March 16, 2020
SENT VIA EMAIL

Colette Peters, Director
Oregon Department of Corrections
2575 Center Street NE
Salem, OR 97301-4667

Dear Director Peters,

We write regarding the anticipated spread of Coronavirus Disease 2019 (COVID-19) to people incarcerated in Oregon prisons. We appreciate that the Oregon Department of Corrections (ODOC) has taken steps to prepare for the spread of the virus, including the issuance of a March 13, 2020 notice to Adults in Custody outlining risk-reduction precautions. While there are no known cases of COVID-19 within ODOC facilities, that is likely to change. Given the mortality rate associated with the virus, we are concerned about the virus's spread to at-risk people, particularly the elderly, within the closed confines of a prison setting. This letter is not intended to alarm or stigmatize anybody, but rather to demand action and transparency rooted in facts and work collaboratively to protect community health. We would like to meet with you next week to discuss how you are protecting the health of the people in your custody and the people who work in the prison. Additionally, we ask the Oregon Department of Corrections (ODOC) to implement the following measures to reduce virus transmission and potential loss of life.

Recommendations to Oregon Department of Corrections

TREATMENT

Comply with CDC, Oregon Health Authority, and NCCHC Guidelines: We urge the ODOC to be in regular contact with experts at the CDC, Oregon Health Authority, and National Commission on Correctional Health Care (NCCHC). In particular, we ask the ODOC to follow guidelines issued by NCCHC and its partners at Emory University, accessible here:

https://www.ncchc.org/blog/covid-19- coronavirus-what-you-need-to-know-in-corrections. We understand that prison-specific, COVID-19 guidelines are likely forthcoming from the CDC.

We ask that you immediately share your plan to address the virus in the prison environment. This is an urgent matter. Having an appropriate, evidence-based plan in place can help prevent an outbreak and minimize its impact if one does occur. Not having one may cost lives of both those in custody and staff.

Vulnerable Populations: ODOC's plan must provide for additional precautions for those who are at high risk of serious illness if they are infected, such as the elderly, pregnant women, people with chronic illnesses, compromised immune systems, or disabilities, and people whose housing placements restrict their access to medical care and limit the staff's ability to observe them.

Ensure Access to Soap, Tissue, Cleaning/Sanitizing Products, and Clean Laundry: The most basic aspect of infection control is hygiene. There must be ready access to warm water and adequate hygiene and cleaning supplies, both for handwashing and for cleaning. People in prison should be given increased supplies of and easy access to soap, tissue (or toilet paper), and cleaning/sanitizing products. Additional steps should be taken to ensure that people have clean laundry on a regular basis. Cleaning and sanitizing products should be provided and available at no cost to adults in custody. This is critical because the virus can live on plastic and metal surfaces for as long as 2 to 3 days.

Eliminate Co-Pays: The ODOC should eliminate all medical co-pays (if they exist) while the pandemic is ongoing. Alternatively, the ODOC should eliminate all co-pays for medical visits from persons with reported respiratory illness, fever, shortness of breath, or other virus-related symptoms. Co-pays may discourage people from reporting symptoms and seeking care. People in prison should also be adequately notified that there will be no cost to them for seeking and receiving such care. Elimination of co-pays on a temporary basis and adequate notice of this will encourage people who may be infected to seek care and could avoid further spread of the virus

Screening and Testing of the People in Your Custody: The plan must include guidance, based on the best science available, on how and when to screen and test people in your facilities for the virus.

Testing: ODOC should quickly test anyone exhibiting symptoms that suggest they may have coronavirus or who may have been in contact with someone who has or is suspected to have the disease. The process to request testing should be easy, quick, and transparent. The response to such requests should be rapid.

Treatment: Courses of treatment must be evidence-based, available immediately, and in compliance with scientifically-based public health protocols.

Treatment at a Hospital: Consistent with best practices, when an individual tests positive for the coronavirus and quarantined, ODOC should seek to send that individual as soon as possible for treatment and further quarantine, rather than prolonged treatment and isolation at the prison.

Housing of persons exposed to the virus: The plan must describe how and where people in the prison will be housed if they are exposed to the virus, are at high risk of serious illness if they become infected, or become sick with it. *This should not result in prolonged, widespread lock-downs.* Any lock-downs or interruptions in regular activities, such as exercise or visits and phone calls with families or attorneys, should be based solely on the best science available and should be as limited as possible in scope and duration. When lock-downs do occur, people should have positive ways to spend their time, including reading materials, tablet access, electronic programming, and the like.

Implement Medical Quarantine Where Appropriate: In consultation with experts at the CDC and/or the Oregon Health Authority, prison medical providers should develop a medical quarantine plan for people who have been exposed to COVID-19. This plan should consider how to isolate people with the virus; how long to quarantine those who are exposed; what personal protective equipment is needed, and for whom; and when isolation can safely be lifted. Any plans for quarantine should be nonpunitive and limited in scope and duration based on the best science available.

Take Steps to Mitigate Effects of Medical Quarantine: Periods of medical quarantine may be stressful for both incarcerated people and staff. We urge the ODOC to ensure that those who are quarantined have positive ways to spend time, including reading materials, tablet access, electronic programming, crossword puzzles, and the like. Access to time on the prison yard is particularly important. These measures will help to keep tensions and anxiety levels down.

Treatment at a Hospital: Consistent with best practices, when an individual tests positive for the coronavirus and quarantined, ODOC should seek to send that individual as soon as possible for treatment and further quarantine, rather than prolonged treatment and isolation at the prison.

STAFFING

Staffing plans: Regardless of how many staff stay home because they are sick, the prison will have to continue functioning. There must be a plan for how necessary functions and services will continue if large numbers of staff are out with the virus.

Implement Emergency Staffing Plan: The ODOC and its medical providers should develop a plan to reinforce staffing and provide for effective care in the event of a mass outbreak. If not already in place, the ODOC should implement paid sick leave to encourage staff members not to come to work if they are ill.

Screening of Staff: ODOC should implement procedures to screen employees prior to any shift, entering the prison, and exiting the prison.

Staffing plans for services provided by prisoners: Many tasks in prisons, such as food preparation and basic sanitation, are performed by people in custody. The plans for an outbreak must also address how necessary tasks performed by people in custody will continue if large numbers of them are ill.

FOOD

Meals: ODOC should ensure that all adults in custody have access to healthy and nutritionally adequate meals. For those adults in custody requiring religious or dietary accommodations, those must be continued to be met. ODOC should implement protocols that ensure safe preparation of meals and schedule meal service that encourages social distancing to the extent possible, such as staggered mealtimes.

EDUCATION

Education of the people in your custody: People housed in prisons need to be informed about the virus, its seriousness, and the measures they can take to minimize their risk of contracting or spreading the virus. They must be educated on the importance of proper handwashing, coughing into their elbows, and social distancing to the extent they can. Information about the spread of the virus, the risks associated with it, and prevention and treatment measures must be based on the best available science. To our knowledge, it is clear that the Adults in Custody do not fully appreciate the severity of the COVID 19 crisis and the public health risk this is for our state.

Education of the staff: Correctional, administrative, and medical staff all must be educated about the virus to protect themselves and their families, as well as the people in their custody. It should be emphasized that an outbreak in a prison will directly impact them, their families, and communities. Additionally, that the current health care system is not equipped to deal with the high numbers individuals who may be infected with COVID-19. ODOC should make public explicit directives being provided to staff about measures they must take to minimize their risk of contracting of spreading the virus.

