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## **Comment from the New York Civil Liberties Union on the Proposed Regulations for Special Housing Units**

**(I.D. No. CCS-35-19-00001-P)**

**October 28, 2019**

The New York Civil Liberties Union (“NYCLU”) submits this comment on the proposed regulations regarding solitary confinement in the New York prison system. We commend the Department of Corrections and Community Supervision (DOCCS) for proposing reforms to “dramatically reduce the use of solitary confinement” and to “end inhumane practices.”<sup>1</sup> Unfortunately, the proposed regulations fall short of ending the inhumane use of solitary confinement.

The NYCLU is a nonprofit, nonpartisan organization that works to defend and promote the fundamental principles and values embodied in the federal and state Constitution, New York laws, and international human rights law, on behalf of all New Yorkers, including those incarcerated in jails and prisons. The NYCLU is an outspoken advocate for evidence-based corrections practices that improve public safety and respect fundamental human dignity. In 2012, the NYCLU released “Boxed In: The True Cost of Extreme Isolation in New York’s Prisons,” a report that documenting the arbitrary, unjustified, and inhumane use of solitary confinement in New York’s prison system.<sup>2</sup> Later that year, the NYCLU sued DOCCS over its solitary confinement practices. That lawsuit, *Peoples v. Annucci*, resulted in a court-ordered settlement agreement requiring broad changes to disciplinary segregation, the most common form of solitary. The *Peoples* settlement reduced the number of people in special housing units or SHU (from nearly 4,500 to 2,300), limited the lengths of confinement in solitary, and improved the conditions of confinement in solitary. While these changes represent progress, they are not enough to end the inhumane use of solitary confinement.

The proposed regulations permit the continued use of torture-through-isolation, fail to protect some of the most vulnerable from the harms of isolation, and fail to adequately restrict the many forms of confinement or improve conditions for those in segregated confinement. The pace of reform under the regulations is also too slow to address the urgent risk of harm individuals face from prolonged isolation. Compared to the Humane Alternative to Long-Term Solitary

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<sup>1</sup> DOCCS Proposed Rulemaking for Special Housing Units, Regulatory Impact Statement, Legislative Objectives at 4, available at <https://www.dos.ny.gov/info/register/2019/aug28.pdf>

<sup>2</sup> *Boxed In: The True Cost of Extreme Isolation in New York’s Prisons*, New York Civil Liberties Union, October 2012, available at [https://www.nyclu.org/sites/default/files/publications/nyclu\\_boxedin\\_FINAL.pdf](https://www.nyclu.org/sites/default/files/publications/nyclu_boxedin_FINAL.pdf)

Confinement (HALT Act), the proposed regulations lack the comprehensive approach necessary to adequately prevent solitary confinement abuses. The NYCLU calls on the Governor and the Legislature, who agreed on these proposed regulations,<sup>3</sup> to pass the HALT Act to enact the comprehensive reforms necessary to end the inhumane use of solitary confinement.

**I. Unlike the HALT Act, the Proposed Regulations Permit the Continued Use of Torture-through-Isolation.**

The proposed regulations fail to end the continued use of torture-through-isolation. The regulations attempt to restrict the use of “segregated confinement” (defined in the regulations as the disciplinary confinement in SHU and separate Keeplock units) and administrative segregation to no more than 30 consecutive days. But, under a loophole in the regulations, people may be held in segregated confinement for much longer than 30 days. The regulations fail to restrict the use of back-to-back confinement sanctions, instead opting to instruct hearing officers that non-confinement sanctions should be “preferred” for individuals in segregated confinement. But DOCCS already has issued similar guidance to hearing officers under the *Peoples v. Annucci* settlement agreement.<sup>4</sup> Under that guidance, back-to-back confinement sanctions *increased* because Keeplock confinement sanctions rose as SHU confinement sanctions decreased.<sup>5</sup> There is no reason to suggest that these new regulations will be any more effective.

