy disciplinary sanctions of SHU confinement are made to run consecutively, prisoners in effect are kept in conditions at least as rigorous and perhaps even more so than in any official Supermax facility perhaps without as carefully thought about consequences as would exist in more official decision to relegate a prisoner to a formal Supermax institution. Tr. p. 9, 4/27/07.

The various efforts worldwide to begin to limit solitary confinement recognize that limitations of this nature are necessary. The Mandela Rules adopted by the United Nations in 2015 prohibit indefinite or prolonged (longer than 15 days) solitary confinement, require that

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<sup>6</sup> The SCOC proposes no time limit on any sentence to solitary confinement, nor any overall limit on the cumulative time spent in isolation. In addition there is no restriction on what can or should place someone into solitary confinement.

<sup>7</sup> The case *Disability Advocates, Inc. v. New York State Office of Mental Health*, No. 1:02-cv-04002 (S.D.N.Y. 2007) (*DAI v. OMH*) was brought with the goal of improving mental health treatment in New York State prisons. The suit was brought state-wide and sought to improve mental health treatment at the front door to the prison, as well as at the door to the isolated confinement housing areas in the state’s prisons. The plaintiff, Disability Advocates, Inc., is a “protection and advocacy” agency, which is authorized by federal law to advocate for the rights of persons with disabilities in New York. Protection and Advocacy for Individuals with Mental Illness Act (“PAIMI”), 42 U.S.C. § 10801 *et seq.*

solitary be used only in “exceptional cases as a last resort” and prohibit its use for “prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures.”<sup>8</sup>

The New York City Board of Correction in 2015 promulgated rules that place time limitations on punitive segregation. They placed a 30 day time limit on any single “sentence” or sanction of punitive segregation; a limit of 30 consecutive days on any placement into punitive segregation; and a cumulative limit of 60 days in punitive segregation in any six month period. In addition, the Board required 7 hours out-of-cell for any placement into punitive segregation imposed for either a “non-violent” or grade 2 offense and disallowed placement into punitive segregation for grade 3 offenses.<sup>9</sup>

The Board of Correction also approved the creation of a new restrictive unit called the Enhanced Supervision Unit (ESH), designed to “protect the safety and security ... while promoting rehabilitation, good behavior, and the psychological and physical well-being of inmates” and “to separate from general population those who pose the greatest threats to the safety and security of staff and other inmates” while “incentivizing good behavior and by providing necessary programs and therapeutic resources.”<sup>10</sup> Even though the Department of Correction does not characterize ESH as “punitive segregation” (a characterization we resoundingly dispute), the Board nonetheless recognized that, here too, limitations on the basis and duration of confinement in the ESH were essential. The Board’s rules further required meaningful due process protections prior to a placement into the ESH, individualization of any additional restrictions imposed on a person in ESH, regular reviews of placement including written reports to individuals that reflect “any actions or behavioral changes that the inmate might undertake to further rehabilitative goals and facilitate the lifting of individual ESH restrictions or ESH release.”<sup>11</sup>

Implementation of ESH—which is ongoing and has not been without difficulty—also showed the need for policies limiting the use of restraints and other deprivations during out-of-cell-time.<sup>12</sup> Upon finding that the Department of Correction was using restraint desks in ESH excessively, the Board imposed the condition that “[r]estraints, including restraint desks, shall not be used except to control an incarcerated person who presents an immediate risk of self-

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<sup>8</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners, the “Mandela Rules,” Rules 43-45, available at [https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E\\_ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf). Solitary confinement is defined as confinement “for 22 hours or more a day without meaningful human contact.” Rule 44.

<sup>9</sup> The New York City Jail Minimum Standards on Punitive Segregation are found at § 1-17 of Title 40 of the Rules of the City of New York.

<sup>10</sup> The New York City Board of Correction, Notice of Adoption of Rules, Statement of Basis and Purpose, at pp. 2-3. January 13, 2015, available at: [http://www1.nyc.gov/assets/boc/downloads/pdf/boc\\_rules\\_governing\\_correctional\\_facilities\\_fr.pdf](http://www1.nyc.gov/assets/boc/downloads/pdf/boc_rules_governing_correctional_facilities_fr.pdf).

<sup>11</sup> The New York City Jail Minimum Standards on Enhanced Supervision Housing are found at § 1-16 of Title 40 of the Rules of the City of New York.

<sup>12</sup> The use of Enhanced Supervision Housing and implementation of the Jail Minimum Standards on Enhanced Supervision Housing remain a topic of concern in New York City. The New York City Board of Correction has granted variances concerning ESH and is pursuing additional rule-making on the City jail’s use of restrictive housing including ESH. Of great concern is the failure to individualize the use of additional restrictions including an excessive use of restraints in the ESH.

injury or injury to others, to prevent serious property damage, for health care purposes, or when necessary as a security precaution during transfer or transport. When restraints are necessary, the Department shall use the least restrictive forms of restraints that are appropriate and should use them only as long as the need exists, not for a pre-determined period of time.”<sup>13</sup>

*Peoples v. Fischer*, 11-CV-2649 (S.D.N.Y), resulted in some restrictions on the use of SHU confinement in the state prisons for *all* individuals. *Peoples* places some restrictions on what conduct can result in cell confinement, places some limits on how long a person can be sent to solitary for an individual rule violation (although it does not limit the total amount of time a person spends in solitary), and creates some alternative units to solitary that require rehabilitative programming.<sup>14</sup> Yet, the SCOC proposed amendments do not include even these minimal reforms and instead fail to impose *any* time limit on solitary confinement or put *any* limit on why a person can be sent to solitary.<sup>15</sup>

As these various efforts show, minimizing the harms of solitary confinement requires much more than prescribing more out-of-cell time. The expansion of time out-of-cell to four hours per day for *all* individuals in solitary confinement is only effective if there is also a limitation on the duration of time in solitary and an appropriate limitation on the discretion granted to extend time in solitary confinement. The SCOC should require that jails and local correctional facilities impose a limit of 15 consecutive days in segregation or solitary confinement, consistent with the Mandela Rules. We recommend the SCOC consider the limit of 20 days of such confinement in any 60 day period consistent with the limits as set forth in proposed New York legislation known as the Humane Alternatives to Long-Term (HALT) Solitary Confinement Act, A. 3080/S. 4784.<sup>16</sup> The SCOC may also consider the cumulative limit of 60 days in punitive segregation in any six month period as set forth in the rules of the New York City Board of Correction.<sup>17</sup> For any extended period of solitary confinement, out-of-cell time should be expanded to at least seven hours out-of-cell and should include meaningful human contacts, treatment and programming. The regulations should limit the use of solitary to serious incidents and expressly state that solitary be used only in “exceptional cases as a last resort.”

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<sup>13</sup> This condition was based on Standard 23-5.9 of the American Bar Association’s Standards on the Treatment of Prisoners.

<sup>14</sup> *Peoples v. Fischer*, Settlement Agreement, Dec. 16, 2015, available at: [https://www.nyclu.org/sites/default/files/releases/20151216\\_settlementagreement\\_filed.pdf](https://www.nyclu.org/sites/default/files/releases/20151216_settlementagreement_filed.pdf). The Correctional Association reports that individuals in New York’s prisons continue to regularly spend months and years in solitary confinement with some people in isolation for decades. <http://www.correctionalassociation.org/news/correctional-association-of-new-york-ca-releases-solitary-at-southport-a-2017-report-based-upon-the-correctional-assn-s-visits-data-analysis-first-hand-accounts-of-the-torture>

<sup>15</sup> The protections in *Peoples* were designed for sentenced prisoners, where the proposed regulations apply even to those not convicted of any crime.

<sup>16</sup> HALT provides the same 15 consecutive day limit set in the Mandela Rules. In addition HALT sets a limit of 20 total days of segregated confinement in any 60 day period *and* provides for diversion from segregated confinement to a separate secure residential rehabilitation unit at that time limit. HALT is available at: <https://www.nysenate.gov/legislation/bills/2017/S4784>.

<sup>17</sup> § 1-17 (d) (3) of Title 40 of the Rules of the City of New York.