COMMUNICATIONS AND ACCESS TO THE COURTS

Access to Legal Services Must be Protected: All efforts should be undertaken to ensure people in custody can maintain their rights to counsel and access to courts. People who are in prison should have access, with minimum restrictions, to regular communication with their legal team, and access to court proceedings.

Facilitate Communication with Family for People Who Can't Pay: We understand that in-person family visitation is suspended. Incarcerated people who can pay can communicate with family through their electronic devices. We ask the ODOC to make available both telephonic and video calls to all adults in custody at no charge to the adult in custody or their family.

POPULATION MANAGEMENT

Create a Plan for Transfers of People Whose Care Cannot Be Safely Managed in Prison: We urge the ODOC and its medical providers to plan now for how they will accommodate a possible need to transfer a large number of people to hospitals or elsewhere, for advanced levels of care.

Preparing Individuals for Reentry: ODOC should ensure that individuals who are releasing are properly screened, educated, supported, and resourced to return the community in the midst of COVID-19 crisis. Considerations should include appropriate education about hygiene and public health, how to access their medical benefits and care in the community, safely plan their transportation, and how to engage with their PO. Every individual should be released with a hygiene kit.

Detainers: ODOC and the State of Oregon should suspend coordination with ICE to take individuals who are releasing to an immigration detention facility. Additionally, ODOC should work with county partners to ensure those individuals who are releasing and have a "jail tail" – a consecutive jail term after DOC custody term – can have the opportunity to do that sentence in the community under supervision.

Create a List of People to Prioritize for Possible Release: It may become necessary to manage the COVID-19 crisis, in part, by reducing the prison population. We respectfully ask the ODOC's medical providers to create a list of persons to prioritize for release if required by the demands of the pandemic. In distributing such a list to others, healthcare workers should not disclose personal health information, but rather should list the persons identified as being at higher risk for becoming ill based upon their underlying condition.

TRANSPARENCY

Ensure Transparency in Communications with Family Members and the Public: Policies adopted in response to COVID-19 should be transparent and clearly communicated to the public and to people in prison. This includes providing regular updates, via press releases and on the ODOC website, about the spread of the virus and the measures being taken to address it. Prison officials should have a plan to address an anticipated increase in the number of calls from family members seeking information.

Data Collection: The collection of data regarding COVID-19 will be part of the public health response. As with any contagious disease, data collection is critical to understanding and

fighting the virus. Oregon's prison systems must be part of this process. The same information that is tracked in the community must be tracked in the prisons.

Public Information Requests: ODOC should comply with all public information requests made by the media and community organizations as it relates to ODOC's policy and practices related to the COVID-19 crisis. This includes working with the Governor's office and the Department of Justice to ensure that all requests are processed and expedited.

The public has a right to know how ODOC is acting to protect the health and safety of their loved ones. We ask that ODOC keep the public regularly informed about its decisions and how those decisions are made, including their foundation in public health science.

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Because of the growing number of inquiries that we are receiving from incarcerated persons and their loved ones, we are sharing this letter publicly. We appreciate the steps that your agencies are taking to respond to COVID-19. We urge you to adopt any additional measures listed in this letter that you have not already implemented, for the protection of people in prison, correctional staff, and the public at large.

Please let us know when you will be available to discuss your plans with us. **We would appreciate a prompt response acknowledging receipt of this letter and proposing times to talk by March 18, 2020.** In the meantime, you can reach us by contacting the members of our coalition listed below.

Sincerely,

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cc

Tina Kotek, Speaker of the House
Peter Courtney, President of the Senate
Nik Blosser, Chief of Staff, Office of the Governor
Constantin Severe, Public Safety and Military Policy Advisor, Office of the Governor
Dustin Buhler, General Counsel, Office of the Governor
Paige Clarkson, President, Oregon District Attorney Association
Sheriff Terry Rowan, President, Oregon State Sheriff's Association
Lane Borg, Executive Director, Office of Public Defense Services
Justice Walters, Chief Justice, Oregon Supreme Court
Nancy Cozine, State Court Administrator
Joe O'Leary, Director, Oregon Youth Authority

Oregon Justice Resource Center questions sent to Director Colette Peters, Department of Corrections on 3.31.2020.

1. In addition to the initial communications you mentioned on your website and response letter, how is information about appropriate prevention and hygiene continually being communicated to AICs? What languages? ADA?
2. Will you instruct all the institutions to relax restrictions around attorney calls so that individuals inside can speak with their attorneys when they need; can attorneys schedule a call without any restrictions? Are you in any further conversations about having the state subsidize in total calls - telephones and video - for those inside so they can communicate with their loved ones for no charge?
3. Will you describe the medical treatment plans in place? How are you ensuring that AICs who exhibit symptoms are getting access to medical care? How many COVID-19 tests have you completed? How are you screening for testing? Have you been able to test everyone who has exhibited symptoms? Who is making the decisions about medical treatments and testing? What protocols have they put in place? Will you make them public? Will you make public the Continuity of Operations Plans? What are you doing to try to lower the death rate of the prisoners most vulnerable to severe illness from Covid-19? Has DOC tested any staff or incarcerated persons for COVID-19?
4. Are there cleaning supplies readily available so that public spaces, dorms, and cells can be properly cleaned? Have there been new temporary jobs created to do additional cleaning/sanitizing? Are AICs who perform high-risk work (e.g., laundry, kitchen) provided with personal protective equipment? Are AIC's able to opt out of work without any negative consequences if they have concerns about their health and this crisis?
5. Have you considered creating an expedited grievance process for those who wish to grieve medical or condition issues related to COVID-19? What are you doing to avoid deterring prisoners from reporting symptoms due to fear of isolation or other negative actions/consequences?
6. Is it physically/actually possible to socially distance in prison? In every prison? Is it possible to follow the guidelines in prisons for the community that have been proffered by the CDC, OHA, Governor Brown, and public health officials?
7. What conversations are you having with Governor Brown about population management? About reducing the prison population? Are you and Governor Brown considering ways to emergency release the vulnerable prisoners? If so, what are they?

8. What efforts are you making to ensure that DOC staff are properly educated about COVID-19? What are doing with employees who are exhibiting symptoms? What percentage of staff has called in sick? Are you screening employees prior to entering the prison? What are the screening protocols? Are you screening employees when they end their shift and exiting the prison? What type of leave policy have you implemented for DOC staff who do not wish to work during this crisis? Have the unions adopted any formal positions?
9. You have identified 1,400 individuals as vulnerable; how did you do that? What was the criteria? What protocol is followed to identify vulnerable persons, and what measures are taken to reduce their risk of exposure?
10. Are you working on keeping programs available by correspondence? Where programs / activities are discontinued, are alternative activities being implemented? There seems to be ways for AIP participants to complete their hours, even while program providers are not able to be in the prisons in person. Is DOC planning to make these accommodations?
11. What are your mail room policies, currently? Are individuals able to receive mail without any delay?
12. Are you expediting the process of responding to media requests for information and public records access requests in relation to your handling of this issue?
13. When changes to routines or housing are made, how is this communicated to AICs? Have bunks been rearranged or other housing changes been made to implement social distancing guidelines?
14. Has DOC considered relaxing restrictions on hand sanitizer? If DOC is providing free soap, is it different from what is offered from the commissary? Is DOC providing quality soap to ensure that AICs will use it? Are you providing lotion and for free?

