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Testimony of

The Legal Aid Society, Prisoners' Rights Project

February 25, 2014

Before the Senate Judiciary Subcommittee on the Constitution,

Civil Rights, and Human Rights:

Reassessing Solitary Confinement II:

The Human Rights, Fiscal, and Public Safety Consequences

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To the Senate Committee:

The Legal Aid Society thanks Chairman Durbin and Members of the Subcommittee for the opportunity to submit this written testimony on the issue of solitary confinement.

My name is Sarah Kerr. I am a staff attorney at the Prisoners' Rights Project ("PRP") of the Legal Aid Society. PRP has been a leading advocate for constitutional and humane conditions of confinement for individuals incarcerated in the New York City and New York State correctional systems since it was established by the Legal Aid Society in 1971. The Prisoners' Rights Project participated in several federal lawsuits that address the inappropriate use of solitary confinement of individuals with mental illness including the state-wide lawsuit, *Disability Advocates, Inc. v. New York State Office of Mental Health*, 02 CIV 4002 (S.D.N.Y.) *("DAI v. OMH").*[1]

I offer this testimony based on ongoing contact with and advocacy on behalf of individuals incarcerated in New York City jails and New York State prisons, knowledge of the New York State Department of Corrections and Community Supervision (DOCCS), the New York State Office of Mental Health (OMH), the New York City Department of Correction (NYC DOC) and the New York City Department of Health and Mental Hygiene (NYC DOHMH).

In June 2012, we submitted testimony to this Subcommittee that focused on the significant progress made in providing for mental health treatment in the New York State prisons pursuant to the *DAI v. OMH* settlement agreement, including limiting the placement of individuals with serious mental illness in solitary confinement settings, taking mental illness into account during disciplinary hearings, and creating and expanding residential mental health treatment settings in the prisons. We also addressed the importance of the Special Housing Unit (SHU) Exclusion Law passed by the New York State Legislature.[2] In that testimony we described the history of advances made due to litigation and legislation in New York. We also reported that despite those improvements, we continue to witness ongoing problems with treatment and discipline of individuals with mental illness including under-diagnosis, failure to identify and designate individuals with serious mental illness, and overly punitive disciplinary

[1] *Disability Advocates, Inc. v. New York State Office of Mental Health*, No. 1:02-cv-04002 (S.D.N.Y. 2007) was brought by Disability Advocates, Inc., the Prisoners' Rights Project of the Legal Aid Society, Prisoners' Legal Services of New York, and the law firm of Davis Polk & Wardwell.

[2] The SHU Exclusion Law provisions are codified as amendments to N.Y. Mental Hyg. Law § 45 (McKinney 2011) and N.Y. Correct. Law §§ 2, 137.6, 401, 401-a (McKinney 2011).

sanctions imposed against many individuals with mental illness. Our 2012 testimony provided information on improvements and recommendations for making further advances that could build on our own efforts.[3]

This testimony will focus on new developments and reports out of New York which reflect the urgency of continued action to implement meaningful reform. Since 2012, progress remains slow despite the fact that evidence regarding the harmful effects of solitary confinement in New York continues to mount.[4] We urge the Subcommittee to support reform efforts in New York and across the country. Federal support for the collection and dissemination of data on the use of solitary confinement (in all its forms – punitive/disciplinary segregation, administrative segregation, protective custody, etc.) will provide essential information on the harmful lengths of stays in solitary and their human and fiscal costs; data collection on alternatives to solitary confinement will ensure that valid evidence-based rehabilitation programs are identified and may then be replicated; and outcome data from correction policies that limit the use of solitary confinement will assist in encouraging rule changes that will create humane, safe and cost-effective corrections policies.

New York State Prisons

Prisoners who suffer from serious mental illness should not be housed in solitary confinement in prisons or jails and we must begin to reconsider the use of solitary confinement for *all* prisoners whether diagnosed with a serious mental illness or not. When Judge Lynch[5] approved the *DAI v. OMH* settlement agreement, 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. Despite this admonition from the Federal bench in 2007, DOCCS did not implement changes to its utilization of solitary confinement beyond what was embodied in the

[3] *See* Testimony to this Subcommittee of The Legal Aid Society, Prisoners' Rights Project, June 19, 2012.

[4] *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; Yaroshefsky, *Rethinking Rikers – Moving from a Correctional to a Therapeutic Model for Youth - Proposal for Rule-Making Report for the NYC Board of Correction* (January 2014); Gilligan, Lee, *Report to the New York Board of Correction* (Sept. 2013); New York Civil Liberties Union, *"Boxed In – The True Cost of Extreme Isolation in New York's Prisons"* available at: http://nyclu.org/publications/report-boxed-true -cost-of-extreme-isolation-new-yorks-prisons-2012.

