



**CAMPAIGN FOR ALTERNATIVES TO ISOLATED CONFINEMENT (CAIC)  
PUBLIC COMMENTS RE SOLITARY CONFINEMENT REGULATIONS**

December 18, 2017

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80 S. Swan Street, 12<sup>th</sup> Floor  
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Re: I.D. No. CMC-44-17-00012-P  
“[Incarcerated Person] Confinement and Deprivation”

The Campaign for Alternatives to Isolated Confinement (CAIC) submits the following as public comments pursuant to the State Administrative Procedure Act in response to the Notice of Proposed Rule Making as published in the New York State Register on November 1, 2017.

CAIC aims to end the torture of solitary confinement for all people through passage of the Humane Alternatives to Long-Term (HALT) Solitary Confinement Act, A. 3080-Aubry / S. 4784-Parker. CAIC is a community of people who have survived solitary, family members of people incarcerated, concerned community members, advocates, health and mental health professionals, and people in the human rights, faith, and social justice communities throughout New York State.

CAIC affirms the intent and attempt by Governor Cuomo and State Commission of Correction (SCOC) to limit the use of solitary confinement in New York jails through the proposed regulations, including the spirit of ensuring that all people in solitary confinement receive at least four hours out-of-cell per day and children and pregnant women at least six hours out-of-cell. At the same time, CAIC believes that the failure of the Governor and SCOC to consult with people who are in solitary, have survived solitary, have had family members in solitary, or otherwise are advocates and experts on the topic, has resulted in poorly drafted proposed regulations that in many ways undermine the purpose of limiting solitary confinement. CAIC hopes that these and other public comments provided by the community, including people most harmed by solitary confinement and their allies, are used by the Governor and SCOC to improve the proposed regulations. We also urge the Governor and the SCOC to delay decision-making and hold public hearings on the topic of solitary confinement.

CAIC believes that the Governor and SCOC should look to the HALT Solitary Confinement Act, A. 3080-Aubry / S. 4784-Parker, as the model to follow for the current regulations and should thus apply the provisions of HALT to both prisons and jails in its amended regulations. Specifically, CAIC urges the SCOC to modify its regulations to:

- 1) **End the torture of solitary confinement for all people by imposing a limit of 15 consecutive days in solitary**, and 20 days total in a 60-day period (whereas the proposed regulations do not impose any time limit);
- 2) **Create more humane and effective alternatives, by expanding the amount of out-of-cell time** guaranteed to all people who are separated and ensuring that out-of-cell time involves **meaningful human contact and programs**;
- 3) **Restrict the criteria that can result in a person being placed in solitary** or otherwise separated to the most egregious conduct (whereas the current regulations do not put any limit on why someone can be sent to solitary);
- 4) **Ban certain groups of people from spending even one day in solitary confinement**, by expanding the protected categories of people and ensuring that the protections for those groups provide meaningful support;
- 5) Enhance **procedural protections, staff qualifications and capabilities**, and **transparency and accountability**, going far beyond the minimal internal reporting required by the proposed regulations; and
- 6) Apply all **protections to prisons as well as jails**.

Including these core components of HALT in the regulations for both prisons and jails will help end the torture of solitary for all people and bring New York in line with international standards and what other states have already done. Beyond the regulations, or if the regulations do not make these changes, the Governor should implement the provisions of HALT administratively and the Governor and New York legislature should pass HALT to enact these changes permanently into law to ensure that no person is ever again subjected to the torture of solitary confinement in New York prisons and jails.

- 1) **End the torture of solitary confinement for all people**

#### The Failures of the Current Proposed Regulations:

The current proposed regulations fail to place any time limit whatsoever on how long a person can be sent to solitary confinement, either for an individual rule violation or for the total length of time a person can spend in solitary. The proposed regulations thus allow people to be held in solitary for months, years, decades, and indefinitely.

### How the Regulation Should be Changed:

Following HALT, the regulations should prohibit any person from spending more than 15 consecutive days in solitary confinement, in line with what international standards prohibit as torture. The regulations should also prohibit any person from spending 20 days total in solitary in any 60-day period to ensure that people do not cycle in and out of solitary confinement.

