

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

SUFFOLK, ss.

No. SJC-12015

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Robert Cantell et al.,  
Plaintiff-Appellants,

v.

Luis S. Spencer, et al.,  
Defendants-Appellees

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ON APPEAL FROM ORDERS OF THE SUPERIOR COURT  
DISMISSING THE CLAIMS OF PLAINTIFFS-APPELLANTS AND  
DENYING CLASS CERTIFICATION

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BRIEF OF THE PLAINTIFFS-APPELLANTS

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### ISSUES PRESENTED

The Plaintiffs-Appellants are Massachusetts Department of Correction (DOC) prisoners held in non-disciplinary segregation in Special Management Units (SMUs). The Superior Court dismissed their claims that their SMU confinement violated DOC regulations as well as their right to due process of law under the state and federal constitutions, and denied their motion for class certification. The Plaintiffs' appeal raises the following issues:

1. Did the Superior Court Err in Dismissing the Plaintiffs' Claims Under the DSU Regulations, 103 CMR 421.00 *et seq.*?
2. Did the Superior Court Err in Dismissing the Plaintiffs' Claims Under the Massachusetts Declaration of Rights?
3. Did the Superior Court Err in Denying Class Certification?
4. Did the Appeals Court Err in Failing to Reach the Merits of Plaintiffs' Claims?

### STATEMENT OF THE CASE

Plaintiffs Robert Cantell and Derrick Maldonado filed a complaint for declaratory and injunctive relief on January 20, 2012, claiming that because conditions in the SMUs are as restrictive as in the cell blocks that were formerly designated as the

Departmental Segregation Unit ("DSU"), the SMUs should be governed by the DSU regulations, 103 CMR 421.00 et seq. See *Haverty v. Commissioner of Correction*, 437 Mass. 737, 763 (2002) (holding that DSU regulations apply to any unit where conditions are as restrictive a DSU, regardless of what the DOC calls the unit). Complaint ¶ 2 (RA 14-15.) The complaint also alleged that Plaintiffs' indefinite SMU detention violated their right to due process of law under the U.S. Constitution; their right to due process of law under the Massachusetts Declaration of Rights; and their statutory right to equal "kindness" pursuant to G.L. c. 127, § 32. Complaint ¶ 3 (RA 15).

The Plaintiffs amended their complaint as of right on April 12, 2012, adding Plaintiffs John T. Fernandes and Albert Jackson along with two additional plaintiffs who are not part of this appeal and one additional Defendant.<sup>1</sup>

On January 31, 2013 the Superior Court, Fahey, J., issued a Memorandum and Order allowing the Defendants' Motion to Dismiss and denying the Plaintiffs' motion for class certification. Citing

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<sup>1</sup> The legal claims were identical to the original complaint.

the Supreme Judicial Court decision addressing the federal due process rights of SMU prisoners, *LaChance v. Comm'r of Corr. et al.*, 463 Mass. 767, 774 (2012), the court ordered that the Defendants "must extend the benefits of the SJC *LaChance* decision to all prisoners held in administrative segregation on awaiting action status" and dismissed all claims. Opinion at 3-4.

The Plaintiffs sought clarification, asking the court to specify that extending the "benefits of the *LaChance* decision" meant that, in addition to the due process protections required by the federal constitution, the DOC must apply the DSU regulations if the SMU is in fact equivalent to a DSU. (RA 316-17.) The Defendants disputed this interpretation of *LaChance* and argued that the DSU regulations do not apply to SMU detainees. (RA 267-69, 319.)

The Court granted the Plaintiffs' motion for clarification on May 20, 2013, but did not address their contention that the SMU is equivalent to a DSU and therefore the DSU regulations apply. Instead, it stated only, "Defendants must comply with the constitutionally required procedures established by the SJC in *LaChance* and the regulations DOC issues pursuant to that SJC decision." (RA 321). It did not

mention the DSU regulations. The Plaintiffs timely appealed, and unsuccessfully sought Direct Appellate Review from the Supreme Judicial Court.

The Appeals Court on July 22, 2015 dismissed the appeal as moot because all but one of the named Plaintiffs had been released from the SMU before the court dismissed the case and the remaining prisoner had been released during the pendency of the appeal. Appeals Court Opinion (App. Op.) at n.7. The majority acknowledged that the exception to mootness for a case which presents an issue "of public importance, capable of repetition yet evading review" has "particular application to litigation involving inmate rights given the ephemeral nature of the alleged improprieties being challenged." App. Op. at 3-4. However, it determined that it would be improvident to decide the issues raised by the Plaintiffs, based on its understanding that regulations were forthcoming from the DOC that would "help frame any unresolved questions" about DOC's obligation to apply the DSU regulations. *Id.* at 10. The dissent disputed that the case is moot, pointing out that since it was brought as a class action and the alleged wrongful conduct continues with respect to members of the putative

class, therefore the Court lacked discretion to refuse to hear it. Rubin, J., dissenting, at 1-2 (citing *Wolf v. Comm'r of Pub. Welfare*, 367 Mass. 293, 299 (1975)). The dissent also refuted the majority's rationale for declining to hear the case on prudential grounds, reasoning that any new regulations from the DOC would have no bearing on the Plaintiffs' claim of entitlement to the DSU regulations. *Id.* at 4-7.

The Plaintiffs filed a petition for rehearing in which they brought to the Court's attention the DOC's response to *LaChance*, a Standard Operating Procedure (SOP) which was appended to the Special Management Regulations, 103 CMR 423, on February 5, 2013, and argued that because the DOC had issued its policy response, with no further regulations forthcoming, the premise for declining to hear the case was mistaken. (Supplemental Record Appendix (Supp. RA) at 2-8.) In their Opposition, the Defendants did not claim any intent to promulgate further regulations but demurred that the SOP policies "have not yet been subject to the regulatory hearing process." (Supp. RA -10.) The Appeals Court denied rehearing, though noting that the DOC's silence as to future regulations "provides some reason for pause." Addendum at 24. Justice Rubin, once

more dissenting, observed that the DOC is applying the SOP, claims that the SOP provides all that is required by *LaChance*, and "neither describes nor promises any further regulatory process, pending or otherwise, nor is there any indication of one." Addendum at 25.

The Supreme Judicial Court on December 3, 2015 granted the Plaintiffs' petition for Further Appellate Review.

#### **STATEMENT OF FACTS**

Because this case was decided on the Defendants' Motion to Dismiss, the facts pleaded in the amended complaint must be accepted as true, along with all favorable inferences drawn from those facts. *See Lipsitt v. Plaud*, 466 Mass. 240, 241 (2013).

##### **1. The Plaintiffs Were Held in Conditions As Restrictive as a Departmental Segregation Unit**

Each of the Plaintiffs was held in non-disciplinary segregation in a Special Management Unit (SMU) at the time he filed his complaint. The SMU is a traditional segregation unit run under the Special Management Unit regulations, 103 CMR 423.00 *et seq.* It is used to house prisoners placed in Administrative Segregation, Protective Custody, or Disciplinary Detention. 103 CMR 423.07. Each of the Plaintiffs was

held in Administrative Segregation, which the SMU regulations define as:

A temporary form of separation from general population used when the continued presence of the inmate in the general population would pose a serious threat to life, property, self, staff or other inmates, or to the security or orderly running of the institution, e.g., inmates pending investigation for a disciplinary or criminal offense or pending transfer may be placed in administrative segregation.

103 CMR 423.06.

Although conditions in each of the DOC's seven SMUs are equivalent to a DSU, the DOC operates them under the Special Management Regulations, 103 CMR 423.00 *et seq.*, and not the DSU regulations. (Amended Complaint ¶¶ 27-29, RA 43).

Prisoners held in SMUs are locked in their cells for 23 hours per day, with only one hour of recreation time in a small outdoor cage on weekdays. On weekends they do not receive any recreation or out-of-cell time. They eat all meals alone in their cells. They are allowed to shower three times per week and to shave once per week. Their visits are all non-contact, i.e. through a glass partition with a telephone. Each facility determines the number and length of personal visits for SMU visitors, but these are generally limited to two non-contact personal

visits per week, of no more than one hour each.

(Amended Complaint ¶¶ 30-33, RA 43-44.)

Prisoners held in SMUs have no access to employment or to congregate rehabilitative, therapeutic, or educational programs and thus have no access to any program that would allow them to earn "good time" reductions from their criminal sentences. They are not allowed to attend communal religious services, nor may they visit the general library. They may purchase only a limited number of stamps, legal supplies and cosmetic items from the canteen compared to prisoners in general population, who may purchase food and a much broader range of personal items. The amount the SMU prisoners are permitted to spend on canteen varies in each SMU, but is limited to between \$20 and \$30 per week, compared to \$50 in the general population. The property the SMU prisoners may keep in their cells is limited to an extent greater than that in the general population. (Amended Complaint ¶¶ 34-36, RA 44.)

Conditions in the SMUs are more restrictive than in the East Wing units which were held to constitute a DSU in *Haverty v. Commissioner of Correction*, 437 Mass. 737, 763 (2002). Those units permitted ninety



minutes a day of out-of-cell communal recreation, five days a week; two one-hour visits a week; up to two hours a week in the library; the opportunity to work as "runners" cleaning their unit; and canteen spending of up to \$30 a week. (Amended Complaint ¶ 46, RA 46).

The SMUs are also at least as restrictive as the units which were designated as DSUs when the current DSU regulations were mandated by the Single Justice.<sup>2</sup> Those DSUs allowed one hour a day out-of-cell recreation, five days a week, plus three 10-minute showers; two one-hour visits a week; four hours a week in the library; and canteen spending of up to \$50 a week. (Amended Complaint ¶¶ 43-45, RA 45-46.)

**2. The Plaintiffs were not given the benefit of the DSU Regulations.**

The DSU regulations, 103 CMR 421.00 *et seq.*, provide that a prisoner in non-disciplinary segregation is entitled to significant procedural<sup>3</sup> and

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<sup>2</sup> See *Hoffer v. Fair*, No. SJ-85-0071 (Single Justice, Mar. 3, 1988) (Liacos, J.) at 36-38 (RA 167-69).

<sup>3</sup> A prisoner may be may only be held in a DSU after a hearing before an impartial Board, 103 CMR 421.12, and a finding based on "substantial evidence" that the prisoner poses a "substantial threat" to the safety of himself or others, or to the operation of the facility. 103 CMR 421.09. Absent extraordinary circumstances, this hearing must be held within 15 days of the prisoners' confinement, or 30 days if the prisoner is being investigated or charged in relation

substantive<sup>4</sup> safeguards spelled out in the regulations. The Defendants do not apply these regulations in the SMUs. Instead, the DOC operates the SMUs under the Special Management regulations, 103 CMR 423.00 et seq., which provide none of these protections. (Amended Complaint ¶¶ 29, RA 43.)

None of the Plaintiffs was given the procedural protections or substantive privileges provided by the DSU regulations. Each was held indefinitely in administrative segregation, without being told when he would be released and without being given conditions which could earn his release. (Amended Complaint ¶¶ 39-41, RA 45.) All were held in the harsh conditions of SMUs for at least five months, see Amended Complaint ¶¶ 4-9, and some far longer. At the time of the Amended Complaint, Plaintiff Luis Bizzarro had

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to a disciplinary offense. See 103 CMR 421.08 (3). If, after the hearing, DSU placement is contemplated, the prisoner must be served in writing with a conditional release date of no longer than six months, absent extraordinary circumstances, and must be given conditions which, if met, will entitle the prisoner to release from the DSU. See 103 CMR 421.15 (2).

<sup>4</sup> Under the DSU regulations, even those prisoners who are found to merit administrative segregation after a hearing and appeal are entitled to property, visitation rights, canteen purchases and other privileges that are substantially greater than the privileges afforded under the Special Management regulations. See 103 CMR 421.20

been held for a year and five months and Wilfredo Virella had spent two years and five months in SMUs<sup>5</sup>. In December 2012 the Defendants acknowledged that Albert Jackson was still in an SMU after a year and three months.<sup>6</sup>

### 3. The DOC response to *LaChance*

After the Supreme Judicial Court ruled that prisoners held in non-disciplinary segregation in an SMU were entitled to procedural guarantees in accord with the U.S. Constitution, *see LaChance v. Comm'r of Corr. et al.*, 463 Mass. 767, 776-77 (2012), the DOC announced in January 2013 that it would provide notice and hearing to prisoners confined in an SMU for 90 days. *See Defendants' Status Report* (RA 286). In February 2013, the DOC appended to its Special Management regulations, 103 CMR 423.00 *et seq.*, a Standard Operating Procedure (SOP) incorporating the same measures. *See Addendum* at 65-66. However, those procedures are not equivalent to the DSU regulations

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<sup>5</sup>Virella's SMU confinement totaled two years and five months, not including an eight month interruption when he was held by Suffolk County. Amended Complaint ¶ 6.

<sup>6</sup>See Defendants Supplemental Memorandum in Support of Motion to Dismiss n. 1 (RA 266); Plaintiffs' Application for Further Appellate Review at 8 n. 8; App. Op. at 3 n. 7. The date of Jackson's release from the SMU not in the record.

and lack many of the regulations' most important guarantees, such as a hearing with 15 or 30 days of confinement, substantial evidentiary criteria that must be met to justify confinement, a conditional release date, and conditions which will enable the prisoner to earn his release.<sup>7</sup> It has been over three years since the SOP was issued and the DOC has not issued any notice of rulemaking or any other indication that it plans new or amended regulations.

#### **4. Factual allegations supporting class certification**

The Plaintiffs sought to certify a class composed of all prisoners held in non-disciplinary segregation in an SMU. As alleged in the Plaintiffs' complaint, membership in the proposed class is so numerous that joinder of all members is impracticable. The Plaintiffs' claims involve common questions of law and fact. Since all the class members are subject to similarly restrictive conditions, the named Plaintiffs' claims are typical of the class as a whole. The common questions predominate over any questions affecting only individual class members. Defendants have acted and refused to act on grounds

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<sup>7</sup> See n. 3, *supra*, and RA 122-131.

generally applicable to the class so that final declaratory and injunctive relief would be appropriate to the class as a whole. (Amended Complaint ¶¶ 20-26, RA 42-43.)

#### SUMMARY OF THE ARGUMENT

The Superior Court erred in dismissing the Plaintiffs' Claims under the Department Segregation Unit Regulations, 103 CMR 421.00 et seq. The DSU regulations have the force of law, and must be provided to administrative detainees in any unit where conditions are as restrictive as a DSU. *See Haverty v. Commissioner of Correction*, 437 Mass. 737, 745 (2002); *Longval v. Commissioner of Correction*, 448 Mass. 412, 422 (2007). The decision in *LaChance v. Comm'r of Corr.*, 463 Mass. 767 (2012), reaffirms this principle. (Br. at. 18-22.)

Although *LaChance* rejected the argument that the DSU regulations are required by the U.S. constitution, and outlined a less stringent set of constitutionally-required procedures, *see id.* at 776-77, it nevertheless affirmed that the DSU regulations retain the force of law and must be provided to administrative detainees held in conditions equivalent to a DSU. *Id.* at 774; *see also id.* at 777 n. 14. The

regulations were ordered by a single justice in *Hoffer v. Fair*, No. SJ-85-0071 (Single Justice, Mar. 3, 1988) (Liacos, J.) 36-38 (RA 167-69), to satisfy the due process requirements of the Massachusetts Declaration of Rights, and in order to repeal or amend them the DOC must seek to modify or vacate this order. (Br. at 22-26.)

The Superior Court made legal and factual findings which preclude dismissal of the Plaintiffs' regulatory claim. It correctly noted that *LaChance* "reiterated that the DSU regulations must be followed in any unit where conditions are as restrictive as a DSU." Opinion at 2 (citing 463 Mass. at 774). The Superior Court also found that the Special Management Units (SMUs) where the Plaintiffs were housed are as restrictive as a DSU. *Id.* (Br. at 26-27.)

The allegations in the Plaintiffs' complaint, which must be taken as true on a motion to dismiss, see *Lipsitt v. Plaud*, 466 Mass. 240, 241 (2013), demonstrate that the SMUs are more restrictive than units held equivalent to a DSU in *Haverty*. The units are also as restrictive as the units designated as DSUs when the DSU regulations were first mandated by a single justice in *Hoffer*. (Br. at 27-29.)

The Plaintiffs' allegations also establish that they were held in administrative segregation without the procedural and substantive protections of the DSU regulations. While the Defendants have implemented new Standard Operating Procedures (SOP) in response to *LaChance*, these procedures fall far short of the DSU regulations. (Br. at 29-32.)

The Appeals Court erred in failing to reach the merits of the Plaintiffs' claims. As the dissent notes, the claims are not moot because a motion for class certification was pending while a Plaintiff continued to suffer the harm alleged. Where the claims of a named plaintiff in a putative class action become moot while a motion for class certification is pending, the case is not moot. *See Wolf v. Comm'r of Public Welfare*, 367 Mass. 293 (1975) (Br. at 32-36.)

Although the Appeals Court acknowledged that the Plaintiffs' claims fall under the exception to the mootness doctrine because they are "of public importance, capable of repetition, yet evading review," Opinion at 3-4, it erroneously declined to decide the case, in the belief that future regulations from the Department of Correction might clarify the issues at stake. *Id.* at 10-11. There is no doubt

that the Plaintiffs may suffer the same harm in the future, and that it may evade review. Furthermore, the case is non-moot because it is due to the defendants' voluntary cessation of harm. (Br. at 36-39.)

The Appeals Court's exercise of discretion in declining to hear the case until new DOC regulations are formally promulgated was based on two mistaken premises. First, it failed to appreciate that DOC had already issued its final response to LaChance in the form of the Standard Operating Procedures that are appended to the SMU regulations, 103 CMR 423. (Br. at 39-42.) In addition, no new SMU regulations will affect Plaintiffs' claim that they are entitled to the benefit of the DSU regulations if they are confined under DSU conditions for more than a very brief period of time. (Br. at 43-45.)

The dismissal of the plaintiffs' claims under the Massachusetts Declaration of Rights was also in error. The DSU regulations were adopted to satisfy the requirements of the Massachusetts Declaration of Rights. See *Hoffer v. Fair* at 36-38 (RA 158-59, 167-69). *LaChance* for the first time reached the federal due process requirements governing administrative segregation, and held that the U.S. constitution



requires procedures less stringent than the DSU regulations. 463 Mass. at 776-77. At the same time, *LaChance* cited with approval previous decisions holding that the regulations are "constitutionally required." See *id.* at 775 (citing *Haverty*, 437 Mass. at 762 and *Hoffer v. Commissioner*, 412 Mass. at 455). The SJC has held that, because of the state constitutional ruling in *Hoffer*, the DOC may not repeal the DOC regulations but rather, if it believes the regulations are no longer required by the Constitution of the Commonwealth, the DOC's remedy is to file a motion to vacate the single justice Order in *Hoffer*, see *Haverty*, 437 Mass. at 738-39, which the DOC has not done. (Br. at 45-47.)

Finally, the denial of class certification was in error. The denial of class certification was based entirely on the Superior Court's erroneous ruling that the *LaChance* decision had disposed of all of the Plaintiffs' claims and on the erroneous dismissal of the lawsuit. The Superior Court never addressed the Plaintiffs' arguments that they met the requirements for class certification set forth in Mass. R. Civ. P. 23. Courts have repeatedly found class certification necessary and appropriate in systemic challenges by

prisoners to segregation practices and other conditions of confinement in Massachusetts. *See, e.g., Haverty*, 437 Mass. at 739. Therefore to the extent that the Court reverses the dismissal of the Plaintiffs' regulatory and state constitutional claims, it should also reverse the denial of class certification. (Br. at 48-49.)

#### ARGUMENT

I. The Superior Court Erred in Dismissing the Plaintiffs' Claims Under the DSU Regulations, 103 CMR 421.00 *et seq.*

A. The DSU Regulations Apply to All Non-Disciplinary Segregation in Conditions Equivalent to a DSU.

A Departmental Segregation Unit (DSU) is a restricted housing unit intended to house prisoners whose "continued presence in a general institution population would be detrimental to the program of the institution." 103 CMR 421.01. The regulations "make clear that a prisoner may not be segregated and denied interaction with other prisoners in the institution for nondisciplinary reasons without receiving certain procedural due process protections." *Haverty v. Commissioner of Correction*, 437 Mass. 737, 745 (2002). The DSU regulations have the force of law and prisoners may seek court enforcement of them. *See*

*Haverty*, 437 Mass. at 740, 762; *Royce v. Commissioner of Correction*, 390 Mass. 425, 426-27 (1983); *Kenney v. Commissioner of Correction*, 393 Mass. 28, 33 (1984).

The current version of the DSU regulations was mandated by a single justice of the SJC as a remedy for violations of state constitutional due process. See *Hoffer v. Fair*, No. SJ-85-0071 (Single Justice, Mar. 3, 1988) (Liacos, J.) at 36-38 (RA 167-69). It is long established that that DSU regulations apply to any unit where conditions are as restrictive a DSU, regardless of what the DOC calls the unit. See *Longval v. Commissioner of Correction*, 448 Mass. 412, 422 (2007) (it is "clearly established" that prisoners in conditions substantially similar to a DSU must have the protection of the DSU regulations); *Haverty*, 437 Mass. 737, 763 (2002) (the protections of the DSU regulations "must be afforded to all prisoners before they are housed in DSU-like conditions operating today in the East Wing...").<sup>8</sup> This principle was most recently

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<sup>8</sup> See also *Longval v. Commissioner*, 404 Mass 325, 330 (1989) ("[T]he department and the Commissioner may not sidestep statutory and regulatory provisions stating the rights of an inmate as to his placement in a DSU by assigning as a pretext another name to such a unit"); *Gilchrist v. Commissioner of Correction*, 48 Mass. App. Ct. 60, 64 (1999) ("whether or not the plaintiff was entitled to the procedural protections

reaffirmed in *LaChance v. Comm'r of Corr.*, 463 Mass. 767, 774 (2012) ("we have held that under DOC regulations, indefinite confinement in any unit where conditions are substantially similar to those of a DSU entitles an inmate to the protections afforded by the DSU regulations.").

