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Testimony by the New York City Bar Association,
Corrections and Community Reentry and New York City Affairs Committees
December 19, 2014 Board of Corrections Hearing About Proposed ESH Rules

I am Jack Beck, and I am testifying on behalf of the Committees on Corrections and Community Reentry and New York City Affairs of the New York City Bar Association ("Association") concerning the proposed rules of the Board of Correction ("Board"). Those rules were proposed in response to the request by the New York City Department of Correction ("Department") to create "enhanced supervision housing" ("ESH") units and the decision of the Board to delay any further action to promulgate rules concerning additional limitations on the use of segregated confinement in the New York City jails.

The Association is an independent, non-governmental organization of 24,000 lawyers, law professors, and government officials from the United States and 50 other countries. Throughout its 144-year history, the Association has consistently maintained that an independent judiciary and respect for the rule of law are essential to all jurisdictions. The conditions of confinement in our state and local prisons and jails, including the use of segregation for punitive and administrative purposes, are a matter of long-standing concern of the Committee and the Association.[1]

We applaud the Department and the Board for their concerns about both the level of violence in the City jails and the problems associated with the placement of incarcerated people in segregated confinement. The Association recognizes that, as documented in Commissioner Ponte's November 4, 2014 letter to the Board, the Department has undertaken and is planning multiple initiatives to reduce jail violence and limit the use of prolonged isolation in punitive segregation. It is clear that the creation of the ESH is an attempt to reduce both violence and the devastating effects of prolonged confinement in punitive segregation.

Despite these laudable goals, we remain concerned about several aspects of the ESH. Although the proposed rules amending the Board's Minimum Standards for the City jails were designed in conjunction with the present administration's initiatives to reduce violence, we are

[1] *See* New York City Bar, Corrections & Community Reentry Committee and International Human Rights Committee, *Report on HALT Solitary Confinement* Act, 2014; available at http://www2.nycbar.org/pdf/report/uploads/20072748-HALTSolitaryConfinementReport.pdf; New York City Bar, Committee on International Human Rights, *Solitary Confinement in U.S. Prisons*, 2011, available at: http://www2.nycbar.org/pdf/report/uploads/20072165-TheBrutalityofSupermaxConfinement.pdf.

concerned that these rules – if passed – will enable permanent reductions in the protections afforded to incarcerated people that will persist beyond the current initiatives and the present administration.

We therefore urge that the Board delay a decision on the current proposed rules and require the Department to adopt modifications of its plans for these ESH units to ensure that: the criteria for placement are more limited; procedural protections are enhanced; appropriate programming is provided to residents; limitations imposed are individualized and directly related to the reasons each resident is in the unit; and mechanisms, programs, and required periodic assessments are implemented, so that residents can demonstrate improved attitude and behavior, including showing that they no longer need this restrictive housing. Finally, we urge the Board to renew its efforts to enact comprehensive Minimum Standards addressing the overuse of punitive segregation and to minimize its deleterious effects.

Criteria for Placement in the ESH

The stated purpose for the ESH is to permit the Department to implement a program to reduce violence towards staff and the incarcerated population caused by the "comparatively small number of [incarcerated people who] are involved in a disproportionate number of violent incidents." [2] The Department proposed improving safety in the jails "[b]y carefully controlling the activity of such [incarcerated individuals] and reducing their contact with others."[3] We agree that reducing violence in the jails is necessary and that a comprehensive plan should entail better monitoring of individuals who are clearly associated with violence. We are concerned, however, that the ESH criteria proposed by the Board appear to go beyond what the Department requested. The proposed criteria go beyond a reasonable definition of those most likely to perpetrate violence and those who pose an ongoing threat of violence.

In Commissioner Ponte's November 14, 2014 letter to the Board, he emphasized that the Department is currently funded for 250 ESH beds, and has no plans to seek additional funding (although it may do so in the future). He acknowledged that more than 250 people meet the criteria for ESH as articulated in the variance request, which is less broad than the rule contemplated by the Board. [4] The Department, therefore, intends to focus initially on people "who have committed serious, violent assaults on staff or other [incarcerated people] but who are living in general population."[5]

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[2] October 22, 2014 Letter from DOC Commissioner Ponte to Board Chair Gordon Campbell, at 1. (Hereinafter "*Commissioner Ponte Oct. 22, 2014 Letter to Board*").
[3] *Id.* at 2.
[4] [4] November 14, 2014 Letter from DOC Commission Ponte to Board Chair Gordon Campbell at 1-2. (Hereinafter "*Commissioner Ponte Nov. 14, 2014 Letter to Board"*).
[5] *Id.* at 2.

