New York State Bar Association
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Memorandum in Support

NYSBA #1 April 20, 2015

A. 1346-A

By: M. of A. O'Donnell
Assembly Committee: Correction
Effective Date: 180th day after it shall have become a law

AN ACT to amend the correction law, in relation to segregated confinement

THE NEW YORK STATE BAR ASSOCIATION SUPPORTS THIS LEGISLATION

The New York State Bar Association (NYSBA) strongly supports this legislation. The NYSBA's House of Delegates in January 2013 approved a Report and Resolution presented by the NYSBA Civil Rights Committee recommending that the NYS Legislature and corrections officials profoundly restrict the use of solitary confinement; adopt strict criteria for its use; prohibit sentences in excess of 15 days; and limit the number of special housing units.[1]

While A.1346-A does not purport to reduce the use of solitary confinement for *all* individuals in the custody of the Department of Corrections and Community Supervision (DOCCS), it does provide limiting language with respect to the general use of solitary confinement, proposing that it only be used "as a measure of last resort" and "for such minimal period as may be necessary for maintenance of order or discipline." Because NYSBA is on record supporting the restricted use of solitary confinement, we write to **SUPPORT** this bill. In addition, the bill prohibits the use of segregated confinement for "juveniles under the age of twenty-one" and for "any person with a mental illness or developmental disability as defined in section 1.03 of the mental hygiene law." Again, because this bill promotes the principals set forth in NYSBA's Resolution on solitary confinement, NYSBA **SUPPORTS** this bill.

We do raise one concern with respect to the proposed definition of "segregated confinement" in Correction Law §2(23), that defines "segregated confinement" as "confinement of an inmate in a special housing unit or a separate keeplock housing unit." This definition fails to set forth the conditions of such confinement and as drafted, this bill only applies to those areas within a state prison that are designated 'special housing units' or 'separate keeplock units.' A simple change in the designation of the confinement could allow the Department of Corrections and Community Supervision (DOCCS) to circumvent what NYSBA perceives as the goal of the legislation, which is to prohibit the placement of certain individuals in solitary confinement. In

[1] New York State Bar Association Committee on Civil Rights Report to the House of Delegates, *Solitary Confinement in New York State*, Presented to and Approved by the NYS Bar Association House of Delegates, January 25, 2013, (hereinafter "NYSBA Report") available at: http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26699.

light of this, NYSBA **urges the addition** of qualifying language that defines segregated confinement as "*any form of keeplock, or cell confinement for more than twelve hours a day, other than in a facility-wide lockdown*."

A.1346-A: Section 1.

Currently, Correction Law §2(23) reads that: "segregated confinement means the disciplinary confinement of an inmate in a special housing unit . . . ." Section 1 of this bill amends Correction Law §2(23) to broaden the definition of "segregated confinement" by striking the word "disciplinary" from the definition. Although segregated confinement within DOCCS has different names, such as protective custody, administrative segregation, or disciplinary confinement, the conditions of the confinement are very similar; most relevant is the fact that all such confinement involves being locked in one's cell for 23 hours a day. NYSBA supports this amendment because it ensures that the restrictions regarding segregated confinement are not limited to just disciplinary confinement, but applicable to all forms of segregated confinement regardless of the name it is given.

A.1346-A: Section 2.

Section 2 of this bill amends the opening paragraph of Correction Law §137(6) by directing the superintendent of any correctional facility to impose segregated confinement only "*as a measure of last resort*" and only "*under supervision of the commissioner*." This bill also proposes inserting the word "*minimal*" in the opening paragraph so as to limit any confinement in any cell or room "*for such minimal period as may be necessary for maintenance of order . . .*" NYSBA embraces this proposed amendment as such limiting language is in line with NYSBA's Resolution which "calls upon all governmental officials charged with the operation of prisons and jails throughout New York State to profoundly restrict the use of long-term solitary confinement, by adopting clear and objective standards to ensure that prisoners are separated from the general prison population only in very limited and very legitimate circumstances and only for the briefest period and under the least restrictive conditions practicable."[2] In addition, the bill would place the onus on the Commissioner of DOCCS to oversee and sign-off on the use of segregated confinement across the State. It is the position of NYSBA that placing the onus on the Commissioner of DOCCS to oversee and sign-off on the use of segregated confinement across the State is prudent and necessary to effect a "top-down" culture change within DOCCS.[3]

