

RAISE the AGE | NY

July 19, 2019

Ms. Cathy Y. Sheehan
Acting Deputy Commissioner and Counsel
New York State Department of Corrections and Community Supervision
1220 Washington Avenue
Albany, NY 12226

Via U.S. mail and email: Rules@DOCCS.ny.gov

RE: Department of Corrections and Community Supervision proposed rules concerning Raise the Age Adolescent Offender Facilities, I.D. No. CCS-21-19-00014-P, published NYS Register May 22, 2019

Dear Acting Deputy Commissioner Sheehan:

We write to provide public comment on the proposed amendments to sections 100.6 and 100.75 of Title 7 NYCRR, concerning the reclassification of two existing adult correctional facilities to Adolescent Offender Facilities, pursuant to Raise the Age (Correction Law, section 70, *et seq.*). While we continue to believe that Department of Corrections and Community Supervision (DOCCS) facilities are inappropriate settings for Adolescent Offenders, we provide this public comment to address our significant concerns with regard to the current regulatory proposals for Adolescent Offender Facilities.

Adolescent Offender Separation Units

The proposed rules establishing an “Adolescent Offender Separation Unit (AOSU) . . . for youth who are 16 or 17 years of age at the time of sentencing and are serving disciplinary confinement sanction” should not be adopted. *See* 7 NYCRR Sec. 100.75(b).¹ Instead, the regulations should parallel provisions established for Adolescent Offender Specialized Secure Detention Facilities. *See* 9 NYCRR Secs. 180-3.17 (room confinement) and 3.12 (behavioral support system).

It appears from the proposed regulations that the AOSU is a “Juvenile Separation Unit” (JSU) pursuant to existing regulations (7 NYCRR Sec. 321.2), where youth “under 18 years of age”

¹ While the governor reportedly plans to reform state solitary confinement and segregation rules in DOCCS facilities, those purported administrative reforms have not been announced and are not reflected in these proposed rules.

“may receive access to programs that are more restrictive than those afforded general population.” It also appears that the proposed AOSU regulations permit youth who are 16 or 17 years of age to be subject to 18 hours of daily lock-in while placed in AOSU, based on the existing regulations set forth for JSUs. See 7 NYCRR Sec. 321.2. Because the proposed regulations do not state otherwise, these new rules would permit youth to be subject to confinement in the AOSU for months, based on the current rules set forth for JSUs, which allow up to 30-day disciplinary penalties to run consecutively and without limitation. See 7 NYCRR Sec. 253.7(1)(ii), (2) and (3).

As currently drafted, the proposed regulations codify existing, dangerous DOCCS practices. This is inconsistent with the purpose of Raise the Age reforms, and incompatible with the language of the Raise the Age law, which requires the Office of Children and Family Services (OCFS) to play a role in administering Adolescent Offender Facilities. See COR Law Sec. 77 (such facilities “shall be managed by the department with the office of children and family services assistance, and services or programs”) (emphasis added).² OCFS is also part of a council that is mandated to “assess the operation of the facility.” See *id.* The law also requires that OCFS designate an assistant commissioner “to assist the department, on a permanent basis, with programs or services provided within such facilities.” See *id.* OCFS is further required to jointly establish with DOCCS “a placement classification protocol to be used to determine the appropriate level of care for each youth” in the facility. See *id.* The purpose of the statute’s requiring OCFS involvement in Adolescent Offender Facilities is to bring an age-appropriate and therapeutic framework to youth confinement in New York—not to codify and continue dangerous adult correctional practices that are impermissible under parallel law for youth the same age in different state-regulated facilities.³

The proposed AOSU (and existing JSU) regulations are at odds with youth safety. Based on experts in youth incarceration, “[o]nce the youth calms down, the youth should be released from his or her room and returned to regular programming.”⁴ Isolation should not be used for discipline. OCFS facilities that currently house adjudicated 16 and 17-year-olds do not permit the prolonged isolation of youth for 18 hours a day.⁵ Indeed, RTA Specialized Secure Detention (SSD) facilities, where Adolescent Offenders are incarcerated pre-trial, and are subject to both New York State Commission of Correction and OCFS regulations, prohibit units like AOSU, allowing only for highly limited room confinement “with the goal of releasing the youth from confinement as soon as possible,” and which cannot be used for punishment or discipline.⁶ Adolescent Offenders sentenced to less than one year can also serve their sentences in SSD. Protections for

² The regulatory impact statement notes that the proposed rule “applies only to designated officials of the Department and the Office of Children and Family Services.” NYS Register dated May 22, 2019 at 4.