Given the Department's focus on people with well documented histories of violence, the broader, open-ended criteria in Rule §1-16 (a) (1-5), which do not require prior violence in all cases, appear unreasonable. We find that the criteria are overbroad in the following respects:

- Subpart (1) includes not only gang leaders, but also anyone who organizes or is a participant in a gang or a "similar entity," regardless of the level of involvement. No evidence of violent activity or intention has to be demonstrated, and "gang," "substantially similar entity," and "leader" are undefined, allowing the possibility of overbroad and arbitrary application of the criteria. In Commissioner Ponte's October 22, 2014 letter, only gang leaders, organizers or participants in a gang-related assault were to be eligible for the ESH.[6] A nexus to gang violence is missing in the Board rule.

- Subpart (5) requires that a person "presents a significant threat to the safety and security of the facility if housed in general population housing." It does not define "significant threat." Possession of non-weapon contraband, verbal confrontations with staff or others, organizing of the incarcerated population, and many other activities could be characterized as a significant threat to the safety and security of the facility without creating a serious risk of personal violence. Generalized rather than specific fears of disrupting the facility should not constitute sufficient grounds for placement on the unit.

- Subpart (4) includes language that a person can be housed in the ESH if s/he "instigated or participated in a riot." When multiple people are involved in an incident in a correctional facility it is not unusual that many other people in the area are also alleged to have participated in a riot, even if no serious physical violence occurs. We are concerned that non-leaders who have tangential or minimal involvement in a disturbance could meet this criterion, even without evidence that they have a history or propensity for serious violence.

- The criteria in subparts (2) through (4) refer to activities while the person was "in custody" but are not limited to the current incarceration or any recent time period. Commissioner Ponte's October 22, 2014 letter makes clear that the Department will be looking at prior incarceration for evidence of behavior that would justify placement in the ESH. With no time limitation in assessing a propensity for violence, past acts or assertions of violent propensities could justify ESH placement without consideration of current threats of violence, or intervening behavior and development of the currently incarcerated person. If prior incarcerations are relied upon, there is no requirement that

[6] *See* Proposed Directive, Enhanced Supervision Housing Directive, § III (A) (2) ("He or she has demonstrated involvement as an organizer of or participant in a Security Risk Group (SRG)-related assault while in Department custody").

the Department must retrieve or review the supporting documentation to assess the context of the past behavior.

We are also concerned about the failure to exempt vulnerable populations from placement on the ESH. In particular, the Board's rules do not exclude people with mental illness from the unit. Although the ESH is not total isolation, such treatment still involves people spending 17 hours in their cells. More importantly, the rules do not require providing any mental health services to the person in ESH. It is well documented that mental health patients face an increased risk of harm and personal deterioration when placed in segregated housing and that they need intense mental health treatment in such situations. [7]

In summary, if the stated purpose of the ESH unit is to separate people who have a significant risk of violence, the current criteria for placement in the unit appear overbroad. Given the Department's intentions and the limited available housing, it appears that that there is no current need for the Board's broad standard to address the immediate problem of jail violence. A more prudent approach would be to promulgate a rule with limited criteria addressing the Department's immediate need to ensure safety. Later the Board could assess the efficacy of the new housing units and expand the criteria if it and the Department determine that the program is effective, necessary and feasible.

Inadequate Procedural Protections Prior to ESH Placement

Compounding the problem of overbroad placement criteria, the procedural protections for people facing ESH confinement are inadequate. The draft Directive provided by Commissioner Ponte indicates that hearings will be conducted in accordance with existing Directive 6500R-B,[8] providing a right to appear, make statements, present material evidence, present witnesses, and in limited designated circumstances, have assistance from a Department hearing facilitator. However, such protections are not contained in the Board's proposed rule and thus may or may

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

[8] Proposed Directive, Enhanced Supervision Housing Directive, § III(C)(5). The existing protections under Directive 6500-B in disciplinary proceedings do not provide any rights to cross-examine adverse witnesses or have independent representation.

not be contained in any finalized Directive governing the ESH units. The Board should guarantee basic rights for a meaningful hearing in the rule.[9]

Absent from the proposed rule is the amount of time and resources a person will have to prepare a case challenging ESH designation, particularly if the person is held in the ESH unit prior to the hearing. Given that, as discussed above, eligibility for placement in an ESH unit could be based on conduct from months or years earlier, and from earlier incarcerations, people could face substantial difficulties in gathering and preparing the requisite evidence and arguments for challenging an ESH placement.