Despite this clear statement from the Court in *LaChance*, the Defendants argued below that *LaChance* effectively overruled *Haverty* and its predecessors and did away with the requirement that the DSU regulations be followed in DSU-like conditions. See Defendants Supplemental Memorandum in Support of Motion to Dismiss at 4-5 (RA 269-70). This is entirely wrong. The SJC in *LaChance* was not faced with a regulatory claim because it had before it an interlocutory appeal of a denial of qualified immunity from damages, which depended upon whether the Defendants had violated a

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set out in the regulations governing DSUs depended upon whether his 'placement in [restrictive confinement] ... was shown to be the substantial equivalent of his being placed in a ... DSU.'" (quoting *Longval*, 404 Mass. 325); *Martino v. Hogan*, 37 Mass. App. Ct. 710, 721 (1994) ("where the conditions in a segregation unit, however named by the correction officials, were as severe as those at the DSU, the unit should be dealt with, at least for such purposes as requirements of hearings and so forth, as a DSU").

federal constitutional right<sup>9</sup> and, if so, whether the right was clearly established. See *Rodrigues v. Furtado*, 410 Mass. 878 (1991).

With *LaChance* the SJC for the first time considered the federal due process implications of administrative segregation, which the court had not reached in *Haverty* because it held the DSU regulations were independently enforceable. See 437 Mass. at 740 (DSU regulations "have the full force of law" and "[i]t is accordingly not necessary to reach the constitutional claims..."). The court in *LaChance*

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<sup>9</sup> *LaChance* claimed both regulatory and constitutional violations, but only the U.S. constitution provided a basis for damages, and therefore this was the only claim considered in the interlocutory appeal. A violation of the DSU regulations alone would not provide a basis for damages. See *Loffredo v. Center for Addictive Behaviors*, 426 Mass. 541, 546-47 (1998) (no cause of action for damages from regulatory violation where governing statute does not provide for a private cause of action).

Neither did *LaChance* have a state constitutional claim for damages. The Superior Court had ruled that the denial of the DSU regulations violated *LaChance's* rights under the Massachusetts Declaration of Rights (RA 227), but dismissed his claim for damages under the state constitution because such a damage claim must be brought under the Massachusetts Civil Rights Act, G.L. c. 12, § 11(H) & (I), and requires a showing of deprivation of rights through the use of "threats, intimidation or coercion," which *LaChance* had not shown. Slip. Op. at 13 (quoting *Layne v. Superintendent, Mass Correctional Inst., Cedar Junction*, 406 Mass. 156, 158 (1989)). (RA 230-31.)

rejected the argument that the DSU regulations were required by the federal constitution, outlining instead a set of somewhat less stringent procedural safeguards, and appears to anticipate the drafting of regulations to implement these safeguards. See 463 Mass. at 776-777. However this in no way undermines the independent legal standing and enforceability of the DSU regulations.

After outlining the notice and hearing requirements that federal due process requires, *LaChance* notes that the "appropriate time frame" for providing this process must balance the inmate's interest in avoiding arbitrary detention with prison officials' interest in appropriately housing an inmate who poses a threat to himself or others, and then states, "*Although we leave it to the DOC to promulgate regulations that reflect the balance of these interests, we conclude that in no circumstances may an inmate be held in segregated confinement on awaiting action status for longer than ninety days without a hearing.*" *Id.* (emphasis supplied). To this very sentence is appended Footnote 14, which states:

Our decision is in part informed by reference to other DOC regulations. We note that where an inmate is held on awaiting action status in a DSU

he is entitled to [a DSU] hearing after 15 days of confinement, or after thirty days if he has been charged with a disciplinary offense or if a disciplinary investigation is pending. 103 CMR 421.08(3) (1994).

463 Mass. at 777 n. 14. Thus in the same breath with which *LaChance* suggests new regulations to implement federal due process rights, it also reminds us that the DSU regulations continue to have effect.

The Plaintiffs in this case are in precisely the situation described by Footnote 14 of *LaChance*. They were held in segregation on awaiting action in SMUs, which were found to be equivalent to a DSU by both the Superior Court in the instant case, Opinion at 2, and the Superior Court and the SJC in *LaChance*. See 473 Mass. at 774. Footnote 14 affirms not only the letter of the DSU regulations regarding Awaiting Action status, but also decades of case law holding that the DOC may not avoid the DSU regulations by calling the restrictive confinement "awaiting action." See *Royce v. Commissioner of Correction*, 390 Mass. 425, 429 (1983) ("prison administrators may not...[use] awaiting action status as a means to accomplish an unlimited punishment immune to the procedures set forth in the [DSU] regulations."); *Kenney v. Commissioner of Correction*, 393 Mass. 28, 33-34 and n. 9 (1984) (same;

DOC's argument that a DSU hearing is required only when formal transfer to DSU is contemplated "borders on the spurious.")<sup>10</sup>

There is also no merit to DOC's argument that the SJC must have meant to overrule *Haverty* because it would not have ordered DOC to promulgate new regulations if it were already bound by the DSU regulations. As Justice Rubin points out in his dissent, prisoners can be placed on awaiting action status in a variety of settings and the due process safeguards ordered in *LaChance* "are required for 'an inmate confined to administrative segregation on awaiting action status, whether such confinement occurs in an area designated as an SMU, a DSU, or otherwise.'" Dissent at 6-7, quoting *LaChance*, 463 Mass. at 776. The *LaChance* safeguards are all that may be necessary when prisoners held on awaiting action in segregation settings less onerous than the

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<sup>10</sup> *Royce* and *Kenney* pre-date the current version of the DSU regulations, which was mandated by *Hoffer* and promulgated in 1993. Therefore while *Royce* holds unlawful two years on awaiting action status in a DSU without a DSU hearing, see 390 Mass. at 429, and *Kenney* invalidates four months on awaiting action status in a DSU without a DSU hearing, 393 Mass. at 33, neither case had before it the current, much briefer, time limits set forth in 103 CMR 421.08(3) (1994) and referenced in *LaChance* n. 14.



extremely austere DSU, but if the conditions are equivalent to a DSU then the DSU regulations apply. See *Haverty*, 437 Mass. at 759-60.

This Court has over the years repeatedly rejected the DOC's efforts to avoid implementing the regulations in DSU-like conditions by, on the one hand, designating prisoners as "awaiting action," see *Royce*, 390 Mass. at 429; *Kenney*, 393 Mass. at 33-34, or, on the other, by labeling their confinement general population housing. See *Haverty*, 437 Mass. at 759-60. Rather than repudiate *Haverty*, the *LaChance* decision explicitly relies upon it:

Although we have never expressly determined that placement in a DSU triggers an inmate's constitutional right to due process, we have held that under DOC regulations, indefinite confinement in any unit where conditions are substantially similar to a DSU entitles an inmate to the protections afforded by the DSU regulations. See [*Haverty*, 437 Mass] at 756-57, 759-60.

463 Mass. at 774-75. Citing *Haverty* and a previous decision enforcing the DSU regulations, *Hoffer v. Commissioner*<sup>11</sup>, the Court explained, "Although not directly controlling [because the prior cases had not decided federal due process claims], these cases support our conclusion that the conditions of

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<sup>11</sup> 412 Mass. 450, 455 (1992).

LaChance's confinement implicate due process concerns." 463 Mass. at 775.

The DOC cannot simply ignore the DSU regulations even if it believes that *LaChance* undermined the vitality of the judgment in *Hoffer v. Fair*, which mandated the current DSU regulations to ensure compliance with the Massachusetts constitution. In *Haverty*, the court observed that DOC had sought to repeal the DSU regulations in 1995, but had been enjoined from doing so. *See Haverty*, 437 Mass. at 758-99. DOC has chosen not to take any additional steps to challenge or vacate the single justice Order in *Hoffer*. Until this happens, the regulations have the force of law, *id.* at 762, and the Plaintiffs have an enforceable right to their protection.

**B. The Superior Court Made Factual and Legal Findings Which Preclude the Dismissal of Plaintiffs' Regulatory Claim.**

The Superior Court itself affirmed the continuing validity of the DSU regulations. It noted that although the SJC had not reached the DSU regulatory claim in *LaChance*, "[h]owever, [the SJC] reiterated that the DSU regulations must be followed in any unit where conditions are as restrictive as a DSU." Slip. Op. at 2 (citing 463 Mass. at 774) (RA 310). The

Superior Court then went on to make the necessary findings of fact to support the Plaintiffs' claims:

Conditions in each of the Department of Corrections SMUs are in all material respects identical, as established by the Special Management Regulations, 103 CMR 423.00 *et seq.*, and are substantially similar to conditions found to be equivalent to a DSU.

Slip Op. at 2 (RA 310).

By the Superior Court's own reasoning the Plaintiffs should have prevailed on their regulatory claim. Nevertheless, it dismissed this claim and ordered compliance only with the constitutional ruling of *LaChance*. (RA 321.) The Court did not explain its reasoning. As noted above, and undisputed by the Defendants, the constitutionally-required procedures outlined in *LaChance* are not equivalent to the DSU regulations.

The Superior Court's dismissal of the regulatory claim is inconsistent with *Haverty's* mandate that the DSU regulations be followed in any unit with essentially the same conditions, 437 Mass. at 763, and with *LaChance's* reaffirmation of that principle. See 463 Mass. at 774; 463 Mass. at 777 n. 18. It should be reversed.

**C. The Plaintiffs Were Held in Conditions Equivalent to a DSU.**

The facts clearly support the Superior Court's finding that SMU conditions, as established by the Special Management regulations, are "substantially similar to conditions found to be equivalent to a DSU." Slip. Op. at 2. (RA 310.)

Each of the seven SMUs operated by the DOC is governed by the Special Management Regulations, 103 CMR 423.00 *et seq.* See Amended Complaint ¶¶ 27-29 (RA 43.) The SJC in *LaChance* agreed that SMU confinement is "essentially equivalent to those in the system's designated DSUs, and in some respects even more restrictive." 463 Mass. at 774 (citing *Haverty*, 437 Mass. at 743 n. 12, 747 & N. 17).

The Plaintiffs alleged extremely restricted living conditions in SMUs. (See RA 43-45.) They had only one hour out-of-cell recreation, five days a week; ate meals alone in their cells; could receive only non-contact visits, generally limited to two per week; could shower three times per week and to shave once per week. (RA 43.) They had no access to any employment or congregate programming and could not earn "good-time" sentence reductions, nor could they visit the library. They were allowed limited personal

property in their cells and only \$30-\$30 per week in canteen spending. (RA 44.)

As the *LaChance* decision notes, these SMU conditions are at least as restrictive as those in the DSUs, which allowed for five hours of recreation a week, two hours of library visitation, three showers, fifty dollars of canteen spending, and two hours of visits. See 463 Mass. at 774. Furthermore, conditions in SMUs are also more restrictive than in the East Wing units which were held to constitute a DSU in *Haverty*, 437 Mass. 737. Those units permitted ninety minutes a day of communal recreation, five days a week; two one-hour visits a week; up to two hours a week in the library; the opportunity to work as "runners" cleaning their unit; and canteen spending of up to \$30 a week. See *Haverty v. Dubois*, No. 953634F, 1999 WL 1487591, \*10, Appendix A (Mass. Super. Oct. 13, 1999), *aff'd in relevant part*, 437 Mass. 737. (RA 210.)

**D. The Plaintiffs Were Denied the Benefit of the DSU Regulations.**

The DSU regulations provide that a prisoner in non-disciplinary segregation is entitled to significant procedural protections. See 103 CMR 421.07

through 421.19. The Defendants do not apply these regulations in the SMUs where the Plaintiffs were held. Instead, these units are operated under the Special Management regulations, 103 CMR 423.00 et seq., which provide none of these protections<sup>12</sup>.

(Amended Complaint ¶¶ 29, RA 43.)

It is undisputed that the DOC's policies implemented in response to LaChance (embodied in the SOP attached to 103 CMR 423) also fall far short of the DSU regulations. The DSU regulations permit segregation only if there is "substantial evidence" that the prisoner poses a "substantial threat" to the safety of others, to property, or to the operation of the facility. 103 CMR 421.09. In contrast, under the SOP a Correctional Program Officer (CPO) need only inform the prisoner of the basis for holding him in the SMU, give the prisoner an opportunity to contest the rationale for SMU placement (with no witnesses or legal representation), orally inform the prisoner of the CPO's "recommendation" regarding future SMU

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<sup>12</sup> The DSU regulations also require that DSU prisoners be afforded privileges and conditions substantially greater than the privileges afforded under the Special Management regulations, including enhanced property, visitation rights, and canteen purchases. Compare 103 CMR 421.20 with 103 423.09.

placement, and communicate the recommendation in writing within two days. Significantly, the SOP does not require a finding that returning the prisoner to general population would pose a "serious threat to life, property, self, staff or other inmates, or to the security or orderly running of the institution" as mandated by the Special Management regulations. 103 CMR 423.06 (definition of Administrative Segregation).

Under the DSU regulations, if a prisoner meets the standard for segregation he must be given a conditional release date not to exceed six months, along with a set of conditions specifically related to the reason for his segregation which, if he meets, will earn his release. 103 CMR 421.15 (2). Under the SOP, the prisoner gets none of this. In addition, the DSU regulations require numerous additional procedural guarantees lacking in the SOP.<sup>13</sup>

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<sup>13</sup> These include, but are not limited to, the following:

(1) The DSU regulations require a hearing after 15 or 30 days of restrictive confinement, 103 CMR 421.08, whereas the SOP provides for a hearing within 90 days of placement. (Addendum at 65).

(2) The DSU regulations require that within five days of confinement the prisoner must be served with a detailed "written referral summary" that outlines the specific information that may be considered at the hearing, the names of any witnesses who may testify, and copies of any documents to be introduced, at least

Thus the DOC's procedures issued in response to LaChance are no substitute for the DSU regulations.

## **II. The Appeals Court Erred in Failing to Reach the Merits of the Plaintiffs' Claims.**

### **A. Plaintiffs' Claims are Not Moot Because A Motion for Class Certification Was Pending Before the Cessation of Harm.**

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72 hours before the hearing. 103 CMR 421.10. The SOP merely requires notice to the inmate of "the basis upon which the inmate is confined in the SMU" at least 48 hours before the hearing. (Addendum at 65.)

(3) The DSU regulations call for a hearing in front of three-person DSU Board appointed by the Commissioner, 103 CMR 421.06, each of whom is subject to challenge for lack of impartiality. 103 CMR 421.12. The SOP requires that a single Correctional Program Officer (CPO) conduct the hearing. (Addendum at 65.)

(4) The DSU hearings are governed by a detailed set of protections, including the right to assistance by a CPO and representation by counsel; the right to assistance for non-English speaking and illiterate persons; and the right to record the hearing and to obtain a duplicate tape. 103 CMR 421.11. Furthermore, prisoners have the right to confront and cross-examine the evidence against them and to testify and submit oral and physical evidence, and the right to assistance obtaining affidavits from witnesses whose presence is not allowed. 103 CMR 421.13. The SOP provides only that the CPO "shall inform the inmate of the basis upon which the inmate is confined to the SMU" and the prisoners may offer verbal or written statements or documents contesting the rationale for confinement. (Addendum at 65.)

(5) The DSU regulations require that the prisoner be notified of his right to appeal to the Associate Commissioner of Programs, Treatment and Classification. 103 CMR 421.15(3). Whether or not the prisoner appeals, the Board's decision is reviewed by the Commissioner or his designee. 103 CMR 421.17. Under the SOP, the prisoner's only appeal is to the Superintendent. (Addendum at 66.)



The Superior Court dismissed this case not because there was any suggestion that the Plaintiffs' claims were moot, but rather because of the Court's mistaken understanding that the relief ordered in *LaChance* satisfied their claims. See Opinion at 2-3. There was no mootness argument because the Defendants had acknowledged in a December 28, 2012 filing to the Superior Court that one of the Plaintiffs, later identified as Albert Jackson,<sup>14</sup> remained in the SMU, and Plaintiffs' motion for class certification was pending. The Appeals Court determined that the claims were moot simply because the Plaintiffs-Appellants, while still in DOC custody, had all been released from Special Management Units by the time of its decision. App. Op. at 3-4.

This was erroneous because where the claims of a named plaintiff in a putative class action become moot while a motion for class certification is pending, the case is not moot. See *Wolf v. Comm'r of Public Welfare*, 367 Mass. 293 (1975); See also, *U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980) (class

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<sup>14</sup> See Defendants Supplemental Memorandum in Support of Motion to Dismiss n. 1 (RA 266); Plaintiffs' Application for Further Appellate Review at 8 n. 8; App. Op. at 3 n. 7.

action brought by a prisoner who was released on parole pending appeal of the dismissal of his substantive claim was not moot even though class certification had been denied); *Reid v. Donelan*, 297 F.R.D. 185, 192 (D. Mass. 2014) (class certification granted even where named plaintiff's individual claim was moot because he had already received the relief he requested on behalf of the class).

In *Wolf*, as here, the Plaintiff had sought class certification before ceasing to suffer injury. The Court held dismissal of her claims for mootness, before consideration of class certification, was in error:

Policies underlying the doctrine of mootness...indicate that the judge should have passed on the existence of a proper class before considering the question of mootness. During the interim between the plaintiffs assertion that she brought the suit in a representative capacity and the court's certification or refusal to certify a class, the judge should have treated the suit as a class suit for the purposes of dismissal.

376 Mass. at 297-98 (citing *Sosna v. Iowa*, 419 U.S. 393 (1975) and other cases). See also *Gerstein v. Pugh*, 420 U.S. at 111 n. 11 (Plaintiffs' claim not moot because capable of repetition, yet evading review and, "[m]oreover, in this case the constant existence of a class of persons suffering the deprivation is

certain." ).

The Appeals Court acknowledged this holding of *Wolf*, which Justice Rubin relied upon in his Dissent<sup>15</sup>, but added, "subsequent cases have treated *Wolf* as an example of the doctrine that courts may hear moot cases if they raise important issues that are 'capable of repetition, yet evading review,' not as establishing a procedural rule applicable to class actions." App. Op. at 3-4, n. 1, citing *Gonzalez v. Comm'r of Corr.*, 407 Mass. 448, 451-453 (1990). However, *Gonzalez* notes that "[t]here are occasions when a judge may be justified in certifying a class despite the mootness of the named representative's claims," and cites as examples precisely the circumstances of this case: when (as discussed below) the claims are capable of repetition yet evading review, or subject to voluntary cessation. 407 Mass. at 452.

Here, Plaintiff Jackson was in the SMU at the time the Superior Court dismissed the suit without ruling on class certification, and there was no question that putative class members held in DOC's

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<sup>15</sup>See Dissent at 2 (citing *Wolf* 367 Mass. at 299).

seven SMUs<sup>16</sup> were suffering the same harm. As Justice Rubin observed in his dissent, the case is therefore non-moot as a matter of law.

**B. The Plaintiffs claims are not moot because they are Capable of Repetition, Yet Evading Review and also subject to voluntary cessation.**

Although the Appeals Court acknowledged that the Plaintiffs' claims fall under the exception to the mootness doctrine because they are "of public importance, capable of repetition, yet evading review," Opinion at 3-4, it declined to decide the case in the belief that future regulations from the Department of Correction might clarify the issues at stake. *Id.* at 10-11. As discussed below in in Section II:C, the court's exercise of discretion in declining to hear the case until new DOC regulations are formally promulgated was based on two mistaken premises. The Plaintiffs' claims were clearly justiciable because they were capable of repetition, yet evading review and because they were subject to the Defendant's voluntary cessation of the alleged harm.

The Plaintiffs' claims fall within the exception to mootness for claims that are capable of repetition,

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<sup>16</sup>Amended Complaint ¶ 28 (RA 6).

yet evading review, as the Appeals Court acknowledged. App. Op., at 3-4 (citing *Superintendent of Worcester State Hospital*, 374 Mass. 271, 274 (1978), *Comm'r of Corr. v. Myers*, 379 Mass. 255, 260-61 (1979), and *Abdul-Alazim v. Superintendent, Mass. Corr. Inst.*, Cedar Junction, 56 Mass. App. Ct. 449, 452 n. 6 (2002)); see also *Gerstein v. Pugh*, 420 U.S. at 111 n.11 (1975). It is well-established that when there is "a reasonable expectation or demonstrated probability" that the plaintiff will be subject to the same unlawful conduct again, the case is not moot because the Plaintiff stands to benefit in a meaningful way from the decision. *Ford v. Bender*, 768 F.3d 15, 30 (1<sup>st</sup> Cir. 2014).<sup>17</sup> Here, The Plaintiffs remain in DOC custody and are subject to administrative segregation in an SMU at any time, the DOC continues to deny that the DSU regulations apply in those circumstances, and any future Plaintiff bringing the same claim would

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<sup>17</sup> The issue is "whether the controversy was *capable of repetition* and not ... whether the claimant had demonstrated that a reoccurrence of the dispute was more probable than not." *Honig, v. Doe*, 484 U.S. 305, 318 n.6 (1988). (emphasis in original). Plaintiffs "need not demonstrate with 'mathematical precision' that they will be subject to the same illegality; rather, Plaintiffs just need to show 'a reasonable expectation' that the challenged illegality will reoccur." *Id.*

also likely be released from the SMU before the case could be adjudicated.<sup>18</sup>

In addition, the harm claimed by the Plaintiffs is not moot as a matter of law, because it ceased due to the voluntary actions of the Defendants. In such circumstances, in order to establish mootness, "the defendant bears the heavy burden of showing that there is no reasonable expectation that the wrong will be repeated; and a defendant's mere assurance on this point may well not be sufficient." *Wolf v. Comm'r of Public Welfare*, 367 Mass. 293, 299 (1975). The Defendants' adamant refusal to provide prisoners in its SMUs with the benefits of the DSU regulations ensures that they cannot meet this "heavy burden burden."

The public importance of the issues in this case strongly argues in favor of reaching the merits of the Plaintiffs-Appellants' claims. See *Commonwealth v. Yameen*, 401 Mass. 331, 333 (1987) (citing *Lockhart v.*

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<sup>18</sup> The Plaintiff in *LaChance* was similarly released from the SMU, though still incarcerated, at the time that the Superior Court and Supreme Judicial Court reached that merits of his claims. See *LaChance*, 463 Mass. at 771. Both courts could have held moot his claims for declaratory and injunctive relief, but the Superior Court rule in his favor and the SJC affirmed that ruling rather than vacating the judgment as moot.

Attorney Gen., 390 Mass. 780, 783 (1984)). At any given moment, hundreds of prisoners are held in non-disciplinary segregation in SMUs without the benefit of the DSU regulations. See RA 29 and 37. The interpretation of two landmark SJC decisions, *Haverty* and *Lachance*, is under dispute, as the DOC continues over 20 years of resistance to implementing the DSU regulations. The heavy toll imposed on prisoners who may be unnecessarily confined under extremely harsh DSU conditions requires final adjudication without delay.

**C. The DOCs Policies In Response to the *LaChance* Decision Do Not Eliminate the Need for Relief**

1. The Standard Operating Procedure attached to the Special Management regulations, 103 CMR 423, is the DOC's final response to *LaChance*.