March 19, 2020

SENT VIA EMAIL

Governor Kate Brown
900 Court Street, Suite 254
Salem, OR 97301

RE: Preparation and Precautions for COVID-19 in Oregon's Criminal Justice System

Thank you for taking necessary steps to protect the public from the COVID-19 pandemic. We, a broad coalition of community-based organizations, legal services providers and concerned stakeholders with expertise in the criminal justice system, urge you to take similar steps to protect people working in and in the custody of state correctional facilities, juvenile facilities and local jails. COVID-19 outbreaks in Oregon prisons and jails have the potential to spread like wildfire and the effects could be especially devastating – even turning a prison sentence into a death sentence for some.

While every aspect of the criminal legal system must be considered – from policing, prosecution and pretrial hearings, sentencing, and confinement, to release from custody – the most effective approach to protect Oregonians in this large system is to prioritize your focus in two areas: 1) preventing entry and diverting individuals from custody in correctional facilities and jails; and 2) releasing as many currently incarcerated people as possible back into the community with proper supports to remain healthy, especially members of vulnerable groups. These releases should be done with consideration for public safety and coordinated with local and state public health agencies, community corrections, reentry and social service providers, and housing programs to ensure that individuals leaving custody are well supported to remain healthy.

Approximately 14,000 Oregonians are currently incarcerated in our state prisons, and thousands more are held in and churning through our jails. The environments in these facilities are highly conducive to a widespread outbreak of COVID-19. People in custody live in close

proximity to each other with no options to stay away from others who are sick. Many are housed in large dormitories with shared bathrooms, living quarters and communal areas. People in prisons and jails are often denied or do not have easy access to adequate soap and cleaning supplies, making infection control nearly impossible. This environment is high risk for prison and jail staff as well as those who are incarcerated.

The age and high-risk health status of incarcerated people increases the likelihood that COVID-19 in these facilities will be severe and particularly deadly. A 2012 study by the ACLU found that Oregon had the ninth largest population of elderly prisoners in the United States, despite being only the 27th largest state by population. This is the very demographic that doctors say is particularly at risk from COVID-19, along with people with certain pre-existing health conditions. Research shows people in prison and jails are generally sicker than people outside, with higher rates of conditions such as asthma, diabetes, and heart problems. The Oregon Department of Corrections has identified at least 1,400 adults in their custody who are over 60 years old, are immunocompromised, or have comorbid medical conditions. We can assume that the jail populations, which have a much higher churn rate than prisons, have similarly high rates of people in their custody at any given time who are at highest risk if exposed to diseases like COVID-19.

The custodial environments, the characteristics of those incarcerated, and the highly infectious and lethal nature of COVID-19 are a formula for a quick and drastic strain on the state's medical system and grave impacts on Oregon communities – affecting the health and lives of many incarcerated people, officers and staff, and their loved ones.

All of us, and especially those in positions of leadership in the legal and prison systems, have a duty to address this issue directly and expeditiously to protect our communities and prevent harm.

We are calling on you, Governor Brown, to take swift action to protect those working and living in our correctional facilities and jails and to slow the spread of COVID-19. In our call-to-action, we request the creation of a COVID-19 Public Safety Task Force and to issue an executive order focused on COVID-19 and Oregon's criminal justice system.

COVID-19 PUBLIC SAFETY TASK FORCE

We request that you create an executive task force composed of the undersigned coalition members, senior staff from your office, and other experts, including directly impacted people (i.e., someone who is formerly incarcerated) or stakeholders, as is necessary. This task force will meet weekly (telephonically or by video) with two priorities:

1) Work with agencies, public officials, and community members to implement recommendations articulated by this coalition (*see* letters to OSSA, Chief Justice Walters, ODOC, and ODAA). The task force will be briefed regularly by the agency leaders and public officials in the criminal justice system about their policies, practices, and plans from arrest through reentry regarding COVID-19; monitor the effectiveness of these protocols; and advise you as needed to encourage coordinated and effective efforts to protect the health of Oregon communities.

2) Compel and oversee expedited processes for the safe release of people incarcerated in state prisons and jails. Oregon's Constitution and statutes include mechanisms that allow the governor, the Department of Corrections, and the Board of Parole to release individuals into the community under supervision who no longer pose a public safety risk.

Examples, in brief, of mechanisms that can be acted on immediately include:

- **Commutation.** The governor's clemency powers flow from Article V, Section 14 of the Oregon Constitution and grant plenary power to reduce the legislatively created and judicially imposed consequences of criminal convictions. The Oregon Constitution explicitly identifies three types of clemency actions the governor may take: pardons, reprieves, and commutations. A commutation replaces the original sentence with a lesser one. For example, the governor can commute the sentences of those incarcerated to supervision in the community. Acts of clemency are not tied to findings of factual or legal innocence, nor do they imply innocence. Rather, they are discretionary acts a governor can take or not take at their sole discretion.
- **Expedite review of current commutation applications.** Your office can immediately address the commutation applications that are currently before you and grant the many worthy applications promptly.
- **Compassionate Release.** With the coordination of your office, the Department of Corrections, and the Board of Parole, can grant early release under ORS 144.126 (Advancing release date of prisoner with severe medical condition including terminal illness or who is elderly and permanently incapacitated) and ORS 144.122 (Advancing initial release date) of those incarcerated in prison who are especially susceptible to devastating consequences of being infected with COVID-19 because of their age and fragile medical conditions.
- **Board of Parole advancing release dates.** The Board of Parole can advance the release dates of those who have an exit interview or prison term hearing in 2020 and 2021 and use expeditious processes available, such as the file-pass procedure.

More on Commutation Considerations:

There should be a particular focus on the 1,400 prisoners whom ODOC has identified as being over 60 years old, immunocompromised, or having comorbid medical conditions. This population is vulnerable to becoming seriously ill, having serious complications, and requiring more medical care with COVID-19. Releasing this vulnerable group from prison and similar groups of individuals from jail will reduce the need to provide complex medical care or transfers to hospitals when the medical system is already strained and possibly prevent deaths.

There should also be a focus on people in jail and prisons who have release dates in 2020 and 2021 and assessing whether they can be released immediately. Their release will limit overcrowding and free up beds in facilities that will be needed to care for the sick.

Lastly, there should be an expedited screening and review process for those who would otherwise be good candidates for commutation. These individuals are those who have demonstrated rehabilitation and can be safely released back into the community.

ISSUE AN EXECUTIVE ORDER

We request that you issue an executive order that includes the following:

- Guidance to local and county officials directing them to significantly reduce their jail populations, both by limiting the number of people coming into them, as well as releasing as many people as possible back into the community. Decreasing the overall jail population will provide the flexibility that will be needed in these facilities to address the coming health crisis within their walls. There are numerous mechanisms under Oregon law for county officials (Sheriffs, Circuit Court Judges, and District Attorneys) to release individuals in local jails.
- A commitment to support and provide resources to county reentry and social services providers, treatment and housing programs, and community health clinics to ensure that individuals leaving custody receive an appropriate continuum of care and support. Funding should be disseminated in an equitable manner and should require recipients to provide services without discrimination based on race, color, religion, sex, gender identity, sexual orientation, or national origin.
- Urge a hold to all new state prison sentences if delaying the sentence would not pose an unreasonable risk of safety to a specific person or persons.
- Guidance to release all people held on probation and parole technical violations. And, put a halt on future custodial sanctions by Parole and Probation.
- A commitment to make transparent and accessible all agencies' policies for handling COVID-19 within each facility. Insist that ODOC adequately and openly address how they will care for people who are incarcerated and ensure that this information is provided to an incarcerated person in that person's primary language**.**
- A commitment to lift or subsidize the cost of all fees for calls from institutions to family members. As ODOC has temporarily halted visits to people who are incarcerated, it is critical that these individuals be able to communicate with their family members and loved ones. All phone calls made by those who are incarcerated to their family members and loved ones should be made free during such time as family visits are limited. Additionally, a commitment to lift restrictions for all legal calls so that individuals in custody can access legal services.
- Guidance to the ODOC, Oregon Youth Authority, and jails to refrain from cooperating with ICE so individuals are not released into ICE custody, are not held on behalf of ICE nor anyone's release is delayed as a result of an ICE request.