The proposed Board rule also fails to specify any qualifications or characteristics of the designated hearing officer, or provide any guarantees of neutrality or independence. The draft Directive indicates that the Department plans to have a Department Hearing Officer adjudicate these proceedings.[10] Using Department staff people, instead of neutral arbiters, could result in flawed and inadequate hearings in which the person challenging the determination would not be able to present an effective case to overturn the decision of senior jail officials.

Moreover, the proposed rules are silent about what the hearing will accomplish. According to Commissioner Ponte's October 22, 2014 letter to the Board, the hearing will only allow for challenging the underlying facts relied upon for assignment to the ESH, *not* necessarily challenging the determination that such facts warrant placement in the ESH.[11] In contrast, the draft Directive states that among the purposes of the hearing is a determination of whether the facts relied upon support placement in ESH.[12] It is unclear which type of hearing will be provided. Finally, neither the proposed Board rule nor the accompanying draft Directive mentions any right to appeal an ESH decision.[13]

We urge the Board to add greater detail to its rule, to specify what due process rights will be afforded individuals at the hearing, to clarify that the hearing will provide an opportunity to challenge both the underlying facts and the nexus between alleged facts and assignment to ESH, and to include a mechanism for appellate review. Finally, the proposed rule only provides for a hearing if an incarcerated person requests one. Given the potential complexity of the issues raised by a decision to place someone in the ESH, we urge the Board to require hearings prior to any ESH placement.

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[9] *See, e.g.*, *Wolff v. McDonnell*, 418 U.S. 539, 563-71 (1974) (holding that in the context of disciplinary proceedings, the minimum constitutional requirement of due process requires, *inter alia*, a limited right to call witnesses and present documentary evidence at a hearing, and in certain cases the assistance of a counsel substitute).
[10] Proposed Directive, Enhanced Supervision Housing Directive, § III(C)(3).
[11] DOC *Commissioner Ponte Oct. 22, 2014 Letter to Board*, at 4.
[12] Proposed Directive, Enhanced Supervision Housing Directive, § III(C)(6).
[13] *See* N.Y. Comp. Codes R. & Regs. tit. 7, § 253.8 (providing absolute right to appeal disciplinary hearings in New York State prisons).

No Mechanisms for Ongoing Review or Release from ESH

Once someone is placed in the ESH, the proposed rule provides no mechanism for ongoing review of such placement. According to the proposed rule, someone could remain in the ESH indefinitely, without any assessment of whether the continued placement in ESH is necessary or justified.[14] There should be review procedures that require the decision-maker to provide a current justification for keeping someone in the ESH unit, along with instructions on how to gain release from the unit.[15]

As written, the proposed rule does not provide any mechanisms for release from the ESH. For example, the proposed rules do not provide for the development of an individualized plan; access to programs (discussed below), treatment, or services that could allow someone to remove the conditions that resulted in the ESH placement; benchmarks of good conduct that could result in release from the ESH; or any time limits on the ESH confinement. Courts have recognized that corrections departments utilizing segregation must have some mechanism for determining how a person held in segregated confinement can make progress towards release from such confinement.[16] By contrast, it appears that people may be held indefinitely in the ESH. Indeed, Commissioner Ponte's November 4, 2014 letter explicitly states that the ESH is intended to serve as a long-term holding area.[17]

People in the ESH should be provided specific requirements for how to earn release. Staff should work with each resident to create an individualized plan for meeting those requirements. The Department should provide access to whatever programs, treatment, or services are necessary to carry out that plan. In turn, there should be meaningful mechanisms to determine whether a person has completed the specified programs, treatment, or corrective action and

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

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

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

[17] November 4, 2014 Letter from DOC Commissioner Ponte to Board Chair Gordon Campbell, p. 4 (Hereinafter "*Commissioner Ponte Nov. 4, 2014 Letter to Board"*).

whether there is any continued justification for holding the person in the ESH. Moreover, there should be some outside time limits on ESH placement as a check on the review procedures.[18]

Lack of Programs in the ESH

People who have allegedly engaged in the most egregious conduct or allegedly pose the greatest risk to others need additional support, programs, and therapy that are both humane and effective. Such measures should empower such incarcerated individuals to address their underlying issues and reduce violence. It has long been recognized, including by the Department of Justice in its recent report on violence at Rikers, that providing meaningful program opportunities reduces idleness, thereby helping decrease confrontations among incarcerated people and between incarcerated people and staff.[19] We are therefore concerned that the proposed rule does not provide for programming for people held in the ESH. While the proposed rule provides that ESH residents may spend time out of their cells for seven hours per day, there is nothing in the rule that indicates how that time will be spent. Particularly given budgetary constraints and all of the restrictions on the Minimum Standards with regard to basic services such as visiting, religious activities, and recreation (discussed below), it seems that the ESH unit could very likely not include any programming.