Even if the 30-day cap was not subject to a loophole, the regulations would still permit inhumane confinement. While the 30-day cap on solitary confinement represents an improvement on the status quo, it does not comport with well-recognized standards for preventing the inhumane use of solitary confinement. The United Nations has issued guidance explaining that solitary confinement for more than 15 days is torture.<sup>6</sup> And the National Commission on Correctional Health Care issued similar guidance calling solitary confinement for more than 15 days “inhumane” and “harmful to an individual’s health.”<sup>7</sup>

Unlike the regulations, the HALT Act ends the use of torture-through-isolation. It caps the use of segregated confinement (including all forms of confinement for 17 or more hours) to no more than 15 consecutive days. And it includes further protections to prevent back-to-back

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<sup>3</sup> Statement from Governor Andrew M. Cuomo, Majority Leader Andrea Stewart-Cousins, and Speaker Carl Heastie on Joint Agreement to Overhaul Solitary Confinement Policies, June 21, 2019, *available at* <https://www.governor.ny.gov/news/statement-governor-andrew-m-cuomo-majority-leader-andrea-stewart-cousins-and-speaker-carl>

<sup>4</sup> The *Peoples* guidance specifically states, “When an inmate is already serving a SHU confinement sanction in a SHU cell, Hearing Officers should, consistent with the need to maintain safety and security, consider alternative sanctions, other than additional SHU confinement.”

<sup>5</sup> *Trapped Inside: The Past, Present, and Future of Solitary Confinement in New York*, New York Civil Liberties Union, October 2019, *available at* [www.nyclu.org](http://www.nyclu.org).

<sup>6</sup> *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United States General Assembly, August 2011, *available at* <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>; *see also* United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), Rules 43-44, *available at* <http://solitaryconfinement.org/uploads/MandelaRules2015UNdocRev.1.pdf>

<sup>7</sup> Position Statement on Solitary Confinement (Isolation), National Commission on Correctional Health Care, *available at* <https://www.ncchc.org/solitary-confinement>

sanctions by preventing any person from being held in segregated confinement for more than 20 days in a 60-day period.

## **II. Unlike the HALT Act, the Proposed Regulations Fail to Protect Some of the Most Vulnerable from the Harms of Isolation.**

The proposed regulations fail to protect some of the most vulnerable from any exposure to solitary confinement. The regulations prohibit the use of segregated confinement and administrative segregation for individuals housed in an adolescent-offender facility; those who are pregnant, within eight weeks of post-partum recovery, or caring for a child in prison; and those with a defined disability when the disability impairs the person's ability to provide self-care. But these protections are insufficient to prevent harm to those populations and fail to protect additional vulnerable populations.

First, the regulations are insufficient because they include a loophole that allows for holding vulnerable populations in Keeplock confinement in a general-population cell. For example, under the regulations, a pregnant woman can be confined to her cell in isolation for 22-hour days on weekends and 19-hour days on weekdays. This loophole permits a dangerous practice of cutting off vulnerable groups from meaningful human interaction for significant time periods. Making matters worse, because the 30-day cap on segregated confinement will not apply to Keeplock confinement in a general population cell, vulnerable populations could be held in Keeplock for months at a time.

Second, the regulations are insufficient because they would continue to permit 22-hour confinement of adolescents on weekends and holidays and 18-hour confinement on weekdays. Isolation for 22- and 18-hour days for potentially weeks at a time may have been viewed as permissible 5 or 10 years ago, but recent scientific developments have helped us understand that prolonged isolation poses a significant risk of harming adolescent brain development.<sup>8</sup> No juvenile should be in solitary confinement for any duration, according to the National Commission on Correctional Health Care.<sup>9</sup>