[5] Judge Gerard E. Lynch, then of the United States District Court for the Southern District of New York, now serving on the United States Court of Appeals for the Second Circuit.

settlement of the *DAI v. OMH* litigation and then in the SHU Exclusion law until additional litigation was pursued by the New York Civil Liberties Union (NYCLU) and others.

In the NYCLU case, *Peoples v. Fischer*, No. 11 Civ. 2694 (S.D.N.Y. 2013), an interim agreement ("Stipulation for a Stay With Conditions") was entered on February 19, 2014.[6] The agreement suspends the litigation for a period of two years during which the use of solitary confinement in the prisons will be studied and reviewed collaboratively with two nationally recognized experts (Dr. James Austin and Eldon Vail).[7] During the two year period, DOCCS will no longer place pregnant women or individuals who are 18 years or younger into solitary confinement and will limit to 30 days SHU sentences of individuals with developmental and cognitive disabilities. The reforms for young individuals and individuals with developmental disabilities are similar to the protections provided to individuals with serious mental illness pursuant to the SHU Exclusion Law which include diversion to less restrictive housing with daily out-of-cell programming. In addition, new guidelines will be implemented controlling the length of isolation sentences for each specific rule violation. The "sentencing" guidelines are not yet public. Whether these interim measures will lead to further more substantial reforms must await the conclusion of this litigation.

We are pleased that New York State is taking additional steps toward reform of solitary confinement in the state prisons and hope that prior reticence toward valid reform will be abated with the guidance from the experts as they review the security bases for the extremely long sentences to solitary that are common in New York's prisons. However, it is substantial and comprehensive reform that must be the goal. Models for valid, safe and humane policies that provide alternatives to solitary confinement are increasing, proving effective and should be replicated in New York and other jurisdictions.[8]

The Humane Alternatives to Long-Term (HALT) Solitary Confinement Act

Newly proposed legislation in New York, the HALT Solitary Confinement Act, A08588 (Aubry) / S06466 (Perkins), provides such a model for comprehensive reform of prison and jail policies and elimination of harmful long-term isolation. The HALT Solitary Confinement Act (HALT) limits isolated confinement to no more than 15 consecutive days nor 20 days total in any 60 day period.[9] Pursuant to HALT, any person who needs to be separated from general

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[6] *Peoples, et. al. v. Fischer*, 11-CV-2964 (SAS), Stipulation for a Stay with Conditions is available at: http://www.nyclu.org/files/releases/Solitary_Stipulation.pdf.

[7] Dr. James Austin is President of the JFA Institute and an expert in classification of prisoners. His work as an expert for the ACLU in an action against the Mississippi Department of Correction significantly reduced the use of solitary confinement in Mississippi. Eldon Vail is the former chief of the Washington State Department of Corrections.

[8] Maine voluntarily reduced confinement in its supermax unit by more than 60 percent and Mississippi reduced its use of solitary confinement by 75 percent and closed a supermax unit. Both states, however, continue to house prisoners in extreme isolation. See Cassella and Ridgweay, *In States That "Reduce" Their Use of Solitary Confinement, Suffering Continues for Those Left Behind*, available at: http://solitarywatch.com/2013/11/13/states-reduced-use-solitary-confinement-suffering-continues-left-behind/. Connecticut and Maine prohibit the solitary confinement of juveniles. CONN. GEN. STAT. ANN. § 46B-133(e), ME. REV. STAT. ANN. TIT. 34 § 3032(5).

[9] The U.N. Special Rapporteur on Torture has defined any use of solitary beyond 15 days to amount to torture or cruel, inhuman or degrading treatment. See Interim report prepared by the Special Rapporteur of the Human Rights

population for a longer period is diverted to a residential rehabilitation unit (RRU) that provides programs, therapy and support. HALT provides *inter alia* criteria for limiting placement into isolation or an RRU, bans vulnerable populations from isolation (those under 21 years old, 55 years or older, with physical, mental or medical disability, pregnant women, and individuals perceived to be LGBTI), creates enhanced due process protections during the disciplinary hearing process, requires training of staff, oversight by the New York State Justice Center for the Protection of People with Special Needs,[10] and public reporting on the number, categories and lengths of stay of prisoners in isolation and in the RRUs.[11]

