

Testimony of The Legal Aid Society

Before the New York State Senate Finance Committee and New York State Assembly Ways and
Means Committee

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Katherine Haas, Staff Attorney
Molly Crane, Legal Intern
Stefen R. Short, Acting Deputy Director
Prisoners' Rights Project
The Legal Aid Society
199 Water Street
New York, NY 10038

Justice in Every Borough.

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The Legal Aid Society's Prisoners Rights Project ("PRP") welcomes the opportunity to submit this testimony concerning critical issues related to the conditions in facilities operated by the New York State Department of Corrections and Community Supervision ("DOCCS"). This testimony is based on our ongoing contact with and administrative advocacy on behalf of people in DOCCS custody, and knowledge we have accumulated through our litigation and other advocacy.

PRP is a law reform and test case unit of The Legal Aid Society that has served the people of New York State for more than fifty years. We have brought numerous class action and individual lawsuits obtaining reforms addressing a wide variety of problems in DOCCS, including inadequate medical and mental health treatment, insufficient infectious disease management, the use of solitary confinement, racism, and sexual abuse. Additionally, we assist thousands of people in DOCCS custody every year who seek legal advice and help.

PRP has challenged the use of solitary confinement since the 1980s, when PRP and co-counsel litigated *Eng v. Smith*, 80-CV-385 (W.D.N.Y.) and *Anderson v. Coughlin*, 80-CV-3037 (S.D.N.Y.). PRP's anti-solitary litigation work culminated in *DAI v. OMH*, 02-CV-4002 (S.D.N.Y.), a class-action lawsuit through which PRP and co-counsel challenged the State's use of solitary confinement as punishment for manifestations of mental illness. Out of and alongside *DAI* grew several pieces of individual litigation and several grassroots coalitions, including Mental Health Alternatives to Solitary Confinement ("MHASC"). For years, MHASC toured the state educating people on the use of solitary confinement in a mental health context. MHASC members agitated in support of the New York SHU Exclusion Law, which was codified in 2008 as a first-in-the-nation reform package. *DAI* and the SHU Exclusion Law were replicated in several jurisdictions. Out of these bellwether reforms grew the Coalition for Alternatives to Isolated Confinement ("CAIC") and ultimately the Humane Alternatives to Long-Term Solitary Confinement Act ("HALT"). In 2021, after decades of advocacy from directly impacted people and support from the advocacy community, the legislature passed HALT. HALT went into effect on March 31, 2022 and required DOCCS to significantly curtail its use of segregated confinement to protect the mental health, physical health, and human dignity of people in prison. HALT contains several bright-line rules and presumptions intended to protect incarcerated people from the rigors of segregated confinement and move DOCCS—and other carceral systems—firmly in the direction of rehabilitation and away from cruel, unnecessary punishment.

Unfortunately, the positive reforms promised by HALT are not yet reality, because DOCCS has failed to implement the statute effectively. Incarcerated people and their advocates persistently inform us that violations of HALT are widespread and, in some instances, systemic. Our clients are experiencing extreme suffering as a result. Some have self-harmed while being held in prolonged segregated confinement. Some have remained stuck in a revolving door of segregated confinement to mental health observation. Others have spent hours upon hours chained to a desk during programming, just hoping to make it through the day. Indeed, this testimony focuses exclusively on HALT noncompliance because, during the last twelve months, the overwhelming majority of complaints we have received from prisoners concern the Department's continued misuse of segregated confinement.

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As described in more detail below, credible reports received by our office show that DOCCS has routinely and often willfully violated numerous key provisions of HALT. As a result, the use of long-term and inappropriate segregated confinement is still widespread in New York prisons, in flagrant disregard of the law. The passage of HALT was a watershed moment, demonstrating this State’s commitment to ending torture inside prison walls. If implemented properly, HALT will make everyone in New York’s prisons safer. But none of this can be accomplished unless DOCCS begins to follow the law that this Legislature passed.

