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**Comment from the New York Civil Liberties Union
on the Proposed Regulations for Disciplinary and Administrative Segregation
of Inmates in Special Housing**

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The New York Civil Liberties Union (“NYCLU”) submits this comment on the proposed regulations addressing solitary confinement in New York jails. Despite the State Commission of Correction’s repeated attempts this year to improve minimum standards on solitary confinement in jails, we remain concerned that the latest proposal, like previous ones, fails to end the “prevalent misuse of solitary confinement” that the SCOC purports to address.¹ Although the proposed regulations are steps in the right direction—as we noted in our March 28th public comment—the regulations still fall short of providing the comprehensive reforms needed to protect those most vulnerable to injury and stop the torture-through-isolation practices that persist in New York jails today.

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. 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.² The NYCLU has submitted comment on each of the SCOC’s past proposals to reform solitary confinement.

The shortcomings of the proposed regulations are especially apparent when compared with the provisions of the Humane Alternatives to Long-Term Solitary Confinement Act (“The HALT Act”), which would make the needed statutory changes to correction law. For the below reasons, we find the SCOC’s proposed regulations woefully inadequate to ending the inhumane use of solitary. The Governor and the Legislature should instead pass the HALT Act into law.

¹ State Commission of Correction, Regulatory Impact Statement, *available at* <http://www.scoc.ny.gov/pdfdocs/ris.pdf>.

² *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.

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

The proposed regulations impose a 30-day cap on the number of consecutive days a person may spend in isolation, but a 30-day limit is insufficient to end torture-through-isolation practices. The restriction neither protects people from irreparable harm nor comports with United Nations standards (the Mandela Rules),³ which define solitary confinement that extends beyond 15 consecutive days as torture. Health officials have found that solitary confinement in excess of 15 days is inhumane, harmful, and can lead to deadly consequences. The National Commission on Correctional Health Care, for example, has issued guidance to correctional health officials explaining that a period of confinement in excess of 15 consecutive days is “inhumane, degrading treatment, and harmful to an individual’s health.”⁴ Similarly, a 2014 study of New York City jails found that while about 7 percent of people spent time in solitary confinement, they accounted for nearly half of all acts of potentially fatal self-harm.⁵ A quarter of suicides behind bars (or even more) occur in solitary confinement.⁶

The time cap will do nothing to resolve the increasing harms inflicted on people in punitive segregation in New York City jails. New York City has had a 30-day time cap on punitive segregation since 2015 but has still seen little progress in reducing the overall number of people in all forms of solitary and tragic deaths continue to occur.⁷ Just this year, a 27-year-old trans woman, Layleen Polanco, was found dead in her cell in punitive segregation. While the numbers for those in punitive segregation are dropping, the numbers for other forms of isolation, like Enhanced Supervision Housing, is increasing.⁸ The regulations would not reduce this population.

³ UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules): note by the Secretariat*, 29 September 2015, A/C.3/70/L.3, available at <https://www.refworld.org/docid/56209cd14.html> (last accessed Oct. 22, 2019); see also *Solitary confinement should be banned in most cases*, UN Expert Says, UN NEWS (Oct. 18, 2011), <https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-unexpert-says> (defining solitary in excess of 15 days as a form of torture).

⁴ Nat’l Commission on Correctional Health Care, *Position Statement on Solitary Confinement (Isolation)*, <https://www.ncchc.org/solitary-confinement>.

⁵ *Solitary Confinement and Risk of Self-Harm Among Jail Inmates* (Mar. 2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3953781/>.

⁶ *Id.*

⁷ Press Release, Mayor de Blasio And Commissioner Ponte Announce Punitive Segregation Reduced By Two-Thirds (Apr. 21, 2016), <https://www1.nyc.gov/office-of-the-mayor/news/375-16/mayor-de-blasio-commissioner-ponte-punitive-segregation-reduced-two-thirds>.

⁸ See NYC Dep’t of Corr. *Evaluation of Enhanced Supervision Housing for Young Adults*, 6 & 14 (Jun. 2017), <https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2017/July-11-2017/DOC-Evaluation-of-Enhanced-Supervision-Housing-for-Young-Adults-6-27-17.pdf>; see also Natasha Lennard, *Here’s How Easily New York Could Become the First Major U.S. City to End Solitary Confinement*, Intercept (Oct. 21, 2019), <https://theintercept.com/2019/10/21/rikers-island-solitary-confinement-new-york/> (“In 2018, the then-chair of the board, Derrick Cephas, said that a spread of 47 different restrictive housing units across the city housed over 450 people.”).

Despite the 30-day cap, people in jails likely will spend far more than 30 days in solitary confinement. The regulations also do not provide limits on the back-to-back sanctions of solitary confinement, or any cap on the cumulative use of isolation. Without such protections, jail officials can circumvent the time-cap limitations and continue to misuse solitary confinement by stringing together consecutive sanctions.

Overall, the regulations lag far behind the more progressive reforms found in the HALT Act. Unlike the proposed 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 prevents the abuse of back-to-back sanctions by preventing any person from being held in segregated confinement for more than 20 days in any 60-day period.