Governor, we know how seriously you take your duty to protect the lives of people living and working in Oregon's prisons and the surrounding communities. As you know, the health, well-being and indeed the lives of these people are in your hands. We urge you to take immediate and decisive action now to save lives. We will support you in taking bold, but necessary, action

now to protect the health of every Oregonian, especially our most vulnerable community members.

Sincerely,

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Nik Blosser, Chief of Staff, Office of the Governor
Tina Kotek, Speaker of the House
Peter Courtney, President of the Senate

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Dustin Buehler, General Counsel, Office of the Governor
Michael Hsu, Chair, Oregon Board of Parole
Paige Clarkson, President, Oregon District Attorneys Association
Lane Borg, Executive Director, Office of Public Defense Services
Justice Walters, Chief Justice, Oregon Supreme Court
Nancy Cozine, State Court Administrator
Colette Peters, Director, Oregon Department of Corrections
Joe O'Leary, Director, Oregon Youth Authority
Pat Allen, Director, Oregon Health Authority
Dawn Jagger, Health Policy Advisory, Office of the Governor
Aaron Knott, Legislative Director, Department of Justice
Sheriff Terry Rowan, President, Oregon State Sheriffs' Association
Sheriff Jason Meyers (Ret.), Executive Director, Oregon State Sheriffs' Association

Oregon Justice Resource Center
Advocate. Educate. Engage.

SENT VIA EMAIL

May 26, 2020

Colette Peters, Director
Oregon Department of Corrections
2575 Center Street NE
Salem, OR 97301-4667

Re: ODOC's mishandling of Alternative Incarceration Programs in recent months

Dear Director Peters,

We write regarding troubling information we received from people incarcerated in Oregon prisons (AICs) and their family members about how the Oregon Department of Corrections (ODOC) handled the Alternative Incarceration Program (AIP) in recent months. The following are of serious concern: the abrupt and permanent loss of expected AIP release dates; the chaotic communication by ODOC to AIP participants; the trauma and harm caused to AICs and their families by the sudden loss of treatment and release dates; and the continued threat that AIP participants could again, quickly, lose their treatment and their new release dates through no fault of their own.

The Oregon Justice Resource Center (OJRC) recognizes the extremely challenging times we are all facing during the COVID-19 pandemic. We understand that leaders must swiftly make tough decisions about unprecedented situations. However, we are critical of ODOC's handling of AIP in response to COVID-19. ODOC's actions appear to have been ill-conceived and chaotic, causing significant harm to AICs and their families and endangering the safety and welfare of the community.

Given that the pandemic continues with no immediate end in sight, we expect that ODOC may confront questions about the implementation of AIP in the future. Going forward, we hope ODOC will consider this letter, along with feedback it has received from AICs and their family members, other state leaders, and other community members. We urge ODOC to formulate a plan centered on the following goals: to carry out AIP with minimal disruption if contractors are again unable to enter prisons; to avoid future detrimental mismanagement and miscommunication; and to explore and implement ways to ameliorate the harm caused to AIP participants by the events of recent months.

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www.ojrc.info

The Alternative Incarceration Program plays a critical role in Oregon's correctional system by promoting rehabilitation and enhancing public safety.

AIP was created by the legislature in 1993[1] and is intended to "promote [AIC] rehabilitation during incarceration and reduce the risk of continuing criminal conduct when the [AIC] is returned to the community."[2] The program allows eligible AICs to participate in rigorous treatment programs lasting a minimum of 270 days.[3] It consists of an institutional phase lasting a minimum of 180 days, followed by a phase completed outside of prison, called "nonprison leave,"[4] for no more than 90 days, after which the AIC may be released to post-prison supervision.[5] The nonprison leave is "designed to provide [AICs] with transitional opportunities that promote successful reintegration into the community[.]"[6] In most cases, successful participation in AIP allows for an earlier release from prison than other forms of early release, such as short-term transitional leave, per ORS 421.168, and earned time credits, also known as "good time," per ORS 421.121.

Currently, AIP is offered in Coffee Creek Correctional Facility (CCCF), Columbia River Correctional Institution (CRCI), and Powder River Correctional Facility (PRCF).[7] Outside agencies, including Cascadia, New Directions Northwest Inc., and The Pathfinder Network, contract with ODOC to provide AIP services. Programs are categorized as "treatment" or "behavioral change" programs. Behavioral change programs are focused on "intensive self-discipline and cognitive skill-building to confront and alter criminal thinking patterns."[8] Treatment programs consist of intensive alcohol and drug treatment, and cognitive behavioral therapy, "offered as a single intervention as well as a combination of the two."[9] Participants live in treatment units separated from other AICs, and follow a highly structured routine 14 hours a day, 7 days a week.[10] This requires participants to hold themselves accountable when service providers are not in the prison.

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[1] HB 2481 (1993). In 2003, the program was expanded when the legislature directed the Department of Corrections to establish an additional program focused on alcohol and drug treatment. HB 2647 (2003); *see* ORS 421.506; *see also* Alternative Incarceration Programs, Oregon Dep't of Corrections, https://www.oregon.gov/doc/intake-and-assessment/Pages/alternative-incarceration-programs.aspx (last visited May 21, 2020).

[2] OAR 291-062-0100(3). The purpose of AIP is also expressed by the legislative finding provided in statute: "(1) There is no method in this state for diverting sentenced offenders from a traditional correctional setting;
(2) The absence of a program that instills discipline, enhances self-esteem and promotes alternatives to criminal behavior has a major impact on overcrowding of prisons and criminal recidivism in this state; and
(3) An emergency need exists to implement a highly structured corrections program that involves intensive mental and physical training and substance abuse treatment." ORS 421.500.

[3] ORS 421.504(1).

[4] ORS 421.510; OAR 291-062-0110(5); OAR 291-062-0120(1)(b).

[5] ORS 421.510(4).

[6] OAR 291-062-0110(5); *see also* ORS 421.510(2).

[7] Oregon Dep't of Corrections Policy 90.1.4, Attachment A, *Treatment Programs Eligibility and Screening Criteria* (Effective March 29, 2016).

[8] Oregon Dep't of Corrections Policy 90.1.4 at 1.

[9] *Id*. at 2.

[10] OAR 291-062-0120(1)(c).

The purpose and intensive nature of AIP makes clear that proper management of the programs by ODOC is critical for the rehabilitation of participants and for the safety and welfare of the communities that they will return to.

Since mid-March 2020, the OJRC has heard from many distressed AICs and their family members about ODOC's recent handling of AIP.