DOCCS Routinely Subjects People with Disabilities to Segregated Confinement

HALT specifies that “persons in a special population . . . shall not be placed in segregated confinement for any length of time, except in keeplock for a period prior to a disciplinary hearing.” N.Y. Correct. Law § 137(6)(h). The law defines “special populations” very clearly to include people with disabilities. N.Y. Correct. Law § 2(33). Nonetheless, DOCCS is routinely holding people with disabilities in the Special Housing Unit (“SHU”)—the unit where people are subjected to segregated confinement as punishment for disciplinary infractions—in clear violation of HALT.

The definition of “disability” utilized in HALT is broad and includes (but is not limited to) everyone who is on the mental health caseload while in DOCCS custody.¹ DOCCS has ignored this, and instead created an internal policy that requires only people who have been diagnosed with what DOCCS and the New York State Office of Mental Health (“OMH”) consider a “serious mental illness” to be excluded from SHU. This is very troubling because DOCCS’s and OMH’s definition of “serious mental illness” is extraordinarily limited and excludes numerous people with serious conditions that require active mental health treatment, and who are therefore extremely vulnerable to the harms of solitary confinement.

On January 1, 2023, there were 126 people in SHU who were designated by the New York State Office of Mental Health as having a Mental Health Service Level (“MHSL”) of 1, 2, 3, or 4.² On December 1, 2022, that number was 155.³ People are designated as Level 1, 2, 3 or 4 for reasons such as currently taking or possibly benefitting from psychiatric medication and/or psychotherapy, having a significant behavioral disorder and less than six months of psychiatric stability, or having engaged in suicidal or self-injurious behavior.⁴ In flagrant violation of HALT, DOCCS routinely holds dozens or even hundreds of these people, all of whom are on the mental health caseload, in segregated confinement at any given time.⁵

¹ Letter from Senator Julia Salazar, et al. to Deputy Commissioner and Counsel Cathy Sheehan, June 16, 2022, at 3, https://drive.google.com/file/d/1xcTyK7HY_2Hg12y5cXQ0xM_r0yUOOU-C/view.

² DOCCS, Demographics of Individuals Housed in Segregated Confinement or RRU, BOB January 1, 2023, <https://doccs.ny.gov/system/files/documents/2023/01/halt-monthly-report-january2023.pdf>.

³ DOCCS, Demographics of Individuals Housed in Segregated Confinement or RRU, BOB December 1, 2022, <https://doccs.ny.gov/system/files/documents/2022/12/halt-monthly-report-november-2022.pdf>.

⁴ See Treatment Needs/Service Level Designation, Central New York Psychiatric Center, Form 167 Med CNYPC.

⁵ Importantly, MHSLs are not a perfect proxy for who has a mental health-related disability, and who therefore is a member of a special population, under HALT. The definition of “disability” utilized in HALT is from the New York

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DOCCS policy is equally violative of HALT when it comes to physical and sensorial disabilities. In response to a request for information from our office, DOCCS provided a list of diagnoses that will result in a person's exclusion from SHU. This list was extraordinarily limited, including diagnoses such as quadriplegia, paraplegia, being legally blind or deaf, or requiring the use of a wheelchair or supplemental oxygen. Obviously, HALT bars the placement of such individuals in segregated confinement. But numerous people with other physical or sensory disabilities must also be excluded from segregated confinement under HALT, but are not on this list. For example, under DOCCS policy, a person with a hearing disability or visual disability that does not rise to the level of deafness or legal blindness may be held in SHU. The same is true of a person who has mobility limitations that do not require the use of a wheelchair. Holding these people in segregated confinement obviously violates HALT, but according to DOCCS policy, it is entirely permissible.

To comply with HALT, DOCCS must revise these policies, and ensure that no one with a disability is ever placed in segregated confinement.

