

Civil Rights, Prisons, and Mental Health



A Report of the
Nebraska Advisory Committee to the
U.S. Commission on Civil Rights

March 2020

Advisory Committees to the U.S. Commission on Civil Rights

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. More specifically, they are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

**Nebraska Advisory Committee to the
U.S. Commission on Civil Rights**

The Nebraska Advisory Committee to the U.S. Commission on Civil Rights submits this report detailing civil rights concerns related to prison conditions in the state for individuals with mental health conditions. The Committee also examined several issue areas such as (i) the extent to which prisoners with mental health conditions are afforded equal access to mental health services, including adequate medical and psychiatric care, reasonable protections from injury or the risk of injury, and rehabilitative/support programs and services; and (ii) the use of solitary confinement on individuals with mental health conditions. The Committee submits this report pursuant to its responsibility to study and report on civil rights issues in the state of Nebraska. The contents of this report are primarily based on testimony the Committee heard during a public hearing on June 13, 2019 in Lincoln, Nebraska and submitted written statements.

Primary concerns include overcrowding at Nebraska detention centers that have detrimental impacts on inmates' well-being, staffing shortages to diagnose and address the needs of inmates with mental health conditions, the lack of rehabilitative programming offered to inmates eligible for parole, and the discretionary and use of solitary confinement and five-point restraints on incarcerated individuals with mental health conditions. The Committee offers the Commission recommendations for addressing prison conditions for individuals with mental health conditions and the use of solitary confinement.

**Nebraska Advisory Committee to the
U.S. Commission on Civil Rights**

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I. EXECUTIVE SUMMARY

Prison overcrowding has become a growing social problem in the United States as state incarceration rates increased from the 1970s, peaking in 2008. Although some states have experienced recent decreases in prison overcrowding, often as a result of “justice reinvestment” initiatives and reform efforts, overcrowding remains a significant problem in many state correctional systems. As of March 2019, Nebraska state correctional facilities are currently at 160 percent capacity.¹ Specific state facilities like the Diagnostic and Evaluation Center, where prisoners start their time in order to be evaluated for which facility they should be transferred to for housing, is at 336 percent capacity. Additionally, the Nebraska Correctional Center for Women is at 122 percent capacity and the Omaha Correctional Center is at 197 percent capacity.²

Recent events have pointed to the vulnerabilities of overcrowded prisons and lack of corrections and behavioral health staff. In 2015, the Tecumseh State Correctional Prison in southeast Nebraska was taken over by its inmates for several hours. Two inmates were killed before staff regained control. The riot was worsened by the fact that several of the state’s prisons are severely overcrowded. On separate occasions, there were reports of prisoners and correctional officers who were seriously wounded from altercations in prison; and growing number of suicides and attempted suicides because no or not enough corrections staff were available to closely monitor those inmates and/or provide needed treatment.

Concerns regarding the use of disciplinary measures like “double celling,” solitary confinement, five-point restraints have also been an apparent concern with over the years. The murder of Terry Berry in April of 2017 brought the practice of double celling to the attention of the public. Mr. Berry was killed by his cellmate after the pair was forced to share a solitary confinement cell together because there were not enough solitary confinements units available. The use of solitary confinement, while warranted as punishment for when prisoners violate prison rules, many argue has proven to be especially harmful for inmates that can create and/or contribute to an individual’s declining mental health condition(s). Its use on juveniles can result in serious detrimental effects that include inhibiting physical, psychological, and developmental growth. Five-point restraints have also been used as a disciplinary practice to refrain the inmate from harming oneself or others. In state corrections facilities, it has been used to address suicidal thoughts or mental health concerns of individuals express to staff.

It has been reported that issues within the Nebraska Department of Correctional Services have been ongoing. Elected officials have employed a combination of passing criminal justice reforms (i.e. an increase in funding allocation for a longevity pay program for state corrections staff and a ban on solitary confinement of vulnerable populations like pregnant women, and individuals with serious mental illness, etc.) and conducting audits through independent state agencies to identify areas that need improvement. The two entities that have conducted audits of the Nebraska Department of Correctional Services are the Office of the Public Counsel and the newly established body created by the Nebraska Legislature to provide increased accountability and

¹ Nebraska Department of Correctional Services, *Quarterly Population Summary, January – March 2019*, https://corrections.nebraska.gov/sites/default/files/ndcs_quarterly_data_sheet_fy19-q3_0.pdf.

² Ibid.

oversight of the Nebraska correctional and parole systems, Office of Inspector General of the Nebraska Correctional System. As part of their charge, the Office of Inspector General of the Nebraska Correctional System is required to submit an annual report to the Nebraska Legislature concerning systemic issues of the Nebraska Department of Correctional Services and the Division of Parole Supervision and also investigates incidents resulting in death or serious injury that occur within the Nebraska correctional system.

