HARVARD PRISON LEGAL ASSISTANCE PROJECT

HARVARD LAW SCHOOL

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October 30, 2015

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Re: DOC LISTENING SESSIONS – HARVARD PLAP and SMHA COMMENT ON DDU CONFINEMENT (103 CMR 430, *Disciplinary Procedures*)

Dear Ms. Richard:

The student Board of the Harvard Prison Legal Assistance Project thanks the Department of Correction for its invitation to provide feedback on the Department's regulations. We write to make a few comments, and propose a few changes, to the DOC's disciplinary procedures, 103 CMR 430.

I. Awaiting Action Status

We urge the DOC to enact more accountable regulatory oversight over the procedures governing when an inmate is placed on segregated Awaiting Action (AA) status. 103 CMR 430.21 contains several provisions concerning AA, but they currently leave room open for excessive segregation time without adequate checks and accountability.

Superintendents or their designees should at a minimum have to state concretely, in writing, why an inmate is in segregation on AA status. We have seen notices that offer only a vague reference to the pending d-report or investigation, with no clarity as to why the prisoner was so moved and when they will be cleared from AA status. From PLAP's experience, a conclusory notice coupled with a lengthy segregation confinement – often much longer than the sanction ultimately dispensed after a hearing -- discredits this system's legitimacy. Accordingly, PLAP proposes that the DOC cap the time in segregation on AA status at 15 days. Alternatively, the DOC should add a written appeal provision for any inmate held in segregation on AA status for longer than 30 days (the maximum segregation sanction for a non-DDU disciplinary report), allowing the inmate to appeal the adequacy of the justification for continued AA status to the Deputy Commissioner for Classification, with a right to lodge continued appeals to the Deputy Commissioner every 30 days thereafter.

Section 430.21(4) should also make explicit that written reasons must be given if an inmate's AA segregation time is not credited against a disciplinary sanction, and that the presumption is for the time to be credited.

Because the length of a stay in segregation on AA status can well exceed the maximum punishment for a non-DDU disciplinary report, AA status risks becoming a shadow system of illegitimate summary punishment, which damages the credibility and the integrity of the disciplinary process. More robust regulations and effective monitoring would help ensure that segregated AA status is used only to the extent necessary, not as a means for imposing informal punishment.

II. Physical and Mental Health Disciplinary Screening

We urge the DOC to broaden its current disciplinary screening of inmates with physical and mental health problems. Currently, such screening is limited to mental health issues and the closest scrutiny is reserved for those inmates diagnosed with the most severe impairments. 103 CMR 430.09(6); 103 DOC 650.09. Screening should extend more broadly to any case in which a mental or physical health issue is implicated, including where inmates have dementia or a brain injury.

Moreover, there is no clearly set requirement for what any such screening need consist of. Although we have encountered rote, boilerplate statements in the Superintendent's daily briefing notes that ostensibly document the mental health screening of the preceding day's disciplinary reports, such entries do not reveal the depth of the screening. If a meaningful review is lacking, the result could be an inappropriate or even abusive use of the disciplinary process. The DOC should provide for greater operational accountability in this area, especially with the growing number of aging, mentally ill, and physically disabled inmates who are included within the DOC's population.

III. Discovery Process – Access to Recordings

Currently, it is Department policy and practice for a prisoner's legal representative to travel to the prison to watch or listen to any relevant recordings. Because disciplinary hearings are often held on a quick turnaround time, the only realistic choice is for the student attorney to view or listen to the recording on the hearing date itself. This practice limits the student attorney's ability to provide meaningful representation (both client counseling and advocacy at the hearing), representation that 103 CMR 430.12 offers to prisoners. We ask that the regulation call for disclosure of such recordings via compact disc or electronically, so that attorneys and student attorneys can review them in advance of the hearing.