ODOC's decision to suspend visits and limit institution access to essential staff was understandable in light of the unexpected nature of the pandemic. Given ODOC's past acknowledgment of the importance of AIP, and the opportunity AIP provides for early release from prison—which is an environment ripe for COVID-19 outbreaks—we initially expected that ODOC would adjust to the situation within a reasonable timeframe and formulate an appropriate plan for AIP. However, throughout April, we became increasingly concerned as we heard from many AICs who were highly distressed about the way AIP was being handled. We have communicated with AICs in CCCF, CRCI, and PRCF and their family members to gain a better understanding of what occurred. Their accounts have been consistent and alarming. Below is a summary of the timeline and impact of ODOC's actions as fallout described in emails, voicemail messages, and conversations with AICs and their family members.

On or about March 12, prison staff told AICs that AIP counselors would not be returning to the prison and that AIP was suspended pending a 30-day review. No other information about what this meant for them or their release dates was provided. About a week later, prison staff told AICs they were all being "administratively removed" from AIP; that they were now considered "general population;" and that their AIP release dates would no longer be effective. Instead, their release would be determined by short-term transitional leave dates or "good time" dates that were many months later. *These changes also applied to participants who had obtained signed certificates of program completion from AIP service providers and who were scheduled to begin their "nonprison leave" in late March 2020.*

Through the rest of March and most of April, the seemingly chaotic and unreliable way that ODOC communicated information to AICs about the status of AIP caused great distress. Few communications, if any, were made in writing. ODOC officials and institution staff verbally conveyed inconsistent messages about what AICs should anticipate, as to original AIP release dates, new AIP release dates, short-term transitional leave release dates, re-opening of programming, consequences of not signing into AIP again, whether to continue "doing treatment" on the units without AIP counselors, and what would happen to AIP treatment days that were already completed. This information from ODOC to AICs changed daily, and sometimes within hours.

AICs at all three institutions expressed incredible frustration and distress about ODOC's communication with them. One AIC stated, "They keep dangling that carrot – they say things that always turn out to be false." Another said, "DOC has repeatedly lied to us since March about our program, counselors and release dates."

In late April and early May, AICs were asked to “sign in” to resume AIP and told the program would start the following week or the week after. For some AICs, it was not made clear how their release dates would be affected by signing in, or whether they would be starting over from the beginning. Some AICs hesitated to sign in, because it appeared that their short-term transitional leave release dates would come sooner than their new AIP release dates, particularly if they were required to start AIP from the beginning. Others did not sign into AIP because they did not trust that it would continue long enough for them to complete it. Some who signed in were skeptical that the program would resume, made wary by previous similar assurances by ODOC that never materialized, and also because staff had warned that the program could end again at any time with changes in ODOC’s positive COVID-19 cases. Some AICs felt forced to sign in or risk losing their short-term transitional leave release dates.

From May 4 to May 6, the OJRC received several panicked calls from AICs in CCCF about the HOPE program. The programs at CCCF include the Turning Point program, run by Cascadia, and the HOPE program, run by The Pathfinder Network. The HOPE program is the only trauma- and gender-responsive AIP in Oregon. When the HOPE program stopped in March, participants had been deeply engaged in addressing profound past trauma with their trusted counselors. AIP was scheduled to start on Monday, May 4 at CCCF, but the HOPE program did not resume because HOPE counselors did not come into the prison. Reportedly, HOPE program participants were given little to no information about what happened to their counselors. The women expressed that they knew their counselors would not “abandon” them without a good reason.

When the HOPE program was suspended and then ended in March 2020, there were three cohorts of AICs, each at a different stage of the program. On May 5, about half of the women in the “middle” HOPE cohort, with no explanation of why they were chosen, were moved into the Turning Point treatment unit and told to sign into Turning Point. The rest of the cohort remained in the HOPE program treatment unit, causing the women who moved to feel confused, anxious and vulnerable. Adding to the confusion and feelings of panic, CCCF staff reportedly advised some women that they should not sign into Turning Point. On May 6, the remainder of the HOPE middle cohort was moved to the Turning Point treatment unit and also asked to sign into the Turning Point program. Throughout these events, no explanation was provided about the absence of HOPE counselors, nor a reason why the other HOPE cohorts remained in the HOPE program treatment unit. The women also received mixed messages about what their new AIP release dates would be and whether they could lose their short-term transitional leave dates if they did not sign into Turning Point.

It was recently reported to us that confusion about AIP release dates continues at PRCF. According to reports, ODOC’s behavioral health services administrator met individually with AICs on May 7 or May 8 about signing back into AIP. One AIC reported that the administrator told him he would have 34 days left in the program. He said that he asked her multiple times to confirm that it would be 34 days, including asking her if he could tell his family 34 days. Each time, she said, “Yes.” So, he signed the contract. On or about May 14, an officer looked him up in the system and told him that his release date was about 70 days out and not 34 days. He feels lied to and abandoned again. Seemingly, there is no one from ODOC who can be held accountable to fix this. He described various consequences of the continued changing of release

dates, including jeopardizing his housing and employment options, and the continuous letdown of his family, particularly his mother.

We are also hearing reports from AICs, and their family members, about AIP participants who had expected release dates this summer. Now, due to the time lost during their "administrative removal," these AICs do not have enough days left in their sentence to complete the institution component and nonprison leave component of AIP. This means that those who recently signed back into AIP will not release to nonprison leave after they complete the institution component. They will instead return to "general population" status and be released on their "good time" release dates toward the end of the year.

AICs also reported that they have heard that their AIP counselors proposed ways to keep treatment going through correspondence and that ODOC rejected those proposals. An AIC commented that after hearing this, he thought, "That's absolutely crazy, we're sitting here waiting to get sick [from COVID-19] when we could have been working the program."

Many AICs and their family members reported that the ODOC's actions caused severe harm.

First, it cannot be overstated how devastating the loss of a release date is for AICs. They sign into AIP with the assurance that if they succeed in the program, they are eligible not only to be released early from incarceration, but to be released on a specific date. Early release is an incentive that encourages eligible AICs to enter AIP and to persist in a challenging program. Participants in AIP are called to deeply engage with past traumas and to honestly confront past destructive behaviors. Before signing the contract committing to AIP, AICs understand that their early release dates are theirs to lose – that the release dates can only be taken away due to individual conduct that prevents them from making progress in the program. They undergo regular check-ins with staff to assess whether their progress is on track, knowing their release dates are at stake.

The release date is reinforced with the AIC throughout the program. Some AICs are informed of the date before agreeing to sign into AIP. Once an AIC begins AIP, their anticipated release date is changed within ODOC's own records and systems. AICs have reported seeing their AIP release dates on their proof of incarceration letters, which are letters AICs use to inform others of the dates of their incarceration. AICs make reentry plans with staff, including confirming transitional housing and contact with probation officers, based on their AIP release dates.

Moreover, AICs and their families make significant plans around the release date, arranging housing, mental health supports, employment, and emotionally preparing for the AIC to come back into their families' lives. Family members, especially the AIC's children and the children's caregivers, rely heavily on those dates. AICs and their loved ones expressed the emotional trauma they experienced when their long-planned-for reunions were unexpectedly postponed. One male AIC commented, "[It's] harmful to have family and kids be ready and then have that taken away and then being in the dark about what will happen." One AIC described

how exhausted their mother is from caring for their children, two of which are high-needs, and the mother's reliance on the earlier AIP release date.