### The Justification for the Proposed Changes to the Regulations:

Solitary confinement is torture. The entire United Nations General Assembly – consisting of every nation of the world, including with support and a vote by the United States – passed the Mandela Rules, which prohibit any person from being in solitary confinement beyond 15 consecutive days. These rules follow the standards articulated by the United Nations Special Rapporteur on Torture, who determined that any amount of time beyond 15 days in solitary for any person amounted to torture, or cruel, inhuman, or degrading treatment.

New York State should not be subjecting people in its prisons and jails to torture. People held 23-24 hours a day without any meaningful human contact or programs has long been demonstrated to cause devastating physical, psychological, and emotional harm. Yet thousands of people each day in New York prisons and jails spend 22 to 24 hours a day locked in a cell the size of an elevator, alone or with one other person. They may be permitted 1-2 hours to exercise alone in a cage; they do not receive any meaningful programs or therapy, and often cannot make phone calls. The sensory deprivation, lack of normal human interaction, and extreme idleness can lead to intense suffering and severe damage. Isolated confinement fails to address, and often exacerbates, underlying causes of difficult behavior as people deteriorate psychologically, physically, and socially. In turn, solitary confinement also decreases institutional and community safety.

Despite the 15 day prohibition in the Mandela Rules, people sent to solitary in New York State prisons and jails regularly spend months or years there; some individuals have been in solitary confinement in New York's prisons for more than two decades (upwards of 30+ years). New York currently places no limit on the total time a person can spend in isolated confinement and these regulations continue that practice. Other states have dramatically reduced the number of people in solitary including by implementing effective time limits. Colorado prisons, for example, have implemented a 15-day time limit in line with the Mandela Rules, reduced the number of people in solitary from 1,500 (almost 7% of the prison population) to 18, and have seen positive results. New York must end the torture of solitary for all people, and these regulations should implement a 15-day limit.

## 2) Create more humane and effective alternatives

### The Failures of the Current Proposed Regulations:

While the proposed regulations positively aim to increase the amount of out-of-cell time a person in solitary receives, the regulations also provide jail administrators with the ability to circumvent that requirement and do not require programs or meaningful human contact during out-of-cell time. Specifically, the regulations state:

*Each segregated [incarcerated person] shall be allowed a minimum of four (4) hours per day outside his or her assigned individual occupancy housing unit, or a minimum of four (4) hours per day outside the sleeping area if the [incarcerated person] is assigned to a multiple occupancy housing unit, unless the chief administrative officer determines that doing so would cause a threat to the safety, security, or good order of the facility, or the safety, security, or health of the [incarcerated person], staff or other [incarcerated persons]. Any such determination shall be made by the chief administrative officer in writing, and shall state the specific facts and reasons underlying the determination.*

These regulations provide far too much discretion to jail administrators to limit out-of-cell time, and thereby codify people spending 24 hours a day in their cells. It is positive that the regulations purport to increase the amount of out-of-cell time for people in solitary. Spending four hours out of cell, rather than one, can make a world of difference to a person who is in such extreme isolation. However, given that a jail administrator can restrict a person from spending any time out of cell for such a vague and broad reason as “good order” of the jail, countless people will likely end up spending 24 hours a day in solitary confinement (and if there continues to be no time limit as described above, can spend that time in solitary indefinitely). While the regulations do positively require that the decision to deny out-of-cell time be in writing and with specific facts and reasons, based on the experiences of people who have been in solitary in jails and prisons and seen abuses with written disciplinary tickets and other documents, it is very unlikely that such a provision will serve as a meaningful check on jail administrators who can easily write any justification they choose.

Also of deep concern, the regulations do not provide any requirements for what happens during the required out-of-cell time. Under the regulations, people could seemingly still be held alone just in another cage, without any meaningful human contact or programs. Currently, people receive their one hour of recreation – if they get it at all – alone in another cage. There is nothing in the regulations that prevent a jail from making all four hours of out-of-cell time, even if granted, also take place alone in another cage.