New York City Jails

In total disregard of reforms implemented in the New York State prisons for individuals with serious mental illness, as well as reforms around the country reducing reliance on solitary confinement, under the Bloomberg Administration, the NYC DOC increased its use of solitary confinement (punitive segregation).[12] The percentage of the New York City jail population in solitary confinement increased from 2.7% in 2004 to 7.5% in 2013. The number of solitary confinement beds increased in number from 614 in 2007 to 998 in 2013. At the same time, approximately 40% of the individuals incarcerated in the City jails were reported to have a psychiatric diagnosis with many of that number suffering from major mental illness.[13]

Because of failure of the prior City Administration to solve, or even make progress towards solving, the long-standing problem of inhumanely housing individuals with mental illness in punitive solitary confinement settings in the City jails, and its increased reliance on solitary confinement of *all* types of prisoners, advocates in New York including the Prisoners' Rights Project of The Legal Aid Society formed a community organization/umbrella group called the NYC Jails Action Coalition (JAC). On April 9, 2013, JAC petitioned[14] the City Board of Correction to implement new rules regarding solitary confinement to be made part of the jail

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Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E.Méndez, available at: http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf.

[10] The New York State Justice Center for the Protection of People with Special Needs is a state agency authorized to monitor, investigate and respond to abuse of vulnerable persons and to make recommendations to positively impact the safety of service recipients and the employees who are entrusted with their care.

[11] The Humane Alternatives to Long-Term Solitary Confinement Act is available at: http://open.nysenate.gov/legislation/bill/A8588-2013.

[12] The prior City Administration was aware that even as crime in NYC had declined, individuals with mental illnesses were an increasing percentage of the City's jail population. In March 2011, NYC sought assistance for a study concerning individuals with mental illness in the NYC jails from The Justice Center of The Council of State Governments. *Improving Outcomes for People with Mental Illnesses Involved with New York City's Criminal Court and Correction Systems* was completed in December 2012. The CSG Report findings included that individuals with mental illness had longer (double) lengths of stay and were less likely to make bail than individuals with no mental illness. It identified failures in linking individuals with mental illness to alternatives to incarceration, and a lack of sufficient community alternatives willing to serve people involved in the criminal justice system. The report is available at: http://www.nyc.gov/html/doc/html/events/FINAL_NYC_Report_12_22_2012.pdf.

[13] Gilligan and Lee, *supra* note 3 at p. 3.

[14] The JAC Petition for Rule-Making is available at: http://www.nycjac.org/storage/JAC%20Petition%20to%20BOC.pdf.

Minimum Standards.[15] After the JAC petition was filed, the NYC DOC took some minimal steps towards reform; the Board of Correction, its experts and its staff have investigated and agreed to initiate rule-making to solve harmful, dangerous, and abusive use of solitary confinement in the jails; and a study of solitary confinement and the risk of self-harm was conducted and published by employees of NYC DOHMH.[16] All of the investigations, reports and studies identify alarming failures by the prior Bloomberg Administration to end abusive and dangerous conditions in the City jails.

In September 2013, a report to the New York City Board of Correction by their mental health experts, Drs. James Gilligan and Bandy Lee, reported on the large numbers of individuals with mental illness in solitary confinement in the City jails and the failure to provide treatment in accordance with the current Minimum Standards.[17] Based on what they observed in the jails, Drs. Gilligan and Lee recommended that no individuals with mental illness should be placed in solitary confinement, that no individuals *at all* should be subjected to the prolonged solitary confinement in use in the City jails because *"it is inherently pathogenic – it is a form of causing mental illness*."[18] They reported on the reforms implemented by NYC DOC: the creation of a 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. The doctors reported that CAPS was far too small for the population that would need a therapeutic alternative placement and should be expanded, and that the RHU was a complete failure and non-therapeutic. The report recommended elimination of the RHU model because it remains punitive in nature and does not grant any relief from the use of solitary confinement. The report detailed the lack of access to treatment (even in the purportedly therapeutic RHU), the lack of an appropriate range of available treatment modalities, and the utter lack of a physical environment conducive to providing confidential treatment in a clean and private space.

