



Mental Health Project

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BY EMAIL

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**Re: Proposed Rule Making I.D. No. CCS-16-22-00003-ERP
Definitions, Standards of Incarcerated Individual Behavior, Special Housing Units,
Residential Rehabilitation Units, and Institutional Programs**

In the interest of safety, dignity, and human rights, the Urban Justice Center Mental Health Project (MHP) urges the New York State Department of Correction and Community Supervision (DOCCS) to amend its proposed regulations to adhere to the letter and spirit of the Humane Alternatives to Long-Term Solitary Confinement Law (HALT Law), protect access to visits, and restore family care packages.

For more than 20 years, MHP has advocated for people with mental health concerns involved in the criminal legal system. We are deeply familiar with the difficulties people with mental health concerns have within jails and prisons and in accessing essential mental health services, housing, and benefits upon release. We represent the *Brad H.* Class, all incarcerated individuals who receive mental health treatment while in New York City jails. As Class Counsel, we regularly interview incarcerated individuals who have mental health challenges. The jail environment, especially placement in solitary confinement, causes continued harm to the *Brad H.* Class, as well as long lasting impact on any individual's mental health. MHP's advocacy to restrict the use of solitary confinement in New York State prisons and City jails spans two decades and includes the SHU Exclusion Law and the HALT Solitary Confinement Act.

Implementation of the HALT Solitary Confinement Law

Because of a tireless campaign led by survivors of solitary confinement, families of people in solitary, and families who have lost loved ones because of solitary, the HALT Law was enacted in 2021 and went into full effect on March 31, 2022. The goal of the law is to stop the torture of long-term solitary beyond 15 days, ban solitary for groups of people most vulnerable to its negative

impacts, and ensure that people who most need effective treatment and support receive it, including through pro-social programming. If implemented properly, HALT will relieve immense suffering and make prisons, jails, and outside communities safer.

Unfortunately, DOCCS is currently violating core components of the HALT Law, including the [15-day limit](#) on solitary, the ban on placement of [special populations](#) in solitary, requirements for [alternatives](#), restrictions on the [conduct](#) that can result in separation, restrictions on [restraints](#) during programming, and the continued use of [illegal regulations](#). DOCCS has made some revisions to its previous proposed regulations, including adding some requirements regarding Residential Rehabilitation Units (RRUs) and protective custody. However, the current proposed regulations continue to include components that directly violate the HALT Law. The regulations must be revised to conform with the law.

To comply with the HALT Law and achieve its benefits, the proposed regulations must be modified.

1. The definition of special populations must be amended to encompass *all* persons with a disability, which includes incarcerated individuals receiving mental health treatment.

The HALT Law explicitly states that persons in a special population cannot be placed in segregated confinement for any length of time, except for pre-hearing confinement in keeplock.¹ The definition of “special population” includes persons with a disability as that term is defined in the NYS Human Rights Law (NYSHRL):²

a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.³

The current regulation defines special populations to include any person who “suffers from a disability” *and* “said disability impairs the individual’s ability to provide self-care within the environment of a correctional facility.”⁴ This additional language regarding the extent of an individual’s impairment is not in the HALT Law and is inconsistent with the definition of disability in the NYSHRL. In fact, the definition of disability in the NYSHRL has been interpreted broadly as it does not require any showing of limitation of a particular activity or function.⁵ The proposed rule does not amend the definition of disability to conform with the HALT Law.

¹ NY Corr. Law § 137(6)(h).

² NY Corr. Law § 2(33).

³ NY Exec. Law § 292(21)(a).

⁴ 7 NYCRR 1.5(u).

⁵ See *Epstein v. Kalvin-Miller Int'l, Inc.*, 100 F. Supp. 2d 222 (S.D.N.Y. 2000); *State Div. of Human Rights ex rel. McDermott v. Xerox Corp.*, 65 N.Y.2d 213 (1985).