### How the Regulation Should be Changed:

Following HALT, the regulations should create more humane and effective alternatives that involve meaningful out-of-cell congregate programming and humane engagement. The regulations should increase the amount of out-of-cell time per day for all people, remove the wide discretion of jail administrators to limit that time, and explicitly require

that any out-of-cell time involve meaningful human contact and congregate rehabilitative and therapeutic programming.

Specifically, following HALT, at least for people who are separated from the general prison or jail population for more than 15 days, the regulations should require at least seven hours out of cell per day, with at least six hours for congregate programs, services, and meals and at least one hour for congregate recreation. Even for people who are in solitary for a few days or less than 15 days, the regulations should require those same standards of seven hours out of cell per day, or at least require – without exception – that people spend at least four hours out-of-cell per day. The regulations should not allow a jail or prison administrator to limit the out-of-cell congregate programming for a person in solitary or other separation unit, and if there is such an allowance it should only be in the most limited of circumstances, with time limits for how long the restrictions can be imposed, and alternative forms of meaningful out-of-cell time and engagement.

#### The Justification for the Proposed Changes to the Regulations:

Solitary confinement is both inhumane and counterproductive. If people have to be separated from the general prison or jail population because they pose a serious risk of harm to the safety of others, there is no logical reason that they should be subjected to the extreme isolation of solitary confinement that will not only cause intense suffering and damage but also likely exacerbate what led the person to being separated. Instead, appropriate treatment and access to programs and recreation must be provided. Specifically, people must be given many hours of out-of-cell time per day, as well as access to meaningful programs and services aimed at addressing their underlying needs and the causes of their behaviors. What is needed is a fundamental transformation from a focus on punishment, isolation, and deprivation, to a focus on accountability, rehabilitation, and treatment.

Other states and countries have implemented program-based alternatives to solitary that have proven both more humane and more effective. Colorado has utilized program-based alternatives to solitary and seen positive results. European countries rarely, if ever, utilize solitary confinement and instead have an intense focus on programming, connections to family and community, granting people autonomy and responsibility, creating conditions akin to life outside of incarceration, and preparation for returning home. New York itself has had very positive examples in both prisons and jails. The Clinical Alternatives to Punitive Segregation (CAPS) unit on Rikers Island is a much more program-intensive, treatment supported, and empowerment-based alternative to solitary confinement that has large amounts of out-of-cell time, utilizes de-escalation of difficult situations, and has greatly reduced the amount of violence and self-harm. The Merle Cooper program in New York prisons – now closed purportedly due to resource constraints – also provided a successful program-intensive, empowerment-based unit that involved complete separation from the rest of the prison population but no isolation of individual people.

### 3) **Restrict the criteria that can result in a person being placed in solitary or otherwise separated**

#### The Failures of the Current Proposed Regulations:

The current proposed regulations do not provide any restrictions on the reasons that a person can be sent to solitary confinement. Such a situation provides broad discretion to correction officers and hearing officers to send people to solitary confinement for any number of reasons, including petty and/or non-violent rule violations, retaliation, cover-up, or other abusive reasons.

#### How the Regulation Should be Changed:

Following HALT, the regulations should explicitly list criteria of what acts can result in solitary confinement or other separation from the general prison or jail population, and that criteria should be limited to the most egregious conduct. Specifically, at most solitary or other separation should only be allowed in circumstances of more serious acts of physical injury, forced sexual acts, extortion, coercion, inciting serious disturbance, procuring deadly weapons or dangerous contraband, or escape, and when the person currently poses a serious and substantial risk of harm to others.

#### The Justification for the Proposed Changes to the Regulations:

The majority of sentences that result in solitary confinement in NYS are for non-violent conduct. People who engage in such conduct should never be isolated and also do not require an intensive rehabilitative and therapeutic intervention. Only those who truly pose a risk of harm to others should be separated so that resources can be focused on providing support to individuals who would actually benefit from such an intensive programmatic and therapeutic intervention.

In addition, restricting the criteria would help to limit the amount of discretion given to correction officers and other staff for imposing solitary confinement, and in turn would limit the amount of racial discrimination that infuses the process of sending people to solitary. Black people represent about 13% of all people in NYS, but 50% of those incarcerated in NYS, and nearly 60% of people held in long-term solitary confinement units in NY. The *New York Times* documented in 2016 what people who have been inside have long known, solitary confinement is fueled by racism and imposed disproportionately against Black and Latino people.