Although Commissioner Ponte's October 2014 letter indicates the possibility of people participating in "other program activities" in the day room of the ESH or "participat[ing] in scheduled program activities even during periods when they are otherwise locked in," neither the existing Board Minimum Standards nor the proposed rule changes would require this type of programming. Moreover, the letter indicates that the ESH will be staffed by an increased number of correction officers and dedicated escorts and meal relief officers, but did not mention program staff assigned to the unit.[20] The proposed rule says that people in the ESH are not going to "intermingle" with people in the general population, suggesting that they are not going to be programmed off of the unit.[21] We are concerned that the inability to program off the unit, combined with the lack of program staff on the unit, means that people in the ESH will not have meaningful program opportunities. Such opportunities should be required in the Board's rule.

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

[19] Preet Bharara, *CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island*, US Department of Justice, US Attorney, Southern District of NY, p. 58, Remedial Measure F(8), Aug. 4, 2014 (Hereinafter "*DOJ 2014 Report"*).

[20] *Commissioner Ponte Oct.22, 2014 Letter to Board*, at p. 2. Commissioner Ponte has also said that there will be no additional training for staff working in the ESH units, which suggests that the ESH staff will not be providing additional programming to address underlying causes of the alleged threat posed by people in the ESH units. *Commissioner Ponte Nov. 14, 2014 Letter to Board*, at p. 2.

[21] *Id.*

The failure to provide programs in ESH is particularly disturbing in a context where many of the people in the Department's custody are being held pre-trial or on sentences of less than one year, and thus return to the outside community within relatively short time periods. It is essential for the safety of the jails, the safety of any prisons these individuals will go to, and the safety of the outside community, that people be provided with the skills and tools to address their issues, needs, and behaviors. Doing so will also increase their likelihood of the incarcerated person's success upon release, while decreasing recidivism. ESH residents should have access to academic classes, anti-violence programs, cognitive behavioral therapy, and individual and group mental health treatment, depending on their needs. Such programs reduce the violence that serves as the justification for the ESH.[22] To significantly reduce violence, there should be more programs, not fewer, provided to people considered to be the most dangerous.

Broad Restrictions on Access to Services for ESH Residents

The proposed rules include numerous restrictions on access to essential services protected by the Board's current Minimum Standards. These include limitations on visits, mail, packages, and access to recreation, the law library and religious services. Others' testimony will highlight in more detail the serious restriction on basic rights that these limitations represent. We will focus on the failure of the restrictions to be related to the risks posed by residents of the ESH. These limitations are being imposed only to reduce violence and enhance safety and not for punitive reasons. Consequently, such restrictions should be assessed in light of their ability to reduce violence as applied to a particular person. We believe many of these restrictions cannot meet this standard, and therefore, we urge the Board to conclude they are overbroad as applied to all ESH residents.

First, the restrictions apply to all the residents without any individualized determination about the risk of violence, gang activity or propensity to secure or use weapons. For example, monitoring correspondence for information about threats to the safety of the jail (discussed in Commissioner Ponte's October 22, 2014 letter to the Board as the justification for the variance), is most relevant to individuals who may be directing gang activities—but many of those who will be placed in the ESH will have no such affiliation. Although the Department also asserts that monitoring correspondence is needed in order to search for contraband, this proposed rule goes well beyond that function by allowing Department officials to read the content of letters. As such, the restriction is overbroad for people who are not a risk for inappropriate

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

communication with outside gang members, activities related to violence in the jail, or other criminal activity. Similarly, the limitation on packages would seem related to those who the Department fears will get or use a weapon, but this is not a risk arising with every resident. Limitations on access to the law library may be relevant for those who may be communicating gang messages, but not for others on the unit who are unaffiliated with gangs. Putting blanket prohibitions on all residents is overly restrictive and excessively punitive. Rather, limitations should be related to the risks a particular resident poses and should be based on individualized determinations.