As part of its responsibility to examine relevant civil rights issues, on February 22, 2019, the Nebraska Advisory Committee to the U.S. Commission on Civil Rights voted unanimously to examine civil rights concerns related to prison conditions in the state for individuals with mental health conditions. The Committee sought to examine the extent to which incarcerated individuals with mental health conditions are afforded equal access to mental health services, including adequate medical and psychiatric care, and reasonable protections from injury or the risk of injury.

At a public meeting in Lincoln Nebraska on June 13, 2019, the Committee received testimony in the following areas:

- Individuals' access to mental health diagnosis and treatment services while incarcerated, and the extent to which denial or insufficient access to mental health services may exacerbate the mental health conditions of inmates, causing additional injury/harm;
- The use of solitary confinement to inappropriately segregate or otherwise isolate individuals with mental health concerns;
- The extent to which incarcerated individuals with mental health concerns have equal access to other rehabilitative/supportive programs and services; and
- Other civil rights concerns related to prison conditions in Nebraska for individuals with mental health concerns.

This report begins with a discussion concerning the issues within the Nebraska Department of Correctional Services, followed by a summary of themes derived from testimony, and concludes with findings and recommendations for the Commission to forward to appropriate federal and state entities.

Findings

1. There is no defined system of care within the state prison system. Without these parameters, there is no sound way of ensuring that inmates with mental health needs are receiving mental health treatment that is appropriate in its intensity, scope, duration and consistent with accepted clinical standards.³ For example, a male prisoner with a mental illness was sent to a secure mental health unit, which operates similar to a restrictive housing unit, and lacks programming and resources necessary to function at an inpatient or residential level of care.
2. Inmates have no effective means to convey their mental health needs to corrections staff in a timely manner. Within the prison system, there are two mechanisms that facilitate prisoner-to-staff communication on mental health issues: (i) Inmate Interview Request

³ Smith Testimony, *Lincoln Briefing*, p. 25.

form and (ii) formal grievances.⁴ Prisoners expressed concern regarding the lack of confidentiality, mental health issues being triaged by staff, and delays with communication (or it never reaching appropriate staff). In a related treatment access issue, correctional officers are not trained mental health professionals and often do not have qualifications to review the request and determine when or if to convey it to mental health staff. This is of concern because prisoners are at risk of having mental health issues persist while they are deprived from communicating with staff at the facility who are situated to provide psychological or psychiatric treatment.

3. Prisoners are required to receive information at orientation on how to submit a formal grievance, however many report to have little understanding on how the process works, what to use it for, when to use the process versus submitting an Inmate Interview Request (IIR). This is particularly acute at the youth facility. Generally, inmates often do not receive any help from corrections staff. The most common way an inmate with a mental health issue receives help in filling out the IIR is by seeking and receiving it from another inmate.⁵
4. While the Nebraska Department of Correctional Services is working to cut down wait list times to process inmates at the Diagnostic and Evaluation Center under 90 days by conducting clinical assessments,⁶ inmates continue to experience long waitlists to receive appropriate treatment planning.⁷ This is especially of concern because testimony indicated that inmates have waited months to be assigned to appropriate detention centers and receive appropriate treatment.
5. Inmates who are scheduled to be considered for parole often miss their opportunity to be released. The most cited reason is because they have not complied with their sentencing, which often requires receiving mental health treatment and/or rehabilitative programming, and miss the opportunity to be released.⁸ In some cases, individuals will be waitlisted for several months because of a shortage in personnel to provide treatment and/or rehabilitative programming,⁹ sometimes beyond their parole date which leave them in prison without any rehabilitation services.
6. Nebraska uses Medicaid to provide cost-effective mental health services to individuals after they have been released and suspect Medicaid eligibility for inmates as opposed to terminating Medicaid coverage when they are incarcerated. This is important because it can more easily ensure that enrollment is reinstated when incarcerated individuals are released and that formerly incarcerated individuals can immediately access health care without a gap in coverage.¹⁰

⁴ Ibid., 20.

⁵ Smith Testimony, *Lincoln Briefing*, p. 31.

⁶ Frakes Testimony, *Lincoln Briefing*, p. 172.

⁷ Smith Testimony, *Lincoln Briefing*, p. 25.

⁸ Moreland Testimony, *Lincoln Briefing*, p. 151.

⁹ Miller Testimony, *Lincoln Briefing*, p. 66.

¹⁰ Meurrens Testimony, *Lincoln Briefing*, p. 97.