## Exclusions from Segregation and Solitary Confinement

The deprivation of human contact and other sensory and intellectual stimulation can have disastrous consequences. The damaging effects of isolated confinement on persons with mental illness are well known and the harm is recognized in our courts.<sup>18</sup> One decision observed that “the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total.”<sup>19</sup> The court recognized that “there is plenty of medical and psychological literature concerning the ill effects of solitary confinement (of which segregation is a variant) . . .”<sup>20</sup> The district court in the Pelican Bay SHU litigation in California concluded after hearing testimony from experts in corrections and mental health, that “many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in SHU.”<sup>21</sup> In their amicus brief in *Wilkinson v. Austin*, leading mental health experts summarized the clinical and research literature about the effects of prolonged isolated confinement and concluded: “No

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<sup>18</sup> *Jones’el v. Berge*, 164 F.Supp.2d 1096, 1101 (W.D. WI 2001), p. 1101 (isolated confinement is “known to cause severe psychiatric morbidity, disability, suffering and mortality [even among those] who have no history of serious mental illness and who are not prone to psychiatric decompensation.”); *Koch v. Lewis*, 216 F.Supp.2d 994, 1001 (D.Ariz. 2001) (experts agreed that extended isolation causes “heightened psychological stressors and creates a risk for mental deterioration”); *Ruiz v. Johnson*, 37 F.Supp.2d 855, 907 (S.D.Tex. 1999), *rev’d on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F.Supp.2d 975 (S.D.Tex. 2001) (the court described administrative segregation units as “incubators of psychoses-seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities”); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1988) (citing expert’s affidavit regarding effects of SHU placement on individuals with mental disorders); *Baraldini v. Meese*, 691 F. Supp. 432, 446–47 (D.D.C. 1988) (citing expert testimony on sensory disturbance, perceptual distortions, and other psychological effects of segregation), *rev’d on other grounds sub nom. Baraldini v. Thornburgh*, 884 F.2d 615 (D.C. Cir. 1989); *Bono v. Saxbe*, 450 F. Supp. 934, 946 (E.D. Ill. 1978) (“Plaintiffs’ uncontroverted evidence showed the debilitating mental effect on those inmates confined to the control unit.”), *aff’d in part and remanded in part on other grounds*, 620 F.2d 609 (7th Cir. 1980); *Madrid v. Gomez*, 889 F. Supp. 1146, 1235 (N.D. Cal. 1995) (concluding, after hearing testimony from experts in corrections and mental health, that “many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in the SHU”) *rev’d in part on other grounds*, 190 F.3d 990 (9th Cir. 1999).

<sup>19</sup> *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7<sup>th</sup> Cir. 1988), *cert. denied*, 488 U.S. 908 (1989). See also *McClary v. Kelly*, 4 F.Supp.2d 195, 208 (W.D.N.Y. 1998) (the fact that “prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this Court as rocket science”).

<sup>20</sup> *Davenport*, 844 F.2d at 1316, citing Grassian, *Psychological Effects of Solitary Confinement*, 140 Am.J.Psychiatry 1450 (1983).

<sup>21</sup> *Madrid v. Gomez*, 889 F.Supp. at, 1235.

study of the effects of solitary or supermax-like confinement that lasted longer than 60 days<sup>22</sup> failed to find evidence of negative psychological effects” (Statement of Interest of Amici, p. 4).<sup>23</sup>

#### A. Mental Health Exclusions

Based on this overwhelming evidence of psychological harm, many jurisdictions, standards and statutes bar individuals with serious mental illness from segregation and other isolating placements in jails and prisons. Yet, the proposed SCOC regulations have no such exclusion, and do not protect even those individuals known to have *serious* mental illness from the known harms of solitary confinement and other forms of segregation.

This stands in direct contrast to the policies in place in New York State prisons. In New York, a settlement in *DAI v. OMH* created Residential Mental Health Units as an alternative to solitary confinement for individuals with serious mental illness who received a SHU sanction longer than 30 days. In the RMHU individuals receive four hours of out-of-cell therapeutic programming and/or mental health treatment per day, five days a week, in addition to the one hour of out-of-cell exercise per day. The settlement also created universal mental health screening of all individuals admitted to the state prisons, expanded residential mental health programs, required and improved suicide prevention assessments upon admission to SHU, improved treatment and conditions for prisoners in psychiatric crisis in observation cells, and modified the disciplinary process. A stated goal of the agreement was to treat rather than isolate and punish prisoners with serious mental health needs.

In early 2008, the legislature codified and expanded on some of the provisions of the *DAI v. OMH* settlement. S.333/A.4870.<sup>24</sup> Prisoners with serious mental illness must to be diverted or removed from segregated confinement to residential mental health units and provided with improved mental health care. The passage of this state law made the improvements to the state prison system permanent. The law has been fully in effect since July 1, 2011. Similarly, in New York City’s jails, individuals who are excluded from punitive segregation due to their mental disability are housed in a clinical setting, Clinical Alternatives to Solitary Confinement (CAPS). In the CAPS unit individuals are not isolated in their cells and they are provided with therapeutic programming. CAPS improved clinical outcomes for individuals significantly.<sup>25</sup> Yet, the SCOC

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<sup>22</sup> In New York, there is no upper limit on the number of days that a prisoner may serve in SHU confinement. The SHU Exclusion Law serves to rectify this situation by requiring, for those prisoners who are designated as individuals with serious mental illness, a 30 day limit to SHU confinement. This is the major difference between the Private Settlement Agreement in *DAI v. OMH* and the SHU Exclusion Law passed by the New York State Legislature.

<sup>23</sup> Brief of Amici Curiae Professors and Practitioners of Psychology and Psychiatry, *Wilkinson v. Austin*, 545 U.S. 209 (2005) (No. 04-4995). See also Peter Scharff Smith, *The effects of Solitary Confinement on Prison Inmates: A Brief History of the Literature*, Crime and Justice, vol. 34 (2006).

<sup>24</sup> Most of the provisions of the statute appear as amendments to N.Y. Correction Law § 137. McKinney's Correction Law § 137.

<sup>25</sup> Glowa-Kollisch, Kaba, Waters, Leung, Ford, and Venters, *From Punishment to Treatment: The “Clinical Alternative to Punitive Segregation” (CAPS) Program in New York City Jails*. Int J Environ Res Public Health. 2016 Feb; 13(2): 182. See also Kaba, Lewis, Glowa-Kollisch, Hadler, Lee, Alper, Selling, MacDonald, Solimo, Parsons and Venters, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM.J. PUBLIC HEALTH 442, 445 at 446 (2014) (the NYC DOHMH found that the risk of self-harm, and potentially fatal self-harm, to those in isolated confinement was higher than those in regular confinement and that self-harm is used as a means to avoid



proposed amendments do not have any similar provision for exclusion of people with serious mental illness, nor include any other protections recognized as necessary in the state prisons or New York City jails such as out-of-cell therapeutic programming and/or mental health treatment.

Our understanding of the need to protect individuals from the harm caused by solitary confinement has expanded beyond individuals with serious mental illness. Rule 45 of the United Nations Mandela Rules prohibits the use of solitary confinement for individuals with “mental or physical disabilities when their conditions would be exacerbated by such measures.” This mandate removes the requirement that the condition be a “serious” mental illness and includes physical disabilities in its exclusion. This is consistent with an increasing body of knowledge showing that housing individuals with mental illness and serious trauma histories in restrictive settings increases incidents of suicide, self-harm, acting out, violence, impulsivity, depression and despair. Yet the SCOC proposed regulations do not provide for mental health screening, mental health treatment, therapeutic programming, presence of clinical staff, ability to meet with clinical staff in a confidential setting, or any other indication that individuals with mental illness will be accommodated with necessary individualized treatment modalities.

## B. Population Exclusions

The SCOC must exclude all young people under 25, all individuals with mental, cognitive and physical disabilities, and pregnant and nursing women from cell confinement and other forms of segregation and isolation.

There is growing consensus that young people should be excluded from solitary confinement and other restrictive settings. Research confirms that youth are at a heightened risk of long-term harm because isolation is seriously detrimental to the development of the brain. Advances in technology have allowed scientists to see exactly how adolescent brains differ, demonstrating which parts of the brain continue to develop well into the mid-20s.<sup>26</sup> While young people are undergoing developmentally important phases of life in an already stressful environment, such as jail or prison, the added stressor of isolated confinement “deprives them of normal developmental opportunities, such as social contact, physical exercise and intellectual stimulation for prolonged periods of time, and can irreparably damage any prospect they may have for normal development.”<sup>27</sup> Young people can suffer severe harm, including among other things, stunted physical growth due to inadequate nutrition,<sup>28</sup> a degraded ability to socialize with

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the rigors of isolated confinement, as inmates reported a willingness to do anything to escape isolated confinement) available at <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301742>.

<sup>26</sup> In 2014, the New York Advisory Committee to the United States Commission on Civil Rights issued *The Solitary Confinement of Youth in New York: a Civil Rights Violation*. The report calls for the elimination of solitary confinement of individuals under 25 years old. The New York Advisory Committee to the United States Commission on Civil Rights, *The Solitary Confinement of Youth in New York: a Civil Rights Violation*, (Dec. 2014) p. 68.

<sup>27</sup> New York State Bar Association Committee on Civil Rights, *Solitary Confinement in New York State*, (Jan. 25 2013), at 8, available at <https://www.nysba.org/DownloadAsset.aspx?id=26699>.