The Appeals Court majority, while acknowledging that the Plaintiffs claims are "capable of repetition, yet evading review," App. Op. at 3-4, declined to reach the merits of their claims, in the belief that regulations might be forthcoming from the DOC that would better frame the issues. *Id.* at 10-11. This belief was based on a January 2013 Status Report to the Superior Court in which the Defendants outlined a draft plan for compliance with *LaChance*. See App. Op.

at 6.

That Status Report detailed planned procedures for reviews of prisoners in administrative segregation or protective custody status pursuant to the Special Management regulations, 103 CMR 423. See RA 286-288. The Defendants reported that "all the details have not yet been finalized" and acknowledged that "prior to making any amendments to 103 CMR 423, the Department must comply with the requirements of G.L. c. 30A, §§ 1-8 [of the Administrative Procedure Act (APA)]." But they promised that reviews pursuant to the new policy would nevertheless begin the week of January 28, 2013.

Relying on the Status Report, the Appeals Court believed that DOC was going to promulgate regulations that might clarify any tension between *LaChance* and *Haverty*. However, DOC instead chose to respond to *LaChance* by issuing the Standard Operating Procedures (SOP), appended to the Special Management regulations, 103 CMR 423, on February 5, 2013. (Supp. RA 65-66.) The SOP includes virtually the same procedures detailed in the status report. When the Plaintiffs pointed this out to the Appeals Court in their Petition for Rehearing, the Defendants' responded



merely by acknowledging, "it is uncontested that the procedures issued by the Department in the wake of *LaChance*...have not yet been subject to the regulatory hearing process." <sup>19</sup> Supp. RA at 10. Although the word "yet" implies that DOC might someday subject the SOP to formal rule-making, DOC did not state that the process was underway, or even that they intended to promulgate regulations in the future.<sup>20</sup> Still, the Appeals Court, though saying that "the DOC's silence on this important issue provides some reason for pause," denied rehearing.<sup>21</sup>

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<sup>19</sup> A careful reading of the January 2013 Status Report shows that the Defendants did not actually promise that the new policy would be formally promulgated, but merely acknowledged that any amendments to their regulations would require compliance with the Administrative Procedures Act, G.L. c. 30A.

<sup>20</sup> DOC often finds it found convenient to implement new policy in the form of a Standard Operating Procedure that supplements an existing regulation rather than go through the notice and public comment required by the APA rule-making process. See e.g., 103 CMR 420 (2007) (Classification), to which are attached Standard Operating Procedures governing Personal Program Plans; 103 CMR 505 (2009) (Use of Force), to which are attached SOP governing the Pyramid of Force.

<sup>21</sup> The decision said that "to the extent is the DOC is not diligently fulfilling the regulatory steps that *LaChance* indicated needed to be undertaken, those in the plaintiffs' position are not without appropriate remedies." However, the Plaintiffs here seek compliance with the DSU regulations, and this lawsuit is the only venue for that claim. The Court in effect insists that the Plaintiffs must litigate whether the

It has been well over three years since *LaChance* directed DOC to draft regulations reflecting the constitutional principles set forth in that opinion. As Justice Rubin said in his dissent from denial of rehearing, the DOC has taken the position that "under the SOP it is providing all that is 'required by *LaChance*'....It neither describes nor promises any further regulatory process, pending or otherwise, nor is there any indication of one." Addendum at 25. The SOP has now functioned for almost three years as the final policy promised by the January 2013 Status Report, and has had a direct impact on the lives of hundreds of prisoners confined to the SMUs. Three years is more than ample time for DOC to craft and put into place regulations necessary to comply with *LaChance*. It would be unreasonable to delay resolution of Plaintiffs' claim under the DSU regulations solely because DOC might at some point in the future promulgate a regulation that might modify the SOP in some fashion.

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DOC must promulgate new regulations to comply with federal due process under *LaChance* before they can litigate the applicability of the DSU regulations.

2. The DOC's Response to *LaChance* does not, and will not, provide the Plaintiffs with the relief sought.

The Plaintiffs seek the enforcement of the DSU regulations which, as detailed in Section I:D, *supra*, provide a panoply of protections not included in the SOP. As discussed in Section I:A, *supra*, the DSU regulations are enforceable apart from any regulations designed to comply with *LaChance*. Even if the DOC did intend to promulgate further regulations, they will not provide the relief that the Plaintiffs seek. If the DOC intended to promulgate anything close to the DSU regulations it surely would not have fought so hard, for so many years, against their implementation.

Indeed, the DOC's response to *LaChance* - as embodied by the SOP - falls short even of the lesser constitutional requirements announced in that decision. First, the DOC is not following the guidance of *LaChance* with regard to the timeliness of the hearing. *LaChance* states that "in no circumstances" can a prisoner be held longer than 90 days in before a hearing," and indicates that in some cases an earlier hearing may be required.

The appropriate time frame for such actions must balance the inmate's interest - to challenge potentially arbitrary detention - with that of

prison officials - to secure the reclassification or transfer of an inmate who poses a threat to himself, to fellow inmates, or to the security of the facility.

463 Mass. at 777. Rather than undertake such balancing, the DOC has chosen to subject all prisoners in administrative segregation to 90 days in "the hole" before they have an opportunity to learn why they are there and contest the rationale. Even if the 90 day wait might be justified for some prisoners, it is surely not justified for all. For example, prison administrators may be justified waiting 90 days to hold a hearing for a prisoner who is under investigation for murder, but the same delay may not be justified if the prisoner is under investigation for a minor disciplinary infraction that could not be punished with ninety days in segregation even if the person is ultimately found guilty.

The SOP also fails to follow the instructions of *LaChance* in a second regard. In holding that reviews the DOC had previously provided under its Special Management regulations were "insufficient to safeguard [the plaintiff's constitutional due process interest] from abuse," the SJC noted that under those regulations the Plaintiff "was never informed of steps

that he might take to mitigate the perceived need to retain him in segregation pending some further action by DOC." 463 Mass. at 776 (citing and quoting *Hoffer v. Commissioner*, 412 Mass. 450, 456 (1992): "inmate confined to DSU without conditional release date 'and conditions by which to guide his behavior is possibly subject to arbitrary treatment.'"). The SOP is insufficient in precisely the same way, as it similarly lacks any such provision.

The DOC's response to *LaChance*, far from mooting the Plaintiffs claims, only highlights their need for relief.

### **III. The Superior Court Erred in Dismissing the Plaintiffs' Claims under the Massachusetts Declaration of Rights.**

The Superior Court did not address the Plaintiffs' claim for declaratory and injunctive relief under the Massachusetts constitution. This was in error because the DSU regulations were adopted to satisfy the requirements of the Declaration of Rights. See *Hoffer v. Fair* at 27-28 and 36-38 (RA 158-59, 167-69). In *Hoffer*, Justice Liacos, acting as single justice, found that the lack of due process in DSU placement violated the plaintiffs' right to due

process under the Constitution of the Commonwealth, and ordered the Commissioner of Correction to draft what are now the current DSU regulations to remedy the violation. See *Hoffer v. Fair* at 27-28 and 36-38 (RA 158-59, 167-69). His decision explicitly disavowed reliance on the Federal Constitution. *Id.* at 25-27 (RA 156-58).

The SJC in *LaChance* was called upon only to decide the federal constitutional claim.<sup>22</sup> The Court held that the federal constitution requires procedures less stringent than the DSU regulations, but it nevertheless cited with approval previous decisions holding that the regulations are "constitutionally required." See 463 Mass. at 775 (citing *Haverty*, 437 Mass. at 762 and *Hoffer v. Commissioner*, 412 Mass. at 455). See also, *Haverty*, 437 Mass. at 757 n. 24 ("It is, of course, the isolation of prisoners that gave rise to the constitutional necessity for the DSU regulations in the first place."); *Longval*, 448 Mass. at 420 ("In *Hoffer v. Commissioner*, 412 Mass. 450 (1992), we again clarified that departmental compliance with the DSU regulations...is

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<sup>22</sup> The Plaintiff had no claim for damages under the Massachusetts constitution. See n. 8, *supra*.

constitutionally required"). Although the Court stated that these decisions were not controlling with respect to the federal constitutional question, it said nothing to suggest that the DSU regulations are not still required to ensure due process under the Massachusetts Declaration of Rights.

Because the single justice ordered the DOC to implement the DSU regulations to remedy a violation of the Declaration of Rights, the SJC has held that the DOC may not repeal them. *See Haverty*, 437 Mass. at 738-39; *see also, Longval*, 448 Mass. at 414, n.4. Rather, if it believes the regulations are no longer required by the Constitution of the Commonwealth, the DOC's remedy is to file a motion to vacate the single justice Order in *Hoffer*, *see Haverty*, 437 Mass. at 738-39, which the DOC has not done. The DSU regulations continue to be required by the Constitution of the Commonwealth, and as such they must be followed in any unit where conditions are as restrictive as a DSU. *See Longval*, 448 Mass. at 423. Therefore, the Superior Court erred in dismissing the Plaintiffs' claims that the denial of the DSU regulations violated their rights under the Declaration of Rights.

#### IV. The Superior Court Erred in Denying Class Certification.

The Superior Court ordered, "Where the Department of Correction has agreed to apply *LaChance* to all appropriate inmates, class certification is unnecessary." (RA 311.) Thus the denial of class certification was based entirely on the Court's erroneous ruling that the *LaChance* decision had disposed of all of the Plaintiffs' claims and on the erroneous dismissal of the lawsuit. The Superior Court never addressed the Plaintiffs' arguments that they met the requirements for class certification set forth in Mass. R. Civ. P. 23.

As discussed above, the Plaintiffs state a valid claim that their segregation was illegal under both the DSU regulations and the Massachusetts Declaration of Rights. Courts have repeatedly found class certification necessary and appropriate in systemic challenges by prisoners to segregation practices and other conditions of confinement in Massachusetts correctional institutions. See, e.g., *Haverty*, 437 Mass. 737 (class of "all prisoners who are now confined or may at some point be confined" at MCI-Cedar Junction in restrictive cell blocks, seeking due process and



enforcement of DSU regulations); *Blaney v. Commissioner of Correction*, 374 Mass. 337 (1978) (class of prisoners in protective custody challenging restrictive conditions of confinement in non-disciplinary segregation); *Hoffer*, No. SJ-85-0071 (Mar. 3, 1988) (class of inmates seeking relief from procedures by which they were placed and held in the DSU) (RA 132); *Smith v. Ashe*, 106 F.R.D. 353 (D.C. Mass., 1985) (class "consisting of all present and future prisoners incarcerated at the Hampden County Jail and House of Correction, including present and future inmates and present and future pretrial detainees" challenging the conditions of confinement in administrative segregation).

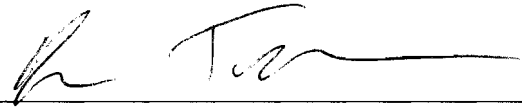
Therefore, to the extent that the Court reverses the dismissal of the Plaintiffs' regulatory and state constitutional claims, it should also reverse the denial of class certification.

#### CONCLUSION

For the reasons stated above, the Superior Court's dismissal of the Plaintiffs' claims under the DSU regulations and the Constitution of the Commonwealth, and its denial of the Plaintiffs' motion for class certification, should be reversed.

January 15, 2016

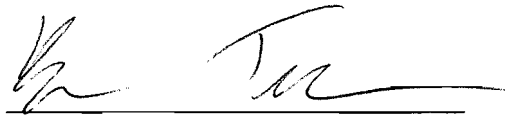
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Certificate of Compliance with Rules

Pursuant to Mass. R. App. P. 16(k), I,  
Bonita Tenneriello, certify that to the best  
of my knowledge this brief conforms with the  
rules of court that pertain to the filing of  
briefs.



Certificate of Service

I, Bonita Tenneriello, hereby certify  
that on January 15, 2016 I served by hand  
delivery two copies of this brief to counsel  
of record for Defendants-Appellants, Sheryl  
F. Grant, Department of Correction Legal  
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## **ADDENDUM**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 2012-250

ROBERT CANTELL, et al.,  
Plaintiffs

Notice sent  
2/05/2013  
B. T.  
S. F. G.

vs.

(sc)

LUIS S. SPENCER, et al.,  
Defendants

**MEMORANDUM OF DECISION AND ORDER ON  
PLAINTIFF'S MOTION FOR CLASS CERTIFICATION  
AND DEFENDANTS' MOTION TO DISMISS**

In *LaChance v. Commissioner, et al.*, the Supreme Judicial Court considered an interlocutory appeal of the lower court's denial of qualified immunity to prison officials who had confined an inmate in awaiting action status in a Special Management Unit ("SMU"). See *LaChance v. Commissioner of Correction et al.*, 463 Mass. 767 (2012). While holding that the Defendants were entitled to qualified immunity because the law was not clearly established, the Court held that "as a matter of due process" a prisoner may not be confined in a segregation unit on awaiting action status for longer than 90 days without being afforded "notice of the basis on which he is detained; a hearing at which he may contest the asserted rationale for his confinement; and a posthearing written notice explaining the reviewing authority's classification decision." 463 Mass. at 776-777.

The LaChance Court did not reach the lower court's separate ruling that "LaChance's confinement in the SMU was substantially similar to confinement in a disciplinary segregation

unit and he was entitled to the procedural protections afforded by the DSU regulations.”

*LaChance v. Clarke, et al.*, No. 06-cv-1246, at p. 8. However, it reiterated that the DSU

regulations must be followed in any unit where conditions are as restrictive as a DSU, stating:

Although we have never expressly determined that placement in a DSU triggers an inmate’s constitutional right to due process, we have held that under DOC regulations, indefinite confinement in any unit where conditions are substantially similar to those of a DSU entitles an inmate to the protections afforded by the DSU regulations. See [*Harvety*] at 756-57, 759-760, 776 N.E.2d 973.

The Court also concluded that *LaChance*’s conditions in an SMU were “essentially equivalent to those in the system’s designated DSUs, and in some respects even more restrictive,” *LaChance v. Comm’r of Corr. et al.*, 463 Mass. 767, 774 (2012).

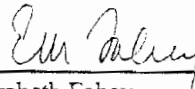
The plaintiffs in the present case are now, or were, held in non-disciplinary segregation in Special Management Units (SMUs). The SJC ordered in *LaChance* “that an inmate confined to administrative segregation on awaiting action status, where such confinement occurs in an area designated as an SMU, a DSU, or otherwise, is entitled, as a matter of due process, to notice of the basis on which he is so detained; a hearing at which he may contest the asserted rationale for his confinement; and a posthearing written notice explaining the reviewing authority’s classification decision.” *LaChance* at 776-777. Conditions in each of the Department of Corrections SMUs are in all material respects identical, as established by the by the Special Management Regulations, 103 CMR 423.00 *et seq.*, and are substantially similar to conditions found to be equivalent to a DSU in both *LaChance* and *Harvety*.

Therefore it is hereby ORDERED that:

- (1) The Defendants must extend the benefits of the SJC; *LaChance* decision to all

prisoners held in administrative segregation on awaiting action status as described above.

- (2) Where the Department of Correction has agreed to apply *LaChance* to all appropriate inmates, class certification is unnecessary;
- (3) Based on the SJC's decision in *LaChance* that the defendants are protected by qualified immunity, these defendants also enjoy that same benefit up to the date *LaChance* issued. For this reason, the defendants' Motion to Dismiss is ALLOWED. This allowance is without prejudice to plaintiffs, or any of them, filing an amended complaint that DOC is failing to properly comply with *LaChance*.



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Elizabeth Fahey  
Justice of the Superior Court

DATED: January 31, 2013

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCReporter@sjc.state.ma.us

13-P-1858

Appeals Court

ROBERT CANTELL & others<sup>1</sup> vs. COMMISSIONER OF CORRECTION & others.<sup>2</sup>

No. 13-P-1858.

Suffolk. December 12, 2014. - July 22, 2015.

Present: Rubin, Milkey, & Carhart, JJ.

Moot Question. Practice, Civil, Moot case, Dismissal of appeal, Class action. Commissioner of Correction. Administrative Law, Regulations. Imprisonment, Segregated confinement. Due Process of Law, Prison classification proceedings.

Civil action commenced in the Superior Court Department on January 20, 2012.

Motions to dismiss and for class certification were heard by Elizabeth M. Fahey, J.

Bonita Tenneriello for the plaintiffs.  
Sheryl F. Grant for the defendants.

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<sup>1</sup> Albert Jackson, Derrick Maldonado, John T. Fernandes, Wilfredo Virella, and Luis Bizzarro. Virella and Bizzarro did not join the appeal.

<sup>2</sup> The superintendents of the Massachusetts Treatment Center, Old Colony Correctional Center, MCI-Cedar Junction, MCI-Shirley, MCI-Norfolk, MCI-Concord, NCCI-Gardner, MCI-Framingham, and Souza-Baranowski Correctional Center.

MILKEY, J. The plaintiffs are inmates at various State prison facilities who for a time had been held in segregated confinement in so-called "special management units" (SMUs).<sup>3</sup> They brought this action seeking declaratory and injunctive relief against the Commissioner and other officials of the Department of Correction (collectively, the DOC). The plaintiffs' amended complaint alleged that they, and other inmates similarly situated, cannot be segregated in SMUs without being afforded certain substantive and procedural protections. Their claims were identical to ones raised by the inmate in LaChance v. Commissioner of Correction, 463 Mass. 767, 774-777 (2012).<sup>4</sup> Thus, for example, like that inmate, the plaintiffs claimed inter alia that the conditions they faced in the SMUs were as onerous as those faced in so-called "departmental segregation units" (DSUs),<sup>5</sup> and that therefore the DOC was bound to extend to them the benefit of existing regulations governing confinement in the DSUs. Once the Supreme Judicial Court issued its opinion in LaChance, a Superior Court judge dismissed this action without prejudice to the plaintiffs' filing a new

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<sup>3</sup> See 103 Code Mass. Regs. §§ 423.00 (2007).

<sup>4</sup> The inmate in LaChance, who was represented by the same counsel as the plaintiffs, additionally sought monetary damages. 463 Mass. at 768, 772.

<sup>5</sup> See 103 Code Mass. Regs. §§ 421.00 (1994).



complaint alleging "that [the] DOC is failing to properly comply with LaChance."<sup>6</sup> For the reasons set forth below, we dismiss this appeal from the judgment as moot.

Framing the mootness question. As an initial matter, we note that it is uncontested that the plaintiffs are no longer held in segregated confinement in SMUs.<sup>7</sup> Accordingly, to the extent that their case seeks to assert their own rights, it is moot. See Littles v. Commissioner of Correction, 444 Mass. 871, 872 n.3 (2005). However, a moot case nevertheless can be heard if it presents an issue "of public importance, capable of repetition, yet evading review." Superintendent of Worcester State Hosp. v. Hagberg, 374 Mass. 271, 274 (1978).<sup>8</sup> As the

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<sup>6</sup> The quoted language comes from the judge's memorandum and order allowing the DOC's motion to dismiss; the judgment itself does not state whether dismissal was with or without prejudice. However, pursuant to Mass.R.Civ.P. 41(b)(3), as amended, 454 Mass. 1403 (2009), a judgment of dismissal does not operate as an adjudication on the merits if "the court in its order for dismissal [so] specifies."

<sup>7</sup> The two original plaintiffs had been released from SMU confinement by April of 2012 when the amended complaint was filed. All but one of the additional named plaintiffs had been released from SMU confinement when the DOC filed its status report in December of 2012. It is uncontested that this inmate has since been released.

<sup>8</sup> In a similar vein, the case law reveals that such litigation often has been pursued through class actions, as the plaintiffs here sought to do. See, e.g., Haverty v. Commissioner of Correction, 437 Mass. 737 (2002), S.C., 440 Mass. 1 (2003); Longval v. Commissioner of Correction, 448 Mass. 412 (2007). At least one Massachusetts opinion states that in a case that purportedly has been brought as a class action, a

dissent accurately points out, this long-recognized exception to the mootness doctrine has particular application to litigation involving inmate rights given the often ephemeral nature of the alleged improprieties being challenged. See, e.g., Commissioner of Correction v. Myers, 379 Mass. 255, 260-261 (1979); Abdul-Alázim v. Superintendent, Mass. Correctional Inst., Cedar Junction, 56 Mass. App. Ct. 449, 452 n.6 (2002). However, whether an appellate court should proceed to address an appeal that has become moot remains a matter of discretion. Lockhart v. Attorney Gen., 390 Mass. 780, 782-783 (1984). See Blake v. Massachusetts Parole Bd., 369 Mass. 701, 708 (1976). As explained below, in the wake of LaChance and the pending regulatory proceeding that LaChance spawned, we conclude that addressing the underlying substantive issues that the plaintiffs seek to raise would be improvident at this time.

The LaChance ruling. In LaChance, a Superior Court judge ruled on summary judgment that prison officials had violated an inmate's Federal and State due process rights by holding him in

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judge should, at least in some circumstances, address class certification before considering whether the case has become moot as to the named plaintiffs. Wolf v. Commissioner of Pub. Welfare, 367 Mass. 293, 297 (1975). Subsequent cases have treated Wolf as an example of the doctrine that courts may hear moot cases if they raise important issues that are "capable of repetition, yet evading review," not as establishing a distinct procedural rule applicable to class actions. See, e.g., Gonzalez v. Commissioner of Correction, 407 Mass. 448, 451-453 (1990).

an SMU for over ten months without a hearing in which he could seek to challenge his segregated confinement. 463 Mass. at 772-773. With regard to the inmate's claims for monetary damages pursuant to 42 U.S.C. § 1983 against the officials in their individual capacities, the judge ruled that the officials were not entitled to qualified immunity, because -- in the judge's view -- the inmate's due process rights clearly had been established by existing precedent. LaChance, supra at 773. On the officials' interlocutory appeal of the denial of their motion to dismiss the § 1983 claims, id. at 768 & n.3, the Supreme Judicial Court held that the officials were entitled to qualified immunity, id. at 777-778.

At the same time, the LaChance court affirmed the judge's ruling that the officials had violated the inmate's due process rights. In the key paragraph, the court stated as follows:

"We conclude that an inmate confined to administrative segregation on awaiting action status, whether such confinement occurs in an area designated as an SMU, a DSU, or otherwise, is entitled, as a matter of due process, to notice of the basis on which he is so detained; a hearing at which he may contest the asserted rationale for his confinement; and a posthearing written notice explaining the reviewing authority's classification decision. The appropriate time frame for such actions must balance the inmate's interest -- to challenge potentially arbitrary detention in severe conditions -- with that of prison officials -- to secure the reclassification or transfer of an inmate who poses a threat to himself, to fellow inmates, or to the security of the facility. Although we leave it to the DOC to promulgate regulations that reflect the balance of these interests, we conclude that in no circumstances may an inmate be held in segregated

confinement on awaiting action status for longer than ninety days without a hearing."