DOCCS Routinely Holds People in the Special Housing Unit for Longer Than Fifteen Consecutive Days

HALT places strict limits on the number of days DOCCS can hold someone in segregated confinement, requiring that “no person may be placed in segregated confinement for longer than necessary and no more than fifteen consecutive days.” N.Y. Correct. Law § 137(6)(h)(i). There is no exception to this 15-day limit. The law further requires that, aside from a small number of narrow exceptions, “nor shall any person be placed in segregated confinement for more than twenty total days within any sixty-day period,” thus providing further protection against the dangers of long-term segregated confinement.

Nonetheless, DOCCS is routinely confining people to SHU for far longer than fifteen days. Indeed, according to its own monthly reporting, on January 1 there were 82 people in SHU who had been there for more than fifteen days.⁶ On December 1, that number was 168, with 40 of those people having been in SHU for 30 days or longer.⁷ Indeed, upon analyzing the data on segregated

Executive Law, and requires only that a person have “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.” Thus, while every person assigned MHSL 1, 2, 3, or 4 has a disability for purposes of HALT, the inverse is not true: there are people who are *not* assigned MHSL 1, 2, 3, or 4, but who *do* have a mental health-related disability under HALT. In other words, the statistics provided above regarding MHSLs 1, 2, 3, and 4 describe a *minimum* number of people who are placed in segregated confinement despite having a mental illness which excludes them under HALT. There are additional people in that situation who are not captured by the above statistics.

⁶ DOCCS, Demographics of Individuals Housed in Segregated Confinement or RRU, BOB January 1, 2023, <https://doccs.ny.gov/system/files/documents/2023/01/halt-monthly-report-january2023.pdf>.

⁷ DOCCS, Demographics of Individuals Housed in Segregated Confinement or RRU, BOB December 1, 2022, <https://doccs.ny.gov/system/files/documents/2022/12/halt-monthly-report-november-2022.pdf>.

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confinement DOCCS has released, journalists concluded that “On September 1, the average person in solitary had been held there longer than the legal limit.”⁸

These reports are consistent with what we have heard from incarcerated people, who frequently report to our office that they have been in SHU for weeks or even months. They are often told they cannot leave SHU despite it having been longer than fifteen days, because the Residential Rehabilitation Unit (“RRU”) is at capacity. For example, one person informed us that they were held in SHU for nearly two months because there was no space in the RRU. (Even more egregiously, this individual reported multiple diagnoses that amount to disabilities under HALT, meaning they should not have been in SHU at all, let alone for a prolonged period.)

But of course, HALT does not mandate that people must go directly from SHU to an RRU. If the Department wishes to require people in SHU to spend time in an RRU after fifteen days, it must make the space to do so. If it does not have the space in an RRU, HALT clearly requires the Department to release people from segregated confinement after fifteen days and return them to either the general population or another appropriate unit.

This problem has been ongoing since shortly after HALT went into effect, having first become apparent in June 2022, when DOCCS reported that approximately one-third of people in SHU had been there for more than fifteen days.⁹ Perhaps realizing that its decision to routinely hold dozens of people in SHU beyond fifteen days was an obvious violation of HALT, the Department has more recently claimed that as of October 24, 2022, “individuals who are incarcerated in a SHU cell for more than 15 days are offered three additional hours of outdoor recreation for a total of seven hours out of cell time daily.”

This appears to be an attempt by the Department to carve those who are held in SHU for longer than 15 days out of HALT’s protections, given that HALT defines segregated confinement as any cell-confinement that lasts for longer than 17 hours per day. Nonetheless, we continue to hear from people who are held in SHU cells without anywhere near seven hours of out-of-cell time and, as detailed more thoroughly below, from people who report that their supposed “out-of-cell” time consists of temporary access to an individual, semi-outdoor cage which is attached to the back of their cell. Such time spent in a small cage is not recreation or “out-of-cell” time in any meaningful sense.