Second, there is no apparent mechanism in place to exempt people from a particular restriction or to gain expanded access to services. Under the proposed rule, it is reasonable to assume that a person assigned to the ESH will remain there until s/he is released from custody or transferred to another agency. These long-term restrictions without an individualized risk assessment do not appear closely related to the threats being addressed and seem unnecessarily punitive.

Third, the cumulative effect of the restrictions essentially isolates a segment of the incarcerated population from the rest of the facility and people in the outside community. The rules limit access to all essential services available outside the ESH, which are guaranteed by the Minimum Standards. Given these restrictions, it seems unlikely that residents would have access to non-mandated services that would involve contact with the general jail population. Although not articulated in the rule, the proposed Directive for the ESH in the Department's variance request included onerous search provisions any time an ESH resident leaves the unit: a strip search and escorted movement with hands cuffed behind the back. It is unlikely that daily movement off the unit for any significant portion of the population would be possible, given these requirements.

Fourth, we are particularly concerned about the prohibitions on contact visits, requiring approval of any visitors and monitoring correspondence, because of the burdens these restrictions place on maintaining family and community ties. Family and community support is well recognized as improving the likelihood of successful reentry into the community after incarceration.[23] Given the intended long-term nature of ESH confinement, the restrictions on communication and contact with family will likely further erode the relationship between the residents and their families, including their children, harming both residents and children.[24] Such restrictions will do little to enhance safety, while inevitably engendering the negative

[23] Travis et. al., *Families Left Behind: The Hidden Costs of Incarceration and Reentry*, 6 (Urban Institute 2005)

[24] *See* Allard & Greene, *Justice Strategies: Children on the Outside*, 22-23 (Justice Strategies 2012); Nickel et. al., *Children of Incarcerated Parents: An Action Plan for Federal Policy Makers*, 13 (Council of State Governments 2011)

consequences of placing barriers between residents and their loved ones. The Board should resist allowing such limitations without an appropriate finding of need.

Failure of the Board to Promulgate Significant Limitations on Solitary Confinement

The Association acknowledges the current efforts of the Department to revise its policies and practices concerning punitive segregation. Still we remain concerned that much-needed, long-term reforms to eliminate the harm caused by isolated confinement will be achieved only if mandated by the Board. Consequently, we urge the Board to reconstitute its solitary confinement committee and–working with the Department, people in the community, and its experts–to continue its efforts to develop and implement comprehensive reforms to the Minimum Standards so as to limit the use and consequent harm of long-term isolation.

Starting in 2013, the Board initiated a substantial examination of limiting punitive segregation in the New York City jails, an effort the Association applauded. The Association has been closely monitoring the progress of the Board's examination to identify the harm that results from prolonged isolation and to develop proposals that would limit its use and negative consequences. In particular, we were impressed with the report by Drs. Gilligan and Lee, documenting the harm associated with isolating patients with mental illness and advocating more treatment and alternatives to long-term isolation that are effective to deal with inappropriate behavior by incarcerated people.[25] We also commend the Department and Mayor Bill de Blasio for ending the placement of 16- and 17-year olds in punitive segregation and the questionable practice of placing people in segregation for disciplinary time owed from previous incarcerations.

Based upon Commissioner Ponte's November 4, 2014 letter to the Board and accompanying documents, it is clear the Department is contemplating more significant reforms to the use of punitive segregation for its jail population. We commend the Department for considering plans to restrict the length of punitive segregation to 30 days and for proposing a new punitive segregation sentencing grid that would limit sentences for many rule violations. In his letter Commissioner Ponte notes that the reduction in punitive segregation sentences are contingent on the operation of ESH units, so that there would be "the smooth continuum of security that would need to exist for violent infractions as they move out of punitive segregation into ESH at the conclusion of much shorter sentences." The Department also has proposed creating "Punitive Segregation Lite" units in which people sentenced to disciplinary confinement would be housed on a unit in which they would have greater out-of-cell time than currently exists in punitive segregation. Finally, after the opening of the ESH and Punitive Segregation Lite

[25] *See* James Gilligan and Bandy Lee, *Report to the New York City Board of Correction*, p. 3, Sept. 5, 2013 ("Gilligan and Lee Report"), *available at*: http://solitarywatch.com/wp-content/uploads/2013/11/Gilligan-Report.-Final.pdf.

units, the Department asserts it could "implement the new sentencing guidelines, moving to 30-day maximums." But the Commissioner also cautioned that "unforeseen circumstances" could require the Department to adjust its plans, so the proposed reforms could be delayed or even abandoned.