LaChance, 463 Mass. at 776-777. Thus, while broadly sketching out the due process rights that the DOC had to provide to inmates who were held in an SMU on "awaiting action" status, the court otherwise left it to the DOC to promulgate new regulations to balance the competing interests at stake. The court took that approach even though it recognized that "the conditions of LaChance's confinement in the SMU were, as the judge found, essentially equivalent to those in the system's designated DSUs, and in some respects even more restrictive." Id. at 774.

The import of LaChance for the instant case. The LaChance court made clear that its holding was not limited to the inmate in that case but instead applied to all "inmate[s] confined to administrative segregation on awaiting action status." Id. at 776. Consequently, the DOC recognizes that, going forward, it is bound to provide all such inmates the due process rights recognized in LaChance.<sup>9</sup> In a January, 2013, status report requested by the motion judge, the DOC reported that it had begun the process of promulgating the new regulations required by LaChance, and that it would commence providing hearings to

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<sup>9</sup> The amended complaint did not specify that the plaintiffs were confined in an SMU while "awaiting action," but both sides appear to have treated their confinement as such in their briefs. In any event, awaiting action status is subject to the review process governing SMUs generally. See 103 Code Mass. Regs. § 430.21(2) (2006).

inmates confined in an SMU even before the new regulations were finalized.

The plaintiffs argue that LaChance itself did not fully resolve the legal issues they raised in their amended complaint and that the completion of the pending regulatory process will not address the issues that remain open. Specifically, the plaintiffs contend that because the conditions of segregated confinement in an SMU are equivalent to those in a DSU,<sup>10</sup> then -- regardless of what the new regulations mandated by LaChance ultimately will say -- DOC is bound to apply its existing DSU regulations to all inmates segregated in an SMU for more than a brief period (including those held on awaiting action status).<sup>11</sup>

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<sup>10</sup> The plaintiffs alleged that SMUs across the Commonwealth had equivalent or worse conditions than designated DSUs, and that allegation must be accepted as true in the context of a motion to dismiss. The dissent characterizes inmates held in SMUs under such conditions as a mere "subgroup" of all inmates held in SMUs. The extent to which this is true is not developed in this record.

<sup>11</sup> As the plaintiffs acknowledge, the Supreme Judicial Court previously has recognized that prison officials can temporarily confine inmates in segregation for "brief" periods without providing them the protections afforded by the DSU regulations. Haverty v. Commissioner of Correction, 437 Mass. 737, 764 (2002), S.C., 440 Mass. 1 (2003). The court further indicated that by the term "brief," it "ha[d] in mind days, not weeks." Id. at 764 n.36. The DSU regulations themselves require a hearing within fifteen days of an inmate's being placed in segregated confinement, or within thirty days if the inmate is being investigated or charged with a disciplinary offense. 103 Code Mass. Regs. § 421.08(3) (1994). This appears to be the principal procedural protection that the plaintiffs are seeking to secure.

They acknowledge that LaChance implicitly forecloses a claim that Federal due process requires that result. However, relying on Haverty v. Commissioner of Correction, 437 Mass. 737 (2002), and other cases cited with approval in LaChance, 463 Mass. at 774-775, the plaintiffs claim that full compliance with the DSU regulations is independently required either by the State Constitution or by the regulations themselves.<sup>12</sup> The plaintiffs additionally maintain that a two-decade old injunction issued by a single justice of the Supreme Judicial Court prohibits the DOC from amending the DSU regulations to make them less protective. See Haverty, supra at 758 & n.26 (referencing the injunction). Therefore, according to the plaintiffs, the judge could not dismiss their case based on LaChance. Instead, they contend,

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<sup>12</sup> In Haverty, the court stated that except where an inmate was held in segregated confinement for only a brief period (see note 11, supra), the DSU regulations applied "to all placement of prisoners in segregated confinement for nondisciplinary reasons for an indefinite period of time." 437 Mass. at 760. As the plaintiffs acknowledge, LaChance, 463 Mass. at 774-775, clarified that the holding of Haverty is not based on Federal due process requirements. However, as noted, LaChance arose as an interlocutory appeal of a judge's decision that DOC officials were not entitled to qualified immunity, and the court's opinion did not directly address whether compliance with the DSU regulations was required by State law. Because LaChance cites to Haverty with approval, the plaintiffs argue that the broad statements in Haverty about the applicability of the DSU regulations continue to stand and that those statements must be grounded either in State constitutional law or in the wording of the DSU regulations themselves. Their amended complaint also cited to G. L. c. 127, § 32 (requiring that inmates be treated with merited "kindness"), but the plaintiffs have abandoned that argument on appeal.

she first should have allowed them to put on their proof that the conditions of SMU confinement are as restrictive as those in the DSUs, and ultimately should have entered judgment requiring the DOC to comply with its DSU regulations as to all inmates held in segregated confinement in SMUs (including those on awaiting action status).

The DOC counters that even if older case law could be read along the lines that the plaintiffs suggest,<sup>13</sup> LaChance marks an implicit departure from that precedent. According to the DOC, it would make no sense for the Supreme Judicial Court to have directed it to go through the process of promulgating a new set of regulations if case law already made it clear that the agency was bound to apply its existing DSU regulations.<sup>14</sup> With regard to the plaintiffs' claim that the single justice's 1995 injunction continues to limit its ability to modify its

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<sup>13</sup> The DOC does not concede that point and contends that the language in Haverty, 437 Mass. at 760, on which the plaintiffs seek to rely does not apply to inmates held in an SMU "awaiting action," because such confinement cannot be said to be for an "indefinite period of time" even if the event for which they are awaiting action has not been scheduled.

<sup>14</sup> In support of its position, the DOC accurately points out that even though the LaChance court agreed with the motion judge's conclusion that conditions at the SMU were at least as restrictive as in DSUs, 463 Mass. at 774, the court characterized the case law requiring application of the DSU regulations as "not directly controlling." Id. at 775. In addition, the court referred to the DSU regulations merely as "other DOC regulations" that "informed in part" the court's decision. Id. at 777 n.14.

regulations, the DOC notes that the full court directed it to issue the new regulations while providing guidance on what due process minimally requires. The DOC also highlights that there is no lawful basis for a court to prohibit it from amending its regulations as it deems appropriate, except to the extent that the agency is constrained by statutory or constitutional limitations. See Judge Rotenberg Educ. Center, Inc. v. Commissioner of the Dept. of Mental Retardation (No. 1), 424 Mass. 430, 466 (1997) ("[T]he judiciary lacks the authority to order a State agency to do anything that it is not required to do as a matter of law"), citing Attorney Gen. v. Sheriff of Suffolk County, 394 Mass. 624, 629-630 (1985).

As this debate between the parties suggests, there is some unresolved tension in the case law. The question is whether we should try to resolve that tension at this time in the current litigation -- now moot as to all named plaintiffs -- under the circumstances presented. We conclude that it would be improvident to do so. Although LaChance may not directly have resolved all the issues the plaintiffs seek to raise, it set in motion a regulatory process that will help frame any unresolved questions. Once the regulations mandated by LaChance have been issued and applied, any remaining claims about what additional process is due, if any, properly can be assessed based on "concrete fact situation[s]." Entergy Nuclear Generation Co. v.



Department of Env'tl. Protection, 459 Mass. 319, 326 (2011), quoting from Hadley v. Amherst, 372 Mass. 46, 52 (1977). In that manner, judicial review can take place in a far more appropriate setting than the abstract one presented by what remains of the current case. See Hadley, 372 Mass. at 52 (noting that "[i]n the absence of a concrete fact situation, any ruling as to the extent of the power granted [to a governmental entity by the relevant statute] is likely to be either too narrow or too broad"). In this regard, we note that an inmate's assignment to an SMU can occur in a broad array of circumstances, and the specific process that an inmate may be due may vary somewhat with those particular circumstances. Deferring consideration of the questions the plaintiffs seek to raise until the DOC has drafted and begun to apply its regulations will help allow informed review of such considerations. Although courts eventually may need to address the issues the plaintiffs seek to raise (assuming they are unsatisfied by the forthcoming regulations), consideration of such issues now would be premature. See Massachusetts Med. Soc. v. Commissioner of Ins., 402 Mass. 44, 48-49 (1988) ("The better policy is to allow the administrative process to run its course before permitting appellate review, thereby granting the administrative agency a sufficient opportunity to apply its

expertise to develop regulations in conformity with the statutory scheme").

For these reasons, we dismiss the appeal.

Appeal dismissed.

RUBIN, J. (dissenting). I disagree with the majority's novel conclusion that we may refuse in our "discretion" to hear a case over which we have jurisdiction.

Mootness is an "aspect[] of justiciability." O'Brien's Case, 424 Mass. 16, 18 (1996). If a case is moot, there is a "jurisdictional defect." Ibid. Unlike Federal courts, however, our Supreme Judicial Court has concluded it has discretion to hear and decide moot cases when it serves the public interest. "In . . . circumstances where some of the usual aspects of justiciability are missing -- particularly where the case was moot as to the parties before the court -- we have proceeded to render an opinion, if a question of general importance was presented which required resolution and if the jurisdictional defect would not interfere with or confuse that resolution." Ibid. In the case on which the majority would rely, Lockhart v. Attorney Gen., 390 Mass. 780, 782-783 (1984), the Supreme Judicial Court articulated this rule and, unremarkably, declined to hear and decide a moot case, id. at 784-785.

This case, however, is not moot, and there is no opinion holding that when a case is as a matter of law not moot, we have discretion not to hear it. Rather, individuals with a claim of aggrievement over which a court has jurisdiction are entitled to know and be granted their rights, whatever they might be. Courts have a "virtually unflagging obligation . . . to exercise

the jurisdiction given them." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

This suit was brought as a putative class action. The allegedly wrongful conduct continues with respect to members of the putative class, even though it has ended with respect to the named plaintiffs. In these circumstances, "[i]f the underlying controversy continues, a court will not allow a defendant's voluntary cessation of his allegedly wrongful conduct with respect to named plaintiffs to moot the case for the entire plaintiff class." Wolf v. Commissioner of Pub. Welfare, 367 Mass. 293, 299 (1975). Rather, the case will be held not to be moot. Id. at 297. This determination is a question of law, not, as the majority now holds, one of determining whether it would be "improvident" or not to hear the case. Indeed, in Wolf itself, the trial court that had held the case moot was reversed for legal error, with no suggestion that it had discretion not to hear the case. See id. at 300. See also, e.g., State Tax Commn. v. Assessors of Haverhill, 331 Mass. 306, 308 (1954) (mootness is a "matter of law").<sup>1</sup>

Nor, I should point out, is there any prudential reason to wait for the regulations mandated by LaChance v. Commissioner of

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<sup>1</sup> The plaintiffs' motion for class certification was denied solely as a logical consequence of the judge's ruling granting the defendants' motion to dismiss on the merits. The proper disposition of this case would include the judge on remand considering the plaintiffs' motion anew.

Correction, 463 Mass. 767, 777 (2012) -- which remain unissued years after that decision -- to decide this case. LaChance says that due process requires, among other things, a hearing within ninety days for inmates confined to administrative segregation on awaiting action status. Ibid. The plaintiffs contend that they are entitled to the more stringent regulatory protections provided for those held in departmental segregation units (DSUs) -- including a hearing within fifteen days. Whatever the precise terms of the new regulations, they will not eliminate this disparity, and there is no reason to make those held in these conditions wait for an adjudication of their rights.

The judgment below therefore must rise or fall on its merits, and it is to those I turn.

Those inmates before us on awaiting action status were not automatically placed because of that status in special management units (SMUs), units whose conditions, including solitary confinement in cells twenty-three hours per day, are "substantially similar" (LaChance, supra at 774) to the extremely harsh conditions in DSUs. Rather, they were placed in SMUs only upon a determination by a prison official that their "continued presence . . . in the general population would pose a serious threat to life, property, self, staff or other inmates, or to the security or orderly running of the institution." 103 Code Mass. Regs. § 423.06 (2007) (explaining when administrative

segregation is permitted). They were placed in SMUs only because they were deemed to warrant administrative segregation because of a threat to safety and security. Before this placement, however, they were not afforded the detailed procedures required by 103 Code Mass. Regs. §§ 421.00 for placement in a DSU. Those regulations require a hearing before an impartial board, 103 Code Mass. Regs. § 421.12, at which there must be "substantial evidence" that an inmate poses "a substantial threat" to either "to the safety of others; or . . . of damaging or destroying property; or . . . to the operation of a state correctional facility." 103 Code Mass. Regs. § 421.09 (1994).

In Haverty v. Commissioner of Correction, 437 Mass. 737, 763, 764 n.36 (2002), the Supreme Judicial Court said that as a matter of interpretation of the regulations, the procedural safeguards detailed in 103 Code Mass. Regs. §§ 421.00 "must be afforded to all prisoners before they are housed in DSU-like conditions" except for those prisoners "whose stay . . . is intended to be, and is, brief," meaning "days, not weeks." The court reminded the Department of Correction (DOC) that "in 1995 the commissioner attempted to repeal the DSU regulations, but his attempt to do so was enjoined by a single justice of this court. The commissioner did not appeal from the order of the single justice, nor does the record reflect that he has made any

subsequent attempt to modify or repeal the regulations." Id. at 758 (footnote omitted). Absent a court order to the contrary, these regulations thus "have the full force of law." Ibid. This has not changed since then, and because Haverty remains good law, the prisoners in this case are entitled to the protections of those regulations as a matter of State law.

The DOC essentially argues that LaChance, 463 Mass. at 774-775, overruled Haverty, supra, and means that these prisoners are entitled only to what LaChance commanded, and no more. The language of the LaChance opinion, robust with favorable citation to Haverty and to Hoffer v. Commissioner of Correction, 412 Mass. 450 (1992), certainly does not appear to have been intended to weaken the procedural protections for prisoners like these. In fact, the LaChance court reiterated that its prior decisions stated that (1) "under DOC regulations, indefinite confinement in any unit where conditions are substantially similar to those of a DSU entitles an inmate to the protections afforded by the DSU regulations," and (2) "the protections afforded by the DSU regulations are mandated by due process considerations." LaChance, 463 Mass. at 774-775, citing Hoffer, supra at 455, and Haverty, supra at 762. As the majority observes, the court noted that these prior decisions were "not directly controlling" on the issue actually decided, LaChance, supra at 775. However, this disclaimer seems to strengthen the

argument that LaChance did not overrule Haverty: the State-law issue decided in Haverty was different from the issue the court was addressing in LaChance, that of Federal due process in the context of 42 U.S.C. § 1983.

On the other hand, as the majority indicates, it can be argued that, if the Supreme Judicial Court in LaChance was ordering the promulgation of regulations only for prisoners in DSU-like conditions, it must have meant to overrule Haverty. If all the prisoners who would be entitled to the benefit of the regulations ordered by LaChance -- including primarily the requirement of a hearing within ninety days -- were already entitled under Haverty to the benefit of 103 Code Mass. Regs. §§ 421.00, which mandates a hearing within fifteen days, requiring the drafting of the new regulations would have been purposeless. Rather than having done something purposeless, the argument goes, the Supreme Judicial Court must have overruled Haverty sub silentio.

The flaw in this argument lies in its major premise. The procedures required by the court in LaChance are not only for those in conditions "substantially similar" to those in the system's designated DSUs. Rather, the court concluded as a matter of Federal due process that the procedures it described are required for "an inmate confined to administrative segregation on awaiting action status, whether such confinement



occurs in an area designated as an SMU, a DSU, or otherwise." LaChance, 463 Mass. at 776. "Administrative segregation is a 'temporary form of segregation from general population used when the continued presence of the inmate in the general population would pose a serious threat to life, property, self, staff or other inmates, or to the security or orderly running of the institution.'" Id. at 769 n.4, quoting from 103 Code Mass. Regs. § 423.06 (2007). Nothing requires that those on administrative segregation be held in harsh conditions "substantially similar" to those in a DSU.

The court in LaChance said nothing about the question presented here: whether the subgroup of those held in administrative segregation on awaiting action status whose conditions of confinement are as harsh as those in DSUs are entitled as a matter of State law to the more stringent protections of 103 Code Mass. Regs. §§ 421.00. Under Haverty, the answer to that question is yes. But that does not render the LaChance regulations purposeless. The LaChance regulations still will articulate the protections required for those inmates held in administrative segregation in conditions which are not substantially as restrictive as those in a DSU, who are not entitled to the more robust protections of Haverty.

For these reasons, I would reverse the judgment of the trial court.

Appeals Court Clerk's Office <AppealsCtClerk@appct.state.ma.us>

Wed, Sep 16, 2015 at  
6:00 PM

To: "Bonita Tenneriello, Esquire" <btenneriello@plisma.org>, "Bonita Tenneriello, Esquire" <jpingeon@plisma.org>

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT CLERK'S OFFICE

September 16, 2015

RE: No. 2013-P-1858

Lower Ct. No.: SUCV2012-00250

ROBERT CANTELL & others [1]

vs.

LUIS SPENCER & others [2]

NOTICE OF DOCKET ENTRY

Please take note that on September 16, 2015, the following entry was made on the docket of the above-referenced case:

MEMORANDUM AND ORDER ON PLAINTIFFS' PETITION FOR REHEARING: In a status report that was provided to the Superior Court prior to entry of judgment, the Department of Correction (DOC) stated that in the wake of *LaChance v. Commissioner of Correction*, 463 Mass. 767 (2012), it would begin providing additional hearings to inmates detained in segregated confinement on awaiting action status even before the agency promulgated the regulations contemplated by that decision. The parties appear to agree on two key points regarding subsequent developments: (1) that the DOC has set forth its working procedures in a February 5, 2013, Standard Operating Procedure (SOP), and (2) that the DOC has not promulgated formal regulations or otherwise completed the regulatory process that *LaChance* appears to have contemplated.

In their petition for rehearing, the plaintiffs aver essentially that the DOC has done all the rulemaking it intends to do, and on this basis they contend that this court erred in deferring judicial consideration of the substantive issues they sought to raise in their complaint. For its part, the DOC has offered no commitment as to when it intends to complete the regulatory process even as it recognizes that the interim policies it apparently is following "have not yet been subject to the regulatory hearing process." Although the DOC's silence on this important issue provides reason for some pause, a majority of the panel is not persuaded that the plaintiffs have met the standard set forth in *Mass.R.A.P. 27(a)*, as appearing in 396 Mass. 1218 (1986), necessary to justify rehearing. We note that the plaintiffs' complaint in this case did not challenge the SOP (which had not yet issued) either on its face or as applied to them. Our conclusion -- that it makes sense to address the important issues that the plaintiffs seek to raise in a more concrete context than the current case allows -- stands. We further note that to the extent that the DOC is not diligently fulfilling the regulatory steps that *LaChance* indicated needed to be undertaken, those in the plaintiffs' position are not without appropriate remedies. (*Rubin, Milkey & Carhart, JJ.*[3]).[4]

RUBIN, J., dissenting from denial of rehearing. In the published opinion in this case, we held that this court had discretion not to hear this appeal even though it fell within a "long-recognized exception to the mootness doctrine." *Cantell v. Commissioner of Correction*, 87 Mass. App. Ct. 629, 630 (2015). We exercised our discretion not to hear this justiciable case. We concluded that there was a "pending regulatory proceeding," *id.* at 631, and that it "would be improvident" to address the issue in this case -- whether the plaintiff class is entitled to the protections attendant upon placement in a Departmental Segregation Unit (DSU) provided by 103 Code Mass. Regs. s.s. 421.00 (1994) -- until "the regulations mandated by *LaChance v. Commissioner of Correction*, 463 Mass. 767 (2012)] have been issued and applied." *Cantell, supra* at 635. Although I dissented from the court's decision, I am bound by it.

In their petition for rehearing, the plaintiffs point out that the Department of Correction (DOC) "has, in fact, issued its policy responding to the LaChance decision, in the form of a February 5, 2013 Standard Operating Procedure (SOP) attached to the Special Management regulations, 103 [Code Mass. Regs. s.s.] 423.00." Petition for Rehearing 1 (citing Department of Correction, Standard Operating Procedures Attachment to 103 [Code Mass. Regs. s.s.] 423 Special Management for Purposes of Additional Review Requirements for Inmates on Awaiting Action or Protective Custody Status for Ninety [90] Days or More 15-17 [Sept. 2014], available at <http://www.mass.gov/eopss/docs/doc/policies/423.pdf> [last visited Sept. 8, 2015]). As the plaintiffs describe, the "SOP lacks many of the [DSU] regulations' most important guarantees, such as a hearing by an impartial Board with 15 or 30 days of confinement, substantial evidentiary criteria that must be met to justify confinement, a conditional release date, and conditions which will enable the prisoner to earn his release. Rather, it provides that after 90 days in an SMU on awaiting action status or protective custody status a prisoner will have a hearing with a single Correctional Program Officer (CPO). At this hearing, the prisoner may offer a verbal or written statement and/or documentation, but may not call witnesses or be represented by counsel. The CPO's recommendation and the rationale for it are then served on the prisoner. The [p]risoner may appeal to the Superintendent, but because the SOP contains no standard as to what does or does not justify segregation there is scant basis for a prisoner to appeal." Petition for Rehearing 2.

In its opposition to the petition for rehearing, the DOC did not dispute that it has promulgated and is applying the SOP. Indeed, its position is that, under this SOP, it is providing all that is "required by LaChance." Opposition to Petition for Rehearing 2. It neither describes nor promises any further regulatory process, pending or otherwise, nor is there any indication of one.

The DOC has thus already responded to LaChance and has published, put in place, and has for two and one-half years been applying the procedures it says are required by that decision. The very premise of the decision not to reach the merits of this case -- that we were all awaiting a response by the DOC to LaChance -- therefore was incorrect. There remains, therefore, no basis for failure to hear this case on its merits. The point is not that the plaintiffs did not challenge the SOP. That is not what the case is about. The SOP -- any regulatory response to LaChance -- is only relevant because this court concluded the merits of this case had to remain unaddressed until such response was given, and new procedures applied. I therefore would grant the petition for rehearing, vacate the decision of this court, reach the merits of the appeal and, for the reasons stated in my dissent from the court's opinion, reverse the judgment below. Because the majority instead simply denies the petition for rehearing, I respectfully dissent. \*Notice.