To bring itself into compliance with HALT, the Department must consistently release people from segregated confinement after 15 days, regardless of whether there is space for them in an RRU and must cease using shortcuts such as semi-outdoor cage access to evade the requirements of State law.

⁸ Gelardi, Chris and Brown, Emily, *State Prisons Are Routinely Violating New York’s Landmark Solitary Confinement Law*, New York Focus (Sept. 12, 2022), <https://www.nysfocus.com/2022/09/12/halt-solitary-implementation-doccs/>.

⁹ Gelardi, Chris and Brown, Emily, *State Prisons Are Routinely Violating New York’s Landmark Solitary Confinement Law*, New York Focus (Sept. 12, 2022), <https://www.nysfocus.com/2022/09/12/halt-solitary-implementation-doccs/>.

DOCCS Routinely Fails to Provide Seven Hours of Out-of-Cell Time to People in Residential Rehabilitation Units, Residential Mental Health Treatment Units, and Other Units

HALT requires that when people are held in an RRU, they must be “offered at least six hours of daily out-of-cell congregate programming, services, treatment, recreation, activities, and/or meals, with an additional minimum of one hour for recreation.” N.Y. Correct. Law § 137(6)(j)(ii). It further requires that such “recreation . . . shall take place in a congregate setting” absent exceptional circumstances. *Id.* Our office has received consistent reports from people in RRUs across several facilities indicating that DOCCS is not abiding by these requirements.

Many people in RRUs report that the only out-of-cell time they are offered is access to a cage officially known as a “recreation pen,” but commonly known by incarcerated people as a “dog kennel.” This is a small, individual, semi-outdoor cage that is attached to a cell through a door at the back of the cell. Rather than actually letting people out of their cells to engage in meaningful social interaction and other activities, DOCCS appears to simply unlock the door to this cage and claim this constitutes the out-of-cell, congregate recreation contemplated by HALT. Of course, this supposed “recreation” is not really recreation at all, is not congregate, and cannot possibly serve any rehabilitative purpose.

Others living in RRUs report that while they are offered opportunities for group programming out-of-cell, these opportunities do not take place every day. Even when they do take place, they often do not add up to seven hours of out-of-cell time per day, even when combined with recreation or other activities.

These failures are particularly concerning given the length of time people spend in an RRU. On January 1, 2023, there were 127 people in RRUs who had been held there for more than 180 days, and more than 300 people who had been held there for between 91 and 179 days. By refusing to provide people in RRUs with the seven hours of meaningful out-of-cell time to which they are entitled, DOCCS is subjecting hundreds of people to segregated confinement for months at a time, in obvious violation of both the plain text and purpose of HALT.

Importantly, many of the people in RRUs (and other specialized units, as discussed below) have disabilities, meaning they are not permitted to be placed in segregated confinement at all, let alone for months at a time. Due to the widespread failure to provide people in RRUs and other units with seven hours of out-of-cell time, our office has heard from people reporting diagnoses ranging from post-traumatic stress disorder, to bipolar disorder, to multiple sclerosis, as well as people who use wheelchairs, are experiencing partial paralysis, and who have hearing disabilities, who have been subjected to segregated confinement in violation of HALT.

This problem is further compounded by the practice of double-celling in RRUs, as well as the conditions there. Our office has received reports from several incarcerated people

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who report that they are forced to share cells in the RRU due to a lack of RRU space. Being confined to a single cell with another person without at least seven-hours of true out-of-cell time is an extraordinarily challenging situation that is in no way conducive to rehabilitation. In addition, individuals living in RRUs have reported disturbing conditions, such as walls stained with feces and urine; lack of access to cleaning supplies, clean clothes, and hygienic items; and unusually small food portions. We have also received reports of lights constantly being left on, thus preventing people from sleeping, and of extremely cold temperatures. One person described his experience as “going on 30 days . . . living in an ice box.”

