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Cathy Sheehan
Acting Deputy Commissioner
NYS Department of Corrections & Community Supervision
Harriman State Campus
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Re: Proposed Changes to Segregation of Individuals
in New York State Prisons

Dear Acting Deputy Commissioner Sheehan:

We write in response to the request for comments on proposed regulations to revise existing policies governing the use of solitary confinement in New York prisons. We are glad to see that New York is proposing changes to its use of solitary confinement. We write because the reforms are not sufficient to limit the harmful practice of placing people in isolation.

Before detailing our concerns, a word of introduction about us is in order. We offer comments because we at the Arthur Liman Center for Public Interest Law at Yale Law School* have been doing extensive research for several years on the use of solitary confinement and on efforts nationwide to limit its use. Since 2013, we have joined the Association of State Correctional Administrators (ASCA) on a series of surveys of prison systems across the country.¹

* These comments have been prepared by the Arthur Liman Center for Public Interest Law at Yale Law School, and they do not represent the views of the institution. Our affiliation is provided for identification purposes only.

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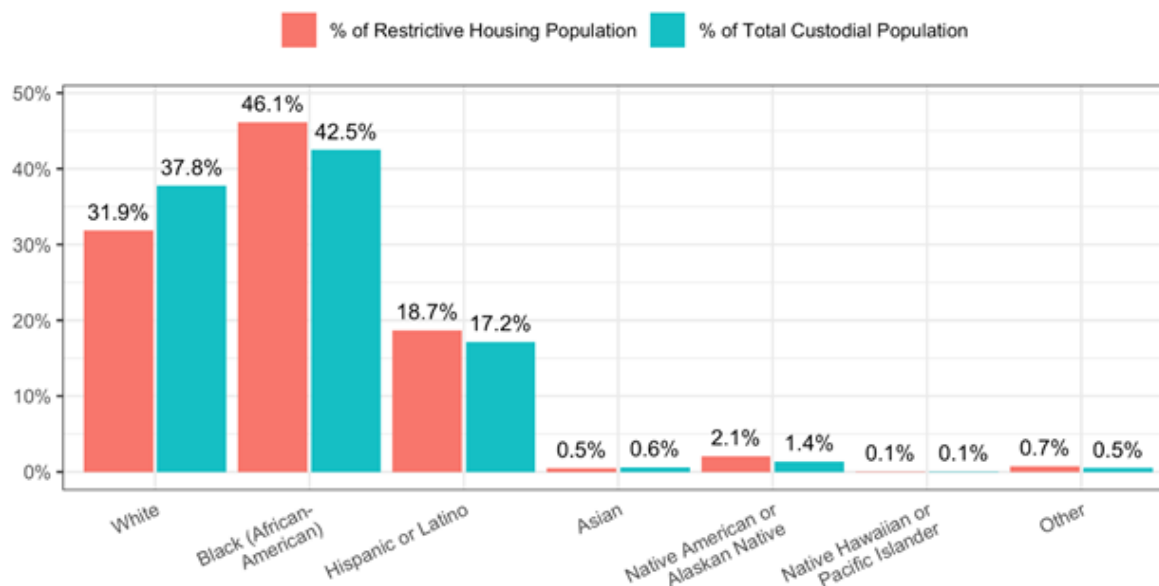
This set of several reports provides the only longitudinal account of the use of solitary confinement in the United States.

What we reported in the most recent monograph, *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell*, published in the fall of 2018, comes from 43 jurisdictions providing data that, in the aggregate, identified 49,197 individuals—4.5% of the people in their custody—who were housed in restrictive housing. The responding jurisdictions held 80.6% of the U.S. prison population. Extrapolating from these numbers to systems not reporting, we estimated that some 61,000 individuals were in isolation in prisons in the fall of 2017.²