In addition, many AICs have conveyed that the abrupt end of treatment and contact with AIP counselors, through no fault of the AICs, has been emotionally devastating. One AIC described the administrative removal this way, "It turned my whole world upside down." He explained that AIP encourages AICs to trust and show empathy, and the swiftness and callousness of his removal from AIP felt like being "thrown back to the wolves." Other AICs described the psychological toll of having invested in treatment and in the idea of trusting the system, only to feel betrayed, and to be shown through ODOC's seeming disregard for release dates, that their hard work and personal development was of little to no significance. One AIC, who has been involved in the criminal justice system for many years and was engaged in treatment for the first time with AIP, said with great disappointment, "When they all walked away, I was one of the few people that kept pushing forward. A lot of star pupils reverted to old behavior. I encouraged other people to keep pushing forward because I didn't think the program would abandon us, but I got proven wrong."

Women from the HOPE program shared that the pain and shock of sudden removal from treatment – which required them to discuss experiences such as sexual assault and child abuse with trusted counselors – was more excruciating than losing their release dates. One woman described it as being "cut open" and not knowing how to heal.

Many AICs expressed bewilderment at the decision to remove them from AIP, particularly those who had graduated and were two weeks away from their expected release dates. AICs at CRCI recalled that when CRCI recently lost one of its AIP service providers, and the program lacked counselors for weeks, the participants in the program were nonetheless permitted to release on their AIP release dates. Similarly, women at CCCF reported that in the past, their program did not have counselors for several weeks due to illness and weather, yet AICs still retained their AIP release dates.

On all accounts, the handling of AIP by ODOC is fundamentally wrong and unjust.

<u>The administrative removal of AICs from AIP due to circumstances caused by the COVID-19 pandemic is not authorized by AIP statutes or regulations.</u>

Under ORS 421.508(2), "The department may suspend or remove an [AIC] from a program for administrative or disciplinary reasons."[11] This authority is reflected in OAR 291-062-0150.[12] Under that rule, a decision to remove or suspend an AIC from the program must be

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[11] ORS 421.508(2).

[12] OAR 291-062-0150(1) provides, "(1) The functional unit manager or designee in his/her discretion may remove or suspend an inmate from any portion of an alternative incarceration program, and may reassign the inmate to another Department of Corrections facility to serve the balance of the inmate's court-imposed incarceration term, for administrative or disciplinary reasons. The decision to remove or suspend an inmate from the program will be made in consultation with a committee appointed by the functional unit manager or designee that is responsible to review the performance of inmates participating in an alternative incarceration program."

made in consultation with a committee responsible for reviewing the performance of program participants.[13]

Administrative removal is properly based on the circumstances of individual AICs; it is not a mechanism for system-wide removal of AICs from programming. The relevant rules do not define precisely what constitutes an "administrative" reason for requiring an AIC to leave the program. However, OAR 291-062-0150(2) provides specific circumstances that may result in administrative suspension or removal, each of which involve an AIC's individual conduct, eligibility, and/or ability to participate:

- The AIC is "not available to participate substantially in the program (e.g., physical and mental illness, court appearance(s), disciplinary segregation, etc.)"[14]
- The AIC's status has changed so that they no longer meet eligibility criteria for AIP;[15]
- The AIC's eligibility for AIP is affected because other charges will result in immediate incarceration upon release to nonprison leave;[16] and
- The AIC is not making adequate progress in the program.[17]

These provisions indicate that permissible reasons for administrative suspension or removal are circumstances that have bearing on an individual AIC's ability to successfully perform in the program, as distinguished from disciplinary removal or program failure.[18] They do not provide authority for system-wide removal of AICs from the program because ODOC faces logistical challenges caused by COVID-19. AICs were removed from programming

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[13] *Id*.
[14] OAR 291-062-0150(2)(b) provides, "An inmate who is not available to participate substantially in the program (e.g., physical and mental illness, court appearance(s), disciplinary segregation, etc.) for up to 30 days following placement will be suspended from participation and will be evaluated by the committee to determine whether the inmate will be removed from the program or accepted back into the program at the program level deemed appropriate by the functional unit manager or designee."
[15] OAR 291-062-0150(2)(c) provides, "Any change in status that would cause an inmate to be ineligible to continue participating in the program as described in OAR 291-062-0130 (e.g., discovery of a detainer), may result in a suspension. (A) If suspended, the inmate will have 30 days to resolve eligibility status with the department. If the inmate's eligibility status remains unresolved, the inmate will be removed from the program. (B) An extension may be made by the functional unit manager or designee on a case-by-case basis."
[16] OAR 291-062-0150(2)(d) provides, "If other charges will result in immediate incarceration upon release to nonprison leave, the inmate will have 30 days to resolve eligibility status with the department. If the inmate's eligibility status remains unresolved, the inmate will be removed from the program. An extension may be made by the functional unit manager or designee on a case-by-case basis."
[17] OAR 291-062-0150(2)(e) provides, "Inmates are expected to participate in all aspects of their program assignment at a level consistent with the length of time they have been assigned to the program.
(A) The functional unit manager or designee in his/her discretion may suspend an inmate from the program for 30 days or more when, in consultation with the program performance review committee, the functional unit manager or designee determines that the inmate is not making adequate program progress. During the suspension, the inmate will be given an opportunity to come into compliance with established program standards.
(B) If the inmate comes into compliance, the inmate will be placed at a program level deemed appropriate by the functional unit manager or designee. The inmate may be removed from the program for failure to meet program expectations. If the inmate is assigned to an intensive alternative incarceration addictions program, the inmate may have the length of the program extended beyond 270 days."
[18] *See* OAR 291-062-0150(3)-(6).

regardless of their own ability or eligibility to participate. This action was not authorized by the administrative removal provisions in ORS 421.508(2) and OAR 291-062-0150(2). No other statute or regulation provides authority for system-wide removal of participants from AIP, nor authority for ODOC to suspend or discontinue AIP.

The legislature required ODOC to establish AIP programs and to adopt rules to carry them out in recognition of the pressing need for these programs.[19] ODOC's own rule states, "Within the inherent limitations of resources, and the need to maintain facility security, internal order, and discipline, and the health and safety of staff, [AICs], and the public, it is the policy of the Department of Corrections to discharge its statutory responsibilities to establish alternative incarceration programs by creating and operating programs that promote [AIC] rehabilitation during incarceration and reduce the risk of continuing criminal conduct when the [AIC] is returned to the community."[20] While the need to maintain health and safety may necessitate changes in the manner of program implementation, it does not provide ODOC with discretion to adopt a system-wide administrative removal of all AICs from programming. An interpretation of AIP statutes and rules that granted such authority would be at odds with the legislative purposes underlying ODOC's statutory obligation.

<u>The handling of AIP exposed ODOC to liability for intentional infliction of emotional distress.</u>

ODOC's decision to "administratively remove" and revoke the release dates of all AIP participants, and its failure to adequately address the anxiety and fear of AICs through clear and open communication, caused immense emotional distress and suffering. AICs were abruptly cut off from their counselors, told their release dates had been taken away, and given no assurance that they would receive credit for the progress they had made. This left them panicked and emotionally devastated. For weeks, AICs were given mixed signals about when counselors would return, whether release dates would be reinstated, and whether AIP participants would have to restart programming from the beginning, which only served to intensify the emotional harm. When ODOC chose to resume the AIP program, AICs were forced to sign paperwork that they did not understand and told they would receive a "program fail" if they did not cooperate. Some were moved to different treatment programs altogether. These actions, among others, have opened ODOC to liability for intentional infliction of emotional distress.