Everyone who requires mental health treatment in DOCCS facilities falls squarely within the definition of a person who suffers from a disability and should be excluded from segregated confinement. Incarcerated individuals who receive mental health treatment in prison have a mental impairment that is demonstrable by medically accepted clinical diagnostic techniques. The Office of Mental Health (OMH) screens all incarcerated individuals admitted to DOCCS reception centers, and those assessed as requiring mental health treatment are admitted to services.

The proposed regulation must be revised to eliminate the additional requirement that the disability impair the individual's ability to provide self-care in the prison environment. Everyone with a disability must be excluded from segregated confinement.

DOCCS's [assessment of public comment](#) from the last comment period acknowledged that this language should be removed and even said that it had been removed, but it is still in the current proposed regulations. In practice, people who qualify as members of the "special populations" category under HALT, including people with mental health needs and visual and hearing impairments, are being [illegally locked](#) in segregated confinement, regardless of their disability. According to DOCCS's [monthly HALT report](#), 95 people on the OMH caseload and 125 people with level 1 and 2 medical needs were held in segregated confinement on February 1, 2023.

2. The regulations must ensure that people confined in Residential Mental Health Treatment Units are afforded the rights and protections specified by the HALT Law.

The proposed regulations do not amend current regulations regarding the Residential Mental Health Treatment Units (RMHTUs), which state that individuals in the RMHTUs are allowed four hours of out-of-cell therapeutic programming daily, except on weekends and holidays.⁶ The HALT Law requires that the RMHTUs comply with all protections for the RRUs, including *seven* hours of daily out-of-cell group programming and activities, in addition to the other requirements for the RMHTUs.⁷

In practice, people in the RMHTUs report that the schedule of four hours of out-of-cell group programming has not changed since HALT was enacted and that they are not provided conditions and services comparable to the RRUs. Relatedly, RMHTU residents report being locked in cell confinement for more than 17 hours a day, meaning they are in segregated confinement – usually for months at a time – in violation of the prohibition on placing people with disabilities in segregated confinement.

3. The regulations must specify the conduct that makes a person eligible to be placed in segregated confinement or alternative Residential Rehabilitation Units.

The HALT Act limits placement in both segregated confinement, defined as any form of cell confinement for more than 17 hours a day, and RRUs to circumstances in which an individual

⁶ 7 NYCRR 320.

⁷ NY Corr. Law § 401(1).

commits one of seven specific acts⁸ *and* the act must be “so heinous and destructive” that the person poses a “significant risk of imminent serious physical injury.”⁹ Recognizing that people who engage in such behavior may need to be separated from others, the HALT Law allows for these individuals to be transferred to RRUs where they will not be isolated from others but instead provided programming and treatment to address underlying causes of problematic behaviors. The overarching language is necessary to protect against the use of solitary confinement, an extreme and dangerous punishment, for minor infractions and to ensure that resources devoted to alternative interventions are utilized in circumstances in which such an intensive intervention is actually needed.

The proposed rule fails to mention the specific acts listed in the HALT Law and the overarching “heinous or destructive” and “imminent serious physical injury” language. The current regulation includes a list of prohibited behavior for which disciplinary action will be taken,¹⁰ but that list includes a wider range of conduct than the specific acts which can result in placement in segregated confinement or an RRU under the HALT Law.

The proposed rule downgrades about a dozen Tier III rule violations, but it still designates as Tier III violations acts that do not qualify for placement in segregated confinement or RRU under the HALT Law (such as possessing an unauthorized tool). The proposed rule does not even indicate that *only* Tier III rule violations can result in segregated confinement or RRU placement.

Because DOCCS has not adopted regulations that specify the criteria for placement in segregated confinement and RRU, many people are being unlawfully confined in these units. An analysis of DOCCS data revealed that between April and September 2022, at least 18% of the segregated

⁸ NY Corr. Law § 137(6)(k)(ii):