#### Footnotes

1. Albert Jackson, Derrick Maldonado, John T. Fernandes, Wilfredo Virella, and Luis Bizzarro. Virella and Bizzarro did not join the appeal.
2. The superintendents of the Massachusetts Treatment Center, Old Colony Correctional Center, MCI-Cedar Junction, MCI-Shirley, MCI-Norfolk, MCI-Concord, NCCI-Gardner, MCI-Framingham, and Souza-Baranowski Correctional Center.
3. The panelists are listed in order of seniority.
4. Justice Rubin dissents from the denial of the petition for rehearing. His dissenting opinion is attached infra.

#### IMPORTANT INFORMATION

**ELECTRONIC NOTIFICATION.** The Clerk's Office requests that all counsel of record and self-represented litigants register to receive electronic (i.e., e-mail) notification of actions, orders, judgments, rescripts, and decisions entered by the Appeals Court, including notices scheduling oral argument.

**HOW TO REGISTER.** Registration is simple. Visit the e-notification page of the court's website at <http://www.mass.gov/courts/docs/forms/appeals/enoticeconsent.pdf> and click on Consent to Electronic

Notification Form. Complete and print a copy of the form, then email it to [enoticesignup@appct.state.ma.us](mailto:enoticesignup@appct.state.ma.us).

FILINGS AFTER ASSIGNMENT OF APPEAL TO PANEL. Once an appeal is assigned to a panel for consideration on the merits, with or without oral argument, all further filings in the appeal are required to be filed electronically by e-mailing the document in PDF to [emotions@appct.state.ma.us](mailto:emotions@appct.state.ma.us).

FILING OF CONFIDENTIAL OR IMPOUNDED INFORMATION. When filing any document containing confidential, impounded, or sealed material, compliance with Mass.R.App.P. 16(d), 16(m), 18(a), 18(g), and the S.J.C.'s Interim Guidelines for the Protection of Personal Identifying Information is required.

Very truly yours,

The Clerk's Office

Dated: September 16, 2015

To: Bonita Tenneriello, Esquire, Sheryl F. Grant, Esquire

103 CMR: DEPARTMENT OF CORRECTIONS  
103 CMR 421: DEPARTMENTAL SEGREGATION UNITS

Section

- 421.01 Purpose
- 421.02 Statutory Authorization
- 421.03 Cancellation
- 421.04 Applicability
- 421.05 Access to Regulations
- 421.06 Definitions
- 421.07 Referral to a DSU Board
- 421.08 Placement on Awaiting Action in Restrictive Confinement
- 421.09 Placement or Retention in a DSU
- 421.10 Proceedings Before the DSU Board
- 421.11 Assistance and Representation of Inmates and the Recording of Proceedings
- 421.12 The DSU Board's General Powers
- 421.13 Fact Finding Aspects of Hearing Before DSU Board
- 421.14 Procedures for the Use of Informant Information
- 421.15 Deliberation and Decision by the DSU Board
- 421.16 Review by the Associate Commissioner of Programs, Treatment & Classification
- 421.17 Appeal and Decision by the Commissioner
- 421.18 Review of Departmental Segregation Status
- 421.19 Admission Process and Continuing Evaluation
- 421.20 Operating Procedures
- 421.21 Programs
- 421.22 Reports to the Commissioner
- 421.23 Time Limits
- 421.24 Emergency
- 421.25 Review Date
- 421.26 Severability Clause

421.01 Purpose

The purpose of 103 CMR 421.000 is to establish rules whereby an inmate may be confined to a Departmental Segregation Unit because his continued presence in a general institution population would be detrimental to the program of the institution.

421.02 Statutory Authorization

103 CMR 421.000 is issued pursuant to M.G.L. c.124, §§.1(b) and (q) and M.G.L. c.127, §.39.

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## 103 CMR: DEPARTMENT OF CORRECTIONS

### 421.03 Cancellation

Except for 103 CMR 421.000, this order cancels all previous Commissioner's bulletins or other departmental or institutional references regarding transfer and release of inmates from departmental segregation units and procedures for the operation of such units.

### 421.04 Applicability

103 CMR 421.000 shall be applicable to all state correctional facilities.

### 421.05 Access to Regulations

This policy shall be maintained within the Central Policy File of the Department and shall be accessible to all Department Employees. A copy of this policy shall also be maintained in each Superintendent's Central Policy File, and at each inmate library.

### 421.06 Definitions

Awaiting Action in Restrictive Confinement - A restricted area or areas designated by a superintendent or by the Commissioner in which an inmate who has been referred to the DSU Board or is awaiting a final transfer decision by the Commissioner regarding placement in DSU may be confined. An inmate who has been classified to a DSU but is awaiting placement in a DSU may also be temporarily housed in this area. An awaiting action area shall not be used as a substitute for a DSU.

Correction Counselor - A non-clinical case manager assigned to a unit or otherwise distinct population of the Department of Correction.

Commissioner - The Commissioner of Correction.

Departmental Segregation Unit (DSU) - An area or areas in a state correctional facility designated by the Commissioner for any inmate segregated pursuant to 103 CMR 421.09 through 421.17.

DSU Board - A board appointed by the Commissioner for a definite or indefinite term and consisting of three members, one of whom he shall designate as chairperson. Once appointed, the board is empowered to recommend an inmate for placement in a DSU or another Massachusetts or out-of-state institution regardless of his location.

Substantial Evidence - Evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.

Superintendent - The chief administrative officer of a state correctional institution.

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Weekday - Monday through Friday, excluding holidays.

### 421.07 Referral to a DSU Board

- (1) An inmate may be referred to a DSU Board for possible transfer to a DSU by the Commissioner or his designee if there is a reasonable basis to believe that the inmate satisfies the criteria set forth in 103 CMR 421.09. A referral to, or placement in, a DSU is not permitted for disciplinary reasons.
- (2) Notwithstanding any rule or regulation of the Department to the contrary, an inmate shall not be referred to a DSU board for committing a specific punishable offense unless a disciplinary board has found him guilty of such offense and has imposed a sanction pursuant to 103 CMR 430.00: *Disciplinary Proceedings*.

### 421.08 Placement on Awaiting Action Status in Restrictive Confinement

- (1) At the discretion of the Superintendent or his designee, an inmate who has been referred to a DSU board pursuant to 103 CMR 421.07 or is awaiting a final transfer decision by the Commissioner regarding placement in a DSU may be placed on awaiting action in restrictive confinement at the institution where he is then confined, or transferred to another Massachusetts institution or an out-of-state institution prior to his DSU hearing.
- (2) Placement on awaiting action in restrictive confinement may never be a substitute for placement in a DSU.
- (3) An inmate must be afforded a segregation unit hearing or released within 15 days after placement in awaiting action in restrictive confinement. However, when a prisoner who is in awaiting action is under investigation for a possible disciplinary offense or has been charged with a disciplinary offense, this period may be extended to 30 days. The foregoing time limits of this paragraph may be exceeded only in extraordinary circumstances, and for no longer than necessary. Whenever an inmate has spent 15 days on awaiting action in restrictive confinement, he shall be immediately reviewed, and every 15 days thereafter. If his retention in awaiting action is approved by the Commissioner or his designee, the decision shall be in writing and an explanation of the decision shall be served on the inmate, which shall include an estimate of how much longer he will remain in awaiting action in restrictive

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confinement and the reason(s) why. Any time spent in awaiting action beyond the above stated 15 or 30 day time limits shall be credited to the period of the inmate's DSU confinement.

#### 421.09 Placement or Retention of an Inmate in a DSU

An inmate may be placed or retained in a DSU only after a finding by the Commissioner based on substantial evidence that, if confined in the general population of any state correctional facility:

- (1) The inmate poses a substantial threat to the safety of others; or
- (2) The inmate poses a substantial threat of damaging or destroying property; or
- (3) The inmate poses a substantial threat to the operation of a state correctional facility.

An inmate may be placed or retained in a segregation unit only for administrative, and not for disciplinary reasons.

#### 421.10 Proceedings before the DSU Board

- (1) Within five weekdays of the referral of an inmate to a DSU board, the inmate's correction counselor shall prepare, provide the board, and serve on the inmate a written referral summary which shall include the following:
  - (a) the specific aspects of the inmate's record or other information which the board may consider. These may include the inmate's disciplinary record, past criminal record, prison records from past institutionalization, psychological makeup, involvement in criminal activity while incarcerated, attitude toward authority, institutional record on work assignments, adjustment to institutional programs, willingness and ability to live with other inmates, record of violent reactions to stressful situations, habitual conduct or language of a type likely to cause difficult management problems, outstanding criminal investigations.
  - (b) the names of any witnesses whom the presenting officer may call to testify, and
  - (c) copies of any documents which will be introduced.



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- (2) The inmate shall be served with a Notice of Referral in the form set forth in Appendix A. The Notice of Referral shall be accompanied by the following: a Referral Summary and its supporting documents; the Powers of the Board and Procedures To Be Followed; a Request for Representation and/or Witnesses form; and, a Waiver of 72 Hour Notice and/or Waiver of Appearance Form.
- (3) Written notice of the hearing must be given to the inmate, and upon request to his representative, at least 72 hours before the hearing.
- (4) The hearing shall be held within a reasonable time. The board may continue the hearing at its discretion with notice to the inmate. The inmate shall be entitled to one continuance for good cause if made in writing and submitted to a staff person at least 24 hours in advance of the scheduled hearing.
- (5) The inmate may waive his right to 72 hours notice of the hearing and/or his right to appear before the board. Any such waiver shall be documented, and the hearing may proceed accordingly.
- (6) If the inmate wishes to be represented by an attorney or law student or have certain witnesses testify, he shall complete the appropriate request form and submit it to a staff person within 24 hours of receiving it. The staff person who receives such a completed request shall deliver it to the correctional counselor before the close of his tour of duty. The failure of an inmate to submit the completed request form may, in the discretion of the board chairperson, constitute a waiver of the inmate's rights to call witnesses and/or to be represented at the hearing.

#### 421.11 Assistance and Representation of Inmates and the Recording of Proceedings

- (1) Prior to the hearing, the inmate's correctional counselor shall be available to discuss all aspects of written referral summary, and all matters which may be relevant to the DSU hearing. The correctional counselor shall also provide upon request those portions of the inmate's file which may be disclosed consistent with 103 CMR 157.00: *Access to and Dissemination of Evaluative Information*.
- (2) The inmate may be represented by an attorney or a law student at the hearing. It shall be the inmate's responsibility to secure such representation and he shall be allowed to make, or have made on his behalf, any telephone call(s) necessary for that purpose. An inmate's representative may thereafter request a continuance. The correctional counselor shall make a reasonable effort, but shall not be obligated, to schedule a hearing in accordance with the scheduling requirements of the representative. The inmate's representative shall be



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courts of the Commonwealth.

- (4) All parties, counsel, witnesses and other persons present at a hearing shall conduct themselves in a professional manner consistent with the standards of decorum commonly observed in the courts of the Commonwealth. The chairperson may take whatever actions are appropriate and necessary to insure the proper conduct of any participant.
- (5) All findings of fact and any decision shall be made upon a majority vote of the board.
- (6) Only members of the DSU board shall be present during the deliberations and other executive sessions of the board, except as provided for in 103 CMR 421.14.

#### 421.13: Fact Finding Aspects of Hearing Before DSU Board

- (1) The chairperson shall conduct a fact finding hearing at which time the correctional counselor may testify and submit, personally or through other witnesses, written, oral or physical evidence. At the discretion of the chairperson, the hearing may be continued in order to call additional witnesses who will be disclosed to the inmate at the time of the continuance. All evidence considered by the board shall be introduced in the presence of the inmate except informant information, which shall be introduced in accordance with the provisions of 103 CMR 421.14.
- (2) The inmate shall be allowed to confront and cross-examine the correctional counselor or any witness presented, with the exception of informants as provided in 103 CMR 421.14. Specific inquiry may be limited, however, as to matters which the chairperson deems:
  - (a) Hazardous to personal safety or institutional security;
  - (b) Irrelevant to placement or retention of the inmate in the DSU;
  - (c) Cumulative or repetitive. In the discretion of the chairperson, testimony may be deemed cumulative or repetitive if contained in the record of a prior DSU hearing or disciplinary hearing, or if capable of having been introduced at a disciplinary hearing. Testimony shall be accepted as relevant if it relates to the inmate's recent good conduct, or to any circumstances which tend to explain or mitigate conduct which the board is considering.

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- (3) The inmate shall be allowed to testify and submit, personally or through other witnesses, written, oral, or physical evidence, subject to the limitations set forth in 103 CMR 421.13(2)(a) through (c) and the availability of the requested witness(es). A witness shall be deemed available unless absent for a prolonged period of time due to illness, vacation, authorized absence, or other good cause. In the event an inmate's witness(es) or line of inquiry is excluded, the inmate shall be permitted to state the substance of the expected testimony. The board shall incorporate in its written report a summary of the expected testimony and the board's reasons for the exclusion or limitation. Whenever a Superintendent or other staff member has submitted to the board a recommendation as to DSU confinement, the inmate is entitled to call that person(s) to the hearing for questioning before the board.
- (4) The inmate may present an oral and/or written statement as to why he should be permitted to remain in, or return to, the general institutional population.
- (5) Where a request for an inmate or other witness(es) has been refused pursuant to 103 CMR 421.13(2)(a), the inmate shall be provided assistance with obtaining an affidavit from the requested witness(es).

#### 421.14: Procedures for the Use of Informant Information

The DSU board may consider documentary evidence or testimony involving informant information which is not introduced in the presence of the inmate or his representative. The board is not required to interview the informant in person, and may receive the informant's evidence as oral or written hearsay. Such evidence may be considered only if the board has:

- (1) Made a finding that the informant is reliable and that the information is credible. This finding shall be included in the record and shall contain the following information:
  - (a) the facts upon which the board based its conclusion that the informant was reliable and that the information was credible;
  - (b) any evidence tending to impeach the informant's credibility; and
  - (c) a statement of the information provided by the informant which is as specific as possible. No information need be provided which would create a substantial risk of disclosing the identity of the informant. The statement shall demonstrate that the informant had personal knowledge of the information provided.

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- (2) Made a finding that the disclosure of the documentary evidence or testimony provided by the informant to the inmate or his representative would create a substantial risk of harm to the informant, to any other person, or to the security of the institution. This finding shall be included in the record.

#### 421.15: Deliberation and Decision by the DSU Board

- (1) After the close of the presentation of the evidence, the DSU board shall meet in executive session to decide whether to recommend that the Commissioner remove the inmate from the general institutional population and place him in another Massachusetts or out-of-state facility, or place or retain the inmate in the DSU. A recommendation to place or retain the inmate in the DSU shall be based on substantial evidence that, if confined in the general population of any state correctional facility, the inmate would pose a substantial threat as set forth in 103 CMR 421.09(1)(a) through (c). The board shall thereafter return and orally notify the inmate of its decision.
- (2) Within two weekdays after the hearing, the board shall serve a written decision on the inmate. The written decision shall contain the following:
  - (a) A description of the specific evidence relied upon;
  - (b) A particularized statement of the reason(s) for the decision. The statement shall explain why the placement or retention of the inmate in a DSU is for administrative and not disciplinary reasons;
  - (c) If placement or retention in a DSU is contemplated:
    - 1. a conditional release date based on the specific aspects of the inmate's record and other information on which the recommendation is based, including any mitigating information. Conditional release dates shall not exceed six months except in the most extraordinary circumstances. The information may include the factors set forth in 103 CMR 421.10(1)(a); and
    - 2. conditions that are specifically related to the administrative reasons for the placement or retention. If the inmate meets these conditions he shall be released from the DSU unless a new DSU referral has been made. Conditions may include the inmate's successful participation in specified counseling or evaluation programs, his completion of work assignments,

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remaining free of disciplinary reports, cooperation with correctional personnel, and maintenance of cell and sanitation standards;

- (d) Where the board has considered informant information, the findings required by 103 CMR 421.14; and
- (e) A notice of the inmate's right to appeal and to submit written objections within five days of the inmate's receipt of the board's written decision. Any appeal and objections should be addressed to the Associate Commissioner of Programs, Treatment and Classification, and submitted by the inmate or his representative to a staff person. The staff person shall deliver them to the correctional counselor before the close of his tour of duty. The correctional counselor shall promptly submit the name of any inmate who has filed an appeal to the Associate Commissioner of Programs, Treatment and Classification.

#### 421.16: Review by the Associate Commissioner of Programs and Treatment

No less than five and no more than ten weekdays after the inmate's receipt of the board's recommendation, the Associate Commissioner shall approve the recommendation of the board, or make his own recommendations concerning the placement of the inmate in a DSU and any conditional release date. Any written statement or objections timely filed by the inmate pursuant to 103 CMR 421.15(2)(e) shall be attached to this recommendation.

#### 421.17: Appeal and Decision by the Commissioner

Whether or not an appeal has been taken, the Commissioner or his designee shall review and act upon the recommendation of the board within five weekdays after review by the Associate Commissioner of Programs, Treatment and Classification. The Commissioner's action shall be based upon substantial evidence in the record of the hearing. In the event that the Commissioner makes a finding pursuant to 103 CMR 421.09, the Commissioner shall serve upon the inmate a written decision which shall contain the information required by 103 CMR 421.15(2)(a) through (c). The Commissioner may sustain and adopt the recommendation in its entirety, shorten, modify or lengthen the conditional release date, order a rehearing, or entirely reject a recommendation of placement in a DSU or another Massachusetts or out-of-state facility. The Commissioner shall specify and explain any aspects of his decision and reasoning which are different from those of the DSU Board. If the Commissioner decides that, contrary to the DSU board's recommendation, out-of-state or federal placement is warranted, the Commissioner shall allow the inmate five days from receipt of the Commissioner's written decision in which to file a written statement or objections pursuant to 103 CMR 421.15(2)(e).

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#### 421.18: Review of DSU Status

Every inmate in a DSU shall be reviewed at 90 day intervals in accordance with the standards and procedures set forth in 103 CMR 421.09 through 421.17.

#### 421.19: Admission Process and Continuing Evaluation

##### (1) Admission Process

- (a) The DSU administrator shall enter into a log book all admissions to the DSU. Entries shall include the name of each inmate so admitted, his DSU number, the date admitted, and the date of the initial 90 day review as required by 103 CMR 421.18.
- (b) The DSU administrator or his designee shall open and maintain a file on each inmate who is transferred to a DSU. This file shall contain any monthly review reports, disciplinary reports, and any other material relating to the inmate during his confinement in the DSU.

##### (2) Monthly Evaluation and Review. A committee composed of the DSU administrator or his designee, a correction officer designated by the DSU administrator, and the correctional counselor of a particular inmate shall meet with the inmate each month to review his case.

- (a) The committee shall prepare a report after each meeting which shall include a summary of the current behavior of the inmate including disciplinary reports, a summary of the program involvement of the inmate, including, for example, education, counseling and recreation activities, and an evaluation of the behavior and attitude of the inmate, and recommendations, if any, for releasing the inmate from the DSU.
- (b) In the event an inmate refuses to attend his monthly review meeting, the committee shall proceed with the evaluation and prepare a written report.
- (c) Upon oral or written request to the DSU administrator, each inmate shall be permitted to review the monthly report of the committee and to take notes or copy information from the report.

#### 421.20: Operating Procedures

The DSU administrator shall, subject to the approval of the Commissioner, establish procedures for the operation of the DSU within 30 days of the date that the Commissioner designates

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an area as a DSU. Copies of 103 CMR 421.20 through 421.21 relating to operating procedures and programs shall be given to each inmate transferred to a DSU. The procedures shall cover the following areas:

(1) Security and Control

- (a) Movement Within the Departmental Segregation Unit Procedures shall provide for when inmates may be released from their cells and how they are to be supervised, the number of inmates to be permitted out of their cells at any one time, and for visitation of inmates.
- (b) Searches and Seizures. Procedures shall provide for searching an inmate or his cell, times for conducting a search, searching of clothing, laundry or other property, and for the inventory and storage of any property of the inmate which is held or confiscated as a result of a search.
- (c) Inspections. Procedures shall provide for daily tours of inspection by the unit administrator and other officers, and the logging of times of inspections and any observations.
- (d) Log Books. Log books shall be maintained which include: the names of employees on duty during each shift, all special orders of the DSU administrator, the names of all persons entering and leaving the unit, as well as a summary of any events of significance to officers on the subsequent shifts. There shall be special log books for recording the activities of each inmate. Employees shall familiarize themselves with entries in log books each day.
- (e) Disciplinary Offenses. Where an inmate is charged with a punishable offense by the DSU administrator or other employee of the unit, such person shall promptly prepare and submit disciplinary reports to the disciplinary officer of the state correctional facility pursuant to 103 CMR 430.00 *et seq.* Appropriate security measures may be taken prior to the preparation of such reports.
- (f) Maintenance. Procedures shall provide for repairs to be made by maintenance employees, especially repairs which will keep cells well-lighted, well-heated and ventilated, and will keep sinks and toilets operable, and for the inventorying and accounting of all tools and materials that are brought into or taken out of the unit.

(2) Health, Sanitation and Safety



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- (a) Medical and Psychiatric Services. A complete physical examination shall be scheduled for each inmate upon transfer to a DSU. Medical and psychiatric services shall be provided, and observation and treatment shall be provided for inmates who attempt suicide or appear to have emotional difficulties.
  - (b) Bathing and Laundry Services. Each inmate shall receive at least three showers each week and the same bedding supplies and laundry services as are available to inmates in the general population.
  - (c) Exercise and Recreation. Inmates shall have a daily exercise and recreation period of at least one hour a day at least five days per week, outside if weather permits. Procedures shall provide for curtailment of the exercise and recreation period in exceptional circumstances due to inadequate officer coverage or disruption in the DSU. Alternative plans for the exercise and recreation period are to be made by the DSU administrator whenever a prolonged curtailment is anticipated.
  - (d) Sanitation. Procedures shall provide for an inmate cleaning his cell.
  - (e) Safety. Procedures for the purposes of fire prevention shall provide for the removal, inventory and storage of excessive accumulations of property in the cell of each inmate.
- (3) Meals. Inmates shall receive three nutritionally sound meals each day. Procedures shall provide for the manner in which meals are to be served, and an accounting of all utensils that are used by each inmate before and after each meal. The meals shall be the same as are provided to inmates in the general population except that, when the inmate has used food as a weapon or to create a health or sanitation hazard, an alternate nutritionally sound meal may be substituted.
  - (4) Haircuts and Shaving. Inmates shall receive haircuts, and shall be permitted to shave each day.
  - (5) Cell Furnishings and Fixtures. Each cell shall be furnished with a bed, table, chair, one blanket, two sheets, one pillow, and one pillow case. Other furnishing may include, for example, a radio, television and reading lamp and shall be subject to procedures for their removal and return.
  - (6) Clothing. Procedures shall provide for each inmate to receive state issued and other clothing except as inconsistent with the security needs of the DSU.