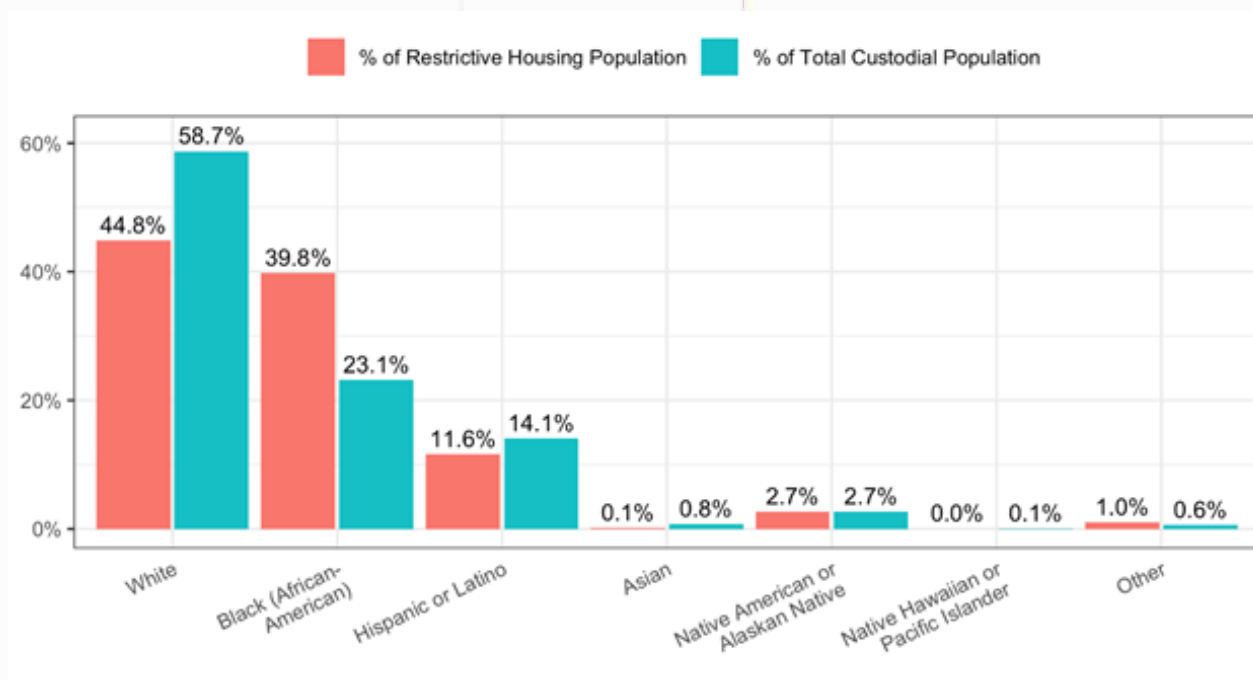
We also learned that more than 4,000 individuals designated by their own systems as “seriously mentally ill” were in restrictive housing.³ Moreover, from the 36 jurisdictions that reported tracking the duration of time people were in solitary confinement, we identified more than 3,500 individuals who were held for more than three years, and almost 2,000 of those people had been in isolation for more than six years.⁴ (We are enclosing these materials and will be sending copies of the 2018 reports to your office by express mail.)

One cannot write about incarceration without focusing on its disproportionate impact on people of color. As the research details, jurisdictions reported that people of color comprised a greater percentage of the restrictive housing population than they did the total prison population. The reverse was true for white prisoners.⁵ The graphs that follow demonstrate this disparity.

Racial and Ethnic Composition of Male Prisoners in Total Custodial Population and in Restrictive Housing Population (n = 33)



**Racial and Ethnic Composition of Female Prisoners in Total Custodial
Population and in Restrictive Housing Population (n = 32)**



In addition to detailing the extensive use of solitary confinement, we have also documented the many efforts underway to curb it. Longitudinal evaluation of the responses to the 2015 and 2017 surveys shows some progress underway in reducing numbers. Forty jurisdictions responded to both surveys, which enabled comparisons. The number of prisoners reported to be in restrictive housing in those forty systems decreased from 56,000 people in 2015 to 47,000 people in 2017. However, the changes are not uniform. In more than two dozen states, the number of people in restrictive housing decreased. In eleven states, the numbers went up.