Our office has also received similar reports of little to no out-of-cell time from people held in the Residential Mental Health Treatment Units (“RMHTU”), Step Down Programs (“SDP”), or other specialized units. For example, one incarcerated person living in a specialized unit informed us that the only recreation time they receive is 3 hours per day in an individual, semi-outdoor recreation pen surrounded by walls on three sides, which took place when it was dark and cold. Thus, the “recreation” available to this person consisted of nothing more than sitting in or pacing around a small, freezing cage. Other individuals in specialized units have reported that they receive no out-of-cell time whatsoever.

Under HALT, anyone who is required to spend more than seven hours per day in their cell is in segregated confinement, unless the purpose of the isolation is for medical or mental health care. There is no unit in which this rule does not apply. Nonetheless, people in RMHTUs and other specialized units frequently report that they are receiving far less than seven hours out of cell each day, despite not having any medical or mental health treatment needs that require isolation. People living in these units also report to us that when they complain about HALT violations, DOCCS often staff tell them – falsely – that HALT does not apply in their units.

To bring itself into compliance with HALT, DOCCS must offer seven hours of true out-of-cell, congregate recreation and programming to those who are not serving a permissible fifteen-day term in SHU. Individual cages that have earned the nickname of “dog kennels” among incarcerated people obviously do not serve this purpose and cannot bring DOCCS into compliance with HALT. Moreover, HALT’s extremely narrow exception to limits on segregated confinement for the purpose of medical treatment cannot be used as a blanket excuse to refuse out-of-cell time to people receiving medical and mental health care. This exception is only relevant in the very rare situation where someone is actively receiving treatment that *specifically requires* their isolation (*i.e.*, a highly contagious illness).

The cost of DOCCS’s failure to provide sufficient out-of-cell time in the RRU is essentially a total nullification of HALT, as it results in numerous people spending months in segregated confinement, experiencing the torture that HALT was meant to prevent. As one person living in an RRU explained to our office: “This environment produces the exact feelings it is supposed to: anger, oppression, depression, anxiety, violent thoughts, drug abuse, suicidal ideations, all of that is here in RRU[.]”

DOCCS Has Not Meaningfully Implemented HALT Provisions Designed to Shorten RRU Stays

HALT contains several provisions designed to ensure that stays in residential rehabilitation units last no longer than necessary to achieve their rehabilitative goals. For example, the law requires that “upon admission to a[n RRU], program and mental health staff shall administer assessments and develop an individual rehabilitation plan . . . based upon his or her medical, mental health, and programing needs.” It further specifies that these plans “shall identify specific goals and programs . . . with projected time frames for completion and discharge from the [RRU]” and that “if a person successfully completes his or her rehabilitation plan before the sanction expires, the person shall have a right to be discharged from the [RRU] upon such completion.” N.Y. Correct. Law § 137(6)(j)(iv); (6)(m)(i).

Our office has received reports indicating that although DOCCS is sometimes providing people with one-page forms called “individual rehabilitation plans,” these are frequently nothing more than *pro forma* paperwork, and present no meaningful plan for individual progress that could lead to discharge from the RRU. For example, these forms may list vague goals, but no specific programming or therapy that an individual should complete, nor any concrete benchmarks they can achieve to demonstrate improvement. Without such information, these rehabilitation plans cannot serve their intended purpose of ensuring that stays in the RRU last only as long as needed to achieve significant rehabilitation, and no longer. We also receive reports from people who never receive any individual rehabilitation plan at all.

Similarly, HALT requires that “there shall be a meaningful periodic review of the status of each incarcerated person in a residential rehabilitation unit at least every sixty days to assess the person's progress and determine if the person should be discharged from the unit.” N.Y. Correct. Law § 137(6)(m)(iii). Furthermore, “if the person is not discharged from the unit, program and mental health staff shall specify in writing the reasons for the determination and the program, treatment, service, and/or corrective action required before discharge.” *Id.*

Reports to our office indicate that DOCCS is not complying with this provision, as incarcerated individuals regularly report that well after their first 60 days in an RRU have passed, they have received no information about any periodic review, nor any information about specific programs or corrective actions they must take to be discharged.