The Association has recently endorsed the passage of the Human Alternatives to Long Term (HALT) Solitary Confinement Act, A.8588-A/S.6466-A, which would substantially reform isolation in all state prisons and jails.[26] We have attached our Report on the legislation for your reference. We will not outline in detail the full provisions of the HALT Solitary Confinement Act or all the reasons the Association has endorsed this legislation, but we will briefly review the major components of the reforms proposed by this legislation, which we urge the Board to consider in its deliberations about establishing Minimum Standards for isolation in the City jails.

More Humane and Effective Alternatives to Isolation

The HALT Solitary Confinement Act would create more humane and effective alternatives to the use of isolation.[27] Specifically, the Bill would require that any person who needs to be separated from the general prison population for more than 15 days be placed in a separate secure rehabilitative and therapeutic unit called a Residential Rehabilitation Unit (RRU).[28] After entering an RRU, a person would work with an assessment committee to develop a rehabilitation plan aimed at addressing the issues underlying the conduct that resulted in his or her being placed in the RRU.[29] In turn, the person would have access to six hours per day of out-of-cell time, including for rehabilitative and therapeutic programming, as well as one hour out of cell for recreation with other residents of the RRU. [30]

We support this alternative model because currently, the conditions of isolated confinement in New York State prisons and jails are inhumane, counterproductive, costly, and unsafe. Subjecting people to 22 to 24 hours a day locked in a cell, without meaningful human interaction, programming, therapy, or even the ability to make phone calls or have contact visits[31] has been proven to have devastating psychological, physical, and behavioral effects. [32]

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[26] New York City Bar Association, *Report on Legislation by the Corrections and Community Reentry Committee and International Human Rights Committee re HALT Solitary Confinement Act* (July 2014).(Hereinafter "Bar Report on HALT Solitary Confinement Act").

[27] *See, e.g.*, *Testimony by the Campaign for Alternatives to Isolated Confinement*, Before the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Human Rights Reassessing Solitary Confinement II, Feb. 25, 2014, *available at*: http://solitarywatch.com/wp-content/uploads/2014/02/Testimony-of-the-NY-Campaign-for-Alternatives-to-Isolated-Confinement-2014.pdf (hereinafter "CAIC Testimony 2014").

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

[29] *Id.* §137(6)(i)(iv).

[30] *Id.* §137(6)(i)(ii).

[31] *See, e.g.*, New York Civil Liberties Union, *Boxed In – The True Cost of Extreme Isolation in New York's Prisons*, at 9 (2012), available at: http://www.nyclu.org/publications/report-boxed-true-cost-of-extreme-isolation-new-yorks-prisons-2012..

Numerous studies have documented the specific psychological and neurological damage caused by isolated confinement, due to the lack of normal human interaction, sensory deprivation, and extreme idleness.[33] In addition to often causing extreme and permanent psychological damage, isolation can cause people's behavior to deteriorate, as evidenced by the frequent accumulation of disciplinary tickets by individuals who are held in isolation.[34]

Isolation has also been shown to create or exacerbate mental health problems. For example, a recent assessment of the use of isolation by the New York City Department of Correction by renowned psychiatric experts found that placing people with pre-existing mental illness in isolation violates the Board's Minimum Standards of mental health care.[35] Isolation also has been proven to increase the risk of suicide and self-harm. Recently, authors affiliated with the New York City Department of Health and Mental Hygiene published a study in the American Journal of Public Health documenting that people held in isolation were nearly seven times more likely to commit self-harm and more than six times more likely to commit potentially fatal self-harm than similarly situated people in the general prison population.[36]

Limitation on the Length of Stay in Isolation

The HALT Solitary Confinement Act would limit the amount of time a person can spend in isolation to a maximum of 15 consecutive days and no more than 20 days in any 60-day period. [37] The second 20-day limit in a 60-day period is aimed at preventing a person from being cycled in and out of isolation – removed from isolation after 15 days and then shortly thereafter returned to isolation for another 15 days, and so forth.[38] At these limits, a person must be returned to the general prison population or be sent to an alternative RRU described above.[39]

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

[33] *See, e.g.*, *Psychiatric Effects of Solitary*; *Mental Health Issues in Long-Term Isolation*; *Twilight in the Box*.

[34] *See* Testimony by the Correctional Association of New York, Before the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Human Rights, Reassessing Solitary Confinement, p. 3-4, June 19, 2012 *available at*: http://www.correctionalassociation.org/wp-content/uploads/2012/10/testimony-solitary-confinement-june-2012.pdf.