Section 2 of this bill also adds paragraph (g) to Correction Law §137(6). Paragraph (g) prohibits segregated confinement for "juveniles under the age of twenty-one" and "any person with a mental illness or a developmental disability as defined in section 1.03 of the mental hygiene law." New York State adult prisons currently house youth who are between 16 and 21 years old who are in the middle and late stages of adolescence as defined by the American Academy of Pediatrics[4] and the National Institute of Mental Health.[5] Until recently, these

[2] *Id.* p. 2. *See also*: New York Civil Liberties Union, "*Boxed In – The True Cost of Extreme Isolation in New York's Prisons*," p. 8. (Oct. 3, 2012), available at: http://www.nyclu.org/publications/report-boxed-true-cost-of-extreme-isolation-new-yorks-prisons-2012.

[3] *Id.* pp. 9-11.

[4] *Id.* pp. 8-9. *See also*: The American Academy of Pediatrics, *Bright Futures, Guidelines for Health Supervision of Infants, Children, and Adolescents*, Third Edition (2008).

adolescents were treated the same as adults – facing disciplinary hearings for any alleged misconduct and/or facing administrative segregation hearings for any perceived threat to security.[6] Over the past two years, however, there have been two cases that have addressed the issue of adolescents under 18 facing solitary confinement: *Peoples v. Fischer* and *Cookhorne v. Fischer.*[7] Together, these cases resulted in significant relief for 16 and 17 year olds who face solitary confinement following disciplinary hearings in NYS prisons. The settlements have resulted, *inter alia*, in abolishing the use of solitary confinement for 16 and 17-year olds by limiting their time of confinement to no more than 18 hours a day during the week and 22 hours a day during the weekend. [8] The *Cookhorne* settlement also resulted in amendments to New York State regulations regarding the discipline of juveniles in state prisons, including mandating that a juvenile's age is a mitigating factor in disciplinary proceedings and requiring that hearing officers include a written record of how a juvenile's age affected the disposition.[9]

While these settlements have improved the way in which 16 & 17 year-olds are treated in New York State prisons, they do not affect 19 & 20 year-olds. Currently, in New York State, there are 2,390 individuals incarcerated in New York State prisons who are under 21 years old, and, of those, only 82 are under the age of 18.[10] In recommending that solitary confinement be profoundly restricted, the NYSBA Report specifically addressed the use of solitary confinement for juveniles. The Report cited to current scientific research "that juveniles lack the culpability of adults because they lack fully developed frontal lobes required for impulse control and because their brain structure is fundamentally and significantly different from that of adults."[11] Moreover, the Report noted that "[d]epriving [juveniles] of normal developmental opportunities, such as social contact, physical exercise and intellectual stimulation for prolonged periods of time, will irreparably damage any prospect they may have for normal development."[12]

More recently, the New York Advisory Committee to the U.S. Commission on Civil Rights issued a report condemning the use of solitary confinement for anyone under the age of 25 and recommending, *inter alia*, that the Department of Justice use its enforcement powers to eliminate solitary confinement in New York for those under 25.[13] Because this bill recognizes the unique physical, mental health, education and programming needs of adolescents involved in the adult prison disciplinary system and the plethora of scientific and medical evidence regarding the effects of solitary confinement on juveniles, NYSBA agrees with the added language.

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[5] National Institute of Mental Health, *The Teen Brain: Still Under Construction*, NIH Publication No.11-4929, (2011).

[6] *See* NYSBA Report, *supra* note 4, at 9.

[7] *Peoples v. Fischer*, Docket No. 11-CV-2694 (S.D.N.Y.)(Scheindlin, J.) (Feb. 19, 2014); *Cookhorne v. Fischer*, Index # 2012-1791 (S.Ct. Erie Co.) (Siwek, J.)(Oct. 17, 2014).