The 2016 and 2018 ASCA-Liman Reports document that, in many jurisdictions, reforms are underway as a result of legislation, litigation, and policy and practice changes. For example, in 2017, Colorado limited the use of restrictive housing to 15 days maximum and permitted that two-week period for only the most serious violations.⁶ In the same year, Idaho reviewed its prisoners placed in restrictive housing with a goal to reserve placement “only for individuals who posed an imminent threat to the security of the institution.”⁷ North Dakota detailed a 60-70% reduction in the population of its Administrative Segregation Unit.⁸ Ohio discussed its progress as well as the institutional and cultural challenges to reforming the use of isolation in prison.⁹

Further, we have done research on pending and enacted legislation limiting restrictive housing.¹⁰ Many jurisdictions are enacting statutes to reduce significantly the numbers of

individuals in solitary confinement, to shorten the duration of their confinement, and to change the conditions of confinement to limit its isolation and debilitation. That trend reflects the consensus among lawmakers, judges, prison officials, prisoners and their families about the harms of isolation. Whereas solitary confinement was once seen as a solution to the problem of prison discipline, it is now widely recognized as a grave problem to solve.

Simply put, a wealth of data sadly documents that profound isolation is harmful for everyone and that it is harmful in specific ways for certain subpopulations. Changes are underway, and New York State could make a substantial contribution by adopting significant reforms. Abolition is one response, and major efforts to reduce the use of solitary confinement another.

Unfortunately, as we detail below, the draft regulations are not sufficient. The regulations have proposed a timeline that puts reform years off. Moreover, the regulations would allow existing and harmful practices to continue. Further, the prohibition on the use of isolation does not sufficiently protect people the system designates as “seriously mentally ill” or youth aged 18-21. The exclusion for people with disabilities is far too narrow, as it limits this category to a disability that “impairs the individual’s ability to provide self-care.”¹¹ More generally, the regulations do not curb placement in solitary by limiting the grounds to direct threats to the safety of prisoners or staff. The regulations do not require reporting requirements specific enough or oversight to ensure that the reforms are implemented at the staff level. In short, we urge that comprehensive reforms are needed to have New York join in leading the country away from the use of this debilitating practice.

1. Reforms need to be put into place immediately.

The proposed regulations would operate on a timeline that ignores the urgency of the need for change. For example, under the current proposal, a 30-day cap on the use of segregated confinement would not be implemented until October 2022. A 60-day cap would not be implemented until April 2022, and a 90-day cap would not be implemented until October 2021.¹² Capping the amount of time prisoners can be placed in solitary confinement is important. But these times frames would not become relevant for almost two years at the earliest, and a three-year wait to implement a 30-day cap is far too long a delay.

Moreover, instead of articulating the need for urgent reform, imposing 15 days as a hard stop, and putting forth a short transition period, the regulations leave much of the current system in place. What the regulations would authorize in the almost-two-year transition period is placement in segregated confinement for a time period “for no longer than necessary,” which is not otherwise defined.¹³ In other words, no concrete and specified time limits would exist.

2. Proposed time frames permit placement in isolation for too long.

Even after three years, the proposed limits on length of time in solitary confinement would still allow for placement in segregated confinement for up to 30 days. While it is important to limit the amount of time a prisoner can be placed in isolation, 30 days is too long.

The reason to limit time is because isolation is harmful to the health and wellbeing of prisoners, as recognized in many regulations and legislation. As described above, Colorado has prohibited the use of solitary confinement for more than 15 consecutive days.¹⁴ New Jersey implemented legislation in 2019 prohibiting the use of “isolated confinement” for more than 20 consecutive days or 30 days in a 60-day period.¹⁵ Legislation proposed in 2018-2019 in Florida, Oregon, and Pennsylvania, as well as in New York, would ban placement in solitary confinement for more than 15 days, and proposed legislation in Nebraska would ban placement for more than 90 days per year.¹⁶ International rules, which U.S. correctional leaders participated in drafting, also provide that the use of solitary confinement for more than 15 consecutive days shall be prohibited.¹⁷

3. The proposed caps on length of placement do not apply throughout the system and do not account for repeated placements; prolonged isolation would continue.