**4) Ban certain groups of people from spending even one day in solitary confinement**

The Failures of the Current Proposed Regulations:

The proposed regulations only offer additional protections to two groups of people – children and pregnant women – and jail administrators are granted wide discretion to limit the protections even for these groups. Specifically, the proposed regulations state:

*Each segregated [incarcerated person] under the age of eighteen (18) years, and each segregated [incarcerated person] who is known by security, health or mental health personnel to be pregnant, shall be allowed a minimum of four (4) hours per day, exclusive of entitled exercise periods, outside his or her assigned individual occupancy housing unit, or a minimum of four (4) hours per day, exclusive of entitled exercise periods, outside the sleeping area if the [incarcerated person] is assigned to a multiple occupancy housing unit, unless the chief administrative officer determines that doing so would cause a threat to the safety, security, or good order of the facility, or the safety, security, or health of the [incarcerated person], staff or other [incarcerated persons]. Any such determination shall be made by the chief administrative officer in writing, and shall state the specific facts and reasons underlying the determination.*

*Any segregation of an [incarcerated person] under the age of eighteen (18) years, or any segregation of an [incarcerated person] who is known by security, health or mental health personnel to be pregnant shall be reviewed by the chief administrative officer, at intervals not to exceed seven (7) days, to determine whether the continuance of such segregation is necessary to maintain discipline or ensure the safety, security, or good order of the facility, or the safety, security, or health of the [incarcerated person], staff or other [incarcerated persons]. Following each such review, the chief administrative officer shall document, in writing, whether such segregation shall continue or cease, and state the specific facts and reasons underlying the continuance or termination.*

*Segregated [incarcerated persons], as that term is defined in section 7075.2 of this Title, who are under the age of eighteen (18) years, or known by security, health or mental health personnel to be pregnant, shall be entitled to an exercise period of at least two hours, seven days a week.*

Compared to current practice, it is positive that the regulations would allow for at least six hours of out-of-cell time for children under 18 and pregnant women, and also would require 7-day periodic reviews of the solitary confinement of these groups of people. However, the proposed regulations give jail administrators wide discretion to deny the ability of children and pregnant women to have any out-of-cell time based on a threat to “good order” of the facility, thereby allowing even these most vulnerable groups to be held in solitary confinement 24 hours a day for little or no reason at all. Similarly, although the 7-day review is positive, there is no clear mechanism for getting out of solitary through these reviews. Children and pregnant women should not ever spend even

one day in solitary confinement, yet these regulations would allow such confinement potentially indefinitely.

Moreover, the regulations do not offer any protections to any other groups of people known to be particularly harmed by either the negative impacts of solitary itself or the possibility of additional abuse while in solitary. Young people in their late teens and early twenties and beyond, elderly people, people with mental health needs, people with physical disabilities, new mothers, and others all can suffer additional particular harm by being placed in solitary confinement.

#### How the Regulation Should be Changed:

The protected groups should be expanded and should not spend any time in solitary, the discretion to limit out-of-cell time for protected groups should be removed, and the out-of-cell time should be increased and required to be more meaningful.

Specifically, following HALT, the regulations should prohibit even one day of solitary confinement for any person: (a) 21 years of age or younger; (b) 55 years of age or older; (c) with a mental health need or a physical/medical disability; or (d) who is pregnant, in the first eight weeks of the post-partum recovery period after giving birth, or caring for a child in a correctional institution.

If someone in one of these categories has to be separated, as above, the person should have at least seven hours out-of-cell per day, with at least six hours of meaningful congregate programming, services, and meals and at least one hour of congregate recreation.

In addition, the discretion by a jail or prison administrator to limit the amount of solitary should be eliminated or at least only allowed in the most limited of circumstances, with a very strict standard, time limits for how long the restrictions can be imposed, and alternative forms of meaningful out-of-cell time and engagement.

