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Re: Proposed DOCCS Regulations: I.D. No. CCS-16-22-00003-ERP

Dear Deputy Commissioner Sheehan,

Robert F. Kennedy Human Rights respectfully writes in response to proposed regulations intended to implement the Humane Alternatives to Long-Term Solitary Confinement Act (“HALT”). We urge the New York State Department of Corrections and Community Supervision (“DOCCS”) to amend its proposed regulations to ensure full compliance with HALT and to protect the rights to visitation and care packages from loved ones. Robert F. Kennedy Human Rights (“RFK Human Rights”) is a nonpartisan, not-for-profit organization that has worked to realize Robert F. Kennedy’s dream of a more just and peaceful world since 1968. The U.S. Advocacy and Litigation Program at RFK Human Rights partners with grassroots community organizations to seek accountability for human rights abuses in the U.S. criminal legal and immigration systems and to promote fairness, equity, and dignity for all people whose lives are touched by those systems.

As currently written, the proposed DOCCS regulations perpetuate prolonged solitary confinement through overbroad exceptions to the protections put in place by HALT. The proposed regulations permit the ongoing practice of prolonged solitary confinement of people with disabilities and for minor infractions. They also gut HALT’s requirements for alternatives to solitary and access to counsel to challenge placement in segregated confinement. In short, the proposed regulations strip incarcerated people of their human rights under both international and state law, subverting the will of the New York State legislature and exposing DOCCS to legal liability.

Current DOCCS Practices of Solitary Confinement Condoned by the Proposed Regulations Violate International Human Rights Law and State Law

When the New York Senate passed HALT, [it did so explicitly to conform DOCCS practices to international human rights standards](#) banning prolonged solitary confinement as torture.¹ State Senator Julia Salazar noted upon the bill's passage that "solitary confinement is inhumane, unethical, and constitutes torture under international law if it extends more than fifteen days."² As the bill's sponsor, Senator Salazar affirmed that "[t]he passage of HALT in the Senate brings us one step closer to bringing justice to all those who have lost loved ones to the wrongful use of solitary, and the New Yorkers who have been victims of this state-sanctioned torture."³

HALT's purpose is to protect against the horrific, often permanent consequences of prolonged solitary confinement. More than a third (33%) of people held in solitary confinement become psychotic and/or suicidal [within the first 15 days](#),⁴ and people who have been subjected to solitary confinement are [78% more likely to commit suicide](#) within a year of being released from prison.⁵ Under international law, prolonged solitary confinement constitutes torture, defined as the intentional infliction of severe physical or mental pain or suffering upon a person.⁶ According to the United Nations Special Rapporteur on Torture, "Solitary confinement, when used for the purpose of punishment, cannot be justified for any reason, precisely because it imposes severe mental pain and suffering beyond any reasonable retribution for criminal behaviour."⁷ The United Nations Standard Minimum Rules for the Treatment of Prisoners, also known as the Mandela Rules, explicitly prohibit indefinite and prolonged solitary confinement, defining prolonged solitary confinement as anything longer than 15 days.⁸

In consideration of the severe mental pain and injury to basic human dignity caused by prolonged solitary confinement, the New York legislature intended HALT to provide immediate relief to thousands of New Yorkers. Yet almost years after HALT was signed into law, New York's prisons and jails continue to violate both the spirit and letter of the law. Adoption of the proposed DOCCS regulations as written would perpetuate these illegal practices, exposing DOCCS to protracted and expensive litigation and prolonging the severe pain and suffering of incarcerated individuals. Below, in partnership with the New York Campaign for Alternatives to Isolated

¹ See Press Release, New York State Senate, Senate Passes the 'HALT' Solitary Confinement Act (Mar. 18, 2021), <https://www.nysenate.gov/newsroom/press-releases/senate-passes-halt-solitary-confinement-act> ("The Nelson Mandela Rules, adopted by the United Nations, define segregated confinement for more than 15 days as torture. HALT will bring New York in compliance with this international standard and save the State tens of millions of dollars over the next several years.").