The regulations refer to “segregated confinement,” defined as “disciplinary confinement” in a “special housing unit or in a separate keeplock unit”; “administrative segregation,” which is defined as “involuntary removal” from general population and placement in a separation unit based on an assessment of risk; and “keeplock confinement,” which is “disciplinary confinement” within “a general population cell or dorm.”¹⁸ The regulations also discuss “residential rehabilitation units,” which are used for “disciplinary sanctions which extend beyond” the provided caps, and “step-down units,” which are meant to prepare prisoners for return to general population or to the community.¹⁹

The proposed caps on placement in segregated confinement would not apply to keeplock confinement in a general population cell or dorm, or to residential rehabilitation units, or step-down units. The regulations thus would allow a regime that, while not called “segregated confinement,” continues to rely on isolating conditions with people in-cell 19 hours a day most days and 22 hours for two or three days a week.

Individuals in both keeplock confinement and residential rehabilitation units would be required to have five hours of out-of-cell time five days a week and two hours for the remaining two days a week.²⁰ Individuals in step-down units would be required to have five hours of out-of-cell time four days a week and two hours on the remaining three days.²¹ This translates to a weekly average of about 20 hours a day in cell, which means that prisoners are still spending the vast majority of their time in-cell.

Further, the regulations regarding keeplock confinement, residential rehabilitation units, and step-down units provide for activities out of cell “in the most congregate setting available.”²² This means individuals might in fact have no interaction with other prisoners. Prisoners in residential rehabilitation units and step-down units also have limited property, visiting, commissary, telephone and correspondence privileges.

In addition, the limits on placement in segregated confinement do not address repeated placement in segregation. Prisoners can be returned to a special housing unit from a residential rehabilitation unit or step-down unit for “chronically failing to comply with the program objectives.”²³ The absence of regulation would allow prisoners to be placed in isolation, removed for short periods of time and returned, without limits on the overall time spent in isolation.

Reforms must place limits on placement in isolation regardless of the name by which it is referred. Limits on length of placement are necessary to prevent prisoners from being kept for long periods of time in solitary confinement by another name.

4. Inadequate restrictions are proposed for the use of isolation for subpopulations.

The regulations define several limits on the use of segregated confinement and administrative segregation for subpopulations referred to as “special populations.” Special populations include individuals housed in adolescent offender facilities; pregnant or post-partum prisoners; and prisoners suffering from a disability that “impairs the individual’s ability to provide self-care within the environment of a correctional facility.”²⁴ Individuals in special populations “shall not be placed” in segregated confinement or administrative segregation “for any length of time.”²⁵

The restrictions are inadequate in that they do not limit placement in keeplock confinement for special populations. Without addressing all the various forms of segregated and isolation housing, special populations could be kept in isolating conditions under the rubric of being in the “general population.”

The restrictions are also inadequate in terms of the populations included. The prohibition on placement of youth covers individuals housed in an adolescent offender facility, which would in most cases exclude individuals aged 18-21. The definition also includes individuals with a disability only if the disability “impairs the individual’s ability to provide self-care within the environment of a correctional facility.” This definition fails to respond to forms of impairment that would make isolation placements harmful to a host of individuals challenged by disabilities.²⁶

The definition of special populations also does not include individuals with serious mental illness. The regulations do not adequately protect such individuals. Under the proposed

regulations, individuals with serious mental illness can still be placed in segregated confinement. They will be diverted to a residential mental health treatment unit only if confinement might exceed 30 days.²⁷ Removal from segregation because of serious mental illness requires an assessment that balances a clinician's opinions as to the prisoner's treatment needs with the safety and security concerns posed by the individual's removal from that unit, rather than prioritizing the mental health treatment of the prisoner.²⁸ The regulations also allow a seriously mentally ill prisoner to be kept in isolation where "removal would pose a substantial risk to the safety of the incarcerated individual or other persons, or a substantial threat to the security of the facility."²⁹ This broad language would allow seriously mentally ill prisoners to remain in solitary confinement even where such placement would exacerbate their mental illness. Further, a prisoner placed in segregation might not be assessed by a mental health clinician for seven days after placement.³⁰

