THE LEGAL AID SOCIETY

TESTIMONY

The Council of the City of New York

Committee on Fire and Criminal Justice Services

Int 0292-A -2014 - A Local Law to amend the administrative code of the city of New York, in relation to requiring the commissioner of correction, in coordination with the commissioner of health and mental hygiene, to post a quarterly report on its website regarding punitive segregation, restricted housing and clinical alternative to punitive segregation housing statistics for city jails.

AND

T2014-1633 Resolution calling on the New York City Department of Correction to end the practice of placing individuals returning to City jails into punitive segregation, also known as solitary confinement, to complete time owed.

August 20, 2014
New York, New York

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Testimony of the Legal Aid Society

Before The New York City Council
Committee on Fire and Criminal Justice Services

August 20, 2014

Thank you for the opportunity to offer this testimony today. We testify in support of the pending legislation to amend the administrative code of the City of New York in relation to requiring the Commissioner of Correction, in coordination with the Commissioner of Health and Mental Hygiene, to post a quarterly statistical report on its website regarding punitive segregation, restricted housing and clinical alternative to punitive segregation housing statistics for City jails and in support of the resolution calling on the New York City Department of Correction to end the practice of placing individuals returning to City jails into punitive segregation, also known as solitary confinement, to complete time "owed" from prior periods of incarceration. We submit this testimony on behalf of The Legal Aid Society, and thank Chair Elizabeth S. Crowley, and the Committee on Fire and Criminal Justice Services for inviting our thoughts on the subject.

The Criminal Practice ("CP") of The Legal Aid Society serves as the primary defender of indigent people prosecuted in the State court system and for parole violations in administrative proceedings at Rikers Island. CDP provides criminal defense representation in approximately 230,000 cases per year. CDP also provides services for clients challenging punitive segregation sentences while in City custody. CDP has daily contacts with clients and their families, frequent interactions with the courts, social service providers, and State and City agencies, including the New York City Police Department ("NYPD"), the New York City Department of Probation, the New York City Department of Correction, the New York State Division of Parole and the various District Attorneys' Offices.

The Prisoners' Rights Project ("PRP") of The Legal Aid Society has addressed problems in the New York City jails for more than 40 years. Through advocacy with the Department of Correction ("DOC") and the Department of Health and Mental Hygiene ("DOHMH"), individual and class action lawsuits, PRP has sought to improve medical and mental health care and to reform the systems for oversight of the use of force and violence in the jails. Each week PRP receives and investigates numerous requests for assistance from individuals incarcerated in the City jails. Years of experience, including daily contact with inmates and their families, has given The Legal Aid Society a firsthand view of problems in the New York City jails. It is on this basis that we offer these comments to legislators and all New Yorkers.

The Need for Increased Transparency, Communication and Reporting

Int 0292-A - 2014 - A Local Law to amend the administrative code of the city of New York, in relation to requiring the commissioner of correction, in coordination with the commissioner of health and mental hygiene, to post a quarterly report on its website regarding punitive segregation, restricted housing and clinical alternative to punitive segregation housing statistics for city jails.

This legislation should not be controversial. It proposes that DOC and DOHMH should be responsible for collecting vital data about solitary confinement in our jails and should post

that information publicly on the web. Collecting and sharing the information will permit the community to understand the utilization and consequences of use of punitive segregation in our jails. The collection and dissemination of the proposed data on the use of punitive segregation will provide essential information on the lengths of stays in solitary confinement and their human and fiscal costs. This data must be collected by DOC and DOHMH in order to inform themselves regarding the consequences and effects of jail policies. The data should be public so that the proposals made by DOC and DOHMH can be subject to rational and informed input from the community.

Valid data about lengths of stay, transfers from mental observation housing, uses of force, self-harm and suicide is an essential prerequisite to the development of appropriate reforms and policy initiatives for safe management of the incarcerated population. The disaggregation of data by facility and program will assist the DOC and DOHMH in identifying specific programs or jails where there are training needs, additional staffing needs or needs for other remedies for identified problems. DOHMH staff described the Clinical Alternatives to Punitive Segregation ("CAPS") and Restrictive Housing Units ("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."[1] Compiling relevant data and making it public will help both the agency and the public judge whether these programs are accomplishing their purposes. The amendments made to the legislation include data collection about self-harm and other behaviors which are essential to ensure that valid evidence-based rehabilitation programs are identified and may then be replicated. This 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 that do not rely on harmful isolated confinement.