103 CMR 430.11 states that automatic discovery includes access to exculpatory evidence as well as documentary, photographic, audio, or video graphic evidence referred to in the disciplinary report or which the officer intends to introduce at the hearing. A delay in the receipt of recordings can materially impact the prisoner's decision on whether to plead guilty or proceed to hearing, and on the student attorney's ability to prepare adequately for the hearing. While some recordings may pose security problems because they show a specific, sensitive part of the facility, in our experience many recordings are mundane, and audio recordings (typically of

phone conversations) are even more so. Sending relevant recordings via physical (CD) or electronic means (email) will improve the fairness and the efficiency of the disciplinary process. Fewer requests to delay the hearing will be sought. Accordingly, this change would benefit all parties.

IV. Notice of Decision to Counsel

Notwithstanding 103 CMR 430.17(1), which states that the hearing officer's decision shall be sent to counsel, in our experience the decision is not always so transmitted. Sometimes the decision is not sent to counsel at all; on other occasions the decision is sent days after it was transmitted to the prisoner. As a result, the time for filing an appeal (15 days from the inmate's receipt of the decision) has sometimes passed or nearly passed before we are even apprised of the decision. PLAP makes it a point to advise clients to contact us when they receive a decision, but some clients are unable to reach us in a timely way by phone or mail, and others reasonably assume that if the Department advised them of the decision, it must have advised PLAP also.

Accordingly, we ask the Department to consider amending 103 CMR 430.18(1) to make the appeal deadline 15 days from the inmate's *or counsel's* receipt of the decision, whichever is later. This change would ensure that attorneys or student attorneys would have adequate time to review the decision, consult the client (who may or may not want to appeal), and prepare and file the appeal if necessary.

V. Burden of Proof

Disciplinary findings should turn on a "clear and convincing evidence" standard rather than the current, "preponderance of the evidence" standard. In *LaFaso v. Patrissi*, the Supreme Court of Vermont disapproved of "a 'some evidence' standard [which] would 'allow the imposition of discipline in the face of probable innocence'." We argue that the 'preponderance of evidence' standard currently employed also allows too easily the imposition of discipline in the face of probable innocence.

As Yale Law Professor Tom Tyler has argued, "people are more willing to accept decisions when they feel that those decisions are made through decision-making procedures they view as fair." A modified standard of proof will improve the fairness of the process, one in which the Department already controls all of the evidence and has investigative powers and access to information that the defendant prisoner does not. A clear and convincing standard would help to offset this imbalance in information. If prisoners feel that the decisions in their disciplinary hearings are made through procedures they perceive to be fair, they will be less likely to appeal, saving the system time and resources that may be utilized elsewhere.

In case law concerning college disciplinary hearings, it has been held that the 'clear and convincing' standard should be used because of the nature of the charges and the seriousness of the consequences. While college students undoubtedly differ in many ways from inmates and the DOC differs from a college in mission, the same logic should apply. A disciplinary report may have serious consequences – landing an inmate in segregation, affect inmate privileges, and it also can influence classification and parole decisions. In order to prevent negative consequences from befalling prisoners unfairly, the standard of proof should be changed to clear and convincing.

VI. Prohibition on Consensual Sex

Under 103 CMR 430.24, engaging in sexual acts with another is a category 3 offense, subjecting an inmate who engages in sexual relations to disciplinary detention, loss of privileges, restitution or other discipline. The Department should end this ban on consensual sex between prisoners.

This summer, the U.S. Supreme Court struck down laws banning gay marriage, saying "The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs." Although this decision and the Court's previous decision striking down anti-sodomy laws do not apply to the Department of Correction, their reasoning should have a resonance in corrections just as it does in free society. Consensual sexual conduct between inmates should not be made illicit, and it should not subject them to discipline.

The Department of Correction has an interest in security and order that allows it to inhibit personal autonomy where reasonable. The Department disciplines prisoners to maintain order and encourage positive inmate behavior change, but the prohibition against consensual sexual conduct fulfills neither purpose. Consensual sexual conduct does not decrease the security or the order of the prison in any way. Prohibiting consensual sexual behavior out of a worry about non-consensual conduct is a rationale that proves too much and would wreak havoc if applied to other aspects of prison life. In other areas, the DOC rightfully distinguishes one factual circumstance from another in applying a rule. It should do so here and prohibit only non-consensual sex.