<sup>28</sup> Ctrs For Disease Control and Prevention, *How Much Physical Activity do Children Need?*, <http://www.cdc.gov/physicalactivity/everyone/guidelines/children.html>; Dep’t Health and Human Services, *Physical Activity Guidelines for Americans*, <http://www.health.gov/paguidelines/factsheetprof.aspx>.

others due to a lack of human contact,<sup>29</sup> and frustrated cognitive development due to restricted access to programming or even reading material.<sup>30</sup> Isolated confinement denies youth essential stimulation to strengthen important synaptic connections.<sup>31</sup> Thus an exclusion of young people from solitary confinement is needed.<sup>32</sup>

In New York young people up to age 18 (including Juvenile Offenders, who have been involved in serious crimes) are *already* managed without the use of isolated confinement. New York City's Administration for Children's Services (ACS), which runs juvenile secure and non-secure detention facilities and contracts with other organizations for non-secure and limited secure placement facilities, only authorizes the use of isolated confinement -- known as room confinement -- as a last resort to prevent a youth from harming him or herself or others.<sup>33</sup> A similar approach is used by the New York State Office of Children and Family Services (OCFS), which is responsible for oversight of ACS and for the management of limited secure and secure juvenile facilities throughout the state. OCFS prohibits the use of room confinement as punishment and permits it only in the extreme circumstance that a child constitutes a "serious and evident danger to himself or others." 9 NYCRR §168.2.

Other standards similarly exclude young people from isolated confinement. Rule 67 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (resolution 45/113, annex) states: "[a]ll disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned. And, as indicated below, the New York City Board of Correction excluded inmates under the age of 21 from both punitive segregation and the less

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<sup>29</sup> See *Miller ex. rel. Jones v. Stewart*, 231 F.3d 1248, 1252 (9th Cir. 2000) (asserting that "it is well accepted that conditions such as those present in [isolated confinement]...can cause psychological decompensation to the point that individuals may become incompetent.").

<sup>30</sup> See Human Rights Watch & The American Civil Liberties Union, *Growing Up Locked Down* (2012), at 42, available at <http://www.aclu.org/growinguplockeddown>.

<sup>31</sup> During adolescence and young adulthood, the brain is engaging in pruning – strengthening those synaptic connections that are stimulated, while trimming away those that go unused. Sapolsky, Robert, *Dude, Where's My Frontal Cortex: There's a Method to the Madness of the Teenage Brain*, Nautilus, July 24, 2014, available at <http://nautil.us/issue/15/turbulence/dude-wheres-my-frontal-cortex>. This means that stimulation during this time is critical.

<sup>32</sup> Youth should never be isolated as *punishment*. To the extent that brief room confinement is ever used, it should be a means of last resort if there is a serious and imminent risk of harm, used for brief periods of time and practiced in conjunction with medical and mental health interventions and support. For example, the Juvenile Detention Alternatives Initiative, which is an effort by the Annie E. Casey Foundation to reduce confinement of youth, prohibits the use of any segregation or room confinement for purposes of punishment. Any use of segregation must not exceed 4 hours and be closely overseen by unit and facility supervisors. The Annie E. Casey Foundation, Juvenile Detention Alternatives Initiative, <http://www.aecf.org/work/juvenile-justice/jdai/>. See also Council of Juvenile Correctional Administrators' Performance-based Standards, September 2012, [http://](http://pbstandards.org/cjcaresources/158/PbS_ReducingIsolation_201209.pdf)

[pbstandards.org/cjcaresources/158/PbS\\_ReducingIsolation\\_201209.pdf](http://pbstandards.org/cjcaresources/158/PbS_ReducingIsolation_201209.pdf) ("isolation . . . should not be used as punishment" and when used should be brief and supervised); American Correctional Association's Use of Separation of Juveniles - Proposed Expected Practices and Definitions (eliminating punitive segregation for juveniles).

<sup>33</sup> The duration of the room confinement also may not to exceed six hours without the approval of high level administrators. See, e.g., ACS Room Confinement Policy for Secure Detention, 2016/xx, available at <http://www1.nyc.gov/assets/acs/policies/init/2016/B.pdf>.

restrictive ESH setting. The New York City Department of Health and Mental Health (NYC DOHMH) similarly concluded that isolated confinement is a dangerous and self-defeating practice, and recommended reconsideration of its use, especially for adolescents.<sup>34</sup> The SCOC regulations should complement, not ignore, these trends, and should exclude all young people from cell confinement and other forms of segregation and isolation.<sup>35</sup>

Other rules of the United Nations prohibit the use of solitary confinement for women and children. Rule 22 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)(resolution 65/229, annex) states: “[p]unishment by close confinement or disciplinary segregation shall not be applied to pregnant women, women with infants and breastfeeding mothers.” SCOC rules should have a similar exclusion.

Similarly, the New York City Board of Correction rule-making in 2015 excluded several categories of individuals from punitive segregation and also excluded them from the less isolating (7 hours out of cell) but restrictive placement of ESH. The exclusion language includes medical staff authority in decisions about placement and removal.<sup>36</sup> In the New York City jails the following categories of incarcerated people are excluded from punitive segregation and ESH: “(i) inmates under the age of 18; (ii) as of January 1, 2016, inmates ages 18 through 21, provided that sufficient resources are made available to the Department for necessary staffing and implementation of necessary alternative programming; and (iii) inmates with serious mental or serious physical disabilities or conditions.”<sup>37</sup> And, in the state prisons, the *Peoples* settlement bans the use of SHU sentences for pregnant women and provides an alternative to SHU for prisoners with special needs.<sup>38</sup>

Incarcerated individuals with physical disabilities and those with temporary disabilities due to serious injury should also be excluded from all forms of cell confinement. Individuals with disabilities often face difficulties with daily functioning and may require intensive medical attention. Their need for ready access to medical professionals and the ability to communicate that need should not be hindered. The SCOC must further recognize in its standards that use of

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<sup>34</sup> See Kaba, Lewis, Glowa-Kollisch, Hadler, Lee, Alper, Selling, MacDonald, Solimo, Parsons and Venters, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM.J. PUBLIC HEALTH 442, 445 (2014) available at <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301742>.

<sup>35</sup> The proposed regulations include the expansion of out-of-cell time for prisoners under the age of 18 that was introduced into the New York state prisons pursuant to the settlement in *Cookhorne v. Fischer*, NY Supreme Ct., Erie County, Index No. 2012-1791. *Cookhorne* limited solitary confinement of 16 and 17 year olds to eighteen hours per day on weekdays and twenty-two hours per day on weekends, filling the out-of-cell time with programming and recreation. The SCOC proposed regulations similarly continue to permit punishment of young persons in segregation yet fail to provide for programming during the out-of-cell time. See SCOC proposed regulations §§ 7028.2 and 7075.4 (e).

<sup>36</sup>The exclusion from punitive segregation and ESH are found at §§ 1-17 (b) and 1-16 (c) of Title 40 of the Rules of the City of New York:

<sup>37</sup> §§ 1-17(b)(1) and 1-16 (c)(1) of Title 40 of the Rules of the City of New York.

<sup>38</sup> Implementing a program called the “Correctional Alternative Rehabilitation” (CAR) program at Sullivan Correctional Facility for prisoners with a BETA/WAIS score of 70 or less or with other limited intellectual capabilities, adaptive functioning and coping skills.

mechanical restraints on disabled and injured individuals may inhibit access to needed medical care that will be too unpleasant to access, and must prohibit or limit their use.

The SCOC must exclude all young people under 25, all individuals with mental, cognitive and physical disabilities, and pregnant and nursing women from cell confinement and other forms of segregation and isolation.

### Treatment and Programming

The SCOC has the power to establish minimum standards that include “care, custody, correction, treatment, supervision, discipline, and other correctional programs.” Correction Law § 45 (6). Yet none of these proposed regulations provide for treatment or programming to assist and rehabilitate individuals incarcerated in our jails and local correctional facilities. The SCOC should include in its rule-making on limiting segregation and deprivations, implementation of jail programs that will provide the treatment and programming that will permit individuals to earn incentives, and move to less restrictive housing and/or less deprivations and limitations on their rights. The SCOC regulations should incorporate principles of evidence-based best practices that include positive reinforcement, and the implementation of individualized plans that permit individuals to gain privileges and incentives for good behavior.

