

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.

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 1993¹ 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.

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.

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

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

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

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.

The handling of AIP exposed ODOC to liability for intentional infliction of emotional distress.

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

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.

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.

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 structured 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