7. Nationwide, state detention centers and county jails have become the de facto mental health institutes of the state.¹¹ In Nebraska state prisons are overcrowded and experience challenges with responding to the needs of the inmates with mental health issues. According to the Nebraska Department of Correctional Services, state prisons are at 160 percent capacity and the most overcrowded facility is the Diagnostic and Evaluation Center.¹² Fifty-six percent of Nebraska inmates suffer from a mental illness, 16 percent suffer from a serious mental illness, and 25 percent of male inmates and 50 percent of female inmates are on psychotropic medication.¹³
8. Sheriffs expressed concern over incarcerating individuals with behavioral and mental illness because they are unequipped to address their needs. Moreover, there are little to no community alternatives to provide care to these individuals especially in rural areas.¹⁴
9. Nebraska has a severe shortage of mental health and behavioral health care providers.¹⁵ In addition, behavioral and mental health treatment programs are less available and sometimes unavailable in rural parts of the state.¹⁶ Not only is there a shortage of behavioral health and mental health providers across the state,¹⁷ it is very likely the state has even fewer or no specialized programming exists that is culturally specific, trauma informed, and serves the limited English proficient population.¹⁸
10. Testimony indicated the use of solitary confinement has damaging effects on all prisoners, especially for vulnerable populations, and should be discouraged. Prisoners with mental health conditions placed in solitary confinement can exacerbate their conditions even further. Placing youth in solitary confinement at a time when their brains are still developing make them susceptible to the prolonged psychological stress that can inhibit development of parts of the brain and can cause irreparable damage. Even prisoners with no current mental health diagnosis that are placed into solitary confinement are still very likely to develop a mental health diagnosis.
11. The occurrence of completed suicides and attempted suicides because of the lack of corrections staff to monitor and treat individuals is concerning. Testimony indicated that inmates who did not receive well-being checks and/or were not diagnosed with co-occurring mental health disorders have significant safety implications.

¹¹ Deol Testimony, *Lincoln Briefing*, p. 179.

¹² Miller Testimony, *Lincoln Briefing*, p. 10.

¹³ Heaney Testimony, *Lincoln Briefing*, p. 36. <https://www.apnews.com/cd7af73286204fc7a37e3dfeacd08f98>

¹⁴ Lathrop Testimony, *Lincoln Briefing*, pp. 156-157.

¹⁵ *Ibid.*, 78; Legislative Counsel Bureau, *Regionalizing the Mental Health System in Nebraska: Considerations and Options*, p. 7, available at:

<https://www.leg.state.nv.us/Division/Research/Publications/InterimReports/2017/Bulletin17-06.pdf>; Lathrop Testimony, *Lincoln Briefing*, p. 155.

¹⁶ Heaney Testimony, *Lincoln Briefing*, p. 35.

¹⁷ Lathrop Testimony, *Lincoln Briefing*, p. 155.

¹⁸ Moyer Testimony, *Lincoln Briefing*, p. 106.

Recommendations

1. The U.S. Commission on Civil Rights should send this report and issue recommendations to the U.S. Department of Justice to:
 - a. Enforce the Americans with Disabilities Act and ensure all corrections facilities are ADA accessible.
 - b. Enforce the Civil Rights of Institutionalized Persons Act, particularly the standards concerning juveniles.
2. The U.S. Commission on Civil Rights should send this report and issue recommendations to the U.S. Department of Health and Human Services to:
 - a. Enforce the Affordable Care Act and provide any other source of care for the mental health of inmates and released prisoners that is available to it.
3. The U.S. Commission on Civil Rights should send this report and issue recommendations to the U.S. Congress to:
 - a. Provide appropriations for the Bureau of Justice Assistance Edward Byrne Memorial Justice Assistance Grant Program to fund state and local jurisdictions with critical funding necessary to support a range of program areas including law enforcement, prosecution, indigent defense, courts, crime prevention and education, corrections and community corrections, drug treatment and enforcement, planning, evaluation, technology improvement, and crime victim and witness initiatives and mental health programs and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams.
4. The U.S. Commission on Civil Rights should send this report and issue recommendations to the Nebraska Legislature to:
 - a. Continue to expand Medicare access.
 - b. Provide equitable funding for mental and physical health services to respond to the absence of funding in rural areas of the state.
 - c. The Judiciary Committee and the Appropriations Committee of the Nebraska State Legislature should commission an independent study to determine the estimated cost of fully addressing the mental health needs of incarcerated individuals in the state. The study should:
 - i. include consideration of addressing the mental health impact of current conditions such as overcrowding;
 - ii. include consideration of legal financial vulnerabilities facing the state if the state fails to address such concerns;
 - iii. be initiated within 120 days of the publication of the Committee's report.
 - d. Provide any other source of care to address the mental health of inmates and released prisoners that is available.