Moreover, the legislation provides for appropriate transparency about our City jails and appears to be consistent with the intent of the City's Open Data Law passed in March of 2012.

For all of these reasons, the legislation should be passed.

The Need for Reduced Reliance on Punitive Segregation: an End to Imposition of Time Owed ("Old Bing Time")

We support the City Council resolution that calls on the New York City Department of Correction to end the practice of placing individuals returning to City jails into punitive segregation to complete time owed ("old bing time"). This practice of imposing punishment weeks and months or longer after misconduct is far too attenuated to be effective. Individuals reentering DOC custody should, as a general rule, be treated as having a clean slate; if they follow institutional rules they should remain in general population and not be punished with isolation. DOC Directive 6500R-B provides only that individuals who return to jail may be required to complete the unfinished balance of punitive segregation time from prior incarcerations with no guidance as to when and whether such action is appropriate.[2] The

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[1]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.

[2]Directive 6500R-B III (D)(5) states: "If an inmate is released on bail or on his/her own recognizance, is discharged, or is transferred to the custody of another jurisdiction or agency before he/she finishes serving his/her Punitive Segregation sentence, and/or before he/she makes restitution in accordance with a penalty imposed as a result of a

imposition of "old bing time" is frequently greatly removed in time from the infraction and has no significant connection to the current incarceration. The failure to engage in any process to determine a current legitimate institutional need for the imposition of an old disciplinary sanction is inadequate and lacks any legitimate correctional rationale. We believe that this is a violation of procedural due process rights under the Fourteenth Amendment. Absent a legitimate institutional need determined at a current due process hearing, imposition of "old bing time" likewise violates substantive due process due to the severity of the punishment relative to any demonstrated need.

Punitive segregation, the isolation of an individual alone in a small cell without benefit of programming or human interaction is known to cause serious physical, psychological, and developmental harm especially to those who are more vulnerable by reason of youth or mental health status.[3] DOHMH's study of DOC, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*[4] 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 in 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 do anything to escape solitary confinement.
- Patients with mental illness become trapped in solitary confinement, earning new infractions resulting in more time in solitary.[5]

The report indicates a need to reconsider the use of solitary confinement as punishment in jails "especially for those with SMI [serious mental illness] and for adolescents," and cites 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 serious mental illness.[6]

The recently released Department of Justice ("DOJ") report concerning adolescent males on Rikers Island, specifically found that "DOC's use of prolonged punitive segregation for

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disciplinary hearing, the transfer will interrupt the sentence being served and the interruption will continue until the inmate returns to the jurisdiction of the Department, at which time he/she may be required to serve the balance owed and/or finish making restitution."

[3]In September 2013, a report to the BOC 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. 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."* Gilligan, Lee, *Report to the New York Board of Correction* (Sept. 2013) at p. 6. See also Testimony of The Legal Aid Society to The New York City Council Committee on Fire and Criminal Justice Services Jointly with the Committee on Health and the Committee on Mental Health, Developmental Disability, Alcoholism, Substance Abuse and Disability Services (June 12, 2014).

[4] See Kaba, Lewis, et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates, supra* note 1.

[5]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.

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

adolescent inmates is excessive and inappropriate." (DOJ 8/4/2014 Report, p. 4.) The DOJ did not focus on the inmate disciplinary system. However, it noted that "based on the volume of infractions, the pattern and practice of false use of force reporting, and inmate reports of staff pressuring them not to report incidents, we believe the Department should take steps to ensure the integrity of the disciplinary process." (DOJ 8/4/2014 Report, fn 45 p. 49.)[7]

Moreover, although DOC has stated that it applies old bing time only in a limited and selective manner, our investigations show that the stated limits are not observed. DOC reported during the March 2012 meeting of the New York City Board of Correction ("BOC") that it was expunging historical time owed for infractions committed during previous incarcerations. In October 2013, DOC reported to the BOC that after two years, infractions for assaults on staff, inmate on inmate assaults that result in injury, and infractions that involve weapons, will be expunged. And, in June 2013, DOC reported that all other infractions are expunged after one year.