Drs. Gilligan and Lee chillingly detail the violent culture in the NYC Jails: "[a]ll too many of the officers that we observed appeared to us to make it clear that they were quite willing to accept an invitation to a fight, or to regard it as a normal response within the cultural norms of the jail."[19] During their investigation they witnessed an adolescent in the RHU becoming increasingly agitated in his cell – first banging his arms and legs on his cell door then his whole body, ripping up a sheet, wrapping his arms, legs and then neck as if preparing to hang himself. No NYC DOC staff responded until Drs. Gilligan and Lee intervened. Shockingly (since the RHU is supposed to be a therapeutic alternative to solitary confinement for individuals with mental illness), the officer staff's first response was to pull out a can of mace. The doctors had to intervene and insist that this was not necessary and that mental health staff should be notified. The violent response of staff to the individuals in their care, followed by severe punishment with solitary confinement, was identified as "the mutually self-defeating vicious cycle that develops between inmates and correction officers, in which the more violently an inmate behaves, the

[15] The Board of Correction establishes and ensures compliance with minimum standards regulating conditions of confinement and correctional health and mental health care in all City correctional facilities.

[16] See Kaba, Lewis, et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, *supra* note 3.

[17] Gilligan, Lee, *supra* note 3.

[18] *Id.* at p. 6.

[19] *Id.* at p. 16.

more seriously he is punished, and the more seriously he is punished, the more violent he becomes." It is a perpetual vicious cycle that fuels continued violent conduct. In the face of overwhelming lack of appropriate care and treatment, the doctors' report calls for significant changes in policy, culture and training of staff.

Two additional reports prepared by and for the Board of Correction concern the adolescent population of the New York City jails.[20] *Three Adolescents with Mental Illness in Punitive Segregation at Rikers Island* was written by members of the Board of Correction staff and details the poor quality of mental health treatment and delivery of treatment services for three children with mental illness while held in solitary confinement settings in the NYC jails.[21] *Rethinking Rikers: Moving from a Correctional to a Therapeutic Model for Youth* was prepared by Professor Ellen Yaroshefsky with assistance from students at Cardozo Law School and provides examples from New York State and other states to use as a basis for eliminating the use of solitary confinement for youth and to shift to a therapeutic approach with practices that are specialized for and dedicated to youth rehabilitation.[22] Similarly to the findings in the report of Drs. Gilligan and Lee, *Rethinking Rikers* reports on the failed policy and over-utilization of solitary confinement and calls for a "much-needed cultural transformation on Rikers Island."[23]

Solitary Confinement and Risk of Self-Harm Among Jail Inmates reports on a study conducted by employees of NYC DOHMH.[24] The report makes numerous findings that illustrate that solitary confinement is a dangerous and self-defeating practice:

- The risk of self-harm and potentially fatal self-harm associated with solitary confinement was higher than outside solitary, independent of prisoners' mental illness status and age group.

- Self-harm is used as a means to avoid the rigors of solitary confinement – inmates reported a willingness to continue to do anything to escape solitary confinement.

- Patients with mental illness become trapped in solitary confinement, earning new infractions resulting in more time in solitary.[25]

The report indicates a need to reconsider the use of solitary confinement as punishment in jails "especially for those with SMI and for adolescents," and cites to the American Psychiatric Association and American Academy of Child Adolescent Psychiatry as professional societies that recommend against the use of solitary confinement for adolescents and individuals with

[20] New York is one of only two states in the country to treat 16 and 17-year olds as adults in its courts.

[21] *Staff Report: Three Adolescents with Mental Illness in Punitive Segregation at Rikers Island,* CITY OF NEW YORK BD. OF CORRECTION (Oct. 2013), available at http://www.nyc.gov/html/boc/downloads/pdf/reports/Three_Adolescents_BOC_staff_report.pdf.

[22] *See* Yaroshefsky, *Rethinking Rikers*, *supra* note 3.

[23] *Id.* at p. 48.

[24] See Kaba, Lewis, et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, *supra* note 3.

[25] The study includes the "extreme" example of a patient breaking a sprinkler head to use to self-harm and receiving an institutional infraction as well as a new criminal charge for the destruction of government property. *Id.* at p. 446.

serious mental illness.[26] It then goes on to describe the creation of CAPS and RHU as reforms that will "provide an opportunity to evaluate the effect of increased clinical management and decreased reliance on solitary confinement as a means to reduce self-harm and other behaviors among inmates with mental illness."

As with steps towards reform in the New York State prisons, we are pleased that the NYC DOC is taking some steps toward reform of solitary confinement. The first reports about the CAPS unit indicate that it appears to provide a therapeutic setting far different than solitary confinement. However, admissions to the CAPS unit remain extremely low despite the large population of individuals with mental illness in need of release from solitary confinement and of its therapeutic programming. The RHUs continue to be extremely punitive in nature and are not providing a respite to long terms of isolation for the individuals with mental illness housed in them. In conjunction with implementation of the RHUs, changes were made to the sentence structure for disciplinary sentences. Although there was a brief period of reduced sentences, those changes were short-lived; sentences are increasing and very harsh sentences continue to be meted out.