- e. Provide adequate funding to expand the Omaha Correctional Center as it currently has eight beds per cell and is not an ADA accessible unit.
 - f. Pass comprehensive criminal justice reform that includes examining each point of contact people with mental illnesses have with the criminal justice system, measures that would decrease the number of individuals serving time in state prisons, and use of solitary confinement.
 - g. Continue funding re-entry and rehabilitative programs in the community, especially those that are culturally competent and trauma-informed.
 - h. Pass legislation to abate use of consecutive periods in solitary confinement on juveniles.
5. The U.S. Commission on Civil Rights should send this report and issue recommendations to the Nebraska Governor to:
 - a. Require mandatory training at all levels of the judicial and legal system on serious mental illness and crisis intervention.
 - b. Provide appropriations to the Nebraska Department of Correctional Services and local jails to increase funding to hire and retain corrections staff that includes behavioral health professionals.
6. The U.S. Commission on Civil Rights should send this report and issue recommendations to the Nebraska Department of Correctional Services to:
 - a. Commit to and develop creative incentives to hire and retain behavioral health staff.
 - b. Require law enforcement to receive training on how to identify persons with mental illness and crisis intervention skills to de-escalate a mental health crisis.
 - c. Review policy on use of solitary confinement and restrain policy.
 - d. Revise procedure for people with mental illnesses to communicate with corrections staff in a confidential and expeditious manner.
 - e. Develop tracking system to identify how many seriously mentally ill inmates are in the prison and jail system. Accounting for these individuals will assist with addressing accessibility to mental health programs and behavioral health programs.
 - f. Comply with the Civil Rights of Institutionalized Persons Act, particularly the standards concerning juveniles.

- g. Continue providing suicide prevention to support formerly incarcerated and their families.
- h. Expand peer to peer mentoring programs for inmates.
- i. Review suicide prevention policy and take appropriate steps to decrease the number of suicides.

II. INTRODUCTION

This section briefly reviews current trends impacting the Nebraska Department of Correctional Services that includes overcrowding and understaffing and the concerning disciplinary practice of solitary confinement on adults and juveniles. The section then provides a short summary of relevant federal and state legal authorities on the issues of prison conditions for individuals with mental health conditions.

A. BACKGROUND

According to the Nebraska Department of Correctional Services 2015-2017 Strategic Plan,¹⁹ inmates are to receive health care services in line with a “community standard of care;” meaning there should be no deterioration of their physical or mental health as a result of their incarceration.²⁰ Yet, given the rates of overcrowding and the lack of sufficient resources, some officials have suggested that many of the inmates remain in prison because of criminal acts that result from the exacerbation of mental health conditions that were left untreated.²¹ When community mental health services are inadequate, many individuals requiring these services become homeless or end up in jail or prison.²² A report by the Treatment Advocacy Center found that American prisons and jails confine individuals with mental health conditions at a rate of more than 10 times the number of patients in psychiatric hospitals.²³ Unfortunately, once in prison, individuals with mental health conditions are “more likely . . . to be held in solitary confinement, and many are raped, commit suicide, or hurt themselves.”²⁴ Moreover, “[c]orrectional facilities may be places that provide structure, . . . but jails and prisons should not be perceived of as places of sanctuary because they do not operate according to a therapeutic orientation and do not necessarily provide relief to persons in distress.”²⁵ In 2016, the Lowenstein Sandler Center for the Public Interest found that “of the 29 states that ban punitive solitary confinement, at least 25 continue to use solitary

¹⁹ Nebraska Department of Correctional Services (NDCS), *Strategic Plan 2015–2017: Building Systems, Improving Performance*, https://corrections.nebraska.gov/sites/default/files/files/39/ndcs_strategic_plan_2015.pdf (last accessed February 15, 2019).

²⁰ According to Bob Houston, former Director of the Nebraska Department of Correctional Services, and Dr. Mark Foxall, former Director of the Douglas County (NE) Correctional Center; in information gathering interview with the Committee Chair, December 3, 2018 in Omaha, NE.