5. Regulations need to impose substantial limits on the grounds for placement in restrictive housing.

Establishing limits on placement is important, but the regulations as proposed do not specify sufficiently narrow bases. The regulations would allow for placement in segregated confinement "for behavior that violates institutional rules and regulations involving conduct that poses an unreasonable risk to the health, safety or security of staff, incarcerated individuals, or security of the facility by:"

(i) causing or attempting to cause injury or death to another person or making a credible threat of such injury or death; (ii) engaging in a sexual act, or compelling or attempting to compel another person to engage in a sexual act; (iii) coercing another, by force or threat of force, to violate any rule; (iv) leading, organizing, inciting, or attempting to cause a riot, insurrection, strike, or other serious disturbance that may result in physical harm to another person, significant property damage or significant interference with facility operations; (v) procuring, possessing, brandishing, or using a weapon that poses a threat to the health, safety, or security of staff, incarcerated individuals, or security of the facility; (vi) procuring, possessing, using or distributing dangerous contraband that poses a threat to the health, safety, or security of staff, incarcerated individuals, or security of the facility; (vii) escaping, attempting to escape or facilitating an escape from a facility, or absconding or attempting to abscond outside of the facility; or (viii) engaging in conduct constituting a felony under the penal law.³¹

The last ground for placement is problematic. The range of offenses constituting a criminal felony is broad and includes a host of non-violent offenses and offenses that, if committed outside of prison, would likely not result in incarceration.

The regulations also allow for placement in administrative segregation if the "individual's continued presence in general population would pose an unreasonable and demonstrable risk to

the safety and security of staff, incarcerated individuals, the facility or would present an unreasonable risk of escape.”³² The regulations do not specify what constitutes an unreasonable and demonstrable risk. The definition allows for placement based on a subjective assessment of a broad and ill-defined standard.

Moreover, section 301.4(a) specifies that the determination of “unreasonable and demonstrable risk” for placement in administrative segregation is to be made “by the facility superintendent, the deputy commissioner for correctional facilities or their designee.” Section 301.4(b) provides that a final written determination after hearing within seven days of placement will be issued by “the deputy commissioner for correctional facilities or his or her designee.” The regulations do not rule out that the same person (the deputy commissioner for correctional services or his or her designee) could be the deciding authority on both the initial placement determination and the review.

Placement in segregation should be limited to circumstances where it is necessary to address direct threats to the safety of the prisoner or other individuals.³³ Further, broad standards are not helpful in constraining placements. Moreover, layers of review, including at the most senior levels of the system, help to ensure the sparing use of solitary confinement.

6. Oversight and mechanisms of implementation are needed.

The regulations require monthly reporting on the total number of people in segregated confinement, in a residential rehabilitation unit, in a step-down unit, and in an adolescent offender separation unit.³⁴ Annual reporting would include the average length of stay in each of the units.³⁵ The regulations do not require reporting on the numbers in administrative segregation or in keeplock confinement. The reports do not appear to include demographic information or information about subpopulations, nor would they include length of stay for individual prisoners. Without such information, the success of the regulations in limiting the use of isolation cannot be assessed. Reporting must capture all forms of isolation, regardless of how the placement is termed. Reporting must also include demographic information and information about subpopulations to ensure that protections for special populations are realized and to ensure that disparities in the use of solitary confinement are not continuing.

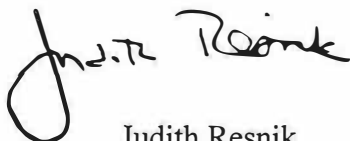
Further, the regulation does not provide for any independent, outside oversight on implementation. Without such independent oversight, and given the loopholes the regulations would create for the continued use of isolating confinement, there is no way to enforce the restrictions on the use of solitary confinement.