Further, the regulations should prohibit protective custody from taking place in solitary confinement, and any protective custody units should provide at least as much congregate out-of-cell programming and meaningful human interaction as described above for people separated for disciplinary or administrative reasons.

#### The Justification for the Proposed Changes to the Regulations:

Countless people are in solitary confinement who are particularly vulnerable either to the effects of isolation itself or to additional abuse while in isolation. Young people, elderly people, people with disabilities, people with mental health or addiction needs, pregnant women, and members of the LGBTQI community are subjected to solitary confinement. While solitary confinement is torture for all people, it can have particularly devastating effects on some of these categories of people, including a young person whose brain is

still developing or a person with mental health needs that are exacerbated by being alone in a box.

Some individuals are put in solitary confinement not as punishment but presumably “for their own protection” but they are not then protected. For instance, young people or transgender women who are housed in prisons or jails for men are often put in solitary confinement for their own protection and then instead face additional abuse while inside. The conditions in protective custody generally resemble conditions in solitary confinement, with people spending 22 to 24 hours a day alone in a cell without any meaningful human contact or programs. Moreover, often the isolation that is connected with such confinement may lead to additional abuse by staff, rather than protection. One’s identity – whether sex, race, sexual orientation, age, religion, gender identity or expression – is not a justification for the torture of solitary confinement. And people shouldn’t have to choose between their safety and their mental, emotional, and physical well-being.

#### **5) Enhance procedural protections, staff qualifications and capabilities, and transparency and accountability**

##### The Failures of the Current Proposed Regulations:

The current proposed regulations fail to address the lack of due process in the imposition of solitary confinement, or the widespread abuse by staff in the imposition of solitary. In addition, while the Governor’s statement launching the proposed regulations indicated that the regulations would “enhance oversight” by “providing critical information,” the regulations are limited in what they require in terms of reporting.

The proposed regulations do require jails to report individual incidents of “[incarcerated person] cell confinement.” They also require records to be kept of when people are sent to solitary, are released from solitary, or refuse to leave their solitary unit. In addition, various decisions would be required to be recorded in writing under the regulations. Also, each jail is required to “maintain a centralized record of all written determinations and reviews required.”

Still, the regulations do not require any compilation or analysis of the use of solitary either on an individual jail level or a statewide level related to such basic information as how many people are in solitary on given days, how long people have spent in solitary, the reasons people are placed in solitary, the demographics of the people who are in solitary, and so forth. Moreover, the regulations do not say anything about making any information public and so there will continue to be no such requirement.

##### How the Regulation Should be Changed:

Following HALT, the regulations should better equip staff to work with incarcerated people (via mandatory training), and make the processes resulting in separation fairer

(including via legal representation), and more transparent (via mandatory public reporting).

Specifically regarding training, the regulations should require that staff and hearing officers undergo at least 40 hours of initial training and 24 hours of annual training on topics including, but not limited to, the purpose and goals of the non-punitive, therapeutic environment; trauma-informed care; restorative justice; dispute resolution methods; the physical and psychological effects of solitary confinement; and procedural and due process rights of the accused.

With regard to processes, the regulations should provide for neutral decision-makers to decide whether to send someone to solitary confinement. The regulations should also allow incarcerated people to be represented at hearings by attorneys, law students, paralegals, or other incarcerated persons. Moreover, the regulations should require that de-escalation, intervention, informational reports, and the withdrawal of incentives be the preferred methods of responding to misbehavior in jails and prisons.

Regarding transparency and accountability, the regulations should require regular, periodic reporting on all relevant data points from all jails and prisons. The jails and prisons should have to produce, and the SCOC publish on its website: monthly reports, with semi-annual and annual cumulative reports, of the total number of people who are in solitary confinement and the total number of people who are in any alternative units on the first day of each month. The reports should also provide a breakdown of the number of people in solitary confinement and alternative units by (a) age; (b) race; (c) gender; (d) mental health treatment level; (e) special health accommodations or needs; (f) need for and participation in substance abuse programs; (g) pregnancy status; (h) continuous length of stay as well as length of stay in the past sixty days; (i) total number of days in solitary confinement; (j) a list of all incidents resulting in sanctions of solitary confinement by facility and date of occurrence; and (k) the number of incarcerated persons in solitary confinement and alternative units by facility.