²¹ *Ibid.*

²² Ana Swanson, *A shocking number of mentally ill Americans End up in prison instead of treatment*, Washington Post (April 30, 2015) <https://www.washingtonpost.com/news/wonk/wp/2015/04/30/a-shocking-number-of-mentally-ill-americans-end-up-in-prisons-instead-of-psychiatric-hospitals/>

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Treatment Advocacy Center: Office of Research and Public Affairs, *Emptying the ‘New Asylums’: A Beds Capacity Model to Reduce Mental Illness Behind Bars* (January 2017)

<https://www.treatmentadvocacycenter.org/storage/documents/emptying-new-asylums.pdf>

(citing H. Richard Lamb and Linda Weinberger, *Rediscovering the concept of asylum for persons with serious mental illness*, *Journal of the American Academy of Psychiatry and the Law* (March 2016)).

confinement for other purposes, such as safety concerns,” and that many permit indefinite extensions of time limits.²⁶

In Nebraska, the overlap of prison and mental health care issues occur across the state.²⁷ The Dodge County Jail in Fremont, Nebraska was sued by the family of Troy Sampson, an inmate who committed suicide in 2006²⁸. Sampson was the twenty-first inmate to attempt to commit suicide in six years.²⁹ The inmate’s physician had warned officials that Sampson was suicidal and the inmate and his mother had requested treatment, but none was provided.³⁰ Similarly, in July 2013, an inmate, who had been diagnosed by three psychiatrists and a therapist as having a mental health condition, was released without any follow-up treatment.³¹ The inmate had told doctors and psychologists that he would kill people if released, submitted written requests for mental health treatment 38 times, and asked for psychiatric treatment and civil commitment, which were all denied.³² However, psychologists within the prison had determined that the inmate merely had behavior problems which prevented him from obtaining proper mental health treatment and a potential transfer to an appropriate facility.³³ Within three weeks of the inmate’s release, he had killed four people in Omaha.³⁴ The prisons’ mental health administrator stated he failed to read the diagnosis until after the killings occurred.³⁵ A current suit against the Nebraska Department of Correctional Services asserts that the Department has been maintaining inhumane and dangerous conditions in Nebraska’s prisons, including insufficient care for persons with mental health needs, resulting in constitutional violations of incarcerated individuals.³⁶ The suit alleges that individuals’ requests for mental health assistance are largely unanswered, and some are improperly medicated or unnecessarily placed in solitary confinement, worsening their condition. The lack of treatment has led to serious consequences, including suicide. The lawsuit is pending.

1. *Overcrowding and Staff Shortages*

Nebraska has the second-most-overcrowded prison system in the country, at approximately 273 incarcerated individuals per 100,000 residents.³⁷ Many stakeholders trace the problem to a 2004

²⁶ Natalie J. Kraner et al., Lowenstein Center for the Public Interest, *51-Jurisdiction Survey of Juvenile Solitary Confinement Rules in Juvenile Justice Systems 2* (2016), <https://www.lowenstein.com/files/upload/51-Jurisdiction%20Survey%20of%20Juvenile%20Solitary%20Confinement%20Rules.pdf>.

²⁷ Treatment Advocacy Center, *The Treatment of Persons With Mental Illness in Prisons and Jails: A State Survey* (April 8, 2014) <https://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf>

²⁸ *Luckert v. Dodge County*, 684 F.3d 808 (8th Cir. 2012).

²⁹ *Id.*

³⁰ *Id.* Although the trial jury found the county and its employees liable for Mr. Sampson’s death, a federal appeals court reversed the holding, after determining that the county and its employees were entitled to qualified immunity.

³¹ JoAnne Young, *Multiple psychiatrists tried to get Nikko Jenkins help for mental illness*, Lincoln Journal Star (Sept. 18, 2014) https://journalstar.com/legislature/multiple-psychiatrists-tried-to-get-nikko-jenkins-help-for-mental/article_2c10b3e1-0ef7-5f01-a1a2-d14f9bc59941.html

³² *Ibid.*

³³ *Ibid.*

³⁴ Young, *supra* note 15.

³⁵ *Ibid.*

³⁶ *Sabata v. Nebraska Department of Correctional Services et al.*, Case No. 4:17-cv-3107 (D. Neb. 2017).

³⁷ *The Sentencing Project*. Criminal Justice Facts, State- by-State Data <https://www.sentencingproject.org/the-facts/#map> (last accessed September 19, 2019) (citing U.S. Bureau of Justice 2017 data).

policy change by then-governor Mike Johanns and the state legislature, which eliminated more than 200 inpatient beds in Nebraska's three psychiatric hospitals.³⁸ State officials estimate that approximately 56 percent of the men and women in prison have at least one mental health diagnosis, and 16 percent have a serious mental health condition.³⁹ The state prison population has seen a steady increase over the past several decades, from 1,402 incarcerated individuals in 1980 to 5,235 in 2016.⁴⁰ In August of 2017, the ACLU of Nebraska reported that all but one of the state prisons was over its capacity, with one prison exceeding 300 percent capacity.⁴¹ While the state legislature has imposed a July 2020 deadline for the Nebraska Corrections Department Services to lower its inmate population to 140 percent of capacity, as of December 2018 the overcrowding was "worse than when lawmakers approved a high-profile prison reform package in 2015."⁴² Such challenges are coupled with insufficient staff to provide mental health treatment for inmates,⁴³ and have allegedly led to excessive use of solitary confinement, riots, and assaults on both staff and prisoners.⁴⁴