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

[36] *Solitary Confinement and Self-Harm* at 444-45.

[37] §137(h), §2(35).

[38] *See* CAIC Testimony 2014.

[39] §137(h).

The limitations envisioned by the HALT Act are intended to reduce the adverse physical and mental health consequences of prolonged isolation. The United Nations Special Rapporteur on Torture studied the impact of isolation in the United States and throughout the world and concluded that "any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment" and recommended that confinement beyond 15 days "should be subject to an absolute prohibition."[40] The New York State Bar Association noted the UN Rapporteur's report favorably while describing the adverse effects of long-term isolation and urging New York State to "profoundly restrict the use of long-term solitary confinement." [41]

Data provided by the Department for calendar year 2012 demonstrates that many people in the City jails are spending long terms in punitive segregation for numerous rules violations.[42] Specifically, the Department's summary indicates that for 25 different rules violations, applied to more than 4,000 people in 2012, the average length of stay in punitive confinement was greater than 50 days. For 11 rules violations, the average length of stay was 80 days or more, involving more than 2,000 people. It must be emphasized that these data appear to be for separate adjudication hearings and do not calculate the total time any individual spent in punitive segregation. As the Board is well aware, many people in punitive segregation receive additional rules violations on the unit and therefore, the cumulative time they spend there may be substantially higher than these figures suggest.

Having a 15-day limit on the use of isolated confinement is more in line with laws and regulations in other countries. For example, solitary confinement is prohibited by statute from exceeding two weeks *in an entire year* in the Netherlands and four weeks in an entire year in Germany.[43] In practice, the Vera Institute of Justice found that these countries utilized solitary even less, with, for example, one German prison using solitary two to three times in a given year, and another German prison utilizing solitary only two times in five years, and only for *a few hours* on each occasion.[44]

Restrictions on the Criteria for Placement in Isolation

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[40] United Nations General Assembly, *Interim Report of the Special Rapporteur of the Human rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, p. 21, 23, Aug. 2011, available at: http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf (Hereinafter "*UN Rapporteur Report").*
[41] *NYS Bar Solitary Confinement Report* at 1-2.
[42] NYC Department of Correction, *NYC DOC Rule Violations by Penalty Range, Average Length of Stay and Average Sentence Imposed (CY 2012).*
[43] Ram Subramanian and Alison Shames, *Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States*, p. 13, Oct. 2013, *available at*: http://www.vera.org/sites/default/files/resources/downloads/european-american-prison-report-v3.pdf.
[44] *Id.*

The HALT Solitary Confinement Act would restrict the criteria for conduct that can result in isolated confinement or placement in the Residential Rehabilitation Units. People who could be confined for up to 15 days or placed in a RRU would include only those found to have committed serious acts of physical injury, forced sexual acts, extortion, coercion, inciting serious disturbance, procuring deadly weapons or dangerous contraband, or escape.[45] This list of predicate acts and the maximum length of time in extended segregated confinement or placement in the RRUs were derived from the criteria proposed by Dr. James Austin, an expert witness during litigation in Mississippi that resulted in a settlement agreement and a dramatic reduction in the number of people in solitary confinement.[46]

Although the criteria for placement for an extended period in the jail punitive segregation units could differ from this list, we believe the basic principle that only serious acts or threats of violence or substantial disruption to the operation of the correctional facility should result in long-term isolation. We urge the Board to adopt a standard similar to the HALT Act, which would ensure that only people who engage in significant misbehavior that requires some sustained therapeutic or rehabilitative intervention will be isolated up to 15 days or separated from the rest of the prison population for more than 15 days, and that these individuals will receive appropriate programs or therapy to address these issues.

Banning the Placement of Vulnerable Groups in Isolation

The HALT Solitary Confinement Act would also ban any length of isolated confinement of people in such vulnerable groups, including any person: (a) 21 years or younger; (b) 55 or over; (c) with a physical, mental, or medical disability; (d) who is pregnant or a recent mother; or (e) who is or is perceived to be LGBTI.[47] If these individuals have to be separated from the general population for any length of time, they should be placed in the more rehabilitative and therapeutic RRUs.