These stated reforms have not been carried out in a consistent manner at the facility level and fall short of the needed reform. For example, from January 2012 to July 2012, one of our clients served almost 7 months of old bing time that included sanctions from disciplinary infractions dating as far back as 1999. A client who returned to City custody in October 2013 was placed into punitive segregation for infractions that were over two years old or were non-violent offenses. From July 2013, until his release from custody in May of 2014, a client served old bing time for a 450 day sanction that was imposed in 2002-2003. All of these disciplinary sanctions should have been expunged under the guidelines DOC has reported to the BOC.

In May 2014, one of our clients with mental illness was transferred repeatedly between jails and programs. Finally, he was placed into the Clinical Alternatives to Punitive Segregation ("CAPS") unit, where he reported doing well despite the runaround (that included several lengthy stays in intake areas) that preceded his CAPS placement. But he was then removed from CAPS because it was found that he owed "old bing time" from a prior incarceration. This old punitive segregation time should not have impacted his CAPS placement – no one is in CAPS who is not serving punitive segregation time. Yet he was transferred to the George R. Vierno Center ("GRVC") RHU, which did not provide sufficient clinical interventions for his mental health treatment needs. Our attempts to get him back into the CAPS program were not heeded despite our expressed concerns about prior acts of self-harm. Our concerns were well placed: in early June this client was hospitalized in the Bellevue Hospital Prison Ward after committing another act of self-harm while in the RHU. When an individual is determined to be clinically appropriate for placement in CAPS, he should stay there. The imposition of "old bing time" – a policy alleged to be changing - should not have interfered with a needed clinical placement.

[7]The DOJ also cautioned that its "focus on the adolescent population should not be interpreted as an exoneration of DOC practices in the jails housing adult inmates. Indeed, ... our investigation suggests the systemic deficiencies identified in this report may exist in equal measure at the other jails on Rikers." (DOJ 8/4/2014 Report, p. 3.)

Conclusion

The collection and dissemination of data on the use of solitary confinement 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. Therefore, the proposed legislation, Int 0292-A – 2014, should be passed.

We support the resolution to end the practice of placing individuals returning to City jails into punitive segregation to complete time owed. Individuals reentering DOC custody should be treated as having a clean slate, so they can avoid punishment if they follow institutional rules. If they violate disciplinary rules, they can be punished for any new misconduct that is committed. Moreover, DOC should reduce its reliance on punitive segregation. The DOC must develop new practices to maintain security and ensure compliance with facility rules without resorting to lengthy harmful isolation. We believe the City Council should adopt the resolution to encourage DOC to change its policy as part of its effort to move away from reliance on punitive segregation as a disciplinary measure.

We thank the Committee for this public forum. The City Council plays and must continue to play an important role in understanding, monitoring and tracking the conditions of confinement for individuals incarcerated in the City jail system.

Dated: August 20, 2014

Written Testimony of

Alexander A. Reinert[1]
Professor of Law
Benjamin N. Cardozo School of Law

Before the

Council of the City of New York
Committee on Fire and Criminal Justice Services

Hearing on

Int 0292-A-2014
T2014-1633

Wednesday, August 20, 2014

[1] Affiliation provided for identification purposes only.

Good morning, my name is Alex Reinert. I live in Brooklyn New York and I am a law professor at the Benjamin N. Cardozo School of Law, where I teach, write, and practice in the area of prisoners' rights, among other things. I am here to offer my support for both resolutions presented before the Committee today, but I will confine my comments to T2014-1633, the resolution to abolish DOC's policy regarding time "owed" in punitive segregation (or what I will call the use of old "Bing" time). It should go without saying that the views I express here are my own.