(A) causing or attempting to cause serious physical injury or death to another person or making an imminent threat of such serious physical injury or death if the person has a history of causing such physical injury or death and the commissioner and, when appropriate, the commissioner of mental health or their designees reasonably determine that there is a strong likelihood that the person will carry out such threat. The commissioner of mental health or his or her designee shall be involved in such determination if the person is or has been on the mental health caseload or appears to require psychiatric attention. The department and the office of mental health shall promulgate rules and regulations pertaining to this clause; (B) compelling or attempting to compel another person, by force or threat of force, to engage in a sexual act; (C) extorting another, by force or threat of force, for property or money; (D) coercing another, by force or threat of force, to violate any rule; (E) leading, organizing, inciting, or attempting to cause a riot, insurrection, or other similarly serious disturbance that results in the taking of a hostage, major property damage, or physical harm to another person; (F) procuring deadly weapons or other dangerous contraband that poses a serious threat to the security of the institution; or (G) escaping, attempting to escape or facilitating an escape from a facility or escaping or attempting to escape while under supervision outside such facility.

⁹ NY Corr. Law § 137(6)(k)(ii).

¹⁰ 7 NYCRR 270.2.

confinement sentences imposed – more than 1,100 – were for infractions that clearly did not conform with the HALT Law’s criteria.¹¹

The regulations must be amended to identify the specific acts that fall within the criteria included in the HALT Law and to make clear that placement in segregated confinement or RRU is only allowed if there is a determination based on specific objective criteria that “the acts were so heinous or destructive that placement of the individual in general population housing creates a significant risk of imminent serious physical injury to staff or other incarcerated persons, and creates an unreasonable risk to the security of the facility.”¹²

4. The regulations must be amended to ensure that administrative segregation, step-down programs, reception, or any other units are operated in compliance with the HALT Law.

DOCCS must ensure that units other than segregated confinement allow incarcerated individuals at least 17 hours of out-of-cell time daily. The current regulations continue to permit some units, including administrative segregation, step-down programs, and reception, to violate HALT’s protections for SHU and RRU. For example, the proposed regulations leave in place existing regulations for step-down programs that allow people to be held indefinitely in segregated confinement. Under existing regulations, people in step-down units are only afforded five hours of out-of-cell time, four days a week, yet there is no time limit on how long a person can be in a step-down unit and no criteria for what conduct can result in placement in step-down units. In practice, people in step-down units report that all these violations of the HALT Law are occurring. The regulations must ensure that either there is a 15-day limit on the use of these units, or the units provide people access to at least seven hours of daily out-of-cell group programming and activities, as well as the RRUs’ restricted criteria for placement and mechanisms for release.

The proposed regulations also continue to allow people to be placed in administrative segregation for overly broad criteria. While the proposed regulations properly remove DOCCS’s ability to place people in SHU or an RRU for administrative segregation, and now have added that people in administrative segregation must not be locked in a cell for more than 17 hours a day, they do not specify any other requirements or protections for people in administrative segregation. Instead, they remove previous protections for people in administrative segregation, including requirements that people in administrative segregation are subject to the same time limitations as those in segregated confinement and that people must have access to normal property and privileges while in administrative segregation.

To the extent that anyone remains in an administrative segregation status, they should be held in the general population, with all the protections that affords, and the regulations should state this explicitly and stipulate all those protections. If DOCCS plans to confine people with an administrative segregation status in an alternative location, those units must afford protections

¹¹ Gelardi, Chris. “Lesser Infractions Aren’t Supposed to Land You in Solitary Confinement. They Do Anyway.” *New York Focus*, 24 October 2022: <https://www.nysfocus.com/2022/10/24/lesser-infractions-halt-solitary-confinement/>.

¹² NY Corr. Law § 137(6)(k)(ii).

equivalent to those provided in general population, or at least be as protective as the requirements for the RRUs.

5. The regulations must require prioritization of non-disciplinary responses.

The HALT Law explicitly requires that DOCCS employ de-escalation and non-disciplinary responses as the preferred method for responding to any disruptive behavior by incarcerated people. DOCCS may only issue disciplinary tickets as a last resort, and only if non-disciplinary interventions have failed or, in the case of acts specified by the law, non-disciplinary interventions are not likely to succeed. The proposed regulations contain none of these requirements, and they must be added.

