

Assessment of Public Comment

In all, the New York State Commission of Correction (hereinafter “Commission”) received numerous formal comments from members of the public, advocacy groups, and members of the New York State Legislature.

A preponderance of the comments received expressed the same three opinions. First, that the proposed regulations are inadequate in that no duration limitations were set for inmate punitive or administrative segregation. Second, that the proposed regulations provide correctional facility administrators “excessive discretion” in imposing punitive or administrative segregation. Finally, the Commission was urged to reformulate the regulations to mirror, and that the New York State Legislature should adopt, the Humane Alternatives to Long-Term (HALT) Solitary Confinement Act (A.3080/S.4784), a bill currently pending in both the New York State Senate and Assembly, that establishes a maximum of 15 consecutive days in solitary confinement, prohibits the use of solitary confinement for inmates 21 and younger, and requires congregate programming for out-of-cell time. Similarly, a commenter urged that the proposed regulations be amended to align with another bill (A.1905A/S.5241) and a companion bill (A.1610/S.4795) that would allow the use of solitary confinement “only as a measure of last resort for the minimum period of time needed to maintain order or discipline in a facility,” and prohibit the use of solitary confinement on inmates under the age of 21, pregnant women and new mothers, inmates afflicted with a physical, developmental or mental disability, and other vulnerable populations.

Correction Law section 137(6), applicable to local correctional facilities by means of Correction Law section 500-k, permits correction officials to “keep any inmate confined in a cell or room ... for such period as may be necessary for maintenance of order or discipline.” The New York State Court of Appeals has held that the Correction Law thus gives correction officials “*broad discretion* in the formulation and implementation of policies relating to security and to the disciplining of inmates [emphasis added].” *Arteaga v. State*, 72 N.Y.2d

212, 217 (1988); see also *Allah v. Coughlin*, 190 A.D.2d 233, 236 (3d. Dept. 1993). Administrative state agencies, such as the Commission, “can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute” being implemented. *Jones v. Berman*, 37 N.Y.2d 42, 53 (1975); see also *McNulty v. Chinlund*, 62 A.D.2d 682, 688 (3d Dept. 1978). Consequently, it has historically been the Commission’s position that the promulgation of regulations that otherwise limit the statutory authority granted exclusively to correction officials would exceed its enabling powers. Nonetheless, it is the Commission’s intention, by adopting the regulations, to ensure that determinations to confine inmates to a cell, or deprive inmates of essential services, are justified and documented, reviewed on a timely basis to assess if continuation is warranted, and reported to the Commission. Thereafter, the Commission’s ability to monitor and oversee such confinement, and the deprivations of essential inmate services, will be sufficient to identify and investigate potential abuses. Nevertheless, the revised rulemaking proposal has expanded the scope of the chief administrative officer’s seven day review of inmate segregation to include inmates “within eight (8) weeks of delivery or pregnancy outcome, mentally or physically disabled, or chronically mentally ill.”

Several received comments requested that the Commission should first hold a public hearing before promulgating the proposed regulations, and criticized the Commission for failing to first consult with recognized experts in the fields of corrections, health and mental health. Additionally, one commenter suggested that the Commission “has not provided an adequate basis to justify” the proposed regulation’s requirement that segregated inmates are provided a presumptive minimum of four (4) hours a day out of their cell. Each of the current members of the Commission has previously served as a county sheriff and have extensively served in other various law enforcement and correctional capacities. Additionally, the disciplines of medicine and psychiatry are well represented on the Commission’s Correctional Medical Review Board, which continues to serve as a vital point of reference to the Commission. Relying on this expertise and intimate

knowledge of the day to day operations of a local correctional facility in New York State, the Commission finds that the regulation serves as an appropriate balance between the inmates' well-being and the operational limitations of the facilities. Other commenters protested that the regulations are not applicable to state prisons. Due to the vast operational differences between state and local correctional facilities, the Commission maintains separate bodies of regulations for each. As compared to local correctional facilities, the authority of the New York State Department of Corrections and Community Supervision (DOCCS) to confine inmates to a cell is more stringently controlled by statute and judicial order, rendering the application of the present regulations to DOCCS facilities without benefit.

Several comments criticized that the regulations lacked specific, additional reporting requirements for inmate cell confinement and essential service deprivation, and also suggested that the proposed regulations should contain requirements that local correctional facilities issue public reports regarding the same. It should be noted that the Commission's specific reporting requirements for local correctional facilities are not contained in the body of regulations, but rather published in the *Reportable Incident Manual for County Jails and the New York City Department of Correction*. By adding "deprivation/limitation of essential services" and "inmate cell confinement" as reportable incident categories in 9 NYCRR section 7022.2, the Commission is now able to establish various reporting requirements on these categories in the manual. To date, any required public reporting by local correctional facilities has been mandated by statute, and the Commission does not find a necessity for such additional regulation.

Similarly, several commenters suggested regulation to provide for required programming of confined inmates during their "out-of-cell" time. It must be noted that this body of regulations applies equally to all local correctional facilities throughout the State, of various resources, from the 6-bed jail in Hamilton County to the expansive facilities of the New York City Department of Correction on Rikers Island. This, coupled with the

transient inmate populations and more frequent court appearances and visitation experienced by local correctional facilities, as compared to state prisons, makes such a requirement currently impractical.

With regard to specific provisions of the regulation, one comment expressed concern that facilities will confuse the provisions of section 7075.4(e), which set forth the requirements for denying minor and pregnant time outside his or her cell, with the provisions of section 7070.7(c), which set forth the permissible instances in which an eligible youth may be denied participation in educational services. As the regulations clearly set forth the required criteria that must be found in each type of determination, the Commission is confident local correctional facilities will be able to comprehend and correctly follow both regulations. Similarly, one comment suggested that provisions be added to the regulations that required health staff to assess inmates placed in segregated confinement. It should be noted that Correction Law section 137(6)(c) currently requires a daily examination of any inmate when confined to a cell in excess of 24 hours. With regard to weekly review of any segregated inmate under the age of eighteen (18) years, an inmate who is known by security, health or mental health personnel to be pregnant, within eight (8) weeks of delivery or pregnancy outcome, mentally or physically disabled, or chronically mentally ill, the revised rulemaking proposal now requires the chief administrative officer to first consult with the jail physician, facility medical director, or other qualified, knowledgeable facility health staff. The same commenter also suggested that the Commission amend its disciplinary rules to accommodate inmates with disabilities to ensure due process of law. The Commission views this as unnecessary, as 9 NYCRR §7006.6(a) currently requires a facility to provide assistance to any inmate who “is non-English speaking, illiterate, or for any other reason is unable to prepare a defense.” With regard to the regulatory provisions allowing the facility chief administrative to render toilets and sinks nonfunctioning, one comment criticized the lack of a required review of any such determination. The Commission agrees that such review is necessary, and the revised rulemaking proposal requires a review and written determination to continue or cease the initial order at intervals not to exceed twenty-four (24) hours.

Lastly, three commenters requested an extension to the proposal's public comment period, to "allow for a more complete analysis of the proposed regulations and to provide all stakeholders with a meaningful opportunity to review, submit comment, and assess what impacts the regulations would have on their respective facilities, staff and inmates." Since publication of the regulatory proposal, members of the Commission's administration met with officials from the New York State Sheriffs' Association, as well as a number of county sheriffs, at which time a productive discussion of the proposed regulations, and the potential impact on facilities, was had. As a result, the Commission is confident that local correctional facility officials have had a sufficient period of time to review and assess the regulations, and Commission staff have answered, and will continue to answer, any questions and concerns.