This rule impinges on the fundamental dignity of prisoners in refusing to let them exercise their ability to engage in intimate conduct and fully develop relationships with others, without providing any meaningful benefit to the prison or the Department as a whole. Accordingly, the category 3 offense for engaging in sexual acts should be removed from the code of offenses.

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Re: DOC LISTENING SESSIONS – HARVARD PLAP COMMENT ON 103 CMR 403, *Inmate Property* and 103 CMR 420, *Classification*

Dear Ms. Richard:

The student Board of the Harvard Prison Legal Assistance Project thanks the Department of Correction for its invitation to provide feedback on its regulations. We write to request that that the DOC's property regulations, 103 CMR 403, be modified to allow prisoners to possess condoms, and that property and classification (103 CMR 420) regulations be modified to allow transgender prisoners to possess property and be housed in accordance with their gender identity.

The Department should not classify condoms as contraband. If inmates are to have consensual sex with one another, which is a reality regardless of whether such conduct is prohibited under 103 CMR 430, they should have the right to do so safely. According to the Center for Disease Control, the HIV rate of incarcerated individuals is five times the rate of non-incarcerated individuals (see: http://www.cdc.gov/hiv/group/correctional.html). Prohibiting condoms can exacerbate this serious public health concern, both for prisoners and for their families and intimate partners once they are released. Allowing condom use will decrease the spread of HIV and other sexually transmitted infections, not only improving prisoner health and decreasing prison health care costs, but also enabling them to be more productive in society once they are released.

Transgender people are overrepresented in prison and more likely to suffer harassment or violence once in prison than cisgender people are (see: http://www.lambdalegal.org/sites/default/files/2015_transgender-incarcerated-people-in-crisis-fs-v5-singlepages.pdf). The DOC should further the progress it has made with respect to management of transgender inmates, by housing them in the facilities that correspond to their gender and by providing them with the property of that gender. Currently, under 103 CMR 403.10, only female inmates can have bras, dresses, and curling irons. However, this regulation--and the practice of housing transgender inmates in prisons based on the sex assigned at birth--does not enhance either security or order in the prison system. Because transgender people comprise only a small percentage of the population, these regulations would not alter anything for the vast majority of prisoners. Safety issues exist for these people, but they exist in any

facility under any circumstance, and should be addressed on a case by case basis. Finally, if the Department shows its respect for this population by recognizing their needs, violence against transgender prisoners will likely decrease, leading to greater security and order in the prison. DOC regulations should be amended to ensure that all inmates have access to both the housing and the property that they need, even if their gender does not match the sex they were assigned at birth.

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Dear Ms. Richard:

The student Board of the Harvard Prison Legal Assistance Project and the HLS Student Mental Health Association jointly thank the Department of Correction for its invitation to provide feedback on its regulations. We write jointly to request that the DOC amend 103 CMR 430, *Disciplinary Procedures*, to eliminate the use of the Departmental Disciplinary Unit (DDU), and specifically to end all segregation sanctions that exceed the 30 days otherwise contemplated in the regulation.

A general consensus has long existed among psychologists, psychiatrists, and other mental health professionals that solitary confinement poses detrimental effects to isolated prisoners.[*] In recent years, even public health officials and general physicians have joined the mental health community in denouncing solitary confinement as hazardous to the health of those isolated and have called upon colleagues within the prison systems to urge for its cessation.[†] One prisoner who had spent over twenty-seven years in isolation described the intense loneliness and how other prisoners reacted to their long-term segregation:

> I've experienced times so difficult and felt boredom and loneliness to such a degree that it seemed to be a physical thing inside so thick it felt like it was choking me, trying to squeeze the sanity from my mind, the spirit from my soul, and the life from my body. I've seen and felt hope becoming like a foggy ephemeral thing, hard to get ahold of, even harder to keep ahold of as the years and then decades disappeared while I stayed trapped in the emptiness of the SHU [Special Housing Unit] world. I've seen minds slipping down the slope of sanity, descending into insanity, and I've been terrified that I would end up like the guys

[*] *See generally*, Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 J.L. & POL'Y 325, (2006); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIM. & DELINQ. 124 (2003).