These issues may be resolved by increasing the budget or reallocating existing resources towards the criminal justice system. The Nebraska Department of Correctional Services is the third leading agency in terms of appropriation increases over the last 20 years, following the Court System (including probation) and the Retirement Board.⁴⁵ Prison overcrowding is an issue that has been

³⁸ Bill Kelly, *Support Grows for Reducing Use of County Jails For Nebraska's Mentally Ill*, NET News (April 26, 2019) <http://netnebraska.org/article/news/1172740/support-grows-reducing-use-county-jails-nebraskas-mentally-ill>

³⁹ JoAnne Young, *Nebraska prisons playing major role in mental health care*, Lincoln Journal Star (June 20, 2018) https://journalstar.com/news/state-and-regional/govt-and-politics/nebraska-prisons-playing-major-role-in-mental-health-care/article_f28ed282-de63-5bf5-89f4-5669b157e17b.html (last accessed February 15, 2019) (citing estimates of Dr. Harbans Deol, deputy director of health services for the Nebraska Department of Correctional Services).

⁴⁰ *The Sentencing Project*. Criminal Justice Facts, State-by-State Data. Detailed State Data, Nebraska. Available at: <https://www.sentencingproject.org/the-facts/#detail?state1Option=Nebraska&state2Option=0> (last accessed February 15, 2019).

⁴¹ Amy Miller, ACLU of Nebraska, *Overcrowding in Nebraska's Prisons is Causing Medical and Mental Health Care Crisis* (August 16, 2017) <https://www.aclu.org/blog/prisoners-rights/cruel-inhuman-and-degrading-conditions/overcrowding-nebraskas-prisons-causing> (last accessed February 15, 2019).

⁴² The Associated Press, *Deadline looks for Nebraska to reduce prison overcrowding* (December 22, 2018) https://www.omaha.com/news/nebraska/deadline-looms-for-nebraska-to-reduce-prison-overcrowding/article_a6fefe3f-e67d-5331-a824-f28e3c8ff4bf.html (last accessed February 15, 2019).

⁴³ Paul Hammel, *Nebraska prisons lack staff to improve mental health treatment for inmates, officials say*, World-Herald Bureau, (October 13, 2016) https://www.omaha.com/livewellnebraska/health/nebraska-prisons-lack-staff-to-improve-mental-health-treatment-for/article_3f94d0d8-84ef-5854-899e-98a4346bb75e.html (last accessed February 15, 2019); see also Otocorg, *Solitary Confinement a mental health issue in Nebraska-Advocacy needed*, Omaha Together One Community, (February 5, 2019) <https://otoc.org/solitary-confinement-a-mental-health-issue-in-nebraska-advocacy-needed/>; Young, JoAnne, American Civil Liberties Union: *Expert reports about Nebraska prisons "quite scathing,"* Lincoln Journal Star (February 19, 2019) https://journalstar.com/news/state-and-regional/govt-and-politics/aclu-nebraska-seeks-class-action-status-for-prison-lawsuit/article_514a94cf-a6ca-5af2-8c57-e801c7beab90.html.

⁴⁴ *Supra*, note 11.

⁴⁵ State of Nebraska Legislature, FY 2019–20/FY 2020–2021: Biennial Budget at 40 (August 2019) <https://nebraskalegislature.gov/pdf/reports/fiscal/2019budget.pdf>

discussed by the state legislature in its August 2019 fiscal discussions.⁴⁶ For the 2019–20 fiscal year, the state of Nebraska has dedicated \$291,767,797 to the Department of Correctional Services, approximately 38.7 percent of the state’s total budget for the year.⁴⁷ The budget includes funding for additional probation and court staff, expanding various specialized courts such as Adult Drug Courts and Veterans Treatment Courts, and creating additional high security housing units.⁴⁸ However, the construction projects would only reduce overcrowding from 163 percent to 135 percent, assuming a static population.⁴⁹ In addition, although funds are provided for the area of “Behavioral Health Aid,” which includes mental health and substance abuse services, it is unclear how much, if any, of the budget is dedicated to increasing such services within prisons.⁵⁰