Intentional infliction of emotional distress (IIED) is committed when, by some extreme or outrageous conduct, an actor intentionally causes severe emotional harm, or acts with the knowledge that such harm is substantially certain to arise from the conduct. *McGanty v. Staudenraus*, 321 Or 532, 543-44, 550-51, 901 P2d 841 (1995). IIED is a recognized tort in

[19] ORS 421.504; ORS 421.506; ORS 421.500 ("The Legislative Assembly finds that: (1) There is no method in this state for diverting sentenced offenders from a traditional correctional setting; (2) The absence of a program that instills discipline, enhances self-esteem and promotes alternatives to criminal behavior has a major impact on overcrowding of prisons and criminal recidivism in this state; and (3) An emergency need exists to implement a highly structured corrections program that involves intensive mental and physical training and substance abuse treatment.").

[20] OAR 291-062-0100(3).

Oregon that permits a plaintiff to recover both compensatory and punitive damages. *Peery v. Hanley*, 135 Or App 162, 167, 897 P2d 1189, *adh'd to on recons*, 136 Or App 492, 902 P2d 602 (1995). Determining whether the elements of IIED are met is a fact-specific inquiry, made "on a case-by-case basis, considering the totality of the circumstances." *Lathrope-Olson v. Oregon Dep't of Transp.*, 128 Or App 405, 408, 876 P2d 345 (1994). IIED is defined by three elements:

(1) Defendant intended to inflict severe emotional distress on the plaintiff, *or knew that defendant's acts were certain or substantially certain to cause severe emotional distress*;
(2) Defendant's acts were the cause of the plaintiff's severe emotional distress; and
(3) Defendant's acts constituted an extraordinary transgression of the bounds of socially tolerable conduct.

McGanty, 321 Or at 543, 550-51 (emphasis added).

ODOC's actions have caused many AICs to experience severe emotional distress. They described feeling emotionally "raw," "panicked," "exposed," "cut open," and "devastated." First, the sudden change in release dates was incredibly damaging. AICs are advised of their release date early in the program and it is immediately etched in their memory—serving as a constant motivation to persist through the challenges of the program. AICs mentally and emotionally prepare themselves for release, and often have challenging conversations with family members in anticipation of that date. AICs who had already graduated from their program were particularly devastated to find that they would not be released as planned. Family members of AICs with dashed expectations in the planned-for release of their loved ones were also harmed, especially the children of AICs.

Second, ODOC caused severe emotional distress by ripping AICs away from their counselors during physically, mentally and emotionally demanding treatment. AIP is a highly-regimented program that includes "intensive [addiction] treatment and cognitive behavioral therapy interventions" and/or "intensive self-discipline and cognitive skill-building to confront and alter criminal thinking patterns."[21] Participants work tirelessly to identify their triggers, develop relapse prevention strategies, address anger issues, and develop emotional regulation skills. The treatment is deeply personal, emotionally taxing, and requires a great deal of trust between the AIC and the counselor. AICs come to rely on this structure, and ODOC's actions have left those individuals emotionally exposed. Further, those who were engaged in the trauma-responsive HOPE program reported that ODOC's handling of the program's suspension "exposed [them] to further trauma." This treatment requires participants to reopen and address deeply personal experiences and trauma they have experienced, such as sexual abuse, domestic violence, and post-traumatic stress disorder. The loss of trusted counselors in the middle of a sensitive and difficult process, followed by chaotic and inconsistent communication from ODOC, caused many to experience extreme emotional pain.

The severe emotional distress inflicted on AICs was a substantially certain outcome of ODOC's actions. ODOC has an intimate knowledge of all AIP programs. ODOC is also aware of

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[21] ORS 421.504; ORS 421.506; Oregon Dep't of Corrections Policy 90.1.4 at 1.

the mental and emotional state of AICs who participate in these programs. Thus, ODOC would clearly be aware that severe emotional distress would be caused by a sudden break in treatment and the revocation of expected release dates. Further, the panic and devastation expressed by AICs to the OJRC was also expressed to ODOC officials on numerous occasions.

Finally, ODOC's actions are an "extraordinary transgression of the bounds of socially tolerable conduct." As to this element, "courts are more likely to consider behavior outrageous if it is inflicted on the more vulnerable partner in a 'special relationship.'" *Clemente v. State*, 227 Or App 434, 442, 206 P3d 249 (2009); *Delaney v. Clifton*, 180 Or App 119, 131 n 7, 41 P3d 1099 (2002). While courts more commonly address this vulnerability in cases between employer and employee, the inherent nature of incarceration would undoubtedly qualify AICs as the "vulnerable partner." Courts have further articulated that "when the defendant's position in relation to the plaintiff involves some responsibility aside from the tort itself," the plaintiff is more likely to be able to establish a claim for IIED. *Hall v. May Dep't Stores*, 292 Or 131, 135, 137, 637 P2d 126 (1981) (citing *Rockhill v. Pollard*, 259 Or 54, 485 P2d 28 (1971), a case where a physician turned away accident victims seeking medical assistance). Here, ODOC is responsible for the health and safety of all AICs in its custody, and has a statutory obligation to create and maintain the AIP program.[22] AICs are an incredibly vulnerable party in a relationship where ODOC has a specific duty to care for their wellbeing, making ODOC's actions particularly outrageous.

In short, ODOC has caused AICs immeasurable emotional harm through actions far outside the bounds of socially tolerable conduct. The harm was a predictable and certain outcome of revoking release dates, cutting off access to AIP counselors, and the subsequent back-and-forth, confused communications that left AICs with no certainty as to what would happen. As a result, ODOC has exposed itself to liability for IIED.

<u>The chain of events described by AICs and their family members suggest that ODOC may have violated the Fourteenth Amendment to the U.S. Constitution.</u>

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides, "No state shall [. . .] deprive any person of life, liberty, or property without due process of law." Freedom from physical restraint and incarceration is a basic facet of liberty. *See, e.g.*, *Meyer v. Nebraska*, 262 US 390, 399 (1923); *Roth v. Board of Regents*, 408 US 564, 572 (1972). The U.S. Supreme Court has noted, "the most elemental of liberty interests [is] the interest in being free from physical detention by one's own government." *Hamdi v. Rumsfeld*, 542 US 507 (2004). The Due Process Clause of the Fourteenth Amendment has been interpreted to require the government to engage in adequate procedures before it deprives a person of a protected liberty interest. This constitutional right to procedural protections is also known as procedural due process.

[22] "An emergency need exists to implement a highly structured corrections program that involves intensive mental and physical training and substance abuse treatment." ORS 421.500(3); "The Department of Corrections [. . .] shall establish a special alternative incarceration program stressing a highly structed and regimented routine." ORS 421.504(1); "The Department of Corrections shall establish an intensive alternative incarceration addiction program." ORS 421.506.

Incarcerated individuals are owed the protections of procedural due process under the Fourteenth Amendment when a protected liberty interest is at issue. *See, e.g.*, *Wolff v. McDonnell*, 418 US 539, 555-56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country."). Courts have determined that protected liberty interests are either inherent in the Due Process Clause of the Fourteenth Amendment or are created by state law. *See, e.g.*, *Vitek v. Jones*, 445 US 480, 488 (1980); *Bristol v. Peters*, No. 3:17-cv-00788-SB, 2018 WL 6183274, at *4 (D. Or. Nov. 27, 2018) ("A protected liberty arises either from the Due Process Clause directly or from state law."). Once a protected liberty interest is created by state law, the state "must follow minimum due process appropriate to the circumstances to ensure that liberty is not arbitrarily abrogated." *Haygood v. Younger*, 769 F2d 1350, 1355 (9th Cir 1985) (citing *Vitek*, 445 US at 488-89).