### Provision of Basic Hygiene

Provision of a working toilet and water is essential to meeting the most basic of human needs, and is a requirement of correctional standards, including those promulgated by the SCOC. The proposed changes to § 7040.4 and 7040.5 would permit “the chief administrative officer of a jail to deliberately render a toilet and sink ...nonfunctioning” in individual and multiple occupancy housing units respectively. The regulations provide that the toilet may only be rendered inoperable “to preserve the safety, security, or good order of the facility, or the safety, security, or health of the inmate, staff or other inmates,” the written decision must state “the specific facts and reasons underlying the determination,” the “dates and times the determination was in effect,” and every two hours “the toilet shall be flushed” and “the inmate shall have brief access to a functioning sink.” §§7040.4 & 7040.5. But there is no required review of the decision to render toilet and sink inoperable. Rather, people can be deprived of a toilet simply pursuant to one report, apparently written after the fact (it will “provide the dates and times the determination was in effect.”).

Humane conditions of confinement necessarily provide for individuals to have access to clean water and toilet facilities. Taking away such a fundamental human necessity from a housing area must be infrequent and short in duration. The SCOC regulations should include the expectation that such a deprivation will be short-lived, should require a review of such deprivation at least daily with a presumption that the toilet and water shall be made operable within one day. In addition, the grant of discretion to deprive an individual of a basic right for anything that would be a threat to the “good order” of the facility is overly broad. This language does not adequately limit the removal of access to a properly functioning toilet and sink nor does

it communicate that removal of access to a toilet and sink is an extreme measure that should be used for the shortest period of time possible.<sup>39</sup>

The provision in § 7040.5 that permits inoperability of toilets and sinks in a multiple occupancy housing unit is particularly troubling and should be deleted. The proposed regulation would permit up to 60 individuals in one housing unit to have restricted access to a toilet and water simultaneously.<sup>40</sup> There is simply no justification for such a barbaric measure anywhere in the state of New York in 2017.

### Oversight and Reporting

Many of the SCOC proposed regulations address record-keeping. We support measures that improve records, especially documentation of reviews of restrictions and deprivations at regular intervals. However, the proposed requirements fall short in that they do not include any concomitant requirement that the facility cumulatively collect the records to provide data on compliance with these restrictions, and results of behavioral interventions. Nor do the SCOC proposed regulations identify data points essential to evaluating the outcomes for incarcerated individuals subject to the proposed regulations. This frustrates the ability of the SCOC to oversee implementation of the regulations, and their outcomes in specific facilities.

For example, the proposed new sections (v) through (vii) in § 7003.3 (j)(6) require that specific information is recorded for each segregated inmate including the time they were confined, the time they were released and a record of any refusals to leave segregation. However, the information is only required to be kept in a “bound ledger” and signed by the staff member. § 7003.3(k). Nothing in this provision requires that the information be included in the record of the individual subject to segregation, nor is there any requirement that data be collected, and reported to the SCOC or to the public, that will reflect the actual practice of segregation at the facility (including compliance with any limitations on its use contained in the regulations).

Similarly, proposed changes to § 7006.7 add a requirement that, in addition to the initial review that occurs within 24 hours, the chief administrative officer of the facility shall review administrative confinement imposed pending a disciplinary hearing at seven-day intervals. The proposed change is important in that it requires the decisions to be made in writing and to include “the specific facts and reasons underlying the determination” to continue confinement of the individual. This is rooted in, and serves to implement, the underlying due process requirement that meaningful periodic review must be provided for individuals held in segregation<sup>41</sup> and must be tailored to the justification for segregation.<sup>42</sup> However, although the

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<sup>39</sup> Courts have had to deal with corrections officials who impeded inmate access to toilets, have condemned the practice and have ordered it to cease. *Negron v. Ward*, 382 F. Supp. 535, 539 (S.D.N.Y. 1974); *Flakes v. Percy*, 511 F. Supp. 1325, 1329 (W.D. Wis. 1981); *Knop v. Johnson*, 667 F. Supp. 467, 477-84 (W.D. Mich. 1987) and cases cited therein; see also *Wells v. Franzen*, 777 F.2d 1258, 1263-64 (7th Cir. 1985).

<sup>40</sup> Multiple occupancy housing units usually have one or more large bathrooms with multiple toilets and sinks. The SCOC regulation requires at least one sink and one toilet per 12 inmates in a multiple occupancy housing unit that may hold up to 60 individuals. The requirement is fulfilled by one bathroom with at least 5 sinks and toilets. SCOC regulations § 7040.5 (c).

<sup>41</sup> *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983). See *Gittens v. LeFevre*, 891 F.2d 38 (2d Cir. 1989) (requiring periodic review or opportunity to be heard on initial or continued placement in segregation); *Ramsey v. Squires*, 879

additional review is required by SCOC proposed regulation 7075.6 to be maintained in a centralized record at the facility, the SCOC regulations do not require compilation of data from these records or reporting of information to the SCOC or to the public. The regulations should provide the SCOC with the ability to systemically monitor that these protections are given force, including that reviews are substantive and that incarcerated individuals have valid information on how to progress to less restrictive confinement.

The regulations should require that jails and local correctional facilities collect and report data concerning their use of segregation and other deprivations. Such reports should be provided to the SCOC and to the public. Reporting on collected data will inform jails and local correctional facilities of their own ability or inability to implement the proposed changes, will provide information to SCOC on jails and local correctional facilities that are failing to comply with new mandates (and may require technical assistance to improve their ability to comply with regulations). Public reporting will provide needed transparency on how these public institutions are operating.

Appendix A, attached to these comments, discusses the proposed changes in regulations and proposed new regulations in numerical order with our commentary and recommendations. We have included proposed data points for information that should be tabulated and reported to the SCOC on a quarterly basis.<sup>43</sup>

## CONCLUSION

The State Commission of Correction should use this rule-making process to strengthen the *Minimum Standards and Regulations for Management of County Jails and Penitentiaries* with requirements that protect vulnerable populations, limit the use of segregated housing and other deprivations, provide for adequate due process and reporting and implement needed treatment, education and rehabilitative programs in these facilities. Such regulations would serve to limit the dangerous and harmful use of segregation (isolated or solitary confinement) and other deprivations in jails and local correctional facilities and ensure the safety and well-being of individuals incarcerated in New York.

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F. Supp. 270, 283 (W.D.N.Y.) *aff'd*, 71 F.3d 405 (2d Cir. 1995) (“[i]f the state regulations do not provide for this minimal opportunity to be heard, they are unconstitutional on their face.”). Such review must be meaningful and not perfunctory and cannot simply repeat stale justifications. *Smart v. Goord*, 441 F. Supp. 2d 631, 642 (S.D.N.Y. 2006) (allegation that review hearings were a “hollow formality” and officials did not actually consider releasing plaintiff stated a due process claim); *McClary v. Kelly*, 87 F. Supp. 2d 205, 214 (W.D.N.Y. 2000) (upholding damage verdict for sham review), *aff'd*, 237 F.3d 185 (2d Cir. 2001); *Giano v. Kelly*, 869 F. Supp. 143, 150 (W.D.N.Y. 1994).

<sup>42</sup> Thus, if segregation is imposed to encourage a prisoner to improve his behavior, “the review should provide a statement of reasons [for retention], which will often serve as a guide for future behavior (*i.e.*, by giving the prisoner some idea of how he might progress toward a more favorable placement).” *Toevs v. Reid*, 685 F.3d 903, 913 (10th Cir. 2012); *accord*, *Anderson v. Colorado*, 887 F.Supp.2d 1133, 1152-53 (D.Colo. 2012)(holding reviews did not “provide meaningful input to Mr. Anderson as to what he needs to do to make progress”).

<sup>43</sup> In Appendix A recommended data points are included in our comments and recommendations for the following proposed regulations: 7003.3, 7004.7, 7005.12, 7006.7, 7006.11, 7022.2, 7024.11, 7025.5, 7026.3, 7028.6, 7040.4. We also recommend the development of data points that will provide information to SCOC on compliance with proposed regulation 7070.7.

As detailed herein and in the attached Appendix A, the proposed rules do not reflect necessary limits that will ensure that New York jails and local correctional facilities are both safe and humane. We recommend that the SCOC refrain from passing the proposed rules and instead schedule a public hearing where stakeholders including directly affected individuals, their family members, advocates, correctional experts, health and mental health experts, may participate and inform the process to develop humane alternatives to, and limitations on, the use of segregation and other deprivations and restrictions. A full participatory process is appropriate because of the importance of these regulations to the lives of New York State citizens.

Dated: December 22, 2017

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## **APPENDIX A**

### **To The Legal Aid Society December 22, 2017 letter concerning State Commission of Correction Proposed Rule Making I.D. No. CMC-44-17-00012-P**

The State Commission of Correction published proposed rule-making in the New York State Register on November 1, 2017. The stated purpose of the rule-making was to “[r]equire local correctional facilities to record, review and report inmate cell confinement and essential service deprivation.” NYS Register, November 1, 2017 at p. 6.

The proposed changes in regulations and proposed new regulations are discussed below in numerical order with commentary and recommendations.