There are many good reasons to end DOC's practice of holding over unserved punitive segregation time. When it is applied, it is done so arbitrarily. It bears no connection to any legitimate security interests. And it unnecessarily exposes detainees to the harms of solitary confinement, harms which have been understood for more than a century now. But I will confine my remarks to one very basic point: DOC's policy is blatantly unconstitutional. Three minutes is not a long time to explain why, but I will do my best.

The analysis starts with a basic principle: pretrial detainees held in DOC custody may not be punished because "[a] person lawfully committed to pretrial detention has not been adjudged guilty of any crime." *See* Bell v. Wolfish, Bell v. Wolfish, 441 U.S. 520, 536 (1979). Thus, if challenged conditions are punitive, they may not lawfully be applied to pretrial detainees. There is no question, I think that the purpose and effect of DOC's holdover policy is to punish. As such, it may not constitutionally be applied to pretrial detainees. *See, e.g., Peoples v. CCA Detention Centers*, 422 F.3d 1090, 1106 (10th Cir. 2005), *vacated in part on other grounds on rehearing en banc*, 449 F.3d 1097 (2006) ("If an act by a prison official, such as placing the detainee in segregation, is done with an intent to punish, the act constitutes unconstitutional pretrial punishment.").

It might be argued that the use of old Bing time is not meant to punish but is consistent with the alternative and legitimate purpose of maintaining safe and secure correctional facilities. *See*, *e.g.*, Taylor v. Commissioner of New York City Dept. of Corrections, 317 Fed.Appx. 80, 2009 WL 792785, *1 (2d Cir. 2009) (concluding that it was reasonable to segregate pretrial detainee "for his own protection and that of the prison population."); *see also Bell*, 441 U.S. at 540 (maintaining jail security is an appropriate justification for inflicting restrictions on pre-trial detainees). There are many problems with this argument, however.

First, there is no evidence that DOC conducts any inquiry, at the time it imposes the continued sentence of segregation, as to whether imposing the sentence is necessary to ensure a safe and secure correctional system. Indeed, the application of the policy suggests otherwise, for often detainees are subjected to the old Bing time when they are sentenced to punitive segregation for a new infraction. No new inquiry is conducted to determine whether it is necessary for the detainee to serve all or only a portion of the old Bing time, nor is the detainee permitted to be heard as to this issue.

Second, that DOC only looks to unserved portions of sentences issued by Rikers also cuts against the argument that it is meeting the legitimate purpose of security and safety. That DOC only looks to prior sentences issued while the detainee was under its supervision suggests that DOC considers itself the sentencing authority, akin to a sovereign, to whom the detainee "owes" time in the Bing.

Third, if DOC were actually imposing the Bing time based on an assessment of risk to safety and security, it would have to conduct a hearing prior to deciding to segregate the detainee. At that hearing, the detainee would presumably be able to offer evidence that the prior misbehavior is not indicative of a current risk to the security and safety of the facility, or that the

remaining punitive segregation sentence is not an appropriate response to whatever risk exists. None of this occurs, however, again casting doubt on the argument that the use of old Bing time is something other than punishment.

In closing, it is unclear how many other correctional systems operate in the same way as the DOC with respect to prior sentences to segregation. I will note that a similar system was successfully challenged in the District of Massachusetts in 2010. *See* Ford v. Clarke, 746 F.Supp.2d 273 (D. Mass. 2010). Thus, the continued application of DOC's policy exposes the City, and its residents, to the risk of suit by those detainees who have been unconstitutionally subjected to this policy, and with that the financial exposure of a successful lawsuit. One need only read current coverage of the increased cost associated with lawsuits brought against our corrections system to know that this is a real concern. Moreover, the risk to our communities of the continued overuse of punitive isolation, of which the policy regarding old Bing time is only one example, also merits comment. For every time we subject detainees to the harms of isolation we are imposing costs beyond the individual detainee, but on his family, friends, and community.

I thank the Committee for its consideration of this important topic, and urge its members to support resolution T2014-1633.

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. T2014 Res. No. 1633

☒ in favor ☐ in opposition

Date: _____

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Name: DaKem (R.K. Roberts)

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Appearance Card

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