[8] *Cookhorne v. Fischer*, Index # 2012-1791 (S.Ct. Erie Co.) (Siwek, J.)(Oct. 17, 2014).

[9] *Id.*

[10] http://www.doccs.ny.gov/Research/Reports/2014/UnderCustody_Report_2014.pdf.

[11] *See* NYSBA Report, *supra* note 4, at 8.

[12] *Id.*

[13] http://www.usccr.gov/pubs/NY-SAC-Solitary-Confinement-Report-without-Cover.pdf.

NYSBA also agrees with paragraph (g)(ii) of this bill, that prohibits the imposition of solitary confinement on "any person with a mental illness or a developmental disability as defined in section 1.03 of the mental hygiene law." In its Report, NYSBA noted the following:

> It is estimated that roughly 14% of those in isolation are on the NYS Office of Mental Health caseload, meaning that they have been diagnosed with a mental illness. As noted in the NYCLU [New York Civil Liberties Union] report, 'the number of people in extreme isolation with mental health problems would likely be greater if DOCCS was not subject to an important limitation on who it can place in the SHU – prisoners diagnosed as "seriously mentally ill.' But there are many prisoners who suffer from mental illness but have slipped through the cracks and, as a result, have not yet been identified as suffering from a mental illness, and there are still others who have no history of mental illness prior to being placed in solitary confinement, but once there, begin to exhibit symptoms of mental illness. And yet, as was found in the NYCLU report, many of those prisoners are often neglected, ignored or labeled as manipulators. In addition, the report noted that the provision of medical and mental health care to those in isolation is made even more difficult due to the lack of confidentiality and other barriers. When medical personnel come to the cells of prisoners who are being held in isolation, prisoners are required to talk to them through the steel door, within earshot of corrections personnel, and for those in double cells, their bunk mate. Because of this, prisoners who need treatment, often fail to request it. [14]

Because it is clear to NYSBA that solitary confinement harms all individuals, it is imperative that, at the very least, New York State restricts such confinement of our most vulnerable populations. It has been proven that solitary confinement causes mental decompensation. As such, no one with any form of a mental illness or developmental disability, as defined in New York's Mental Hygiene law, should be subjected to such confinement. "The injury done to human beings by subjecting them to solitary confinement has been well documented across multiple forums. . . . courts of law, legal scholars, medical commentators, and independent observers have documented the wide range of deleterious effects that solitary confinement can have on the confined individual."[15] In light of this, NYSBA agrees with this legislative change.

Section 2 of this bill also adds paragraph (h) to Correction Law §137(6). Paragraph (h) states that "[t]he commissioner shall compile and publish comprehensive disaggregated data on the use of segregated confinement, including related suicide attempts and self-harm on a quarterly basis." NYSBA agrees with this amendment in light of NYSBA's Report which found that [a]lthough significant progress has been made over the last several years due to litigation and legislation that has limited DOCCS ability to place seriously mentally ill individuals in solitary confinement, a special report on prison suicide rates in the Poughkeepsie Journal in April 2011 found that 33% of all prison suicides in New York State are committed by individuals who

[14] See NYSBA Report, supra note 4, at 7.

[15] See NYSBA Report, supra note 4, at 11.

are in solitary confinement, and less than 8% of the total prison population is in solitary confinement."[16]

A.1346-A: Section 3.

Finally, A.1346-A proposes an amendment to Correction Law §138(3) limiting the use of segregated confinement by adding the following language: "Facility rules shall state the range of disciplinary sanctions which can be imposed for violation of each rule *but any sanction of segregated confinement shall be for the minimum period necessary for the maintenance of order or discipline*" (amended language in italics). This amended language tracks the language of NYSBA's Resolution by limiting the imposition of solitary confinement for "the briefest period" of time possible.[17]

Based on the fact that this legislation would fulfill NYSBA's Resolution to "call[] upon the State Legislature to . . . adopt appropriate legislation to address the use of solitary confinement,"[18] The New York State Bar Association **SUPPORTS** A.1346-A.

[16] *Id.*, p. 12. Citations omitted.

[17] *Id*. p. 2.

[18] *Id.*