² *Id.*

³ *Id.*

⁴ Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 *Crime and Delinquency* 124 (2003).

⁵ Lauren Brinkley-Rubinsten, Josie Sivaraman & David L. Rosen, *Association of Restrictive Housing During Incarceration with Mortality After Release*, *JAMA Network Open* (2019).

⁶ CAT art. 1; Manfred Nowak (*Special Rapporteur on the Question of Torture*), *Civil and Political Rights Including the Questions of Torture and Detention*, ¶ 35, U.N. Doc. E/CN.4/2006/6 (Dec. 23, 2005).

⁷ U.N.G.A., 66th Sess., Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Punishment, ¶ 81, U.N. Doc. A/66/268 (Aug. 5, 2011), <https://undocs.org/A/66/268>.

⁸ G.A. Res. 70/175: United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Rules 43–44, U.N. Doc. A/RES/70/175, (Jan. 8, 2016), <https://undocs.org/A/RES/70/175>.

Confinement and its #HALTsolitary campaign, we highlight the ways in which the currently written regulations violate HALT.

1. Fully Implement the HALT Solitary Law.

Current DOCCS practices [blatantly violate](#) various core components of HALT, including the [15-day limit on solitary](#), the [ban on special populations](#) from solitary, the [requirements for alternatives](#), the [restrictions on what conduct](#) can result in any separation, the [restrictions on restraints](#) during programming, and the continued [use of illegal regulations](#). Several provisions in DOCCS' proposed regulations [continue to violate](#) HALT and must be revised to comply with the law.

a. The regulations must comply with HALT's limitations on the types of conduct that are eligible for placement in segregated confinement or alternative RRUs.

HALT is explicit that in order for a person to be placed in segregated confinement beyond three days, or in an alternative Residential Rehabilitation Unit ("RRU"), they must be found guilty of one of the specific acts listed in HALT AND the act must be "so heinous or destructive" that the person poses a "significant risk of imminent serious physical injury." The overarching language is necessary to protect against the use of solitary confinement, an extreme and dangerous punishment, for minor infractions and as retaliation and cover-up for staff abuses, and to ensure that resources devoted for alternative interventions are utilized in circumstances actually in need of an intensive intervention.

The proposed regulations fail to even mention the specific acts listed in HALT or the overarching "heinous or destructive" and "imminent serious physical injury" language. Regulations prior to HALT include a list of acts, but those acts allow a wider range of acts to result in segregated confinement, only apply to disciplinary confinement (and not other forms of segregated confinement or RRUs as under HALT), and do not include the "heinous" or "imminent serious physical injury" language. The proposed regulations downgrade a small number of Tier III rule violations under their current rules, but still include acts that do not qualify for placement in segregated confinement or RRU under HALT (such as possessing an unauthorized tool). The proposed regulations do not even indicate that only Tier III rule violations can result in placement in Special Housing Unit ("SHU")/RRU. Without changes, far more people will be sent to SHU and RRUs than permitted by the law. This is [already happening](#).

b. The regulations must follow HALT's ban on solitary for all people with mental health needs and all people with any disability.

HALT explicitly states that all people with a disability under section 292(21)(a) are banned from spending even one day in segregated confinement. The proposed regulations only ban people who fit that definition AND also wrongfully require that the "said disability impairs the individual's ability to provide self-care within the environment of a correctional facility." This additional language regarding individual impairment is not in HALT, would apply to a much narrower set of people, directly contradicts the explicit language of the law, and must be removed from the proposed regulations. DOCCS' [assessment of public comment](#) from the last public

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.

c. The regulations must require that step-down programs, administrative segregation, and any other units comply with HALT’s protections for SHU and RRU.

DOCCS must ensure there are no other forms of solitary by another name for any people, for any reason, under any circumstances. The current regulations continue to allow for such forms of solitary without complying with 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 of these violations of HALT 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 RRU’s 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, and instead remove previous protections for people in administrative segregation, including requirements that people confined in administrative segregation are subject to the same time limitations as those in segregated confinement, and requirements 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 of those protections. If DOCCS plans to confine people with an administrative segregation status in an alternative location, the requirements and protections of any such placements must afford protections equivalent to those provided in general population, or at least be as protective as the requirements for the RRUs.

d. DOCCS must ensure that people confined in Residential Mental Health Treatment Units are afforded the rights and protections specified by HALT.