The implementation of CAPS and RHU and the changes to disciplinary sentencing simply do not comprise the needed comprehensive reforms that address the root problems of far too many individuals with mental illness ending up in the criminal justice system or the failure to respond to their needs in the jails in a non-punitive manner. Necessary reforms include training DOC staff to work with individuals with mental illness in an appropriate and humane manner rather than in a punitive (and all too commonly violent) manner; changing police and bail policies to reduce the number of individuals with mental illness committed to the City jails; and sufficient alternatives to incarceration to move individuals with mental health needs out of the criminal justice system, since the need is for medical and social service interventions.

The existing reforms also do not reflect the substantial and comprehensive reform to the use of solitary confinement needed in the NYC jails and now repeatedly identified in the described reports and studies.

JAC Petition for Rule-Making in New York City

The HALT Solitary Act (described above) and the JAC Petition for Rule-Making provide models for comprehensive reform of prison and jail policies and elimination of harmful long-term isolation. The JAC Petition proposes significant limits on the use of solitary confinement, places a 15 day limit on each sentence with no more than 60 consecutive days permitted, provides for 4 hours out-of-cell in solitary confinement, excludes vulnerable populations (under 25 years old, and individuals with mental, physical or medical disabilities), provides for alternative safety restrictions for vulnerable populations which require 8 hours out-of-cell daily and a program of positive incentives, enhanced due process requirements at disciplinary and

[26] *Id.* at p. 447.

other hearings, and public reporting on the use of solitary confinement and alternative safety restrictions.[27]

We are hopeful that when the new City Commissioner is appointed substantial and comprehensive reforms of the failed policies of the prior Bloomberg Administration can proceed. We are hopeful that the rule-making initiative of the Board of Correction will serve to implement reforms recommended in the JAC Petition and put an end to the overly punitive response to *all* individuals in the NYC Jails, and will end the use of isolated confinement for individuals with disabilities and for individuals under the age of 25. The need for comprehensive reform is clearly identified in each of the recent studies and reports on the NYC jails. The City should also change police and bail policies to reduce the number of individuals with mental illness who are relegated to the City jails, and provide sufficient alternatives to incarceration to move individuals with mental health needs out of the criminal justice system and provide the medical and social service interventions that they need and that will better serve society than locking them up in institutions that do not adequately address their problems.

The advocates in NYC will continue to push for genuine comprehensive reform, increased transparency and more community involvement in designing and implementing jail reforms.

Conclusion

We urge the Subcommittee to support solitary confinement reform efforts in New York and across the country. Federal support for the collection and dissemination of data on the use of solitary confinement (in all its forms – punitive/disciplinary segregation, administrative segregation, protective custody etc.) will provide essential information on the harmful lengths of stays in solitary and their human and fiscal costs; data collection on alternatives to solitary confinement will ensure that valid evidence-based rehabilitation programs are identified and may then be replicated; and outcome data from correction policies that limit the use of solitary confinement will assist in encouraging rule changes that will create humane, safe and cost-effective corrections policies. In order to achieve comprehensive reform we make the following recommendations to the Subcommittee:

Increase transparency and publicly available information about solitary confinement:

- Provide Federal funding for the study of the costs and effects of solitary confinement including barriers to reentry and recidivism.
- Provide for public reporting by the Bureau of Justice Statistics on the use and cost of solitary confinement nation-wide.
- Support legislative and other initiatives to publicly report on use of solitary confinement in jails and prisons.

[27] The JAC Petition for Rule-Making is available at: http://www.nycjac.org/storage/JAC%20Petition%20to%20BOC.pdf.

- Provide funding and other support for implementation of independent oversight agencies for jails and prisons.

Support efforts to end long-term solitary confinement:

- Federally fund comprehensive evidence-based initiatives to reform the use of solitary confinement (with public reporting on outcomes) and provide enhanced programming.

- Support efforts to implement legislation, correction policy, regulations and other rules to limit the use of all forms of isolation in prisons, jails and other detention facilities and to ban solitary confinement of vulnerable populations.

- Federally fund correction staff training that includes non-violent de-escalation interventions and skills for working with trauma victims and individuals with mental illness and other disabilities.

I thank the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights for attention to the important issue of solitary confinement in our prisons and jails. I appreciate the opportunity to provide this written testimony.

Dated: February 25, 2014

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