[†] Cloud et al., *supra* note 17, at 21–22; Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY & LAW 104, 106–07 (2010).

> around me that have cracked and become nuts. It's a sad thing to watch a human being go insane before your eyes because he can't handle the pressure that the box exerts on the mind, but it is sadder still to see the spirit shaken from a soul. And it is more disastrous. Sometimes the prison guards find them hanging and blue; sometimes their necks get broken when they jump from their bed, the sheet tied around the neck that's also wrapped around the grate covering the light in the ceiling snapping taut with a pop. I've seen the spirit leaving men in SHU and have witnessed the results.[‡]

Prisoners can experience adverse health and mental health effects within just a few days of being isolated – electroencephalograms (EEGs) taken of isolated prisoners reveal abnormal patterns of brain waves characteristic of medical patients experiencing delirium.[§] Prisoners lose their ability to focus, concentrate, or even respond to normal stimuli.[**] Other environmental stimuli can become almost unbearable – small noises sound cacophonous, smells from the unit and the inmate's toilet facilities become terribly overwhelming, and minor physical sensations may become an obsession.[††] When these prisoners do have a chance to interact with other human beings, they cannot respond to social cues or even tolerate the prolonged stimulation of a normal conversation.[‡‡] One inmate who had spent over a decade in isolation described how in a meeting with his attorney, her body language sent him into a panic attack, and as a result, he actually requested to go back to his cell.

Some inmates, especially those with pre-existing psychological conditions or other vulnerabilities can become overtly psychotic, paranoid, and delusional.[§§] Prisoners may hear voices calling their name, telling them to commit violent acts against themselves or other people. They engage in acts of self-mutilation and attempt to commit suicide at rates significantly higher than the general population inmates.[***] They start to believe the correctional officers are plotting against them, poisoning their food, or making noises just to irritate them. They engage in revenge fantasies against their captors.[†††] They often appear in a stupor, yet cannot have a restful sleep – their circadian rhythms become highly disturbed.[‡‡‡] They fly into impulsive rages and

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[‡] William Blake, *A Sentence Worse than Death*, VOICES FROM SOLITARY (Dec. 25, 2014), http://solitarywatch.com.

[§] Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 J.L. & POL'Y 325, 331 (2006).

[**] *Id.*

[††] *Id.*

[‡‡] *Id.* at 332–33.

[§§] *Id.* at 335–36.

[***] Fatos Kaba, Andrea Lewis, Sarah Glowa-Kollisch, James Hadler, David Lee, Howard Alper, Daniel Selling, Ross MacDonald, Angela Solimo, Amanda Parsons & Homer Venters, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH 442, 445 (2014).

[†††] Grassian, *supra* note 29, at 336.

[‡‡‡] *Id.* at 332.

aggressive outbursts, often physically injuring themselves or correctional staff in the process.[§§§] And here as in many states, no regulations prevent prisoners from being released directly into the community without any transitional stepdown or mental health programming.[****] Prior to its implementation of drastic solitary reforms, over 40% of Colorado's segregated prisoners were released directly to the street, and often committed violent crimes that landed them back in the state's penitentiaries.[††††]

The costs of this practice are too high to justify continued long-term isolation of Massachusetts' prisoners in the DDU.

[§§§] *Id.* at 336.

[****] David H. Cloud, Ernest Drucker, Angela Browne & Jim Parsons, *Public Health and Solitary Confinement in the United States*, 105 AM. J. PUB. HEALTH 18, 22 (2015).

[††††] Erica Goode, *Prisons Rethink Isolation, Saving Money, Lives and Sanity*, N.Y. TIMES, March 10, 2012, http://www.nytimes.com/2012/03/11/us/rethinking-solitary-confinement.html?pagewanted=all&_r=0.