Third, the regulations do not go far enough because they do not protect all vulnerable populations from solitary confinement. The regulations do not exclude from solitary confinement young adults aged 18-21. Because the adolescent brain undergoes significant development until a person reaches their mid-20s,<sup>10</sup> barring the use of solitary confinement for individuals aged 21 and under is the minimum step necessary to protect young adults. Indeed, this year New Jersey banned the use of solitary confinement for people aged 21 and under.<sup>11</sup>

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<sup>8</sup> *Alone & Afraid: Children Held In Solitary Confinement and Isolation in Juvenile Detention and Correctional Facilities*, American Civil Liberties Union, November 2013, available at [https://www.aclu.org/sites/default/files/field\\_document/alone\\_and\\_afraid\\_complete\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/alone_and_afraid_complete_final.pdf)

<sup>9</sup> Position Statement on Solitary Confinement (Isolation), National Commission on Correctional Health Care, available at <https://www.ncchc.org/solitary-confinement> (The Commission defines solitary confinement as minimal or rare meaningful contact with others.)

<sup>10</sup> Massachusetts Institute of Technology, Young Adult Development Project: Brain Changes, 2018, available at <http://hrweb.mit.edu/worklife/youngadult/brain.html>.

<sup>11</sup> N.J. Stat. Ann. § 30:4-82.5 (West).

The regulations also do not protect individuals aged 55 and older from solitary confinement, another group of individuals who due to their age are more vulnerable to harm.<sup>12</sup> And they do not protect all people with disabilities because its protections are limited to a narrow group of individuals whose disability is so severe that it inhibits their ability to provide “self-care.” For example, a person with a diagnosed major mental-health disorder who is seen as able to provide self-care would not be exempted from segregated confinement. Similarly, a person with hearing impairment who also may be able to provide self-care would be excluded from the special population exemption, despite the increased harm that isolation would pose to such a person’s mental health.<sup>13</sup>

By comparison, the HALT Act would prohibit the use of all forms of solitary confinement, including Keeplock, for vulnerable populations. And it includes a much broader group of vulnerable populations: individuals aged 21 and under, those aged 55 and over, individuals with a disability, and those who are pregnant, within eight weeks of post-partum recovery, and caring for a child in prison. Under HALT, thousands more vulnerable individuals would be protected from solitary confinement.

### **III. Unlike the HALT Act, the Proposed Regulations Fail to Adequately Restrict the Many Forms of Confinement or Improve Conditions for Those in Segregated Confinement.**

The proposed regulations fail to adequately restrict all forms of confinement. First, under the proposed regulations, the current practice of isolating individuals in SHU for protective custody would still continue. This practice harms the individuals that DOCCS is attempting to protect. While the regulations eventually would cap the duration a person can be confined in SHU to 30 days, no person should spend a day in SHU simply because they fear for their safety in prison. Unlike the regulations, the HALT Act would prohibit holding anyone in SHU or Keeplock for protective custody. Instead, it would require that any protective custody unit have, at a minimum, the same out-of-cell time and programming requirements for a Residential Rehabilitation Unit.

Second, the regulations fail to adequately restrict the use of Keeplock confinement. The regulations exempt Keeplock confinement in a general population cell from its definition of “segregated confinement.” As a result, the eventual 30-day cap that applies to segregated confinement will not apply to Keeplock. This is particularly concerning because, under the *Peoples* settlement agreement, DOCCS’ reliance on Keeplock increased as it reduced the number of people in SHU. Unlike the regulations, the HALT Act defines “segregated confinement” broadly enough that its 15-day cap applies equally to SHU and Keeplock confinement.

Third, the regulations fail to restrict the use of pre-hearing confinement, which is the second most common reason why people are held in SHU. Under existing regulations, individuals are regularly held in pre-hearing confinement for extended periods of time. In 2018, for example, 54 individuals were in pre-hearing confinement for more than 100 days. Such long periods in pre-

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<sup>12</sup> *Aging alone: Uncovering the Risk of Solitary Confinement for People Over 45*, Prison Policy Institute, May 2, 2017, available at [https://www.prisonpolicy.org/blog/2017/05/02/aging\\_alone/](https://www.prisonpolicy.org/blog/2017/05/02/aging_alone/).