Notably, in addition to serving the purpose of ensuring that RRU stays are not unnecessarily long, complying with these provisions would also free up space in RRUs by shortening the time people spend there, thus easing some of the crowding problems that have been reported. DOCCS must take these provisions of HALT seriously and perform meaningful individual assessments to determine when discharge is appropriate, rather than simply defaulting to keeping everyone in the RRU until the expiration of their disciplinary sanction.

DOCCS Consistently Places People in Residential Rehabilitation Units in Restraints

HALT provides that “restraints shall not be used when incarcerated persons are participating in out-of-cell activities within a residential rehabilitation unit unless an individual assessment is made that restraints are required because of a significant and unreasonable risk to the safety and security of other incarcerated persons or staff.” N.Y. Correct. Law § 137(6)(j)(vii).

Nonetheless, it is DOCCS policy to place *everyone* in the RRU in restraints whenever they leave their cell. Such a policy inevitably means that numerous people will be placed in restraints without the “individual assessment” that HALT very clearly requires, including many people who pose no safety or security risk. To comply with HALT, DOCCS must immediately end its blanket policy of placing everyone in an RRU in restraints.

The harm caused by this blanket policy should not be underestimated. We have received reports from incarcerated people, particularly those with injuries that make shackling painful, who choose not to leave their cells due to the physical suffering that comes with being placed in restraints. One person described experiencing pain so severe that he wept, and, due to being restrained, was unable to clean his face as others laughed at him. We have also received several reports of people being restrained during phone calls with their attorneys, which means that the calls must take place on speaker phone, potentially compromising their confidentiality.

DOCCS Routinely Denies People in Segregated Confinement Access to Their Property

HALT requires that “persons in a residential rehabilitation unit shall have access to all of their personal property unless an individual determination is made that having a specific item would pose a significant and unreasonable risk to the safety of incarcerated persons or staff or the security of the unit.” N.Y. Correct. Law § 137(6)(j)(iii). Nonetheless, our office has received numerous reports from individuals who have been unable to access their property while they are housed in the RRU, without being informed of any particular reason or individual determination. We have also learned that some facilities set blanket policies placing arbitrary limits on the amount of property people in the RRU may have. This results in people losing access to extremely important items like legal files, medical documentation, medical equipment, and photographs of loved ones.

DOCCS Denies Access to Representation at Disciplinary Hearings

HALT provides that people subject to disciplinary hearings which could potentially place them in segregated confinement “shall be permitted to be represented by any attorney or law student, or by any paralegal or incarcerated person unless the department reasonably disapproves of such paralegal or incarcerated person based upon objective written criteria developed by the department.” N.Y. Correct. Law § 137(6)(l). Our office has received numerous reports from incarcerated people that DOCCS effectively denies them the ability to obtain legal assistance from an attorney for disciplinary hearings by giving them extremely limited time to do so or forcing them to choose between obtaining legal advice and receiving assistance from Department staff with interviewing witnesses and gathering evidence.

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Conclusion

These are but a few examples of the many ways DOCCS has undermined HALT's implementation during the last eleven months. There are other provisions that DOCCS has violated with similar impunity. In addition to taking the steps we outlined in the foregoing, the Department must fully implement HALT in its entirety, and must be accountable to both the legislature and the people. By continuing its widespread use of segregated confinement in violation of HALT, DOCCS catalyzes further violence in the prisons and renders us all less safe. It also disrespects the rule of law—the cornerstone principle that executive agencies are required to implement the laws the legislature codifies. We thank the Assembly and Senate for their steadfast commitment to forward-thinking prison reform, and we appreciate the opportunity to submit this testimony today.

Katherine Haas, Staff Attorney
Molly Crane, Legal Intern
Stefen R. Short, Acting Deputy Director
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New York, NY 10038