#### **Section 7003.3**

Proposed changes to 7003.3 require that facilities must keep a written record of the segregation of inmates under the new section 7075.2. Facility housing supervision recording requirements now include the newly added “significant events and activities occurring during supervision” concerning segregated inmates as defined in the new section 7075.2. See also changes to 7022.2 (a) discussed below.

Section 7003.3 j(6) has new proposed new sections (v) through (vii):

(v) for each segregated inmate, as that term is defined in section 7075.2 of this Title, the date and time of each instance such inmate is either confined to an individual occupancy housing unit, or is confined to the sleeping area of a multiple occupancy housing unit;

(vi) for each segregated inmate, as that term is defined in section 7075.2 of this Title, the date and time of each instance such inmate is either released from an individual occupancy housing unit, or no longer confined to the sleeping area of a multiple occupancy housing unit; and

(vii) for each segregated inmate, as that term is defined in section 7075.2 of this Title, any refusal of such inmate to leave an individual occupancy housing unit, or the sleeping area of a multiple occupancy housing unit.

#### **Comments and Recommendations:**

These requirements mean that for all inmates who are subject to segregation (involuntary confinement) there will be a written record of their confinement including the length of their segregation (confinement and release) and a record of refusals to leave segregation. The information is required to be kept in a “bound ledger” and signed by the staff member. § 7003.3(k). Nothing in this provision requires that the information be included in the record of the individual subject to segregation, nor is there any requirement that data be collected, and reported to the SCOC or to the public, that will reflect the actual practice of segregation at the facility (including compliance with any limitations on its use contained in the regulations). Collecting this data is important for understanding the operation of each local jail and correctional facility in New York. The SCOC, as the state oversight agency, should be carefully



reviewing the information to understand how and where the regulations are working to increase out-of-cell time and reduce reliance on segregation. While the proposed changes to 7022.2 require that the local jail and correctional facilities report the incidents of “deprivation/limitation of essential services” and “inmate cell confinement” that occur to the commission (§ 7022.2 (a)(22) & (23)), there is no requirement that the descriptive incident data collected pursuant to proposed 7003.3 (j)(6)(v) through (vii) is included in that reporting and there is no requirement that the information is collected, tabulated and provided to the commission in a comprehensive manner.

The regulations should require that jails and local correctional facilities collect and report data concerning their use of segregation. Such reports should be provided to the SCOC and to the public. Reporting on collected data will inform jails and local correctional facilities of their own ability or inability to comply with and implement the proposed regulations, will provide information to SCOC on jails and local correctional facilities that are failing to comply with new mandates (and may require technical assistance to improve their ability to comply with regulations). Public reporting will provide needed transparency on how these public institutions are operating.

The regulations should require that each facility collect and report on the data concerning all of the individuals in segregation at each facility on a quarterly basis. We recommend that the recording requirements include the following additional data:

- Total segregation time imposed (sentence information) on each segregated inmate over the six month period preceding the reporting period;
- Total time each segregated inmate has been in segregation (length of stay information);
- Reasons for placement into segregation and total number for each reason in the reporting period;
- Type of area and total numbers where individuals were segregated (individual occupancy housing unit, multiple occupancy housing unit or other) during the reporting period;
- Number of reviews of placement in segregation during the reporting period;
- Outcomes of reviews of placement during the reporting period (number of individuals who were moved to less restrictive placement, number that remained in segregation, other outcomes);
  - Reasons for failure to move to less restrictive placement and the numbers for each reason for the reporting period;
- Additional deprivations imposed during the reporting period (numbers of individuals subject to each form of deprivation);
  - Reasons for imposition of deprivations and total number for each reason in the reporting period;
  - Data on release from any additional deprivations due to outcome reviews including reasons for failure to remove deprivations and the numbers for each reason for the reporting period;
- Reasons for refusals to leave segregation;
  - Type of alternative placement that was refused; and
  - Reason given for refusal.

## **New Section 7004.7**

The proposed new section 7004.7 permits jails to limit the ability of an individual to retain correspondence in their housing unit. Section 7004.7 states: “Any and all correspondence delivered to the inmate may be retained by the inmate in his or her housing unit, subject to the provisions of section 7075.5 of this Title.” The new provision 7075.5 gives jails the ability to deprive inmates of essential services when “the chief administrative officer determines that providing such essential service would cause 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.” Section 7075.5 requires written records of any such deprivations and reviews every seven days.

### Comments and Recommendations:

The SCOC regulations should carefully limit the ability to implement restrictions on essential services. The regulations should require that all deprivations be reviewed at regular intervals, with restoration of services as a stated goal, and a requirement that data about the reason for deprivations, length of deprivations, and results of reviews is collected and reported to the SCOC on a quarterly basis. Here, and elsewhere in these proposed rules, deprivations of essential services are permitted under a broad grant of discretion for anything that would be a threat to the “good order” of the facility. This language does not adequately limit the use of deprivations nor does it communicate that deprivations should be used for the shortest period of time possible. We recommend that the regulation permitting the deprivation of correspondence include the following:

- The stated goal to permit individuals to retain or be restored to the ability to have all of their correspondence in their housing area;
- That any deprivation of access to correspondence shall be for the shortest period of time possible;
- A presumption that deprivation of access to correspondence shall be no longer than seven days;
- Require quarterly reporting of data on use of this deprivation to the SCOC including:
  - Number of individuals subject to this deprivation during the reporting period;
  - Total time deprivation was imposed on each individual during the reporting period;
  - Reasons for imposition of deprivation and total number for each reason in the reporting period;
  - Number of reviews during the reporting period;
  - Outcomes of reviews during the reporting period (number of deprivations continued beyond seven days, other outcomes); and
  - Reasons for failure to restore this essential service after seven days.

**New Section 7005.12** [NOTE: this provision was not listed in the NYS Register announcement of the Proposed Rule Making. However, it was on the SCOC notice on their website along with the text for the proposed rules.]

The proposed new section 7005.12 heading is “[d]eprivation of personal hygiene” The language of the section permits jails to “restrict or limit an inmate of any right, service, item or article” if done “in accordance with section 7075.5 of this Title.” While the heading references personal hygiene, the language is exceptionally broad and permits basically any limitation so long as the “the chief administrative officer determines that providing such essential service would cause 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.” § 7075.5 (b).

#### Comments and Recommendations:

The ability to restrict or limit rights, services, items or articles of an individual must be limited through amendments to this proposed regulation. Here, and elsewhere in these proposed rules, deprivations of essential services are permitted under a broad grant of discretion for anything that would be a threat to the “good order” of the facility. This language does not adequately limit the use of deprivations nor does it communicate that deprivations should be used for the shortest period of time possible. We recommend that the regulation permitting the restriction of individuals to “any right, service, item or article” include the following:

- The stated goal to permit individuals to retain or be restored to the ability to have all of the rights, service, items and articles;
- That any deprivation of access to personal hygiene articles, or any other rights, service, items and articles, shall be for the shortest period of time possible;
- A presumption that deprivation of access to personal hygiene articles, or any other rights, service, items and articles, shall be no longer than seven days;
- Require quarterly reporting of data on use of this deprivation to the SCOC including:
  - Number of individuals subject to this deprivation during the reporting period;
  - Total time deprivation was imposed on each individual during the reporting period;
  - Reasons for imposition of deprivation and total number for each reason in the reporting period;
  - Number of reviews during the reporting period;
  - Outcomes of reviews during the reporting period (number of deprivations continued beyond seven days, other outcomes); and
  - Reasons for failure to restore this essential service after seven days.

#### **Section 7006.7**

Proposed changes to 7006.7 adds a requirement that, in addition to the initial review that occurs within 24 hours, the chief administrative officer of the facility shall review administrative confinement imposed pending a disciplinary hearing at seven-day intervals. The proposed changes require the decisions to be made in writing and to include “the specific facts and reasons underlying the determination” to continue confinement of the individual.

### Comments and Recommendations:

Administrative confinement of individuals should be subject to regular review and should be reviewed by a high level official that recognizes that such administrative confinement must be time limited, used for the least amount of time necessary and only used in response to serious incidents. No one should be held in administrative confinement that restricts out-of-cell time pending a hearing unless there is a safety and security basis for such confinement. All hearings to determine if a person may be placed in segregated confinement should occur prior to placement in segregated confinement. The proposed language does not adequately emphasize the need to limit administrative confinement nor does it provide the instruction that such confinement should be used for the shortest period of time possible. We recommend that the regulation permitting the administrative confinement of individuals include the following:

- The stated goal that individuals will not be held in segregated confinement pre-hearing. If an individual is placed into segregated administrative confinement pre-hearing, it shall be for the shortest amount of time possible with the presumption that no one will be held pre-hearing for longer than four days;
- That reviews of pre-hearing administrative confinement should occur each day with the goal to minimize pre-hearing administrative confinement;
- Require quarterly reporting of data on use of pre-hearing administrative confinement to the SCOC including:
  - Number of individuals subject to pre-hearing administrative confinement during the reporting period;
  - Total time pre-hearing administrative confinement was imposed on each individual during the reporting period;
  - Conditions of pre-hearing administrative confinement (including e.g. time out-of-cell and any other deprivations imposed);
  - Bases for imposition of pre-hearing administrative confinement imposed on each individual during the reporting period;
  - Number of reviews during the reporting period;
  - Outcomes of reviews during the reporting period (including number of pre-hearing administrative confinements continued beyond four days, other outcomes); and
  - Reasons for failure to hold hearing or remove from pre-hearing administrative confinement within four days.