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- (7) Visits. Procedures shall provide for visitation of inmates in areas located within the DSU or at such other areas designated by the superintendent of the state correctional facility. Inmates in segregation shall be afforded visiting privileges which are, as much as practicable, the same as those available to inmates in the general population.
- (8) Correspondence. Procedures shall be the same as those for the general population of the state correctional facility.
- (9) Reading Material. The availability of reading materials shall be the same as for the general population of the state correctional facility. Procedures shall provide for requesting, receiving and returning reading material from the library of the state correctional facility.
- (10) Canteen. Availability of canteen shall be the same as for the general population of the state correctional facility, except as inconsistent with the security needs of the DSU. Procedures shall provide for requesting and receiving items from the canteen in the state correctional facility.
- (11) Religion. Procedures shall provide for access to religious counseling or discussions, and the attendance of an inmate at religious services or other ceremonies within the DSU or at such other places designated by the superintendent of the state correctional facility.

#### 421.21: Programs

Programs shall be the same as are provided to inmates in the general population, except as inconsistent with the security needs of the DSU. An emphasis shall be placed upon making individualized rehabilitative programming available which has as its goal the return of inmates to the general population. Such opportunities shall be provided whenever feasible, and may be used to assess whether an inmate is appropriate for less restrictive confinement.

- (1) Counseling Programs. Counseling sessions shall be arranged upon the request of an inmate confined in a DSU. Counseling shall be coordinated between a correctional counselor assigned to the inmate and a staff member of the Psychological Services of the Department of Correction who shall supervise the counseling of such inmate.
- (2) Education Programs. Education programs may include individual tutoring, correspondence courses, and wherever appropriate, participation in education programs at such other places designated by the superintendent of the state

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correctional facility.

- (3) Employment Programs. Employment programs may include working within the DSU, and wherever appropriate, working in such other places designated by the superintendent of the state correctional facility. The DSU administrator, after considering space and security requirements, may permit an inmate to pursue an avocational interest.
- (4) Furloughs. An inmate may apply for a furlough and the fact of his confinement in the departmental segregation unit shall not automatically preclude him from receiving a furlough. An inmate may apply to the DSU administrator for consideration in accordance with 103 CMR 463.00: *Furloughs*.

### 421.22: Reports to the Commissioner

The DSU administrator shall prepare a monthly report on the operation of the departmental segregation unit. This report shall be submitted by the 15th day of the following month to the Commissioner of Correction with a copy to the Deputy Commissioner and the superintendent of the state correctional facility.

### 421.23: Time Limits

All time limits set forth in 103 CMR 421.000 are directory.

### 421.24: Emergency

If an emergency requires, the Commissioner may temporarily suspend part or all of 103 CMR 421.000.

### 421.25: Review Date

This policy shall be reviewed at least annually from the effective date by the Commissioner or his designee. The party or parties conducting the review shall develop a memorandum to the Commissioner with a copy to the Central Policy File indicating revisions, additions, or deletions.

### 421.26: Severability Clause

If any article, section, subsection, sentence, clause or phrase of 103 CMR 421.000 is for any reason held by a court of competent jurisdiction to be unconstitutional, contrary to statute, in excess of the authority of the Commissioner or otherwise inoperative, such decision shall not affect the validity of any other article, section, subsection, sentence, clause or phrase of this policy.

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**REGULATORY AUTHORITY**

103 CMR 421.000:M.G.L. c.124, ss.1(b), 1(q); c.127, s 39.

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## 103 CMR 423.00: SPECIAL MANAGEMENT

### Section

- 423.01: Purpose
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#### 423.01 Purpose

103 CMR 423.00 establishes Department of Correction regulations concerning special management units.

#### 423.02 Authorization

103 CMR 423.00 is issued pursuant to M.G.L. Chapter 124, § 1 (c) and (q). 103 CMR 423.00 is not intended to confer any procedural or substantive rights not otherwise granted by state or federal law, nor any private cause of action.

#### 423.03 Cancellation

103 CMR 423.00 cancels all previous departmental policy statements, bulletins, directives, orders, notices, rules and regulations regarding institution special management units.

#### 423.04 Applicability

103 CMR 423.00 applies to those institutions either operating special management units designated by the superintendent of the institution or otherwise housing inmates on administrative segregation, protective custody, or disciplinary detention status. 103 CMR 423.00 does not apply to inmates housed in a departmental segregation unit or a department disciplinary unit.

#### 423.05 Access to Regulations

103 CMR 423.00 shall be maintained within the Department of Correction's central policy file, in each institution's central policy file, in each institution's inmate law library, and may be made available to the public upon request.

#### 423.06 Definitions

Administrative Segregation: A temporary form of separation from general population used when the continued presence of the inmate in the general population would pose a serious threat to life, property, self, staff or other inmates, or to the security or orderly running of the institution, e.g., inmates pending investigation for a disciplinary or criminal offense or pending transfer may be placed in administrative segregation.

Director of Security: The individual responsible for the overall security within a correctional institution through formulation and enforcement of rules and regulations and by overseeing the performance of security staff.

Disciplinary Detention: As referenced in M.G.L. c. 127. § 40 as isolation; Disciplinary Detention is the separation from the general population of an inmate who has been found guilty of a serious violation of the regulations. Such sanction shall not exceed 15 days for one offense and no more than 30 days for all violations arising out of the same or substantially connected incident(s), unless specifically authorized by the commissioner. This status may be imposed only after complying with all provisions of 103 CMR 430.00: Disciplinary Proceedings. Disciplinary detention does not refer to inmates sentenced to a department disciplinary unit.

General Population: Any housing area other than a special management unit, health service unit, departmental segregation unit, departmental disciplinary unit, or the departmental protective custody unit.

Protective Custody: A form of separation from the general population for inmates requesting or requiring protection from other inmates for reasons of health or safety. The inmates status is reviewed periodically by the classification committee or designated group with the goal of terminating the separate housing assignment as soon as possible.

Special Management Unit: A separate housing area from general population within institutions in which inmates may be confined for reasons of administrative segregation, protective custody, or disciplinary detention.

Shift Commander: That officer designated by the superintendent to be responsible for the supervision of all subordinate custodial staff and the care and custody of inmates during an assigned tour of duty.

Superintendent: The chief administrative officer of a correctional institution.

#### 423.07 Establishment of Special Management Units

Each superintendent of an institution with a security rating level of 4, 5, or 6 may designate an area or areas within the institution to be used for housing inmates placed into:

- (a) Administrative Segregation
- (b) Protective Custody
- (c) Disciplinary Detention

#### 423.08 Placement, Review and Release Procedures

Each Superintendent shall develop procedures regarding the placement, review and release of inmates in special management units.

(1) Assignment to Administrative/Protective Custody Segregation and Protective Custody.  
An inmate may be placed in administrative segregation by the commissioner or his designee, or superintendent, or his designee, e.g., disciplinary officer, shift commander, or members of an inmate's unit team. Placement in administrative segregation/protective custody may occur in instances such as, but not limited to, when an inmate:

- (a) Is awaiting a hearing for a violation of institution rules or regulations;
- (b) Is awaiting an investigation of a serious violation of institution rules or regulations;
- (c) Is pending investigation for disciplinary offenses or criminal acts that may have occurred while incarcerated;
- (d) Requests admission to administrative segregation for his/her own protection or staff recommends that placement in or continuation of such status is necessary for the inmate's own protection and that no reasonable alternatives are available;
- (e) Is pending transfer;
- (f) Is pending classification;
- (g) Is placed in administrative segregation following a disciplinary hearing.

(2) Review of administrative segregation and protective custody inmates:

- (a) Inmates will have a physical screening by health care staff prior to being placed into a special management unit on administrative segregation or protective custody status or immediately after arrival in the special management unit.
- (b) The status of each inmate placed in a special management unit on administrative segregation or protective custody status should initially be reviewed by the superintendent or designee within 72 hours of placement. Thereafter, each inmate's status should be reviewed every seven days for the first two months and at least every 30 days thereafter by a classification committee or other authorized group.
- (c) Inmates with long-term protective custody needs should be reviewed, and where appropriate, classified to a departmental protective custody unit. After classification to a departmental protective custody unit, an inmate's placement shall be reviewed in accordance with 103 CMR 420: Classification.

(d) A qualified mental health professional shall personally interview and prepare a written report on any inmate remaining for more than 30 days in administrative segregation or protective custody status. If such confinement continues, a psychological assessment shall be made at least every 90 days thereafter - more frequently if prescribed by the chief medical authority.

(3) Placement in Disciplinary Detention An inmate may be placed in disciplinary detention only after being found guilty of a serious violation of regulations. Disciplinary detention shall not exceed 15 days for any one offense and no more than 30 days for all violations arising out of the same or substantially connected incident(s), unless specifically authorized by the commissioner, and only after complying with all provisions of 103 CMR 430, Disciplinary Proceedings.

(4) Review of Disciplinary Detention Status The superintendent shall designate such person(s) as he deems appropriate to review the status of inmates housed on disciplinary detention on a weekly basis.

A qualified mental health professional shall interview and prepare a written report on any inmate remaining in disciplinary detention for more than 30 days. If such confinement continues, a psychological assessment shall be made at least every 90 days thereafter - more frequently if prescribed by the chief medical authority.

#### 423.09 Conditions of Confinement

(1) Administrative Segregation/Protective Custody Each superintendent shall develop procedures for the conditions of confinement of all inmates housed in special management units.

(a) Personal Items: Inmates should, as far as reasonably practicable, be provided clothing that is comparable to that permitted in population. Property will be restricted to what is permitted in 103 CMR 403.11, Approved Inmate Personal Property - Transient with the exception of a cigarette lighter that is prohibited. In addition, each inmate will be permitted a radio. The superintendent is authorized to further limit the amount of property and to issue jumpsuits in lieu of such clothing for security purposes, if there is imminent danger that an inmate or inmates will destroy an item, or induce injury to self or others.

(b) Personal Hygiene: Inmates shall have the opportunity to shave and shower at least three times per week. Additionally, all inmates shall be issued an allowed exchange of clothing, bedding, and linen, and provided laundry, barbering, and hair care services on the same basis as general population. Exceptions shall only be permitted when found necessary by the supervising officer on duty, and shall be recorded in the unit log and justified in writing.

(c) Meals: All inmates shall receive the same meals as those served to the general population unless being placed upon alternate feeding. Alternative meal service may be provided to an inmate in a special management unit who uses food or food service equipment in a manner that is hazardous to self, staff, or other inmates. Alternative meal service is provided on an individual basis, based on health or safety considerations only,



meets basic nutritional requirements, and occurs with the approval of the superintendent and responsible health authority. The substitution period shall not exceed seven days.

(d) Mail: All inmates shall be provided the same opportunities for writing and receipt of letters as is available to the general population.

(e) Visitation: Inmates shall normally have opportunities for visitation similar to general population unless articulable reasons for withholding such privileges exist. The length and number of visits may be limited due to space, schedules, personnel constraints or when there is a substantial reason to justify limitation.

(f) Legal Material: All inmates shall have access to legal materials and legal reference material.

(g) Reading Material: Inmates shall have access to reading materials and the opportunity to borrow reading materials from the institution library.

(h) Exercise: All inmates shall receive one hour of exercise per day outside their cells, five days per week, unless security or safety considerations dictate otherwise.

(i) Telephone Access: Inmates shall be allowed telephone privileges in accordance with institutional procedure. Superintendents may set limits on the permitted number of telephone calls.

(j) Programs: Inmates shall receive the services of a correctional program officer. Inmates may participate in such educational vocational and/or rehabilitative programs as can be provided within the confines of the special management unit, consistent with the security needs of the unit. Emphasis shall be placed on making rehabilitative programming available which has as its goal the return of persons to the general prison population. The institutional chaplain(s) shall visit special management units weekly. Programs may be limited to those inmates who have been or are likely to be confined on a long term basis.

(k) Canteen: Inmates may order stamps, cosmetics and legal supplies from the canteen. These items may be withheld if the institution's director of security determines that they pose a threat to the security of the special management unit.

(l) Medical Services: All inmates shall receive visits from a member of the health services unit daily, unless medical attention is needed more frequently. All inmates in need of prescribed medications and/or therapeutic diets, as approved by health service staff, shall be provided such.

(2) DISCIPLINARY DETENTION Each Superintendent shall develop procedures for the conditions of confinement of all inmates housed on disciplinary detention status in special management units.

(a) Personal Items: Inmates shall be provided clothing that is comparable to that permitted in population. Property will be restricted to what is permitted in 103 CMR 403.00 et seq., Approved Inmate Personal Property - Transient with the exception of a cigarette lighter which is prohibited. Inmates will not be permitted a television or radio. The superintendent is authorized to further limit the amount of property and to issue jumpsuits in lieu of such clothing for security purposes, if there is imminent danger that an inmate or inmates will destroy an item, or induce injury to self or others.

(b) Personal Hygiene: Inmates shall have the opportunity to shave and shower at least three times per week. Additionally, all inmates shall be issued an allowed exchange of clothing, bedding, and linen, and provided laundry, barbering, and hair care services

on the same basis as general population. Exceptions shall only be permitted when found necessary by the supervising officer on duty, and shall be recorded in the unit log and justified in writing.

(c) Meals: All inmates shall receive the same meals as those served to the general population unless being placed upon alternate feeding. Alternative meal service may be provided to an inmate in a special management unit who uses food or food service equipment in a manner that is hazardous to self, staff, or other inmates. Alternative meal service is provided on an individual basis, based on health or safety considerations only, meets basic nutritional requirements, and occurs with the approval of the superintendent and responsible health authority. The substitution period shall not exceed seven days.

(d) Mail: All inmates shall be provided the same opportunities for writing and receipt of letters as is available to the general population.

(e) Visitation: Inmates on disciplinary detention shall only be allowed visits from their attorneys/paralegal assistants unless otherwise authorized by the superintendent. The length and number of visits may be limited due to space, schedules, personnel constraints or when there is a substantial reason to justify limitation.

(f) Legal Material: All inmates shall have access to legal materials and legal reference material.

(g) Reading Material: Superintendents may limit access to and/or the amount of reading materials made available to inmates on disciplinary detention status.

(h) Exercise: All inmates shall receive one hour of exercise per day outside their cells, five days per week, unless security or safety considerations dictate otherwise.

(i) Telephone Access: Inmates shall receive only limited use of the telephone for emergency calls and calls to the attorney of record in connection with prospective or pending litigation. Procedures shall specify hours of availability, length of calls, and limitation that apply.

(j) Programs: Access to programs while on disciplinary detention shall be prohibited unless remaining on such status for over 60 days.

(k) Canteen: Canteen purchases shall be restricted to cosmetic items only. Superintendents may restrict the amount and type of cosmetic items purchased.

(l) Medical Services: All inmates shall receive visits from a member of the health services unit daily unless medical attention is needed more frequently. All inmates in need of prescribed medications and/or therapeutic diets, as approved by health service staff, shall be provided such.

#### 423.10 Control and Management

Each superintendent whose institution contains a special management unit shall establish written procedures governing the following:

(1) Personnel Selection, Training, and Evaluation: Procedures shall govern the selection criteria, supervision, and rotation of staff who work directly with inmates in a special management unit on a regular daily basis.

(2) Records: Procedures shall establish permanent logs and for documentation of all activities and events including, but not limited to: admissions and releases, unit visitors, unusual

events, inmates' opportunities for showering, out of cell exercise, and telephone access, and deprivation of any usually authorized items or privileges of an inmate. In the latter mentioned instance, any such deprivation of a usual item or activity shall require that a report be filled out and sent to the director of security or designee and to the inmate's case folder.

(3) Supervision

(a) Procedures shall require that all inmates on administrative segregation, protective custody or disciplinary detention status are personally observed by correctional staff at least every 30 minutes, on an irregular schedule, unless their behavior requires more frequent observation.

(b) Procedures shall require daily tours of inspection by the shift commander or designee and the logging of times and results of such inspections.

(c) Procedures shall require that inmates on protective custody or administrative segregation status receive visits from program staff upon request.

(4) Safety Procedures shall provide for the safe evacuation of all inmates in the event of a fire or other emergency.

(5) Cell Furnishings and Fixtures Procedures shall require supplying each cell in which an inmate is housed with a bed, table, chair/stool, one blanket, two sheets, one pillow and one pillow case. Additionally, procedures shall be established listing personal items authorized for retention in inmates' cells according to status.

(6) Security and Control

(a) Movement Within The Unit Procedures shall provide for when inmates may be released from their cells and how they are supervised, the number of inmates to be permitted out of their cells at any one time, and the visitation of inmates.

(b) Searches and Seizures Procedures shall provide for searching an inmate or his cell, frequency of searches conducted, searching of clothing, laundry or other property, and for the storage of any property of the inmate which is confiscated as a result of a search.

(c) Security Inspection Procedures shall provide for security inspections to occur at the frequency of once per shift for the entire unit.

423.11 Responsible Staff

(1) The director of policy development and compliance shall be responsible for implementation of this policy and for the review of all institutional procedures.

(2) Each superintendent shall develop all necessary procedures in accordance with this policy and shall ensure that institutional practice conforms to these directives.

#### 423.12 Review Date

103 CMR 423.00 shall be reviewed annually from the effective date by the director of policy development and compliance.

#### 423.13 Severability Clause

If any article, section, subsection, sentence, clause or phrase of 103 CMR 423.00 is for any reason held to be unconstitutional, contrary to statute, in excess of the authority of the Commissioner or otherwise inoperative, such decision shall not affect the validity of any other article, section, subsection, sentence, clause or phrase of 103 CMR 423.00.

#### REGULATORY AUTHORITY

103 CMR 423.00: M.G.L. c. 124, § 1(c) and (q)

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF CORRECTION  
STANDARD OPERATING PROCEDURES  
SPECIAL MANAGEMENT UNITS**

**PURPOSE:** To establish standard operating guidelines for those Department of Correction facilities operating Special Management Units (SMU). These units are for inmates who, in the opinion of the facility superintendent, demonstrate their inability to function under departmental and institutional regulations and as a result require increased control for safety and security reasons.

**I. Chain of Command**

- A. Each superintendent shall assign a supervisory staff member to oversee the management and daily operation of the Special Management Unit to ensure safe, consistent operation.
- B. Each superintendent shall assign staff to the unit during each shift, ensuring experienced supervisors and correctional officers are utilized consistent with 103 DOC 515, Security Employees Assigned to A Special Management Unit.

**II. Placement, Review and Release**

- A. Inmates shall be placed in a Special Management Unit only with the approval of the commissioner or his/her designee, superintendent or his/her designee or the facility shift commander. An inmate shall only be placed into one of the following statuses:
  - (AS) **Administrative Segregation** – A temporary form of separation from general population used when the continued presence of the inmate in the general population would pose a serious threat to life, property, self, staff or other inmates, or to the security or orderly running of the institution, e.g., inmates pending investigation for a disciplinary or criminal offense or pending transfer may be placed in administrative segregation.
  - (PC) **Protective Custody** – Used for reviewing instances when the inmate is requesting or requiring protection from other inmates for reasons of health or safety. Upon completion of the review the facility shall determine if the inmate can be returned to general population, needs to be classified to another facility; or be placed in the Department Protective Custody Unit. Placement in the MCI Concord Special Housing Unit(SHU) can only occur after a finding by the commissioner or his/her designee that the inmate cannot be safely placed in the general population of any state correctional facility (103 CMR 422).

(DD) **Disciplinary Detention** – As referenced in M.G.L. c. 127. § 40 as isolation; Disciplinary Detention is the separation from the general population of an inmate who has been found guilty of a serious violation of the regulations. Such sanction shall not exceed fifteen (15) days for one offense and no more than 30 days for all violations arising out of the same or substantially connected incident(s), unless specifically authorized by the commissioner. This status may be imposed only after complying with all provisions of 103 CMR 430.00: Disciplinary Proceedings. Disciplinary detention does not refer to inmates sentenced to a department disciplinary unit (DDU).

- B. Once an inmate is placed in a Special Management Unit, the inmate's status shall be reviewed within 72 hours by the superintendent's designee and thereafter by a classification committee or other authorized group. This committee shall have the authority to determine if further segregation and/or release is warranted. The committee shall review the reason for placement, threat to institutional security, pending disciplinary issues, disciplinary sanctions, classification issues, enemy situations, mental health issues, attitude toward authority, willingness and ability to live with others, etc. To ensure proper documenting of this review the committee shall maintain a Special Management Unit report that lists each inmate housed in the unit, their status, date admitted, date of last review, release date if applicable and any other information the superintendent feels appropriate. This report shall be signed by the chairperson of the committee. This review shall be documented in the SMU Reviews screen on the Inmate Management System (IMS).
- C. Any inmate on Administrative Segregation or Protective Custody status, after being initially reviewed, shall have his status reviewed by the classification committee or other authorized group every seven days for the first two months and then every thirty days thereafter. Such review shall be documented on the Special Management Unit report and signed by the chairperson of the committee. This review shall be documented in the SMU Reviews screen.

### III. **Medical Reviews/Rounds**

- A. Prior to or immediately upon placement in a Special Management Unit, the inmate shall be screened by medical staff. This screening shall be documented and placed in the inmate's medical record. This shall be documented on the SMU Inmate Information screen.
- B. Each inmate housed within a Special Management Unit shall be visited daily by a member of the medical staff (unless medical attention is needed more frequently) to ensure his health and well-being are maintained. These visits shall be in addition to medication pass, shall be announced and documented in IMS.

Documentation shall be separate from a medication log and include that an announcement has been made. Additional documentation by medical staff will be made on the SMU Inmate Daily Log screen.

- C. A qualified mental health professional shall personally interview and prepare a written report on any inmate remaining in the Special Management Unit for more than thirty days. If confinement continues beyond thirty days, a mental health assessment by a qualified mental health professional is to be made at least every three months- more frequently if prescribed by the chief medical authority. This assessment shall be documented and placed in the inmate's medical record and forwarded to the superintendent/designee. Completion of the assessment shall also be documented in the Mental Health/Substance Abuse History screen.