The proposed regulations do not specify—as HALT requires—that at the very least, the Residential Mental Health Treatment Units (“RMHTU”) comply with all of the protections for the RRUs, in addition to the other requirements for the RMHTUs. In practice, people in the RMHTUs report that they are not afforded access to seven hours of daily out-of-cell group programming and

activities, as required for RRUs. Relatedly, people are also reporting being locked in cell confinement for more than 17 hours a day, meaning they are in segregated confinement—including for months at a time—in violation of the prohibition on people with mental health needs being placed in segregated confinement.

e. The regulations must follow HALT's requirement to prioritize non-disciplinary responses.

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.

f. The regulations must facilitate, rather than block, people's access to representation under HALT.

HALT explicitly states that all people at hearings that can result in a placement in segregated confinement or in an RRU are permitted to have representation. 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, how to schedule and meet with a representative, how to obtain relevant evidence from DOCCS, and how to participate in the hearing in-person and via videoconference. The proposed regulations must also permit both in-person representation and representation by video conference in order to comply with constitutional due process requirements for representation. DOCCS is currently only allowing telephonic “representation.” This means that an attorney or paralegal can only call into a hearing via telephone. Telephonic representation, for example, prevents a representative from reviewing evidence, witnessing testimony, and making objections and arguments in response to communication cues that are imperceptible on the phone.

2. Rescind Proposed Restrictions on Human Rights to Contact with Loved Ones.

In addition to codifying violations of HALT, the proposed regulations place unnecessary new limits on incarcerated individuals' communication with and access to loved ones. International law guarantees the human rights of incarcerated individuals to “be treated with humanity and with respect for the inherent dignity of the human person” and to a penitentiary system “the essential aim of which shall be their reformation and social rehabilitation.”⁹ The

⁹ International Covenant on Civil and Political Rights, Art. 10, *ratified* June 8, 1992, .999 U.N.T.S. 171.

proposed restrictions on contact with loved ones injure human dignity, impair social rehabilitation, and would increase the likelihood of social tension and disruption in DOCCS facilities.

a. Ensure Visits with Family, Friends, and Loved Ones.

Visiting with children, family members, and other loved ones 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 visitation. The proposed regulations seek to drastically limit people's access to visits, allowing restrictions on visitation to be imposed for *any* DOCCS rule violation, including extremely minor violations and those that have nothing to do with visits. Given the large number of administrative rules and given that nearly all disciplinary tickets result in guilty findings, under the proposed regulations essentially any staff member would have the ability to take away any person's visits for nearly any reason or no reason at all. This is beyond unacceptable, would cause tremendous harm to people incarcerated and their families and loved ones, and would only increase tension and abuse and decrease safety for everyone.

b. Restore Care Packages and Direct Mail.

Receiving care packages from family, friends, and loved ones 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 directly mail packages. This package ban—which has already been in effect across the state—is depriving people of their only source of nutritional food, imposing heavy burdens on families, and depriving people of connections with their families, friends, loved ones, and communities. In turn, the package ban is increasing tension and weakening 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 directly send packages.

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 only provide people with *photocopies* of mail, which also has negative impacts on people and their relationships with their children, other family members, friends, loved ones, and communities.

CONCLUSION

The passage of HALT represented the fulfillment of a historic commitment to end state-sponsored torture in New York by bringing DOCCS practices in line with international humanitarian law. The proposed regulations fail to follow through on that promise. Instead, they perpetuate ongoing violation of human rights, expose DOCCS to legal liability under state law, and inflict further isolation and suffering through restrictions on contact with loved ones. We urge DOCCS to amend its regulations to address the above-described issues. Properly implemented, HALT will relieve suffering, stop torture, reduce tension inside of facilities, and save lives.