Here, it could be argued that the nonprison leave component of AIP is a state-created right that constitutes a liberty interest protected by the Due Process Clause. *See Wolff v. McDonnell*, 418 US 539 (1974). In *Wolff*, the U.S. Supreme Court found that a state-created right to good-time credits constituted a protected liberty interest. *Id.* at 557. Under a state statute, good time credits constituted "a right to a shortened prison sentence through the accumulation of credits for good behavior", which could "be forfeited only for serious misbehavior." *Id.* The court reasoned that because the "determination of whether such behavior has occurred" was "critical" under the statutory scheme, "the minimum requirements of procedural due process appropriate for the circumstances must be observed." *Id.* at 558.

Similar to the protected liberty interest found in *Wolff*, state law here creates a right to nonprison leave that may not be arbitrarily deprived. The state has created a process whereby AICs may release early from prison upon successful completion of an institutional program. The nonprison leave component of this process is plainly necessary to fully achieve the legislature's purposes for creating AIP, which included creating a "method for diverting sentenced [AICs] from traditional correctional settings." ORS 421.500. Further, OAR 291-062-0120(1)(b) provides, "Each alternative incarceration program is a minimum of 270 days in duration and includes two components – a structured institution program and a period of structured nonprison leave." The regulation thus affirmatively states that the AIP program includes a period of nonprison leave.

As in *Wolff*, here the state-created right to early release from prison may be deprived only for specific reasons. Regulations authorize ODOC to remove AICs from AIP, but they do not authorize unfettered discretion to remove them for any reason. Permissible reasons, whether classified as disciplinary or administrative, are limited to circumstances bearing on the individual AIC's ability to perform in the program, as described in OAR 291-062-0150 (1)-(3).

If ODOC interprets its authority as the ability to remove AICs from AIP at any time for any reason, such authority would likely infringe on the right to procedural due process. *Bristol v. Peters*, No. 3:17-cv-00788-SB, 2018 WL 6183274, at *5 (D. Or. Nov. 27, 2018). OAR 291-062-0150 (2)(a) authorizes "[t]he functional unit manager or designee in his/her discretion [to] immediately remove or suspend an [AIC] from the program and reassign the [AIC] to another Department of Corrections facility without a hearing, for administrative reasons." However, the

authority granted to ODOC under this provision does not diminish the liberty interest in nonprison leave. *Bristol*, 2018 WL 6183274, at *5. The *Bristol* court determined that an AIP participant released to nonprison leave had a liberty interest in remaining outside of prison, and that OAR 291-062-0150(2)(a) did not diminish that liberty interest. The court found that the plaintiff's "belief that ODOC would not revoke his release arbitrarily in the absence of a violation [of release conditions] was a reasonable belief under the circumstances[.]" *Id*. The court also explained that, to the extent the regulation allows ODOC to remove AICs from nonprison leave at any time for "administrative" reasons without a hearing, it "raises serious due process concerns." *Id*. Here, a removal from AIP for "administrative" reasons without a hearing that results in a longer term of confinement raises similar due process concerns.

The inquiry for whether state law creates a liberty interest is whether the law provides a freedom from restraint that "imposes atypical and significant hardship on the [AIC] in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 US 472, 484 (1995). The *Sandin* plaintiff argued that he had a liberty interest in avoiding disciplinary confinement. The court held there was no liberty interest because his confinement "did not exceed similar, but totally discretionary, confinement in either duration or degree of restriction. Based on a comparison between [AICs] inside and outside disciplinary segregation, the State's actions in placing him there for 30 days did not work a major disruption in his environment [. . . .] Nor does [his] situation present a case where the State's action will inevitably affect the duration of his sentence." *Id*. at 486-87.

It may be argued that the administrative removal of AICs here imposed an "atypical and significant hardship" on those participants. Unlike in *Sandin*, ODOC's actions "inevitably affect the duration" of time they will spend in prison. The abrupt loss of release dates of every AIP participant through a systemwide administrative removal was certainly "atypical" as compared to the normal administration of AIP. And as explained in detail in this letter, it caused a "major disruption" to AICs.

ODOC told AICs, with no prior notice, that they had been administratively removed from AIP and had lost their nonprison leave dates. This was not an adequate procedure to prevent the arbitrary deprivation of a protected liberty interest, because no process was provided at all. Therefore, it may be argued that ODOC violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Conclusion

Even without the support of these legal theories, what AICs and their families described about how ODOC treated AICs and handled AIP rings loudly of fundamental injustice and wrongdoing. The sudden loss of treatment and release dates, the inadequate and contradictory communication, and the disregard shown for AICs' well-being were profound betrayals by the system that will have long-term consequences for AICs, their families, and the communities that AICs return to.

Recommendations

We are still in the midst of the COVID-19 pandemic. The number of AICs confirmed to have COVID-19 continues to rise at an increasing number of institutions. It is likely that ODOC will again need to bar AIP counselors from institution access, or that AIP counselors will stop coming to institutions of their own accord due to serious health and safety concerns, as the HOPE program counselors did. Given the current realities and the struggles that ODOC has had handling AIP, we make the following recommendations:

1. ODOC must ameliorate the harm already done to AICs over the past few months.

   a. This should include individually reviewing the approximately 200 AICs who were in AIP at the time of administrative removal in March and exploring all options to release those individuals as close to their originally expected AIP release dates as possible. While this review is occurring, ODOC should correct the release dates for those at PRCF and elsewhere who, at the time of resuming AIP in May, were assured certain release dates, and subsequently learned the system shows their release dates are later than what they were told.

   b. ODOC should work with The Pathfinder Network to find a way, exploring every option available, to return the HOPE program to CCCF and should release HOPE program participants as close to their originally expected AIP release dates as possible.

2. ODOC should create and make public their plan for handling AIP in the future in emergency situations, such as those related to the COVID-19 pandemic, when AIP counselors cannot go into the institutions. In creating this plan, ODOC must convene discussions with and accept recommendations from other stakeholders, e.g. agencies contracted to provide AIP, like The Pathfinder Network, New Directions Northwest, Inc., and Cascadia, who have expertise and can recommend feasible options that ODOC may not have considered. The plan must fulfill the purpose of the legislatively-created AIP and must not violate notions of fundamental fairness and ODOC's duty of care to AICs. At a minimum, the plan should include:

   a. A presumption that every AIC in AIP will remain in the program and maintain their expected release dates;

   b. A process for providing treatment through correspondence or other remote means;

   c. A requirement that any action, such as suspension or removal of AICs from AIP, that affects AIP release dates on a system-wide or institution-wide basis, be the last resort after all other alternatives are explored and determined to be unfeasible to implement;

   d. A process for providing regular updates and explanations in writing to AIP participants about decisions being made about the program and release dates;

e. The designation of an institution staff person who is accessible to AICs and can provide accurate information to AICs about AIP implementation; and

f. A process that allows AIP counselors to adequately communicate with AICs.

3. If ODOC stops AIP and takes away or delays AIP release dates, ODOC should report to the legislature within 14 days to describe the alternatives explored prior to halting AIP and their plans for resuming programming as soon as possible.

We recognize that as the Director of the Oregon Department of Corrections during this COVID-19 pandemic there are countless issues that you need to address. We hope that this letter helps you to better understand your department's recent handling of AIP, including the AICs' experiences, the grave harms that have occurred, and the community's justifiable concerns. We hope that with this information and our recommendations, ODOC will take immediate action to ameliorate the harms that have occurred and to prevent future mishandling of AIP.

Sincerely,

Bobbin Singh
Executive Director