³ See, e.g., regulations for Specialized Secure Detention (9 NYCRR Sec. 180-3.17), Secure Placement (9 NYCRR Secs. 168.2, 168.4), and Secure Detention (9 NYCRR Sec. 180-1.9), which prohibit the use of room confinement for disciplinary purposes, and place extreme restrictions on the length of confinement.

⁴ Jennifer Lutz, Mark Soler, and Jeremy Kittredge, *Not In Isolation: How to Reduce Room Confinement While Increasing Safety in Youth Facilities* (Washington, DC: Center for Children’s Law and Policy and the Justice Policy Institute, May 2019), at 13, available at: <http://www.stopsolitaryforkids.org/wp-content/uploads/2019/06/Not-In-Isolation-Final.pdf>.

⁵ 9 NYCRR Sec. 168.2.

⁶ See 9 NYCRR Sec. 180-3.17.

Adolescent Offenders should not depend on whether they are being held pre- or post-disposition, or relate to the duration of their sentence. The same rules establishing basic safety practices and programmatic supports for Adolescent Offenders should apply in all setting where youth are held. The proposed rules should be withdrawn and new rules that mirror those created for Specialized Secure Detention should be proposed.

Our concerns about AOSUs are not merely theoretical. A recent media report described the horrific experience of a severely mentally-ill seventeen-year-old boy who was subjected to confinement in the AOSU at the Hudson Correctional Facility.⁷ He was moved to AOSU for “pretending to swallow his medication” where he remained for seven months.⁸ As a result of his placement, he “react[ed] with self-mutilating behavior, cutting himself on the arm.”⁹ A federal judge issued an emergency order demanding that he be removed from the AOSU at the Adolescent Offender facility, finding that “his severe isolation was a major factor in his deteriorating mental health.”¹⁰ The boy in DOCCS custody reported fear and anxiety, having panic attacks, wanting to hurt himself, and having trouble sleeping while in AOSU. While locked in his cell for 18 hours a day he wrote “I need a doctor” and “help me” on the walls of his cell.¹¹

While cruel and shocking, this adolescent’s experience is also entirely predictable. Because brain development is underway, adolescents are more vulnerable than older adults to the negative effects of solitary confinement, including increased risk for: mental illness or worsened mental illness; anxiety; rage; insomnia; self-mutilation; suicidal thoughts; and suicide.¹² In addition to the immediate harm inflicted, solitary confinement can impede brain development and affect long-term cognitive and social abilities.¹³ Moreover, the harms that result from prolonged isolation are “experienced most acutely by youth with mental illness, youth with trauma histories, youth of color, and LGBTQ and gender non-conforming youth.”¹⁴

⁷ *Cruel Confinement: Judge halts use of solitary cell for mentally-ill teen; says 17-year-old suffered ‘irreparable harm’*, Leonard Greene, Daily News, Jun. 19, 2019, available at: <https://www.nydailynews.com/new-york/ny-solitary-confinement-injunction-20190619-wotutt2msvbsfegpbdyj232zsu-story.html>.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ See Memorandum-Decision and Order, J. Sannes, *Paykina v. Lewin, et al.*, 9:19-cv-00061-BKS-DJS (NDNY), Doc. No. 65 filed 5/31/2019.

¹¹ *Ibid.*

¹² MacArthur Foundation & Models for Change Resource Center Partnership, *Systems Reform in Juvenile Justice, Because Kids are Different: Five Opportunities for Reforming the Juvenile Justice System* (2014), at 11. See also: Policy Statement of the American Academy of Child and Adolescent Psychiatry, *Solitary Confinement of Juvenile Offenders* (April 2012), available at: https://www.aacap.org/aacap/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx.

¹³ Anthony Giannetti, *The Solitary Confinement of Juveniles in Adult Jails and Prisons: A Cruel and Unusual Punishment?*, 30 Buff. Pub. Int. L.J. 31, 45-49 (2011-2012).

¹⁴ Jennifer Lutz, Mark Soler, and Jeremy Kittredge, *Not In Isolation: How to Reduce Room Confinement While Increasing Safety in Youth Facilities* (Washington, DC: Center for Children’s Law and Policy and the Justice Policy Institute, May 2019), at 8, available at: <http://www.stopsolitaryforkids.org/wp-content/uploads/2019/06/Not-In-Isolation-Final.pdf>.