#### IV. **Conditions of Confinement**

Each superintendent shall ensure each Special Management Unit functions in a way that provides for security, safety and orderly operation. The following guidelines shall be followed:

##### A. **SMU Activity Log Sheets**

SMU Activity Log sheets (Attachment A) shall be maintained for each inmate in the Special Management Unit. These sheets are a weekly mechanism for staff to document the rounds completed, meals served, showers and exercise offered, medical rounds completed and inmate visits received. These sheets must be accurately maintained at all times. The SMU Inmate Daily Log and door sheet reports obtained via the button on the screen shall be used in conjunction with the Unit/Activity Log screen instead of Attachment A. It is the responsibility of each shift supervisor to ensure staff fully complete these sheets or screens during their tour of duty and take corrective action if necessary.

Any deprivation of an item or activity listed on the activity log sheet or SMU Inmate Daily Log screen shall require that an incident report be completed and sent to the director of security or designee explaining the reason for the deprivation.

##### B. **Administrative Segregation/Protective Custody Inmates**

Observation – All inmates shall be visually observed by a unit officer on an irregular schedule. No round in the unit should exceed thirty minutes from the previous round completed. These rounds shall be documented on the SMU Activity Log Sheet/ IMS SMU Inmate Daily Log Screen. A superintendent can authorize a special observation detail for those inmates who need to be monitored more closely due to their behavior. The "Security Watch" field on the SMU Inmate Information screen shall be completed with the observation frequency, if applicable.

Meals - All inmates shall receive the same meals as those served to the general population unless placed on alternate feeding as described in section IV. All meals shall be served by staff via the cell food slot. To control the flow of contraband in the unit, meal trays shall be searched and the contents visually inspected prior to giving the meal to the inmate. Each meal offered to an inmate shall be documented on the SMU Activity Log Sheet/ IMS SMU Inmate Daily Log screen.

Alternate Feeding - Standard food services shall be made available to inmates in Special Management Units, providing their participation is consistent with the safety and security of the institution and its employees. Any inmate, who becomes disruptive or assaultive by either throwing food, food trays or containers, or by utilizing food or drink containers to assault staff with food or any substances, may be placed on alternate feeding status as a result of such actions. Inmates on alternate feeding status shall receive the same meals as those given to the population. Alternate feeding is considered the method to deliver and retrieve the food from the inmate and not an adjustment to the meal itself.

The Special Management Unit officer in charge or shift commander may place an inmate on alternate feeding pending the approval of the superintendent and the responsible health authority. Placement on alternate feeding must be in accordance with the guidelines established in 103 DOC 760, Food Services.

The Special Management Unit officer in charge or shift commander shall submit a copy of the disciplinary report with an alternate feeding form (attachment B) to the superintendent stating the reasons why alternate feeding is requested.

The superintendent shall return approved requests for alternate feeding to the Special Management Unit officer in charge (OIC).

Once approval is received for alternate feeding, the Special Management Unit officer in charge (OIC) shall enter the approval in the SMU Inmate Information screen.

Once alternate feeding is implemented, the following feeding procedure shall be followed:

If the physical design of the cell door allows for the delivery of food without inmate contact i.e., the delivery of the meal through the leg iron restraint slot without the need to breach the cell door, this shall be the preferred method of delivery. However, if the physical design of the door does not allow for the delivery of food in such a manner, the following procedure shall be adhered to:

- (1) Two staff members shall be utilized and the cell light shall be turned on.



- (2) The inmate shall be asked to willingly comply with alternate feeding procedures.
- (3) If the inmate is willing to comply the food slot will then be opened, the inmate shall be ordered to turn around and back up to the door, placed in hand cuffs and ordered to sit down on the bed. Once the inmate is sitting on the bed the door to the cell shall be opened and the meal shall be placed in the cell. The door to the cell shall be re-secured and the inmate shall be ordered to turn around and back up to the door so the restraints can be removed. Once the meal is consumed the same process shall be utilized to retrieve all food and equipment. No food/utensils shall remain in the cell.
- (4) If the inmate refuses to comply with any of these feeding procedures, it shall constitute a refusal to accept the meal and an incident report shall be submitted. The refusal shall also be noted on the inmate's activity sheet/IMS SMU Inmate Daily Log screen and in the unit logbook/IMS Unit/Activity Log screen.
- (5) All inmates placed on alternate feeding shall be reviewed daily by the SMU officer in charge (OIC) or Shift Commander.
- (6) The duration of alternate feeding status shall be consistent with 103 DOC 760 – Food Service policy.

Therapeutic Diets - Inmates on therapeutic diets shall be afforded the same food values in accordance with their therapeutic diet while on alternate feeding status. Any complaints regarding therapeutic meals shall be submitted to the Special Management Unit officer in charge or direct a formal complaint to the superintendent in accordance with the 103 DOC 761 Access to Therapeutic Diets and Medical Care.

Personal Hygiene - Inmates shall have the opportunity to shave and shower at least three times per week. Each superintendent shall establish the days and shifts showers shall be offered. Each shower offered to an inmate shall be documented on the SMU Activity Log sheet/ IMS SMU Inmate Daily Log screen. Barbering shall be made available on the same basis as general population.

Linen and Bedding - Suitable clean bedding and linen, including two sheets, one pillow and one pillow case, one mattress, two towels, one wash cloth and sufficient blankets to provide comfort under existing temperature controls. Each superintendent shall ensure there is an adequate method to exchange and/or launder clothing, linens and bedding weekly.

Exercise - All inmates shall receive one hour of exercise per day, five days per week, outside their cells, unless security or safety considerations dictate otherwise. Each superintendent shall establish a schedule on what days and shifts

exercise shall be offered. Each exercise period offered to an inmate shall be documented on the SMU Activity Log Sheet/ IMS SMU Inmate Daily Log Screen. Inmates will normally exercise alone unless physical plant limitations dictate otherwise. All exercise periods shall be supervised and monitored by a staff member.

Property - Property within a Special Management Unit shall be restricted. However, personal property must be strictly controlled to prevent its use for high risk activity and to maintain the safety and security of the unit. Inmates should, as far as reasonably practicable, be provided clothing that is comparable to that permitted in population. Property will be restricted to what is permitted in 103 CMR 403.09, Approved Inmate Personal Property - Transient. In addition, each inmate will be permitted a radio. The superintendent is authorized to further limit the amount of property and to issue jumpsuits in lieu of such clothing for security purposes, if there is imminent danger that an inmate or inmates will destroy an item, or induce injury to self or others. In this regard only the following personal property items are authorized:

- Three (3) red jumpsuits or (3) trousers and shirts;
- One (1) radio;
- One (1) wedding ring;
- One (1) medical alert medal/bracelet;
- Paper/stamps/pens/pencils - limited quantities at the discretion of the superintendent;
- Letters, Post Cards, Personal Pictures - (amount not to exceed that which can fit in a shoe box size);
- Container - (5" high, 9" wide, 13" long);
- Legal Documents - one cubic foot only (each superintendent shall provide a system for the inmate to exchange legal documents);
- Hygiene items (inside cell) - (1) toothbrush, toothpaste, (1) bar soap, (1) comb and brush;
- Hygiene items (outside cell) - any other hygiene items sold via the SMU Canteen order form. Issued during shower periods;
- Prescription Eyeglasses;
- Hearing Aids and prosthetic devices;
- Underwear/t-shirts/socks - 7 pairs each
- Seven (7) Bras (female only - no under wire);
- One (1) pair footwear - and one pair of shower shoes; and
- One (1) handkerchief.

Clean and suitable coats and hats shall be issued as needed for outside exercise. These items shall be retained in the cell.

Canteen items shall be limited to what can be ordered from the SMU Canteen Order form. Superintendents shall determine any limitations on the quantities allowed to be retained in the cell.

Mail - All inmates shall be provided the same opportunities for writing and receipt of letters as is available to the general population. A locked portable mailbox shall be provided for each Special Management Unit. The locked mailbox on a daily basis shall be brought by each cell to give the inmate an opportunity to deposit outgoing mail. The mail officer shall pick up the mail in accordance with facility procedures. The unit supervisor shall ensure mail delivered to the unit is forwarded to the appropriate inmate.

Visitation - Inmates shall normally have opportunities for visitation similar to general population unless articulable reasons for withholding such privileges exist. The length and number of visits may be limited due to space, schedules, personnel constraints or when there is a substantial reason to justify limitation. Superintendents shall ensure that inmates on Administrative Segregation/Protective Custody status are allowed to receive a minimum of two visits per week. These visits must be pre-scheduled and will not be longer than one hour in duration. Visits shall be pre-scheduled in the Inmate Schedule screen. The days of the week and time periods are at the discretion of the superintendent but must meet the requirements of 103 CMR 483, Visiting Procedures. Attorney visits shall not be limited in amount or duration. Each visiting period received by an inmate shall be documented on the SMU Activity Log Sheet (Attachment A)/IMS SMU Inmate Daily Log screen.

Legal Supplies - All inmates shall have access to legal supplies and legal reference material. Each superintendent shall at a minimum afford inmates either the opportunity to go to or access the law library on a weekly basis or provide a mechanism for the inmate to obtain legal materials and legal reference material on a weekly basis. The Law Library Services/Materials Request Form (Attachment E) shall be used for this purpose.

Reading Material - Superintendents shall provide that inmates in a Special Management Unit have access to reading materials and the opportunity to borrow reading materials from the institution library. Reading material shall be limited to a quantity of ten (10) publications in each cell. Inmates shall have the access and availability to purchase books published in hard cover from approved vendors. Prior to ordering hard cover book(s), inmates must sign a waiver (see attachment) authorizing the institution's property staff to remove and destroy the hard covers upon receipt. The signed waiver shall be kept in the inmate's property file. Once the hard cover book is received by the Institution Property Officer, the hard cover shall be removed and destroyed, and the book shall be delivered to the inmate.

Telephone Access - Inmates shall be allowed to receive the use of the telephone for personal calls twice per week for fifteen minutes per call. Calls to the attorney of record in connection with prospective or pending litigation are not limited in amount or duration. Emergency phone calls may be approved by the shift commander. Telephone calls shall be documented on the weekly Telephone Use Log (Attachment D). Attachment D shall be utilized for the inmate request and

OIC approval, however, the status of phone calls completed, not completed, or refused shall instead be documented in the SMU Inmate Daily Log screen.

Programs - The superintendent shall assign and ensure that inmates receive the services of a correctional program officer.

Inmates may participate in such educational, vocational and/or rehabilitative programs as can be provided within the confines of the Special Management Unit, consistent with the security needs of the unit.

The superintendent shall ensure that institutional chaplain(s) visit Special Management Units weekly. Visits shall be documented in the Unit Visitor Log screen.

C. **Disciplinary Detention Inmates**

Each Superintendent shall ensure that the conditions of confinement of all inmates housed on disciplinary detention status in Special Management Units are the same as those provided for inmates on Administrative Segregation/Protective Custody status with the exception of the following:

Property – The same as inmates on Administrative Segregation/Protective Custody status.

Reading Material – Only one religious book is allowed. A one for one exchange is allowed for another religious book.

Visitation – No visits allowed except for Attorney visits.

Telephone Access – No personal phone calls are allowed. Inmates shall be allowed to receive the use of the telephone for calls to the attorney of record in connection with prospective or pending litigation. These calls are not limited in amount or duration. Emergency phone calls may be approved by the shift commander. All attorney telephone calls shall be documented on the Weekly Telephone Use Log (Attachment D). Attachment D shall be utilized for the inmate request and OIC approval, however, the status of phone calls completed, not completed, or refused shall instead be documented in the SMU Inmate Daily Log screen.

Programs – Inmates on Disciplinary Detention are not eligible to participate in educational, vocational and/or rehabilitative programs until such time as their sanction has been served.

V. **Standard Unit Operation**

Each superintendent shall ensure that the Special Management Unit adheres to the following minimum operating guidelines.

A. **MOVEMENT – ROUTINE USE OF RESTRAINTS IN SPECIAL MANAGEMENT UNITS**

1. Movement Inside The Special Management Unit

- i. Whenever an inmate is to be removed from his/her cell for routine movement inside a segregation unit the inmate shall be handcuffed behind the back.
- ii. The inmate shall be handcuffed prior to opening the door and shall be moved under a hands-on escort by two staff members.

2. Movement Outside The Special Management Unit

- i. Whenever an inmate is to be moved outside the unit the inmate shall be handcuffed behind the back and placed in leg irons.
- ii. The inmate shall be handcuffed and placed in leg irons prior to the cell door opening. Those facilities where leg irons cannot be logistically placed on an inmate prior to the cell door opening shall ensure that handcuffs are applied prior to opening the door. The leg irons shall then be applied inside the room.
- iii. Routinely all movement of inmates outside the Special Management Unit shall be under a hands on escort by two staff members. Exceptions, as approved by the superintendent, may be made when moving inmates to areas such as the law library, etc; under these circumstances the number of inmates moved shall be kept to a minimum. The group shall be escorted by a minimum of two staff members who shall position themselves behind the inmates when moving to the area.

3. Movement for Recreation

- ii. All Special Management Unit inmates shall be moved to the recreation area handcuffed behind the back under a hands on escort by two staff members.
- ii. Once secured in the recreation area the restraints shall be removed.

B. **EXTRA RESTRAINT STATUS FOR POTENTIALLY VIOLENT/ASSAULTIVE SPECIAL MANAGEMENT UNIT INMATES**

1. In the event an inmate is deemed a risk to the unit and/or staff due to the inmate's behavior extra restraints may be authorized by the superintendent or designee (Attachment C). Authorized extra restraints should be noted in the "Other Restrictions" field on the SMU Inmate Information screen.
2. Any movement outside of the cell by an inmate placed on extra restraint status shall be in waist chains and leg irons.
3. An inmate on extra restraint status shall exercise alone and remain in restraints for the entire exercise period.
4. The status of any inmate placed on extra restraints shall be reviewed every three days by the superintendent or designee for the continued need to utilize extra restraints. Each superintendent shall develop a mechanism to document the approval of extra restraint status and any subsequent reviews thereafter.

C. **Entrance** – Access to the unit shall be strictly controlled. Only authorized staff shall be allowed entrance to the unit. Superintendents shall ensure that the unit is free from escape or external intrusion. In this regard, entrance traps shall be interlocked or manually controlled to ensure only one door is opened at a time. No operational key rings within the unit shall have a key that can get staff or an inmate completely out of the unit. With the exception of an emergency key ring, no operational key ring within the facility should allow staff or an inmate outside the unit to gain access into the unit. Due to limited staffing and to ensure the safety and security of staff, the 11-7 shift should not have a key to access the inmate cells. If an emergency exists, the key should be provided via an emergency key ring.

D. **Searches/Inspections** – Each inmate cell within a Special Management Unit shall be searched weekly and the search documented. Searches shall be documented in the applicable screens in accordance with the 103 DOC 506 Institution Search Plan policy.

Any item of property removed by an officer from an inmate's cell shall be held as follows:

1. Property which could be evidence in disciplinary or criminal proceedings shall, by the end of the seizing officer's tour of duty, be delivered to the Superintendent or his designee for safekeeping or delivery to the appropriate law enforcement agency.
2. All other property which has been removed shall be forwarded to the property officer who shall inventory and store such property until such time as it is disposed of in accordance with 103 CMR 403.14.

Any inmate entering or leaving the unit, including inmate workers, shall be strip searched. All inmates shall be searched in a secure holding room or cell. Inmate workers are required to wear a jumpsuit while in the unit (any color except for red).

Food trays shall be searched by staff prior to issuance to the inmate.

Each inmate cell shall be subject to a security inspection each shift in accordance with 103 DOC 504, Security Inspections. Segregation units, detention units and holding cells in all facilities shall be inspected once per shift.

- E. **Records/Log Books** - It is the responsibility of the Special Management Unit officer in charge to read the logbook/IMS Unit/Activity Log screen entries of the previous two (2) shifts for information such as admissions, discharges, changes in status, operational issues, etc.

It is the responsibility of the Special Management Unit officer in charge to maintain the unit logbook and to ensure that all pertinent information regarding all situations that arise on the shift are properly recorded. Facilities shall record this information on the Unit/Activity Log screen. The unit logbook shall be maintained in a secure area in the Special Management Unit. The following information, as well as the time of each entry must be entered in the logbook/IMS Unit/Activity Log screen:

1. Accounting of all keys and equipment;
2. All personnel working in the unit;
3. Counts;
4. Meal carts entering and leaving the unit and officer assigned;
5. Assigned staff who leave the unit, to include destination and their actual time of return to the unit;
6. Any significant incidents occurring in the unit, including incident reports and disciplinary reports;
7. Any equipment leaving the unit, with whom and destination;
8. Maintenance workers entering the unit and duties performed, to include inmate workers;
9. Laundry;
10. Status changes and person authorizing same;

11. Names and titles of authorized staff ingressing/egressing the unit to conduct official business and the purpose of their visits. These entries will be made in red ink and the staff member entering the unit will initial the logbook entry (along with the officer-in-charge who is required to initial each logbook entry). This information shall be entered in the Unit Visitor Log screen instead of the Unit/Activity Log screen; and
12. Admissions and discharges of inmates to and from the unit. The following information must be logged in the logbook/IMS Unit/Activity Log screen:
  - i. Date the inmate enters the unit;
  - ii. Inmate name;
  - iii. Inmate commitment number;
  - iv. Reason for placement in the Special Management Unit;
  - v. Staff member who ordered the Special Management Unit placement;
  - vi. Unit the inmate came from;
  - vii. Escorting staff members names; and
  - viii. Date inmate is discharged from the Special Management Unit.

Additionally, the SMU Inmate Information screen shall be completed upon each inmate's admission and discharge to and from the unit.

- F. **Evacuation Procedure** – Each superintendent shall ensure for the safe evacuation of the unit upon the discovery of a fire, extensive smoke or any other emergency. Each unit shall have enough restraint equipment on hand to evacuate the entire unit in restraints.

## **VI. Cell Decorum Standards**

### **A. Cell Decor**

1. Cells shall be painted only with colors approved by the superintendent:
2. The painting of window glass shall not be permitted.
3. The painting of symbols, emblems, plaques, and the writing on walls shall not be permitted and shall be considered a disciplinary violation.
4. Floor coverings of any kind will not be allowed.



5. Wall decorations are not allowed in the Special Management Units. Anything found on a wall shall be considered an unauthorized wall hanging, which shall be subject to a disciplinary report.
6. Cell lights are not to be tampered with or covered.
7. Heating pipes are not to be covered.

**B. Furnishings Provided by the Institution**

1. One bed and mattress secured along the designated wall or floor if possible.
2. One secured desk/chair per cell.
3. One toilet and sink.

**C. Maintenance of Cells**

1. Heating pipes are not to be covered.
2. Cardboard boxes and paper bags are prohibited for storage use in the cells.
3. Cells must be kept clean and orderly.
4. Shelves on walls are not allowed.
5. Clotheslines in cells are not allowed.
6. Cleaning equipment cannot be kept in cells.
7. No spliced wiring is allowed on any electrical unit.
8. No plastic bags are allowed in any cell.

- D. Weekly Cell Cleaning** – Each superintendent shall ensure at a minimum that each inmate is given the opportunity to clean his cell weekly. Specific equipment shall be identified and safeguards taken to ensure security. At a minimum the following is allowable for the inmate:

An officer assigned to the unit shall pass a broom and dustpan/brush through the food slot and instruct the inmate to clean the cell. Items shall be issued one at a time with the exception of the dustpan/brush, which are given together. The inmate shall return all items to the officer in the same manner in which the items were received. A mop may be necessary and will be issued and returned in the

same manner described above. If necessary, the inmate may be given a spray bottle of pine cleaner and a powder cleanser.

A barrel shall be placed adjacent to the inmate's cell, in which the inmate shall dispose of all trash by placing it in the barrel via the food slot.

All empty cells shall be cleaned thoroughly by the unit worker and supervised and inspected by the unit officers.

## **VII. Inspections/Tours**

Below is a list of designated staff members, other than unit staff, required to make inspections/tours of the Special Management Units and the frequency of such inspections/tours. Inspections/tours shall be documented in the Unit Visitor Log screen.

The superintendent shall require that all inmates on administrative segregation, protective custody or disciplinary detention status are personally observed by correctional staff at least every 30 minutes, on an irregular schedule, unless their behavior requires more frequent observation.

The superintendent shall require that inmates on protective custody or administrative segregation status receive visits from program staff upon request.

|                                                    |                                                                                                 |
|----------------------------------------------------|-------------------------------------------------------------------------------------------------|
| Superintendent                                     | once per week                                                                                   |
| Deputy Superintendents                             | once per week                                                                                   |
| Director of Security                               | once per week                                                                                   |
| Shift Commanders/Special Management Unit           | once per shift                                                                                  |
| Administrator/Designee                             | once per day                                                                                    |
| Nurse                                              | once per day                                                                                    |
| Chaplains                                          | once per week                                                                                   |
| Special Management Unit Correction Program Officer | Assigned to the unit or at a minimum three time per week (Mon., Wed., Fri., excluding holidays) |

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF CORRECTION  
STANDARD OPERATING PROCEDURES  
ATTACHMENT TO 103 CMR 423 SPECIAL MANAGEMENT  
FOR PURPOSES OF ADDITIONAL REVIEW REQUIREMENTS FOR INMATES ON  
AWAITING ACTION OR PROTECTIVE CUSTODY STATUS FOR NINETY (90) DAYS  
OR MORE**

**PURPOSE:** To establish standard operating procedures to provide additional reviews for inmates in a special management unit or on special management status in an alternate unit on awaiting action or protective custody status for ninety (90) days or more.

I. Scope of Review

In addition to the review required by 103 CMR 423.08(2)(b), and the review required by 103 CMR 430.21(2) for an inmate under investigation for a possible disciplinary offense, the status of each inmate placed in a special management unit or on special management status in an alternate unit on awaiting action or protective custody status shall be reviewed as set forth herein within ninety (90) days of placement and at intervals of no longer than ninety (90) days thereafter. Inmates housed in a special management unit pending the availability of a bed in a Special Treatment Unit (STU) or following the imposition of a Departmental Disciplinary Unit (DDU) sanction, shall not receive the review required by this Standard Operating Procedure.

II. Review Process

- A. A Correctional Program Officer shall: (i) review information pertinent to the inmate's placement and retention in the special management unit or on special management status in an alternate unit on awaiting action or protective custody status; (ii) conduct a hearing; and (iii) make recommendations whether there is a need for the inmate's continued placement in a special management unit or on special management status.
- B. Notice. The inmate shall be provided with at least forty-eight (48) hours advance written notice of the scheduled hearing. The notice shall state the basis upon which the inmate is housed in the special management unit or on special management status in an alternate unit. Notice shall be documented and may be waived by the inmate in writing.
- C. Hearing. At the hearing, the inmate may offer a verbal or written statement and/or submit documentation to contest the rationale for his placement in the special management unit or on special management status in an alternate unit. The inmate shall not be entitled to call witnesses or to representation by counsel. At the conclusion of the hearing, the Correctional Program Officer shall inform the inmate orally of his recommendation as to whether there is a need for the inmate's continued placement in a special management unit or on special management status in an alternate unit.