7. New York should become a leader in reducing and eliminating solitary confinement.

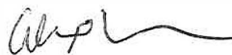
We are glad to see that solitary confinement is an issue of grave concern to the community and to public officials in New York State. Meaningful reforms can be possible with provisions that meet each of the inadequacies outlined above. Indeed, proposed legislation in New York State provides an example, as it would clearly restrict the use of isolation for people in prison: prohibiting its use for more than 15 consecutive days or more than 20 days in a 60-day period; prohibiting placement for youth aged 21 or younger, older prisoners, pregnant or post-partum prisoners, and prisoners with mental health needs or disabilities; placing clear limits on the use of alternative separation units; narrowing the criteria for placement in isolation; and requiring independent, outside oversight of the use of solitary confinement.³⁶

We look forward to learning of the next steps in New York's reform efforts, and if we can be of help, we would be glad to do so.

Sincerely,



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Alexandra Harrington
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Anna VanCleave
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Enc. *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell*, https://law.yale.edu/sites/default/files/area/center/liman/document/asca_liman_2018_restrictive_housing_released_oct_2018.pdf

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https://law.yale.edu/sites/default/files/area/center/liman/document/asca_liman_2018_restrictive_housing_efforts_in_four_jurisdictions_to_make_changes.pdf

Regulating Restrictive Housing: State and Federal Legislation on Solitary Confinement as of July 1, 2019, https://law.yale.edu/sites/default/files/area/center/liman/document/restrictive_housing_legislation_research_brief.pdf

¹ ARTHUR LIMAN PUBLIC INTEREST PROGRAM AT YALE LAW SCHOOL, ADMINISTRATIVE SEGREGATION, DEGREES OF ISOLATION, AND INCARCERATION: A NATIONAL OVERVIEW OF STATE AND FEDERAL CORRECTIONAL POLICIES (June 2013), *available at* [https://law.yale.edu/system/files/area/center/liman/document/Liman_overview_segregation_June_25_2013_TO_POST_FINAL\(1\).pdf](https://law.yale.edu/system/files/area/center/liman/document/Liman_overview_segregation_June_25_2013_TO_POST_FINAL(1).pdf); ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS & ARTHUR LIMAN PUBLIC INTEREST PROGRAM AT YALE LAW SCHOOL, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON (Aug. 2015), *available at* https://law.yale.edu/system/files/documents/pdf/asca-liman_administrative_segregation_report_sep_2_2015.pdf; ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS & ARTHUR LIMAN PUBLIC INTEREST PROGRAM AT YALE LAW SCHOOL, AIMING TO REDUCE TIME-IN-CELL: REPORTS FROM CORRECTIONAL SYSTEMS ON THE NUMBERS OF PRISONERS IN RESTRICTED HOUSING AND ON THE POTENTIAL OF POLICY CHANGES TO BRING ABOUT REFORMS (Nov. 2016), *available at* <https://law.yale.edu/system/files/area/center/liman/document/aimingtoreducetic.pdf>; ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS & ARTHUR LIMAN CENTER FOR PUBLIC INTEREST LAW AT YALE LAW SCHOOL, REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL (Oct. 2018), *available at* https://law.yale.edu/sites/default/files/area/center/liman/document/asca_liman_2018_restrictive_housing_released_oct_2018.pdf [hereinafter ASCA-LIMAN 2018 REFORMING RESTRICTIVE HOUSING]; ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS & ARTHUR LIMAN CENTER FOR PUBLIC INTEREST LAW AT YALE LAW SCHOOL, WORKING TO LIMIT RESTRICTIVE HOUSING: EFFORTS IN FOUR JURISDICTIONS TO MAKE CHANGES (Oct. 2018), *available at* https://law.yale.edu/sites/default/files/area/center/liman/document/asca_liman_2018_restrictive_housing_efforts_in_four_jurisdictions_to_make_changes.pdf [hereinafter WORKING TO LIMIT RESTRICTIVE HOUSING].