2. *Solitary Confinement*

Solitary confinement is a term used for isolation as a result of either administrative or disciplinary segregation. Administrative segregation is used while an inmate awaits transfer or must be separated from other inmates for protection.⁵¹ Disciplinary segregation is the most commonly used form of restrictive housing in most states.⁵² While disciplinary segregation is used as a punishment for violating prison rules, some scholars have argued that solitary confinement places inmates at serious risk of significant harm and increases the number of inmate violations and/or further contributes to their declining mental health conditions, often leading to behavioral issues. In addition, combined with the timing of confinement prior to release, a recent study has found that disciplinary segregation is associated with increased odds of recidivism.⁵³ While in solitary confinement, inmates spend the majority of the day alone in a cell (22-24 hours) with limited interaction with other inmates or even staff. Solitary confinement may include restricted recreation, programming, and visitation. Extensive research on the impact of solitary confinement on adult prisoners has shown numerous physiological and psychological reactions such as “hypersensitivity to stimuli; perceptual distortions and hallucinations; increased anxiety and nervousness; revenge fantasies, rage, and irrational anger; fears of persecution; lack of impulse control; severe and chronic depression; appetite loss and weight loss; heart palpitations; withdrawal; blunting of affect and apathy; talking to oneself; headaches; problems sleeping;

⁴⁶ *Ibid.*, 4.

⁴⁷ State Spending Nebraska, 2019–2020 State Budget: fiscal year July 1, 2019–June 30, 2020 <http://www.statespending.nebraska.gov/spent1920/>

⁴⁸ *Supra*, note 29 at 4–5.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, 44–45.

⁵¹ See Tamar R. Birckhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1, 4-5 (2015).

⁵² Benjamin Steiner, *Disciplinary segregation in prison*, Oxford Research Encyclopedia of Criminology and Criminal Justice, Oxford UK, Oxford University Press (2018) at 1–23.

⁵³ H. Daniel Butler, Benjamin Steiner, Matthew D. Makarios, Lawrence F. Travis, III, *An Examination of the Influence of Exposure to Disciplinary Segregation on Recidivism*, Crime and Delinquency Journal (August 13, 2019).

confusing thought processes; nightmares; dizziness; self-mutilation; and lower levels of brain function, including a decline in EEG activity after only seven days in solitary confinement.”⁵⁴

In addition, solitary confinement is imposed on certain groups disproportionately. The authors of a recent study found that prison officials made disciplinary confinement decisions based on a history of misconduct, age, gender, criminal history, prison work, visitation, and time served, rather than the rule violation itself.⁵⁵ Inmates who were more likely to receive a sanction of disciplinary segregation were young, male, previously incarcerated, and serving longer sentences.⁵⁶ In contrast, female inmates, serving time as a sex offender, receiving visits, and working more hours at a prison job were found to be less likely to receive disciplinary segregation sanctions.⁵⁷ Reports have also found that black and Latinx youth, gender non-conforming youth, LGBTQ youth, and youth with disabilities are disproportionately represented in restrictive confinement, and that Black men represent a larger percentage of the restrictive housing population than their representation in the total male custodial population.⁵⁸

3. *Impact of Solitary Confinement on Juveniles*

The negative effects of solitary confinement are significant for any individual, but they carry a particularly heavy weight when imposed on juveniles. The Department of Justice reports that there are over 60,000 juveniles being held in more than 2,000 juvenile facilities around the country, with roughly one in five juveniles being held in isolation.⁵⁹ The Administration of Juvenile Justice under the Department of Justice has limited juvenile isolation to a maximum period of 24 hours.⁶⁰ Solitary confinement has been found to result in serious detrimental effects on youth, inhibiting their physical, psychological, and developmental growth. Because such isolation takes place at a

⁵⁴ See Am. Civil Liberties Union, *Alone and Afraid* (June 2012) at 4.

<https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf>.

⁵⁵ Sam Houston State University, Study examines disciplinary segregation in state prisons Phys.org (June 27, 2017)

<https://phys.org/news/2017-06-disciplinary-segregation-state-prisons.html>

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Eli Hager, *Ending Solitary for Juveniles: A Goal Grows Closer*, The Marshall Project, (Aug. 1, 2017)

<https://www.themarshallproject.org/2017/08/01/ending-solitary-for-juveniles-a-goal-grows-closer> (citing Jessica Feierman, Karen U. Lindell, and Natane Eaddy, *Unlocking Youth: Legal Strategies to End Solitary Confinement in Juvenile Facilities*, Juvenile Law Center (2017)

http://jlc.org/sites/default/files/publication_pdfs/JLC_Solitary_Report-FINAL.pdf; The Association of State Correctional Administrators, The Liman Center for Public Interest Law at Yale Law School, *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell* (2018)/

⁵⁹ Garrett Therolf, *Advocates Seek to End Solitary Confinement Options for Young Offenders*, L.A. Times (May 28, 2015, 4:00 AM), <http://www.latimes.com/local/crime/la-me-solitary-juvenile-20150528-story.html>.