In all instances where language barriers exist, the Telephone Interpreter Service shall be used, and its use documented. Hearing impaired inmates may request an interpreter pursuant to the procedures set forth in 103 DOC 207.00, Special Accommodations for Inmates.

The inmate's failure to appear at the scheduled hearing shall be deemed a refusal to appear.

- D. Recommendation. Within two (2) business days of the hearing, the Correctional Program Officer shall make a recommendation via IMS as to whether the inmate should continue to be housed in the special management unit or on special management status in an alternate unit and the rationale for such recommendation. A copy of this recommendation shall be served on the inmate.
- E. Inmate Appeal. If the inmate disagrees with the written recommendation of the Correctional Program Officer, the inmate may submit a written appeal within five (5) business days of service of the Correctional Program Officer's written recommendation.
- F. Final Decision. If the inmate does not appeal, waives appeal, or does not submit a timely appeal, the Deputy Superintendent for Classification and Treatment shall render the final decision via IMS and provide the inmate with such decision in writing. If the inmate has submitted a timely appeal, then the Superintendent shall render the final decision via IMS and provide the inmate with such decision in writing. The written decision shall explain the reasons for the inmate's placement/status and shall be provided to the inmate within twenty (20) business days after the date of the hearing.

## **SUPPLEMENTAL RECORD APPENDIX**



## PRISONERS' LEGAL SERVICES OF MASSACHUSETTS

10 Winthrop Square, 3rd Floor • Boston, MA 02110 • [www.plsma.org](http://www.plsma.org)  
[fb.me/prisonerslegalservices](https://www.facebook.com/plsma) • @PLSMA  
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State prisoner speed dial: \*9004# • County prisoner collect calls: 617-482-4124

July 28, 2015

Associate Justice Peter J. Rubin  
Massachusetts Appeals Court  
John Adams Courthouse  
One Pemberton Square  
Boston, MA 02108-1705

Re: Robert Cantell et al. v. Luis S. Spencer et al., No. 2013-P-1858  
Petition for Rehearing.

Dear Justice Rubin:

The Plaintiffs seek rehearing of the July 22, 2015 decision in the above-titled case, which appears to be based on a misapprehension of the facts of the case.

The Plaintiffs' central claim is that prisoners held in Special Management Units (SMUs) in administrative segregation (on awaiting action status or protective custody status) are entitled to the benefit of the Departmental Segregation Unit, or DSU, regulations, 103 CMR 421.00. The Court noted that all of the Plaintiffs had been released from SMUs and thus their claims are moot.<sup>1</sup> The court acknowledged that it could have reached the merits of their claims based on exception to the mootness doctrine for issue of public importance, capable of repetition yet evading review, and that this doctrine has particular application to litigation involving prisoners' rights. Opinion at 4. However, the court declined to reach the merits because it believed that this would be premature in light of regulations that it anticipated from the Department of Correction (DOC) pursuant to the decision in *LaChance v. Comm'r of Corr.*, 463 Mass. 767 (2012). Such regulations, while not directly resolving the Plaintiffs' central claim, would nevertheless help frame the unresolved legal issues. Opinion at 10.

This premise was mistaken, as the DOC has, in fact, issued its policy responding to the *LaChance* decision, in the form of a February 5, 2013 Standard Operating Procedure (SOP) attached to the Special Management regulations, 103 CMR 423.00.<sup>2</sup> See <http://www.mass.gov/eopss/docs/doc/policies/423.pdf> at p. 15-17, attached as Exh. 1. It is clear that the DOC does not intend to provide anything close to the procedures required by the

<sup>1</sup> Opinion at 3 and n. 7.

<sup>2</sup> The SOP is nearly identical in substance to a draft plan submitted to the Court by the Defendants on January 8, 2013. See RA 287-288.

DSU regulations. The SOP lacks many of the regulations' most important guarantees, such as a hearing by an impartial Board with 15 or 30 days of confinement, substantial evidentiary criteria that must be met to justify confinement, a conditional release date, and conditions which will enable the prisoner to earn his release. Rather, it provides that after 90 days in an SMU on awaiting action status or protective custody status a prisoner will have a hearing with a single Correctional Program Officer (CPO). At this hearing, the prisoner may offer a verbal or written statement and/or documentation, but may not call witnesses or be represented by counsel. The CPO's recommendation and the rationale for it are then served on the prisoner. The Prisoner may appeal to the Superintendent, but because the SOP contains no standard as to what does or does not justify segregation there is scant basis for a prisoner to appeal.

Thus the Defendants' response to the *LaChance* decision is clear, and a decision as to the Plaintiffs' entitlement to the DSU regulations would not be premature. Furthermore, there are compelling reasons to permit those Plaintiffs who remain in DOC custody and subject to administrative segregation to serve as class representatives.

The Superior Court denied class certification in the erroneous assumption that *LaChance* had provided all the relief the Plaintiffs sought, and not because they lacked a personal stake in the outcome of the case. Superior Court Slip Op. at 2-3 (RA 310-311). At the time of the Superior Court decision, at least one Plaintiff was in an SMU,<sup>3</sup> and furthermore those Plaintiffs who were held in SMUs at the time class certification was sought, and who remain incarcerated, retain a stake sufficient to act as class representatives. These Plaintiffs remain subject to administrative segregation in an SMU and their claims are capable of repetition yet evading review. As the Court recognized, this exception to the mootness doctrine "has particular application to litigation involving inmate rights given the often ephemeral nature of the alleged improprieties being challenged," and such litigation is often pursued through class actions, as the Plaintiffs sought here. Opinion at 3-4 and n. 8, quoting *Superintendent of Worcester State Hosp. v. Hagberg*, 374 Mass. 271, 274 (1978), *Haverty v. Comm'r of Corr.*, 437 Mass. 737 (2002) and *Longval v. Commissioner of Corr.*, 448 Mass. 412 (2007).

Where a Plaintiff is suffering injury at the time class certification is sought, and the injury is capable of repetition as to that Plaintiff, such a Plaintiff may be certified as a class representative although they no longer suffer injury. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991); *Wolf v. Comm'r of Public Welfare*, 367 Mass. at 293, 298-99 (1975). The Superior Court did not engage with this question due to its mistaken view of the merits of the case. The Appeals Court did not correct the Superior Court's error because it mistakenly believed the merits would be clarified by DOC regulations. Because it is clear that the

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<sup>3</sup> The record reflects that one Plaintiff, Albert Jackson, was in an SMU as of December 28, 2012, shortly before the Superior Court's ruling on January 31, 2013. See Def. Br. at 10 and RA 266. By the time of the Plaintiffs' application for Direct Appellate Review, the Defendants represented that none of the Plaintiffs was held on Awaiting Action Status in an SMU (though they did not say whether any were held in an SMU on protective custody status). See Def. Br. at 10, citing Def. Opp. to Application in DAR-22139, pp. 1-2. There is no information in the record as to whether any of the Plaintiffs has since been returned to an SMU on Awaiting Action or Protective Custody status.

Defendants do not intend to offer prisoners in SMUs in administrative segregation anything close to the procedures required by the DSU regulations, the Plaintiffs' claim is ripe for decision. Those Plaintiffs who were in SMUs at the time they sought class certification, and who remain incarcerated, should be permitted to serve as class representatives.

Sincerely,

/s/ Bonita Tenneriello

Bonita Tenneriello, Esq.  
Staff Attorney

cc: Sheryl F. Grant, Esq.





Deval L. Patrick  
Governor

Timothy P. Murray  
Lieutenant Governor

Andrea J. Cabral  
Secretary

*The Commonwealth of Massachusetts*  
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Luis S. Spencer  
Commissioner

Peter A. Pepe, Jr.  
Katherine A. Chmiel  
Deputy Commissioners

Paul L. DiPaolo  
Acting Deputy Commissioner

TO: Luis S. Spencer, Commissioner

THRU: Jennifer Gaffney, Director, Policy Development & Compliance Unit

FROM: Peter A. Pepe, Jr., Deputy Commissioner, Prison Division

DATE: February 5, 2013

RE: 103 CMR 423, Special Management, Standard Operating Procedures

Please be advised that the Standard Operating Procedures for 103 CMR 423, Special Management has been amended to reflect the additional review requirements for inmates on awaiting action or protective custody status for (90) days or more.

**COMMONWEALTH OF MASSACHUSETTS**  
**DEPARTMENT OF CORRECTION**  
**STANDARD OPERATING PROCEDURES**  
**ATTACHMENT TO 103 CMR 423 SPECIAL MANAGEMENT**  
**FOR PURPOSES OF ADDITIONAL REVIEW REQUIREMENTS FOR**  
**INMATES ON AWAITING ACTION OR PROTECTIVE CUSTODY STATUS**  
**FOR NINETY (90) DAYS OR MORE**

**PURPOSE:** To establish standard operating procedures to provide additional reviews for inmates in a special management unit or on special management status in an alternate unit on awaiting action or protective custody status for ninety (90) days or more.

**I. Scope of Review**

In addition to the review required by 103 CMR 423.08(2)(b), and the review required by 103 CMR 430.21(2) for an inmate under investigation for a possible disciplinary offense, the status of each inmate placed in a special management unit

*Exhibit 1*

or on special management status in an alternate unit on awaiting action or protective custody status shall be reviewed as set forth herein within ninety (90) days of placement and at intervals of no longer than ninety (90) days thereafter. Inmates housed in a special management unit pending the availability of a bed in a Special Treatment Unit (STU) or following the imposition of a Departmental Disciplinary Unit (DDU) sanction, shall not receive the review required by this Standard Operating Procedure.

## II. Review Process

- A. A Correctional Program Officer shall: (i) review information pertinent to the inmate's placement and retention in the special management unit or on special management status in an alternate unit on awaiting action or protective custody status; (ii) conduct a hearing; and (iii) make recommendations whether there is a need for the inmate's continued placement in a special management unit or on special management status.
- B. Notice. The inmate shall be provided with at least forty-eight (48) hours advance written notice of the scheduled hearing. The notice shall state the basis upon which the inmate is housed in the special management unit or on special management status in an alternate unit. Notice shall be documented and may be waived by the inmate in writing.
- C. Hearing. At the hearing, the inmate may offer a verbal or written statement and/or submit documentation to contest the rationale for his placement in the special management unit or on special management status in an alternate unit. The inmate shall not be entitled to call witnesses or to representation by counsel. At the conclusion of the hearing, the Correctional Program Officer shall inform the inmate orally of his recommendation as to whether there is a need for the inmate's continued placement in a special management unit or on special management status in an alternate unit.

In all instances where language barriers exist, the Telephone Interpreter Service shall be used, and its use documented. Hearing impaired inmates may request an interpreter pursuant to the procedures set forth in 103 DOC 207.00, Special Accommodations for Inmates.

The inmate's failure to appear at the scheduled hearing shall be deemed a refusal to appear.

- D. Recommendation. Within two (2) business days of the hearing, the Correctional Program Officer shall make a recommendation via IMS as to whether the inmate should continue to be housed in the special management unit or on special management status in an alternate unit and the rationale for such recommendation. A copy of this recommendation shall be served on the inmate.

- E. Inmate Appeal. If the inmate disagrees with the written recommendation of the Correctional Program Officer, the inmate may submit a written appeal within five (5) business days of service of the Correctional Program Officer's written recommendation.
- F. Final Decision. If the inmate does not appeal, waives appeal, or does not submit a timely appeal, the Deputy Superintendent for Classification and Treatment shall render the final decision via IMS and provide the inmate with such decision in writing. If the inmate has submitted a timely appeal, then the Superintendent shall render the final decision via IMS and provide the inmate with such decision in writing. The written decision shall explain the reasons for the inmate's placement/status and shall be provided to the inmate within twenty (20) business days after the date of the hearing.

Approved: \_\_\_\_\_

Luis S. Spencer, Commissioner

2/22/13

Date

Respectfully submitted,

NANCY ANKERS WHITE  
Special Assistant Attorney General

11/5/13  
Date

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#### CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of the above document was served on the plaintiffs by placing a copy in a depository for mailing, first class mail, postage prepaid, this day, to their attorney:

Bonita Tenneriello, Esq.  
Prisoners' Legal Services  
10 Winthrop Square, 3<sup>rd</sup> Floor  
Boston, MA 02110

Date: 11/5/13

Sheryl F. Grant  
Sheryl F. Grant, Counsel

August 19, 2015

The Honorable Peter J. Rubin  
Massachusetts Appeals Court  
John Adams Courthouse  
One Pemberton Square, Suite 1200  
Boston, MA 02108

RE: Cantell, et al. v. Spencer, et al.,  
NO. 2013-P-1858  
OPPOSITION TO PETITION FOR REHEARING

Dear Justice Rubin:

The defendants oppose plaintiffs' Petition for Rehearing ("Petition") in the above-referenced case.

This Court did not "overlook" or "misapprehend" any point of law or fact in its Opinion. See Mass. R. App. P. 27(a). This Court dismissed the appeal as moot because "it is uncontested that the plaintiffs are no longer held in segregated confinement in [Special Management Units ("SMUs")]." Opinion at 3. This fact remains uncontested.

The plaintiffs assert that the existence of a Standard Operating Procedure issued by the Department of Correction ("Department") pertaining to additional review requirements for inmates on awaiting action

status or protective custody status somehow demonstrates a basic misapprehension of the facts by this Court as to whether provisions regarding such hearings have been promulgated in a regulation. It does not. It is uncontested that the procedures issued by the Department in the wake of LaChance v. Comm'r of Correction, 463 Mass. 767 (2012), have not yet been subject to the regulatory hearing process. Thus, this fact was not misapprehended by the Court.

As also noted by the Court (Opinion at 6-7), in January 2013 the defendants filed a status report in the court below detailing the plans for the reviews required by LaChance. As noted in the status report and by this Court (Opinion at 6-7), the Department began providing the additional reviews, as required by LaChance, before the promulgation of any regulations.

There is an important point that the plaintiffs do not mention in their Petition that bears consideration. In the lower court's January 31, 2013 Memorandum of Decision, the judge expressly stated that the allowance of defendants' motion to dismiss was "without prejudice to plaintiffs, or any of them, filing an amended complaint that DOC is failing to properly comply with LaChance." (RA 311). Final judgment did not

enter until approximately six months later on August 1, 2013. The plaintiffs, who were aware of the process detailed in the status report,<sup>1</sup> never filed an amended complaint asserting that the requirements of LaChance were not being followed, or that the process described in the status report was deficient in some manner, or that any of the plaintiffs had been subject to the new process. Additionally, plaintiffs failed to plead any facts in the governing complaint pertaining to the reasons why any of them had been placed in segregation. These deficiencies and failings demonstrate the lack of a "concrete fact situation" referenced by this Court (Opinion at 10-11). Plaintiffs, through this Petition, are now asking for this Court to review the process that plaintiffs deliberately chose not to challenge in this case, despite being given ample opportunity to do so by the lower court, and on the basis of a complaint that did not even include factual allegations pertaining to the reasons for the plaintiffs' segregation placements. Matters that were not alleged in the complaint filed in the lower court cannot be raised for the first time on appeal, and cer-

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<sup>1</sup> As noted by plaintiffs, the process detailed in the Standard Operating Procedure is substantially similar.

tainly not in a Petition for Rehearing. Cacicio v. Secretary of Public Safety, 422 Mass. 764, 769 n.9 (1996); Comm'r of Correction v. McCabe, 410 Mass. 847, 850 n.7 (1991). Plaintiffs' failure to challenge the process detailed in the status report, or allege that they had been subject to the new process, or allege facts pertaining to the reasons for any of the segregation placements, is hardly a misapprehension of fact or law by this Court to justify a rehearing.

Further, this Court properly dismissed the appeal as moot. It is the general rule that courts will decide only actual controversies. When an aggrieved party ceases to have a personal stake in its outcome, litigation is ordinarily deemed moot. Purvis v. Ponte, 929 F.2d 822, 824-825 (1<sup>st</sup> Cir. 1991) (where inmate sought equitable relief regarding alternative placement, but inmate already moved, issue moot); Stokes v. Supt., Massachusetts Correctional Inst., Walpole, 389 Mass. 883, 886 (1983); Blake v. Massachusetts Parole Bd., 369 Mass. 701, 703 (1976); Smith v. Allen, 502 F.3d 1255, 1267 (11th Cir. 2007) ("The general rule...is that a transfer or a release of a prisoner from prison will moot that prisoner's claims for injunctive and declaratory relief."); Smith v. City of



Tupelo, 281 Fed.Appx. 279, 282 (5th Cir. 2008) ("A claim for declaratory and injunctive relief based on conditions of confinement is rendered moot upon the prisoner's release or transfer from the facility"). Wholesale speculation and conjecture that the same harm might befall plaintiffs in the future is insufficient; civil proceedings must be concerned with "the resolution of real, not hypothetical, controversies." Bello v. South Shore Hosp., 384 Mass. 770, 778 (1981). See Camreta v. Greene, - U.S. -, 131 S. Ct. 2020, 2034 (2011); City of Los Angeles v. Lyons, 461 U.S. 95, 105-106 (1983); O'Shea v. Littleton, 414 U.S. 488, 496-497 (1974); County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979); Metro-Goldwyn Mayer, Inc. v. 007 Safety Prods., Inc., 183 F.3d 10, 15 (1st Cir.1999). "The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) (internal quotations and citation omitted); American Civil Liberties Union of Massachusetts v. U.S. Conference of Catholic Bishops, 705 F.3d 44, 52 (1st Cir. 2013).

Plaintiffs should be foreclosed from even arguing that their claims evaded review because they did not seek preliminary relief in this case. A plaintiff who fails to pursue a preliminary injunction is barred from laying claim to the capable-of-repetition exception; this ensures that "only situations that truly evade review in an exceptional way fall under the doctrine's umbrella." Newdow v. Roberts, 603 F.3d 1002, 1009 (D.C. Cir. 2010), cert. denied, 131 S.Ct. 2441 (2011). "The capable-of-repetition doctrine is not meant to save mooted cases that may have remained live but for the neglect of the plaintiff." Id.; see also Armstrong v. FAA, 515 F.3d 1294, 1297 (D.C. Cir. 2008).

In any event, the issues raised by plaintiffs are not "capable of repetition, yet evading review." Supt. of Worcester State Hosp. v. Hagberg, 374 Mass. 271, 274 (1978). Indeed, a mere review of the vast array of cases with inmates challenging time spent in segregation, conditions of segregation, and/or housing transfers illustrates this fact. See e.g., Royce v. Comm'r of Correction, 390 Mass. 425, 429 (1983); Puckett v. Comm'r of Correction, 28 Mass. App. Ct. 448, 450-51 (1990); Lamoureux v. Supt., MCI-Walpole, 390 Mass. 409, 417-18 (1983); Nelson v. Comm'r of Correction, 390 Mass.

379, 397 (1983). This Court, in Footnote 8 (Opinion at 3-4), also cited to additional cases involving similar challenges.

The mere fact that a case is, or was requested to be, a class action does not create a different set of rules as to mootness. As this Court noted, whether a case is a class action or not, the exception to the mootness doctrine, as relevant to this case, still requires that the issue be capable of repetition, yet evading review. (Opinion at 3-4, n. 4). See Gonzalez v. Comm'r of Correction, 407 Mass. 448, 451-453 (1990). As argued above, this standard has not been met.

Additionally, as argued by defendants in their brief, "The class action device [is] an exception to the usual rule that litigation is conducted by and on behalf of the named parties only." General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 155 (1982). The Supreme Judicial Court has stated that the plaintiffs in a class action lawsuit bear the burden of satisfying six factors before class certification may be appropriate under Mass. R. Civ. P. 23:

[1] the class must be numerous, [2] there must be common questions of law or fact, [3] the claims of the representative parties must be typical, and [4] those parties must fairly and adequately protect the interests

of the class. In addition, [5] the common questions must predominate over individual questions, and [6] the class action must be superior to other available methods for fair and efficient adjudication.

Carpenter v. Suffolk Franklin Sav. Bank, 370 Mass.

314, 318 (1976). Failure on the part of a plaintiff to satisfy any one of these requirements is fatal to class certification. Spear v. H.V. Greene Co., 246 Mass. 258, 266 (1923). "A judge deciding a motion under rule 23 has broad discretion whether to grant class status." Aspinall v. Phillip Morris Co., 442 Mass. 381, 391 (2004). A party moving for class certification must provide "information sufficient to enable the motion judge to form a reasonable judgment that certification requirements are met." Id. at 392 (internal citations and quotations omitted).

In this case, plaintiffs wished to sue about potentially thousands of independent inmate placement decisions, even though the reasons for those decisions are wholly unrelated to each other. Plaintiffs failed to provide the court with any facts specific to plaintiffs. The motion for class certification pertained to just two plaintiffs (RA 25), only one of whom was even in an SMU at the time the Amended Complaint was filed (RA 50). That motion simply averred that those two

plaintiffs had been in administrative segregation in SMUs. There were no facts alleged from which the court could have concluded that all the requirements for class certification were met. Plaintiffs failed to describe the reasons why either of them was placed in segregation. Inmates may have varying needs or concerns with their placements depending on the reasons for the placement. Plaintiffs failed to show that they sufficiently represented the varied reasons why inmates may be placed in an SMU such that the court could have concluded they would adequately represent the interests of all inmates, that their claims were typical, or that there were common questions of fact.

Plaintiffs also failed to provide information to demonstrate that class action was a superior method of adjudication. Assuming *arguendo* that the court were to grant plaintiffs' desired relief by enjoining defendants from holding inmates in SMUs without the process set forth in 103 CMR 421 (the DSU regulation), the implications of such a judgment would have been systemic. Additionally, the LaChance decision itself is illustrative of the fact that class adjudication is unnecessary in a case involving the constitutionality of

a regulation or policy, or the process due to an inmate pertaining to such placements.

Finally, although it was not the basis of this Court's decision, defendants submit that, for all the reasons argued in their appellate brief, the LaChance decision disposed of the issues in this case. As noted by this Court, the plaintiffs' claims "were identical to ones raised by the inmate in LaChance...." (Opinion at 2).

For all the aforementioned reasons, there is no need for this Court to rehear this matter. Plaintiff's Petition should be denied.

Sincerely,

On behalf of  
defendants-appellees,

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