² ASCA-LIMAN 2018 REFORMING RESTRICTIVE HOUSING, *supra* note 1, at 4.

³ *Id.* at 48-49.

⁴ *Id.* at 14.

⁵ *Id.* at 23.

⁶ WORKING TO LIMIT RESTRICTIVE HOUSING, *supra* note 1, at 3-4.

⁷ *Id.* at 6.

⁸ *Id.* at 8-10.

⁹ *Id.* at 11-17.

¹⁰ See The Liman Center for Public Interest Law at Yale Law School, *Regulating Restrictive Housing: State and Federal Legislation on Solitary Confinement as of July 1, 2019* (Jul. 2019), *available at* https://law.yale.edu/sites/default/files/area/center/liman/document/restrictive_housing_legislation_research_brief.pdf.

¹¹ Vol. XLI N.Y. Reg. 1-4 (Aug. 28, 2019), [hereinafter Proposed Regulations] § 1.5(w).

¹² *Id.* at § 301.1.

¹³ *Id.*

¹⁴ WORKING TO LIMIT RESTRICTIVE HOUSING, *supra* note 1, at 3-4.

¹⁵ A 314, S 3261, 2018-19 Leg., Reg. Sess. (N.J. 2019).

¹⁶ SB 1402, 2019 Leg., Reg. Sess. (Fla. 2019); A 02500, S 01623, 2019-20 Leg., Reg. Sess. (N.Y. 2019); HB 3186, 2019 Leg., Reg. Sess. (Or. 2019); HB 497, 2019 Leg., Reg. Sess. (Pa. 2019); LB 739, 2019 Leg., Reg. Sess. (Neb. 2019).

¹⁷ United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), U.N. ESC Committee on Crime Prevention and Criminal Justice, 24th Sess., U.N. Doc. E/CN.15/2015/L.6/Rev.1, Rule 43, Rule 44 (May 22, 2015), https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf [hereinafter Nelson Mandela Rules].

¹⁸ Proposed Regulations, *supra* note 11, at §1.5(x), (y), (z).

¹⁹ *Id.* at § 315.1; § 316.1.

²⁰ *Id.* at § 315.2(a); § 301.6(k).

²¹ *Id.* at § 316.3(b)(1).

²² *Id.* at § 315.1; § 316.2.

²³ *Id.* at § 315.2(c)(1); § 316.3(d)(1).

²⁴ *Id.* at § 1.5(w).

²⁵ *Id.* at § 301.1; § 301.4(g).

²⁶ See American Civil Liberties Union, *Caged In: Solitary Confinement's Devastating Harm on People with Physical Disabilities* (2017), available at <https://www.aclu.org/report/caged-devastating-harms-solitary-confinement-prisoners-physical-disabilities>; Nelson Mandela Rules, *supra* note 17, Rule 45 ("solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures).

²⁷ Proposed Regulations, *supra* note 11, at § 319.3(a).

²⁸ *Id.* at § 319.3 (b)(5).

²⁹ *Id.*

³⁰ *Id.* at § 319.3(b)(2) (addressing placement at a level three or level four facility).

³¹ *Id.* at § 250.2 (e), 301.2 (a).

³² *Id.* at § 301.4

³³ The American Correctional Association Restrictive Housing Performance Based Standards provide that “the placement of an inmate in Restrictive Housing shall be limited to those circumstances that pose a direct threat to the safety of persons or a clear threat to the safe and secure operations of the facility”. AMERICAN CORRECTIONAL ASSOCIATION RESTRICTIVE HOUSING PERFORMANCE BASED STANDARDS AUGUST 2016, Rule 4-RH-0001, *available at* <https://www.asca.net/pdffdocs/8.pdf>.

³⁴ Proposed Regulations, *supra* note 11, at § 255.06.

³⁵ *Id.*

³⁶ S 1623, 2019-20 Leg., Reg. Sess. (N.Y. 2019).