### **Section 7006.9**

Proposed changes to 7006.9 add a reference to new section 7075.4 in § 7006.9 (a)(5). This reference clarifies that disciplinary confinement must be limited in accordance to the requirements of the proposed new regulation. In addition, there is a new part (d) added which permits the chief administrative officer to “suspend a sanction of confinement .... in order to assess the behavioral adjustment of the inmate” and permits the sanction to be “reinstated at the discretion of the chief administrative officer.”

### Comments and Recommendations:

Termination or suspension of a sanction of confinement to segregation should be encouraged and is in line with the principle that segregation should be used for the least amount of time possible. Time in segregation should be time limited. As discussed in our letter, the SCOC should require that jails and local correctional facilities impose a limit of 15 consecutive days in segregation or solitary confinement, consistent with the Mandela Rules. We recommend the SCOC consider the limit of 20 days of such confinement in any 60 day period consistent with the limits as set forth in proposed New York legislation known as the Humane Alternatives to Long-Term (HALT) Solitary Confinement Act, A. 3080/S. 4784. The SCOC may also consider the cumulative limit of 60 days in punitive segregation in any six month period as set forth in the rules of the New York City Board of Correction. The proposed language does not adequately emphasize the need to limit the use of segregation nor does it provide the instruction that such confinement should be used for the shortest amount of time possible. In addition, the language permitting a sanction to be reinstated at the discretion of the chief administrative officer should be limited – no sanction should be reinstated that is not close in time to the time of the suspension. Permitting sanctions to remain in abeyance for an unlimited period is inappropriate. We recommend that the regulation permitting suspension of a sanction of segregated confinement include the following:

- The stated goal that individuals will be held in segregation for the shortest amount of time possible;
- A limit of 15 consecutive days in segregation at one time;
- An additional limit on time after that provides either: diversion after 20 days in any 60 day period, or sets a limit on segregation of 60 days in any six month period;
- That reviews of individuals in segregation by the chief administrative officer should occur at intervals of seven days with the goal to minimize the use of segregation and terminate segregation sanctions absent current need;
- That no period of segregation that is suspended will be reinstated unless such reinstatement occurs within seven days of the suspension; and
- Require quarterly reporting on suspension and termination of segregation sanctions to the SCOC as indicated below in reference to proposed changes to section 7006.11.

### **Section 7006.11**

Proposed changes to 7006.11 adds to the record keeping requirement of the regulations that disciplinary records will include records of “suspension and reinstatements” of disciplinary sanctions. § 7006.11 (a).

### Comments and Recommendations:

The suspensions and reinstatements should be recorded in the individual disciplinary records as proposed with the addition that the written determination shall state the specific facts and reasons underlying the decision of the chief administrative officer. In addition, the regulations should require that jails and local correctional facilities collect and report data concerning their suspension and reinstatement of segregation sanctions. We recommend that the recording requirements include the following additional data:

- Any determination to terminate, suspend or reinstate a sanction of segregation shall be made by the chief administrative officer in writing, and shall state the specific facts and reasons underlying the determination;
- Require quarterly reporting on suspension and termination of segregation sanctions to the SCOC including:
  - Number of reviews during the reporting period;
  - Number of individuals subject to suspension or termination of segregation sanction (due to review) during the reporting period;
  - Total time segregation was imposed on each individual during the reporting period prior to the suspension or termination of the segregation sanction;
  - Bases for any reinstatement of a suspended segregation sanction; and
  - Statement of reasons for termination of sanctions based on finding of a lack of current need.

## **Section 7022.2**

Proposed changes to 7022.2 adds “deprivation/limitation of essential services” and “inmate cell confinement” to the list of incidents that will be reported to the commission. § 7022.2 (a)(22) & (23).

### Comments and Recommendations:

Here and elsewhere in these regulations it should be made clear that the term segregation includes cell confinement as well as pre-hearing administrative confinement. The changes to 7022.2 should clearly state that all types of segregation should be reported to the commission. We recommend that 7022.2 (a)(23) should require reporting of each type of segregation as defined in proposed section 7075.5 (e). In addition, the guidelines referenced in section 7022.2 (b) will need to be updated to reflect rule-changes made by the SCOC (“(b) Each facility shall report incidents to the commission pursuant to the requirements outlined in the commission's *Reportable Incident Guidelines for County Correctional Facilities*.”).

## **Section 7024.11**

Proposed changes to 7024.11 adds the requirement that any limitation on the exercise of religious beliefs of any prisoner will be subject to the seven-day review and reporting requirements of the new sections 7075.5 and 7075.6.

### Comments and Recommendations:

The SCOC regulations should carefully limit the ability to restrict the exercise of religious beliefs and participation in congregate religious activities in jails and local correctional facilities. The regulations should require that all restrictions on religion be reviewed at regular intervals, with restoration of the right to exercise religious beliefs and to participate in congregate religious activities as a stated goal. The SCOC should require that data about the reason for religious restrictions, length of restrictions, and results of reviews is collected and reported to the SCOC on a quarterly basis. Here, and elsewhere in these proposed rules, deprivations of rights and essential services are permitted under a broad grant of discretion for anything that would be a threat to the “good order” of the facility. This language does not adequately limit restrictions on

religion nor does it communicate that such restrictions should be used for the shortest period of time possible. We recommend that the regulation permitting the restriction on the exercise of religion include the following:

- The stated goal to permit incarcerated individuals the ability to exercise their religious beliefs and participate in congregate religious activities;
- That any restriction on the exercise of religious beliefs and participation in congregate religious activities shall be for the shortest period of time possible;
- A presumption that a restriction on the exercise of religious beliefs or participation in congregate religious activities shall be no longer than seven days;
- Require quarterly reporting of data on restrictions on the exercise of religious beliefs or participation in congregate religious activities to the SCOC including:
  - Number of individuals subject to such restrictions during the reporting period;
  - Total time such restriction was imposed on each individual during the reporting period;
  - Reasons for imposition of restriction and total number for each reason in the reporting period;
  - Number of reviews during the reporting period;
  - Outcomes of reviews during the reporting period (number of restrictions continued beyond seven days, other outcomes); and
  - Reasons for failure to restore the ability to exercise religious beliefs and participate in congregate religious activities after seven days.

### **New Section 7025.5**

The proposed new section 7025.5 heading is “[d]eprivation of packages.” The proposed new section 7025.5 permits jails to limit the ability of an individual to receive packages. Section 7025.5 states: “[a]ny decision to deny, restrict or limit an inmate of any right, service, item or article, guaranteed an inmate by the provisions of this Part, shall be done in accordance with sections 7075.5 and 7075.6 of this Title.” The new provision 7075.5 gives jails the ability to deprive individuals of essential services when “the chief administrative officer determines that providing such essential service would cause 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.” § 7075.5 (b). Section 7075.5 requires written records of any such deprivations and reviews every seven days. Section 7075.6 requires that “[e]ach facility shall maintain a centralized record of all written determinations and reviews required by the provisions of this Part.” The ability to restrict or limit rights, services, items or articles of an individual must be limited through amendments to this proposed regulation.

### **Comments and Recommendations:**

The SCOC regulations should carefully limit the ability to implement restrictions on essential services. The regulations should require that all deprivations be reviewed at regular intervals, with restoration of services as a stated goal, and a requirement that data about the reason for deprivations, length of deprivations, and results of reviews is collected and reported to the SCOC on a quarterly basis. Here, and elsewhere in these proposed rules, deprivations of essential

services are permitted under a broad grant of discretion for anything that would be a threat to the “good order” of the facility. This language does not adequately limit the use of deprivations nor does it communicate that deprivations should be used for the shortest period of time possible. We recommend that the regulation permitting the deprivation of packages include the following:

- The stated goal to permit individuals to retain or be restored to the ability to receive packages;
- That any restriction on the right to receive packages shall be for the shortest period of time possible;
- A presumption that the restriction on the right to receive packages shall be no longer than seven days;
- Require quarterly reporting of data on restrictions on packages to the SCOC including:
  - Number of individuals subject to this restriction during the reporting period;
  - Total time restriction was imposed on each individual during the reporting period;
  - Reasons for imposition of restriction and total number for each reason in the reporting period;
  - Number of reviews during the reporting period;
  - Outcomes of reviews during the reporting period (number of restrictions continued beyond seven days, other outcomes); and
  - Reasons for failure to restore this essential service after seven days.