Experts in youth mental health and corrections have rejected isolation and solitary confinement as a response to adolescent behavior, including mental illness, in facilities.¹⁵ There is “widespread and growing awareness of the harms and ineffectiveness of confinement” described in JSU and the proposed AOSU regulations, which reflects the “involuntary placement of a youth alone in a room or other area for any reason other than as a temporary response to behavior that risks immediate physical harm.”¹⁶ For example, the Council of Juvenile Correctional Administrators’ position is “that isolating or confining a youth in his/her room should be used only to protect the youth from harming him/herself or others and if used, should be for a short period and supervised.”¹⁷ Isolation should not be used for punishment.¹⁸ This position is also held by the National Council on Juvenile and Family Court Judges¹⁹, the National Partnership for Juvenile Services²⁰, as well as the American Academy of Child and Adolescent Psychiatry.²¹

Services and Programs in Adolescent Offender Facilities

We also note that these proposed regulations do not address services and programs for Adolescent Offenders. See COR Law Sec. 77(1)(a). Nor are there proposed regulations that guide DOCCS practice of discharge planning from Adolescent Offender Facilities, which must be conducted “in consultation with the office of children and family services” and be “tailored to address [Adolescent Offenders’] individual needs . . . includ[ing] services designed to promote public safety and the successful and productive reentry of such adolescents into society.” COR Law Sec. 78.

All youth entering, living in, and returning home from institutionalized settings, require stable, continuous and coordinated care. Programming and services within facilities must identify young people’s individualized strengths and vulnerabilities, help mitigate trauma, promote safety and security for youth and staff inside, and help ease the transition home. Education and vocational training, mental and behavioral health services, recreation and other programmatic

¹⁵ See, e.g., Andrew B. Clark, *Juvenile Solitary Confinement as a Form of Child Abuse*, *J Am Acad Psychiatry Law* 45:350-57, 2017, available at: <http://jaapl.org/content/jaapl/45/3/350.full.pdf>; The National Commission on Correctional Health Care, Position Statement on Solitary Confinement, available at: <https://www.ncchc.org/solitary-confinement>.

¹⁶ Jennifer Lutz, Mark Soler, and Jeremy Kittredge, *Not In Isolation: How to Reduce Room Confinement While Increasing Safety in Youth Facilities* (Washington, DC: Center for Children’s Law and Policy and the Justice Policy Institute, May 2019), at 8, available at: <http://www.stopsolitaryforkids.org/wp-content/uploads/2019/06/Not-In-Isolation-Final.pdf>.

¹⁷ Council of Juvenile Correctional Administrators Toolkit: Reducing the Use of Isolation (March 2015), at 5, available at: <http://cjca.net/wp-content/uploads/2018/02/CJCA-Toolkit-Reducing-the-Use-of-Isolation-1.pdf>.

¹⁸ Ibid.

¹⁹ National Council on Juvenile and Family Court Judges Resolution regarding Reducing the Use of Solitary Confinement for youth (August 2016), available at: http://www.ncjfcj.org/sites/default/files/Final_SolitaryConfinementResolution_8_6-2016.pdf.

²⁰ Position Statement of the National Partnership for Juvenile Services on the Use of Isolation (October 2014), available at: <http://npjs.org/wp-content/uploads/2012/12/NPJS-Use-of-Isolation.pdf>.

²¹ Policy Statement of the American Academy of Child and Adolescent Psychiatry, Solitary Confinement of Juvenile Offenders (April 2012), available at: https://www.aacap.org/aacap/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx.

activities are essential in these settings. Consistent engagement with youth through age-appropriate supports is at the heart of Raise the Age.

The absence of any proposed DOCCS (or OCFS) rules guiding the creation and delivery of services and discharge planning for Adolescent Offenders, coupled with the reliance on solitary confinement and segregation, demonstrate how inappropriate these Adolescent Offender Facilities are for 16- and 17-year-olds. Despite nine months having elapsed since the law went into effect, the current regulatory framework for Adirondack and Hudson maintains the same adult orientation to confinement that Raise the Age was meant to change. Short of removing Adolescent Offenders from these facilities to secure placements operated by OCFS, the State must immediately promulgate rules for public comment that will ensure access to adequate, developmentally-appropriate programs and services, and effectively plan for discharge and re-entry for these youth.

Sincerely,

Campaign for Youth Justice
Center for Children's Law and Policy
Center for Community Alternatives, Inc.
Children's Defense Fund-New York
Citizens' Committee for Children of New York, Inc.
Disability Rights New York
Families Together in New York State
Girls for Gender Equity
Justice Policy Institute
New York County Defender Services
Stop Solitary for Kids
The Children's Agenda
Westchester Children's Association
Youth Represent

cc: Sheila Poole, Acting Commissioner, Office of Children and Family Services (via email)