6. The regulations must facilitate, rather than block, access to representation.

The HALT Law explicitly states that all people at hearings that can result in placement in segregated confinement or an RRU are permitted to have representation.¹³ The proposed regulations only permit representation for people in pre-hearing confinement. This requirement violates HALT and must be removed. While the assessment of public comment on the last version of the regulations agreed and said that an amendment was made to ensure that representation was permitted at any hearing that can result in segregated confinement, the text of the proposed regulations did not change in that respect and still only permits representation for people in pre-hearing confinement.

The proposed regulations also continue to fail to provide guidance about securing representation for a disciplinary hearing, notifying a representative, scheduling and meeting with a representative, obtaining relevant evidence from DOCCS, and participating in the hearing in person or via videoconference. The proposed regulations must also permit both in-person representation and representation by video conference to comply with constitutional due process requirements for representation. DOCCS is currently only allowing telephonic “representation.” This means that an attorney, paralegal, or law student can only call into a hearing via telephone. Telephonic representation prevents a representative from reviewing evidence, witnessing testimony, and making objections and arguments in response to communication cues that are imperceptible on the phone.

In addition to the components that violate the HALT Law, the proposed regulations include other troubling provisions that allow for more punitive sanctions for any misconduct, worsen conditions for incarcerated individuals, and unnecessarily burden their families and friends.

Visit Restrictions

Visiting with children, family members, and friends is critical for incarcerated people, their children, family members, and loved ones and is beneficial for facility and community safety. Rather than limiting visits with loved ones, DOCCS should be facilitating greater access to visits. The proposed regulations seek to limit access to visits drastically, allowing restrictions on visits to be imposed for *any* DOCCS rule violation, including extremely minor violations and those that

¹³ NY Corr. Law § 137(6)(l).

have nothing to do with visits. Given the numerous administrative rules and the fact that almost all disciplinary tickets result in a guilty finding, the proposed regulations essentially allow any staff member the ability to take away any person's visits for nearly any reason or no reason at all. Such broad discretion is unacceptable. Increased visit restrictions would cause tremendous harm to people incarcerated, their families, and loved ones, and would only increase tension and abuse and decrease safety for everyone.

The proposed regulations should be amended to limit the use of visit restrictions as a penalty for misconduct.

Care Packages and Direct Mail

Receiving care packages from family and friends serves as a critical form of connection and community, provides people with essential food and nutrition, provides access to religious materials, and more. The proposed regulations would strip people of the ability to bring care packages on visits and the ability to mail packages directly. This package ban – which has already been in effect across the state – is depriving people of their main source of nutritional food, imposing heavy burdens on families, and denying people of connections with their families, friends, and communities. In turn, the package ban is increasing tension in facilities and diminishing safety for everyone. The proposed regulations must be amended to rescind the package ban and ensure everyone is able to bring packages on visits and send packages directly.

In a similar vein, the regulations should also be amended to guarantee that people can receive direct correspondence from family and friends, including letters, birthday and holiday cards, postcards, and photographs. DOCCS is currently instituting a policy to provide people with *photocopies* of mail only, which also has negative impacts on incarcerated people and their relationships with their children, other family members, friends, and communities.

Conclusion

Proper implementation of the HALT Law will relieve suffering, stop torture, and save lives. Unfortunately, DOCCS has not embraced this opportunity to improve the treatment of incarcerated persons. Instead, DOCCS proposes regulations that violate the law, allow for solitary by another name, inflict damage on people's health and well-being, and undermine the safety benefits of the HALT Law. At the same time, the proposed regulations would inflict other forms of devastating isolation, including vastly expanding the ability to take away visits and banning family care packages. These policies would cause tremendous harm to incarcerated people and their families and loved ones, while also increasing tension and worsening safety for everyone.

Serving clients who have experienced incarceration, MHP witnesses the damage that the punitive prison environment inflicts on their health. DOCCS should be working to improve conditions and support rehabilitation and recovery. But the proposed regulations do just the opposite. We urge DOCCS to change its regulations in the ways described above to come into compliance with the HALT Law, achieve the law's intended practices and results, and improve the lives, well-being, and safety of people in its custody and their families and friends.