### **Section 7026.3**

Proposed changes to 7026.3 adds the requirement that “any decision to deny, restrict or limit an inmate of any right, service, item or article, guaranteed by the provisions of this Part, shall be done in accordance with section 7075.5 of this Title.” The heading of this section is amended to include “and deprivation” so that it now reads “Limitation and deprivation of incoming printed material and publications.” While the heading references printed materials and publications, the language is exceptionally broad and permits basically any limitation so long as the “the chief administrative officer determines that providing such essential service would cause 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.” § 7075.5 (b). The ability to restrict or limit rights, services, items or articles of an individual must be limited through amendments to this proposed regulation.

#### Comments and Recommendations:

The SCOC regulations should carefully limit the ability to implement restrictions on essential services. The regulations should require that all deprivations be reviewed at regular intervals, with restoration of services as a stated goal, and a requirement that data about the reason for deprivations, length of deprivations, and results of reviews is collected and reported to the SCOC on a quarterly basis. Here, and elsewhere in these proposed rules, deprivations of essential services are permitted under a broad grant of discretion for anything that would be a threat to the “good order” of the facility. This language does not adequately limit the use of deprivations nor does it communicate that deprivations should be used for the shortest period of time possible. We recommend that the regulation limiting access to incoming printed material and publications include the following:



- The stated goal to permit individuals access to incoming printed material and publications or be restored to the ability to have access to incoming printed material and publications;
- That any restriction on the right to access to incoming printed material and publications shall be for the shortest period of time possible;
- Require a review by the chief administrative officer of restrictions on the right to access incoming printed material and publications at seven-day intervals;
- A presumption that the restriction on the right to access to incoming printed material and publications shall be no longer than seven days;
- Require quarterly reporting of data on restrictions on access to incoming printed material and publications to the SCOC including:
  - Number of individuals subject to this restriction during the reporting period;
  - Total time restriction was imposed on each individual during the reporting period;
  - Reasons for imposition of restriction and total number for each reason in the reporting period;
  - Number of reviews during the reporting period;
  - Outcomes of reviews during the reporting period (number of restrictions continued beyond seven days, other outcomes); and
  - Reasons for failure to restore this essential service after seven days.

## **Section 7028.2**

Proposed changes to 7028.2 require that “Segregated inmates, as that term is defined in section 7075.2 of this Title, who are under the age of eighteen (18) years, or known by security, health or mental health personnel to be pregnant, shall be entitled to an exercise period of at least two hours, seven days a week.” § 7028.2 (d).

### Comments and Recommendations:

As indicated in our letter, we agree that increases to time out-of-cell and limits on the use of segregation (isolated or solitary confinement) in jails and local correctional facilities are needed. However, we oppose the proposed SCOC regulations in this section and sections 7075.4 (c) through (f) because they fail to exclude young people under the age of 25, individuals with mental illness, cognitive and physical disabilities, pregnant and nursing women from segregation. Moreover, they grant overbroad discretion to jail officials to abrogate these minimums. The chief administrative officer may reduce out-of-cell time for all populations without exception (including individuals with mental and physical disabilities, young people and pregnant and nursing women). The only curb on that discretion is that the denial of out-of-cell time be for the purpose of maintaining the “safety, security, or good order of the facility.” This is a phenomenally overbroad standard, guaranteed to be the exception that swallows the rule. It risks outcomes that are unfair, lack process, lack consistency, reflect personal bias and create frustration and dangerous conditions for individuals subjected to the unfettered power to punish them with unlimited cell confinement for 24 hours per day.

The SCOC must exclude all young people under the age of 25, individuals with mental illness, cognitive and physical disabilities, pregnant and nursing women from segregation. from cell confinement and other forms of segregation and isolation. The SCOC must set limits on the

reasons for placement into segregation and must set time limits on its use as well. We do encourage periodic reviews of all decisions concerning the use of segregation and further recommend that the SCOC require data compilation related to such reviews with quarterly reporting to the SCOC and to the public.

### **Section 7028.6**

Proposed changes to 7028.6 adds the following language concerning any decision to use mechanical restraints during an individual's exercise period: "[a]ny determination to mechanically restrain an inmate during his or her exercise period shall be made by the chief administrative officer in writing, shall state the restraints employed and the specific facts and reasons underlying such determination, and shall be maintained as part of the centralized record required by section 7075.6 of this Part." § 7028.6(c).

### Comments and Recommendations:

The SCOC regulations should carefully limit the ability to utilize mechanical restraints in jails and local correctional facilities including during exercise periods. The regulations should require that all use of mechanical restraints be reviewed at regular intervals, with cessation of the need for mechanical restraints and use of less restrictive alternatives as a stated goal. The SCOC should require that data on the reason for utilization of mechanical restraints, length of utilizations, types of restraints used and results of reviews is collected and reported to the SCOC on a quarterly basis. Here, and elsewhere in these proposed rules, restrictions and deprivations are permitted under a broad grant of discretion for anything that would be a threat to the "good order" of the facility. This language does not adequately limit the use of mechanical restraints nor does it communicate that utilization of such extreme measures should be used for the shortest period of time possible. The use of mechanical restraints during recreation will negatively affect the utilization of the recreation period by those subject to restraints. Such an outcome will result in individuals isolating in their cells and experiencing the dangers of solitary confinement. We recommend that the regulation limit the use of mechanical restraints during recreation periods and include the following measures to ensure that the use of mechanical restraints is curtailed to a minimum:

- The stated goal to permit individuals to participate in recreation without mechanical restraints;
- That any use of mechanical restraints on individuals during recreation shall be for the shortest period of time possible;
- Provide a presumption that the use of mechanical restraints on an individual during recreation shall be for no longer than seven days;
- Require a review by the chief administrative officer of the use of mechanical restraints during recreation at seven-day intervals;
- Require quarterly reporting of data on the use of mechanical restraints on individuals during recreation to the SCOC including:
  - Number of individuals subject to mechanical restraints during recreation during the reporting period;
  - Total time mechanical restraints during recreation was imposed on each individual during the reporting period;

- Utilization of recreation by individuals subject to mechanical restraints during recreation (number or refusals, duration of individual refusals);
- Reasons for imposition of mechanical restraints during recreation and total number for each reason in the reporting period;
- Number of reviews during the reporting period;
- Outcomes of reviews during the reporting period (number of use of mechanical restraints during recreation continued beyond seven days, other outcomes); and
- Reasons for failure to remove use of mechanical restraints during recreation after seven days.

#### **Section 7040.4**

Proposed changes to 7040.4 add a section (f) that permits the chief administrative officer of a jail to deliberately render a toilet and sink in an individual occupancy housing unit nonfunctioning. The section requires that such action is determined to be necessary “to preserve the safety, security, or good order of the facility, or the safety, security, or health of the inmate, staff or other inmates,” requires that the decision be in writing stating “the specific facts and reasons underlying the determination,” the “dates and times the determination was in effect,” and that every two hours “the toilet shall be flushed” and “the inmate shall have brief access to a functioning sink.” 7040.4 (f). The section requires the written decision to be maintained as part of the centralized record required by the new section 7075.6.

#### **Comments and Recommendations:**

Humane conditions of confinement necessarily provide for individuals to have access to clean water and toilet facilities. Taking away such a fundamental human necessity from a housing area must be infrequent and short in duration. Here, and elsewhere in these proposed rules, restrictions and deprivations are permitted under a broad grant of discretion for anything that would be a threat to the “good order” of the facility. This language does not adequately limit the removal of access to a properly functioning toilet and sink nor does it communicate that removal of access to a toilet and sink is an extreme measure that should be used for the shortest period of time possible. We recommend that the regulation include the following measures to ensure that the any deprivation of access to an operable toilet and sink is curtailed to a minimum:

- The stated goal to provide every incarcerated person free access to an operable toilet and sink at all times;
- That any deprivation of access to an operable toilet and sink shall be for the shortest period of time possible;
- Provide a presumption that the any deprivation of access to an operable toilet and sink shall be for no longer than one day;
- Require a review by the chief administrative officer of any deprivation of access to an operable toilet and sink at the start of each shift;
- Require quarterly reporting of data on imposed deprivations of access to an operable toilet and sink to the SCOC including:
  - Number of individuals subject to any deprivation of access to an operable toilet and sink during the reporting period;

- Total time any deprivation of access to an operable toilet and sink imposed on each individual during the reporting period;
- Reasons for imposition of any deprivation of access to an operable toilet and sink during the reporting period;
- Number of reviews during the reporting period;
- Outcomes of reviews during the reporting period (number of any deprivation of access to an operable toilet and sink continued beyond one day, other outcomes); and
- Reasons for failure to remove any deprivation of access to an operable toilet and sink within one day during the reporting period.