<sup>13</sup> *Caged In: Solitary Confinement’s Devastating Harm on Prisoners with Physical Disabilities*, American Civil Liberties Union, 2017, available at [https://www.aclu.org/sites/default/files/field\\_document/010916-aclu-solitarydisabilityreport-single.pdf](https://www.aclu.org/sites/default/files/field_document/010916-aclu-solitarydisabilityreport-single.pdf).

hearing confinement is problematic because some individuals are ultimately found not guilty of their charges. In 2018 alone, people ultimately found not guilty of their charges spent a total of almost 20,000 days in SHU. While the proposed regulations impose no restrictions on pre-hearing confinement, the HALT Act restricts the duration of any pre-hearing confinement to no more than five days, unless the person in confinement requests to postpone their disciplinary hearing.

Fourth, the regulations fail to adequately restrict the duration of confinement in Residential Rehabilitation Units (RRU). Under the regulations, a person who has reached the maximum time cap in segregated confinement can be transferred to an RRU to serve the remainder of their sanction. The individual must remain in an RRU until the completion of their sanction or completion of their individual rehabilitation plan, whichever is sooner. Because there is no fixed time for completing an individual rehabilitation plan, that process can potentially last years. A person's confinement sanction can also last years. While the regulations allow for the possibility of time cuts on a person's sanction length, many of the people not eligible for time cuts (those charged with the most serious infractions) face the longest confinement penalties. By comparison, to prevent prolonged confinement in an RRU, the HALT Act restricts confinement to no more than one year, unless extraordinary circumstances warrant further confinement.

Finally, for those individuals confined in segregated confinement, the regulations fail to improve their conditions of confinement. Even with caps on confinement, the proposed regulations should take measures to reduce the harms from isolation by affording those in SHU and separate Keeplock units access to programming. Prison programs provide opportunities for incarcerated people to work on their personal development. Some programs focus on addressing the causes of problematic behavior that either resulted in a disciplinary sanction or their incarceration, and others focus on providing educational and job training opportunities. Because most effective programs require that people take classes outside of their small cells, prison programs also provide a respite from extreme isolation. Despite the benefits of programming, the regulations continue the practice of isolating individuals for up to 23 hours a day with no opportunity to take part in rehabilitative or therapeutic programming. By comparison, the HALT Act requires that individuals in segregated confinement be afforded four hours of out-of-cell programming every day.

#### **IV. Unlike the HALT Act, the Pace of Reform Under the Regulations Is Too Slow.**

The proposed regulations slowly phase in reforms by implementing a 90-day cap on segregated confinement in two years, a 60-day cap in two and a half years, and a 30-day cap in three years. People subject to solitary confinement cannot wait two years for DOCCS to begin to act. As studies show, people in solitary confinement are seven times more likely to hurt themselves or kill themselves.<sup>14</sup> The slow roll-out of reforms under the regulations does not address the urgent need to protect the health and lives of people in isolation. By comparison, within one year of its passage, the HALT Act would implement its 15-day cap on solitary confinement.

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<sup>14</sup> *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, Am. J. Public Health, March 2014, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3953781/#>

## V. Conclusion

When compared with the HALT Act, the proposed regulations fall short of the protections needed to end inhumane solitary confinement practices. In addition to the many ways described above that HALT is superior to the regulations, the HALT Act also provides greater transparency and accountability by requiring more in-depth public reporting on confinement practices and by requiring that an independent agency regularly evaluates DOCCS' compliance with confinement restrictions. And, unlike the proposed regulations, neither DOCCS nor any future administration can roll back the HALT Act, because it is legislative, rather than regulatory, reform. For all these reasons, the NYCLU calls on the Governor and the Legislature to pass the HALT Act.