Many experts have concluded that the impact of solitary confinement is particularly serious for young people and people suffering from mental illness. The 2012 report of Human Rights Watch and the ACLU, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, details the differences between youth and adults in terms of their brain development, their ability to control their behavior, and the greater vulnerability of

[45] §137(6)(j)(iii), §2(35).
[46] *See* Dr. James Austin, *Assessment and Recommendations: Mississippi Department of Corrections, Mississippi State Penitentiary, Unit 32*, p. 4-5, Aug. 15, 2007, *available at*: https://www.aclu.org/files/pdfs/prison/austin_report_2007august.pdf; Terry Kupers et. al., *Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, July 21, 2009, *available at*: https://www.aclu.org/sites/default/files/images/asset_upload_file359_41136.pdf.
[47] §137(g), §2(32).

young people to adverse consequences from isolation.[48] Scientific research now recognizes that young people process thoughts, feelings and information in a different way because their frontal lobes are still developing. Specifically, they have less ability to inhibit impulses, weigh the consequences of their actions, prioritize actions and strategize. Consequently their decision-making processes are adversely impacted by impulsivity, immaturity and an under-developed ability to fully appreciate the consequences of their actions.[49]

Moreover, young people respond differently to isolation, making its impact even more detrimental to their physical, emotional and mental development. Research shows that they subjectively perceive the duration of isolation as lasting longer than an adult would experience, making young people's detention even more onerous to them. Young people are also undergoing dramatic physical and psychological changes, and any extended isolation can cause serious emotional problems; increase stress, lead to anxiety, rage and insomnia; and result in episodes of self-harm and suicide.[50] In addition to calling for a prohibition on isolation beyond 15 days for any person, the UN Rapporteur also condemned any form of isolation for any length of time for young people.[51]

As noted above, experts have also documented the significant psychological harm caused to anyone placed in isolation. These include social withdrawal; anxiety; panic attacks; irrational anger and rage; loss of impulse control; paranoia; hypersensitivity to external stimuli; severe depression; difficulties with thinking, concentration and memory; confusion; and hallucinations.[52] Moreover, long-term isolation of people already suffering from mental illness increases the risk that they will suffer adverse psychological harm and can enhance the severity of such symptoms. For example, psychiatrist Stuart Grassian studied the impact of isolation on incarcerated people and concluded "the presence of a preexisting personality disorder or impairment of psychosocial functioning was associated with increased risk of incapacitating fearfulness, paranoia, agitation, and irrational aggression toward staff."[53] Psychologist Craig Haney, who studied people confined at California's Pelican Bay isolation unit, concluded that those with preexisting mental illnesses put in solitary confinement "are at greater risk of having this suffering deepen into something more permanent and disabling."[54]

It is unclear whether any groups, other than 16- and 17-year olds will be prohibited from placement in the City's punitive segregation units even after the reforms detailed by the

[48] Human Rights Watch/American Civil Liberties Union, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, 2012 (Hereinafter "*Growing Up Locked Down"*), available at: https://www.aclu.org/files/assets/us1012webwcover.pdf. *See also NYS Bar Solitary Confinement Report* at 8-9.
[49] *Growing Up Locked Down* at 15-16.
[50] *Id.* at 20-32. *See also NYS Bar Solitary Confinement Report* at 8-9.
[51] *UN Rapporteur Report* at 23.
[52] *Psychiatric Effects of Solitary* at 335-36.
[53] *Id.* at 348.
[54] *Mental Health Issues in Long-Term Isolation,* at 142.

Commissioner are implemented. Certainly, many people 18- to 21- years old will be on these units given the Department's assertion that such individuals often are the ones involved in violent acts towards staff and other incarcerated people. Similarly, these units may also confine people with mental health needs. Although the Department has created the Clinical Alternative to Punitive Segregation (CAPS) unit for individuals with serious mental illness and the Restricted Housing Units (RHU) for individuals with "non-serious" mental illness, there is no requirement that a person with mental illness must be placed in either location rather than in punitive segregation, and many individuals with mental illness remain in punitive segregation housing areas. Placement in CAPS and the RHU is determined by the availability of beds and not only by the mental health condition of the person being disciplined.

We urge the Board to examine the Department's proposals for reforming its use of punitive segregation in light of the principles articulated in the HALT Solitary Confinement Act. Whether the Board decides to adopt the specific provisions of the HALT Solitary Confinement Act or to fashion a different set of limitations, it is essential that the Board mandate reform that will fundamentally change the practices of placing people in long-term isolation in our City jails. Although the current Commission and administration seem to have good intentions, the Board has the ability to make more lasting changes to punitive segregation. The time has come for the City and its jails to turn away from a solely punitive response to misconduct within our correctional institutions to one that entails some measure of treatment, programs, and engagement that have a much greater likelihood of curtailing such conduct and of leading to better outcomes for the affected people, the correctional institutions, and society.