### **Section 7040.5**

Proposed changes to 7040.5 add a section (e) that permits the chief administrative officer of a jail to deliberately render a toilet and sink in a multiple occupancy housing unit nonfunctioning. The section requires that such action is determined to be necessary “to preserve the safety, security, or good order of the facility, or the safety, security, or health of the inmate, staff or other inmates,” requires that the decision be in writing stating “the specific facts and reasons underlying the determination,” the “dates and times the determination was in effect,” and that every two hours “the toilet shall be flushed” and “the inmate shall have brief access to a functioning sink.” 7040.5(e). The section requires the written decision to be maintained as part of the centralized record required by the new section 7075.6. Last sentence references “the inmate,” however, if implemented there would be up to 60 incarcerated individuals affected at one time.

#### Comments and Recommendations:

The provision in § 7040.5 that permits inoperability of toilets and sinks in a multiple occupancy housing unit should not be approved. As worded, this would permit up to 60 individuals in one housing unit to be restricted from access to a toilet and water simultaneously. The SCOC should not permit toilets and sinks to be made inoperable in multiple occupancy housing units.

### **Section 7070.7**

Proposed changes to 7070.7 (h) require that when a young person’s participation in educational services is limited that the chief administrative officer shall review the determination to limit access to services “in writing within one (1) school day and every school day thereafter while such restriction or denial is in effect.” The prior language of the regulation required this review only every 14 days. A new section 7070.7 (j)(4) requires that the written determinations be retained as part of the “centralized record required by section 7075.6 of this Part.”

#### Comments and Recommendations:

We agree with the requirement that the restriction of a young person’s educational services should be reviewed daily. The SCOC should consider what additional data points concerning the provision and restriction of educational services should be required from jails and local correctional facilities. Such data should be collected and reported to the SCOC on a quarterly basis and reports and data should be available to the public. As noted elsewhere, young persons should not be subject to segregation. An exclusion for young people would require amendment to section 7070.7 (a).

## **New Section 7075**

New section 7075.1 states that the “purpose of this Part shall be to ensure that inmates are confined to housing units, and deprived of essential inmate services, only when necessary to maintain the safety, security and good order of the facility.”

### Comments and Recommendations:

This language does not adequately limit the use of deprivations nor does it communicate that deprivations should be used for the shortest period of time possible. Here, and elsewhere in these proposed rules, deprivations of essential services are permitted under a broad grant of discretion for anything that would be a threat to the “good order” of the facility. This is a phenomenally overbroad standard, guaranteed to be the exception that swallows the rule. If, the purpose is truly to ensure that deprivations are implemented “only when necessary,” we recommend that the stated purpose of this section must include:

- The stated goal to permit individuals to retain or be restored to all essential services as quickly as possible;
- That any deprivation of essential services shall be for the shortest period of time possible; and
- A presumption that deprivation of any essential service shall be no longer than seven days unless these regulations provide for a shorter time frame, in which restoration shall be presumed to occur within that shorter period of time.

New Section 7075.3 requires that each facility recognize the policy that segregation of, and deprivations of essential services to, incarcerated individuals, should be limited “to instances necessary to maintain the safety, security and good order of the facility.”

### Comments and Recommendations:

Similar to the stated purpose found in proposed regulation 7075.1, this language does not adequately limit the use of segregation and deprivations nor does it communicate that segregation and deprivations should be used for the shortest period of time possible. Here, and elsewhere in these proposed rules, deprivations of essential services are permitted under a broad grant of discretion for anything that would be a threat to the “good order” of the facility. This is a phenomenally overbroad standard, guaranteed to be the exception that swallows the rule. If, the policies are truly to ensure that segregation and deprivations should be limited “to instances necessary” we recommend that the stated policy on segregation and deprivations must include:

- The policies and procedures of each local jail and correctional facility must state that individuals shall be placed into segregation for the shortest time possible consistent with the time limitations, presumptions and procedures found in these regulations; and
- The policies and procedures of each local jail and correctional facility must state that individuals shall be restored to all essential services as quickly as possible consistent with the time limitations, presumptions and procedures found in these regulations.

## **New section 7075.4**

New section 7075.4 (c) Each segregated inmate shall be allowed a minimum of four (4) hours per day outside his or her assigned individual occupancy housing unit, or a minimum of four (4)

hours per day outside the sleeping area if the inmate is assigned to a multiple occupancy housing unit, unless the chief administrative officer determines that doing so would cause 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. Any such determination shall be made by the chief administrative officer in writing, and shall state the specific facts and reasons underlying the determination.

New section 7075.4 (d) Any determination made pursuant to subdivision (c) of this section shall be reviewed by the chief administrative officer at intervals not to exceed seven (7) days. Following such review, the chief administrative officer shall document, in writing, whether such determination shall continue or cease, and state the specific facts and reasons underlying the continuance or termination.

New section 7075.4 (e) Each segregated inmate under the age of eighteen (18) years, and each segregated inmate who is known by security, health or mental health personnel to be pregnant, shall be allowed a minimum of four (4) hours per day, exclusive of entitled exercise periods, outside his or her assigned individual occupancy housing unit, or a minimum of four (4) hours per day, exclusive of entitled exercise periods, outside the sleeping area if the inmate is assigned to a multiple occupancy housing unit, unless the chief administrative officer determines that doing so would cause 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. Any such determination shall be made by the chief administrative officer in writing, and shall state the specific facts and reasons underlying the determination.

New section 7075.4 (f) Any segregation of an inmate under the age of eighteen (18) years, or any segregation of an inmate who is known by security, health or mental health personnel to be pregnant shall be reviewed by the chief administrative officer, at intervals not to exceed seven (7) days, to determine whether the continuance of such segregation is necessary to maintain discipline or ensure the safety, security, or good order of the facility, or the safety, security, or health of the inmate, staff or other inmates. Following each such review, the chief administrative officer shall document, in writing, whether such segregation shall continue or cease, and state the specific facts and reasons underlying the continuance or termination.

#### Comments and Recommendations:

As indicated in our letter, we oppose the proposed SCOC regulations in these sections and section 7028.2 because they fail to exclude young people under the age of 25, individuals with mental illness, cognitive and physical disabilities, pregnant and nursing women from segregation. Moreover, the regulations grant overbroad discretion to jail officials to abrogate these minimums. The chief administrative officer may reduce out-of-cell time for *all populations* without exception (including individuals with mental, cognitive and physical disabilities, young people, pregnant and nursing women). The only curb on that discretion is that the denial of out-of-cell time be for the purpose of maintaining the “safety, security, or good order of the facility.” This is a phenomenally overbroad standard, guaranteed to be the exception that swallows the rule. It risks outcomes that are unfair, lack process, lack consistency, reflect personal bias and create frustration and dangerous conditions for individuals subjected to the unfettered power to punish them with unlimited cell confinement for 24 hours per day.

The SCOC must exclude all young people under 25, all individuals with mental, cognitive and physical disabilities, pregnant and nursing women from cell confinement and other forms of segregation and isolation. The SCOC must set limits on the reasons for use of segregation and must set time limits on the length of confinement as well. We do encourage periodic reviews of all decisions concerning the use of segregation and further recommend that the SCOC require data compilation related to such reviews with quarterly reporting to the SCOC and to the public.

#### New section **7075.5**

New section 7075.5 (b) Unless otherwise specified by the provisions of this Chapter, the provision of an essential service to an inmate shall not be denied, restricted or limited unless the chief administrative officer determines that providing such essential service would cause 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. Any such determination shall be made by the chief administrative officer in writing, and shall state the specific facts and reasons underlying the determination.

New section 7075.5 (c) Any determination made pursuant to subdivision (b) of this section shall be reviewed by the chief administrative officer at intervals not to exceed seven (7) days. Following each such review, the chief administrative officer shall document, in writing, whether such determination shall continue or cease, and state the specific facts and reasons underlying the continuance or termination.

#### Comments and Recommendations:

These provisions provide that deprivations of “essential services” that are not enumerated in these regulations will be subject to written findings and reviews every seven days. Consistent with our recommendations throughout this Appendix, the SCOC should make clear the goal to permit individuals to retain or be restored to all services as quickly as possible. Here, and elsewhere in these proposed rules, restrictions and deprivations are permitted under a broad grant of discretion for anything that would be a threat to the “good order” of the facility. This language does not adequately limit the deprivation of an essential service. We encourage the written record and periodic review and further recommend that the SCOC require data compilation related to such reviews with quarterly reporting to the SCOC and to the public for all deprivations of services.