II. Unlike the HALT Act, the Proposed Regulations Fail to Provide Strict, Uniform Standards that Limit the Use of Solitary Confinement.

The regulations fail to narrow the broad set of justifications offered by jail officials for the use of solitary confinement. Under the regulations, jail officials may still place people in solitary for whatever reason they deem necessary to maintain the safety, security, or good order of the facility, which includes trivial, sometimes innocuous, behavior. The regulations provide no limits on what behavior may justify the use of solitary confinement. To prevent the misuse of solitary confinement, the proposed regulations must limit the use of confinement to serving as a response to very serious threats to the bodily harm of others, not just any trivial misbehavior.

The standard for placement in solitary is not only problematic because it fails to substantially reduce its use, but because the standard also allows broad discretion in its application, permitting racial biases to take hold unchecked. And the regulations will do nothing to stop the widening racial disparities in the population subjected to solitary confinement. A 2014 study on solitary in NYC jails found that Blacks/African Americans and Latinx individuals were more likely than whites to be placed in solitary.⁹ The Governor’s office characterized the proposed regulations as steps to “further help to correct inequities” in the criminal legal system.¹⁰ Without limiting the broad discretion to isolate people for trivial misbehavior, racial inequities will continue.

III. Unlike the HALT Act, the Pace of Reform Under the Regulations Is Too Slow.

The proposed regulations additionally fall short because the pace of reform is too slow. The SCOC acknowledged that there has been a “prevalent misuse of solitary confinement,” in New York jails, yet it set an effective date more than two years from now for the time caps on isolation. Given the potentially irreparable harm that individuals will suffer in solitary, the pace of reform is

⁹ Solitary Confinement and Risk of Self-Harm, *supra* n. 5.

¹⁰ Statement by Governor Cuomo, Majority Leader Andrea Stewart Cousins, and Speaker Carl Heastie (Jun. 11, 2019),

<https://www.governor.ny.gov/news/statement-governor-andrew-m-cuomo-majority-leader-andrea-stewart-cousins-and-speaker-carl>.

woefully inadequate and fails to respond to recent reported deaths and harms with any urgency.¹¹ Because the pace of fully implementing restrictions on solitary is unnecessarily drawn out over the course of several years (April 1, 2022), the timeline does not account for the imminent implementation of new statewide pretrial reforms, which are expected to significantly reduce jail populations as early as January of 2020. Fewer people in jail should mean fewer people will be in solitary, which should make it faster and more feasible to apply the regulations. Unlike the regulations, the HALT Solitary Confinement Act, if passed in January, would go into effect as early as 2021.

IV. 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 exposure to solitary confinement. Young adults would still face solitary in the same way as adults would, despite the growing research that demonstrates the irreparable harm done to their still-developing brains. Because the adolescent brain undergoes significant development until a person reaches their mid-20s,¹² 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 age 21 and under.¹³

Not only do the regulations fail to protect young adults, but the regulations also allow older populations, individuals older than 55, to still face solitary. Studies show that people age more quickly while incarcerated; solitary conditions only exacerbate the effects of aging and place these individuals in serious medical harm.¹⁴ The SCOC cannot meet its responsibility of properly caring for these individuals. And, because the regulations do not require a medical consultation before a person is placed in solitary, a person with an undiagnosed severe condition could be subject to the harms of solitary.

V. Unlike the HALT Act, the Regulations Do Not Address the Lack of Programming in Jails.

The proposed regulations are silent about affording programming services for individuals during their out-of-cell time. Effective programming, like counseling services or job training services, can help offset the harmful effects of solitary confinement through treatment or through meaningful socialization. Reducing the use of isolation should go hand-in-hand with increasing the use of programming services; yet the proposed regulations fail to even acknowledge that more

¹¹ Michael Gold & Sean Piccoli, *After a Transgender Woman's Death at Rikers, Calls for Justice and Answers*, NY Times (Jun. 11, 2019), <https://www.nytimes.com/2019/06/11/nyregion/layleen-polanco-travaganza-death-rikers-island.html>.

¹² Massachusetts Institute of Technology, Young Adult Development Project: Brain Changes, 2018, available at <http://hrweb.mit.edu/worklife/youngadult/brain.html>.

¹³ 2019 N.J. Stat. Ann. § 30:4-82.5 (West).

¹⁴ Maschi, Tina, "Incarcerated Older Adults," Grantmakers in Aging, available at <https://www.giaging.org/issues/incarcerated-older-adults/>.

programming is necessary. Unlike the regulations, the HALT Act would require 6 hours of out-of-cell programming plus one hour of out-of-cell recreation per day.

In addition, we recommend that the Commission, in its annual requests for budget appropriations, request funding for programming for each jail facility. Taken together, these two steps would ensure that programming services are provided to populations that need them and that individuals can make productive use of their out-of-cell time.

VI. Conclusion

This is the third time in two years the SCOC has tried to improve its regulations. We remain concerned that the SCOC regulations are insufficient. Jails still reserve broad discretion not to follow the restrictions. To end abusive solitary practices, the legislature needs to pass the HALT Solitary Confinement Act that would make the needed statutory changes to the correction law.