#### The Justification for the Proposed Changes to the Regulations:

The processes resulting in solitary confinement are often arbitrary and unfair, involve under-equipped staff, and take place with little transparency or accountability. As noted above, correction officers or other staff can often write disciplinary tickets for the most minor of reasons, or for false reasons or due to racial or other bias. Jails and prisons across the state are laden with staff brutality and other abuses. As one element of that, staff are not equipped to work with people with serious needs or who engage in challenging behavior, and so brute force and disciplinary sanctions as punishment become the only ways staff have of responding.

At the next level, the hearings or administrative procedures that result in placement in solitary confinement are not conducted by judges or other supposedly non-biased, neutral decision-makers, but rather by corrections staff. In New York, approximately 95% of the

people who are charged with the most serious rule violations that can result in isolated confinement are found guilty.

Further, what takes place to lead people to solitary confinement or what happens to people while in solitary confinement often takes place essentially secretly, cut off from the outside world. Such a situation further creates an environment in which there is little oversight and no accountability and more opportunity for abuse. While the SCOC purportedly will be providing some oversight over some of the information that is being shared by jails under the proposal, it is absolutely critical that the public have a clearer understanding of how solitary confinement is being used in jails and prisons. Currently it is very difficult to know even how many people are in solitary confinement in jails across the state. Similarly the state prisons do not even report the number of people in keeplock – one form of solitary – and so again the public doesn't even know how many people are in solitary on a given day, let alone why people are in solitary, for how long people have been in solitary, how many people are subjected to solitary in a given year, the demographic breakdown of who is in solitary, etc. This type of information should be readily and easily available to all members of the public as a way to shed light on what these public institutions are doing in our name and with our taxpayer dollars.

#### **6) Apply all protections to prisons as well as jails**

##### The Failures of the Current Proposed Regulations:

The proposed regulations only apply to jails. Yet, as noted above, in NY prisons, thousands of people continue to be held in solitary confinement each day, and people have been held in solitary for months, years, and decades.

##### How the Regulation Should be Changed:

Following HALT, the regulations should apply all of the above proposed changes to both prisons and jails throughout New York State.

##### The Justification for the Proposed Changes to the Regulations:

The regulations must end the torture of solitary confinement for all people held in New York prisons, as well as jails. While there have been some limits on the use of solitary in the last two years because of the settlement of litigation brought by incarcerated plaintiffs, the New York Civil Liberties Union, and others, there still remain thousands of people in New York prisons each day and still people are held in solitary for months, years, and decades without an end in sight. As noted above, these conditions are torture and New York State must no longer allow torture to take place in either its prisons or its jails.

## **Conclusion**

The use and abuse of solitary confinement in New York State must end. New York can no longer use the inhumane and counterproductive practice of solitary confinement for the lengths and reasons currently employed. Instead New York must end the torture of solitary and must create alternatives that are humane and effective. Governor Cuomo and the SCOC have an opportunity to make bold and necessary changes toward that end.

The HALT Solitary Confinement Act provides a model of a comprehensive approach toward ending the torture of solitary confinement in a humane and effective manner. CAIC urges the Governor and the SCOC to utilize HALT's provisions to make the regulations meaningful in their limitation of solitary. CAIC also urges Governor Cuomo to implement HALT's provisions through executive action, and the Governor and the Assembly and Senate to enact HALT this legislative session. New York must move from being worse than most states in its use of solitary to being the leading state in ending this torture for all people.

Moreover, CAIC recognizes that solitary is just a window into the broader challenges of the incarceration system. It urges New York policymakers to take the same approach at the core of HALT – namely moving away from a racist punishment paradigm to one built on individual and community empowerment and support – and apply it to the incarceration system as a whole. From parole reform to restoring higher education in prisons to ending the criminalization of young people and people with mental health needs to reducing sentence lengths, promoting alternatives to incarceration, closing prisons and jails, and decarcerating New York, to addressing the longstanding racism driving the system, it is imperative that Governor Cuomo and the New York Legislature make bold, progressive policy changes.

Thank you for your consideration of these comments.