⁶⁰ Dep’t. Justice, Office of Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice*, Standard 4.52 (1980), available at <http://catalog.hathitrust.org/Record/000127687> (“juveniles should be placed in room confinement only when no less restrictive measure is sufficient to protect the safety of the facility and the persons residing or employed therein ... Room confinement of more than twenty-four hours should never be imposed.”)

crucial period of growth and development, children are particularly vulnerable to the harmful effects of solitary confinement.⁶¹

Juveniles held in solitary confinement are unlikely to get necessary out-of-cell physical exercise and nutrition, which can result in stunted growth, weight and hair loss, or loss of menstruation for female juveniles.⁶² As discussed above, solitary confinement can result in serious psychological harm, including increased anxiety and nervousness, lack of impulse control, severe and chronic depression, blunting of affect and apathy, and talking to oneself.⁶³ Like adults, juveniles who are assigned to solitary confinement are typically denied access to programming, such as educational programming, access to reading materials, and the ability to write, call, or visit with loved ones.⁶⁴ Because children experience time differently (*e.g.*, time in isolation feels longer to a child) and they have a greater need for social stimulation, the damage is “more comprehensive and lasting.”⁶⁵

The lingering effects of solitary confinement warrants special attention. Children who are, or who have previously been, held in solitary confinement “are more likely to commit suicide, attempt suicide, and engage in other acts of self-harm.”⁶⁶ The Department of Justice has found that “more than 50 percent of the suicides of children detained in juvenile facilities occurred while young people were isolated alone in their rooms, and that more than 60 percent of young people who committed suicide had a history of being held in isolation.”⁶⁷ These detrimental effects of solitary confinement are exacerbated when imposed on juveniles who have disabilities or experienced previous trauma, which is not unusual for many children in the juvenile justice system.⁶⁸

B. Legal Authority

The following federal and state laws outline relevant laws implicated in the issue of prison conditions in the state for individuals with mental health conditions.

1. Federal Authority

- The Fifth Amendment⁶⁹ to the U.S. Constitution guarantees that the federal government shall not deprive any individual of life, liberty, or property interests without “due process of law.” The Fourteenth Amendment extends this protection to state action.⁷⁰

⁶¹ *Supra*, note 35.

⁶² See Am. Civil Liberties Union & Human Rights Watch, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States* (2012) at 38–40
https://www.aclu.org/sites/default/files/field_document/us1012webwcover.pdf.

⁶³ *Supra*, note 40.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ U.S. CONST. amend. V.

⁷⁰ U.S. CONST. amend. XIV.

- In *Wolff v. McDonnell*, the Supreme Court reviewed a case brought by Nebraska inmates, who challenged the constitutionality of prison policies regarding the deprivation of good-time credit, in proceedings where solitary confinement could be imposed.⁷¹ The Nebraska state statute provided that inmate misconduct could be met with solitary confinement when misconduct was flagrant or serious and that good-time credit may be withheld or forfeited.⁷² Although the state statute did not establish specific disciplinary procedures, the prison regulations outlined investigation and decision-making procedures.⁷³ The *Wolff* Court held that limited due process safeguards should precede placement in solitary confinement.⁷⁴ However, in *Sandin v. Conner*, the Supreme Court held that inmates do not have a protected liberty interest that requires due process before placement in solitary confinement when the confinement was more akin to the conditions of “administrative segregation and protective custody.”⁷⁵
- In addition to its due process protections, the Fourteenth Amendment⁷⁶ also prohibits states from denying “equal protection of the laws” to any person.
- The Eighth Amendment⁷⁷ to the U.S. Constitution prohibits any state from inflicting “cruel and unusual punishment;” Denying access to mental health services or exacerbating current mental health conditions can rise to the level of cruel and unusual punishment.⁷⁸
- The Americans with Disabilities Act⁷⁹ prohibits public entities from discriminating against or denying benefits, services, programs, or activities to any qualified individual on the basis of a disability.
- Section 504 of the Rehabilitation Act of 1973⁸⁰ prohibits discrimination against people with disabilities in any program that receives federal financial assistance.
- The Americans with Disabilities Act, the Rehabilitation Act, and the Individuals with Disabilities Education Act⁸¹ all require state and local governments to accommodate disabilities when they care for children in custody.

⁷¹ *Wolff v. McDonnell*, 418 U.S. 539 (1974).

⁷² *Id.* at 547-48.

⁷³ *Id.* at 552-553.

⁷⁴ *Id.* at 540.

⁷⁵ *Sandin v. Conner*, 515 U.S. 472 (1995).

⁷⁶ U.S. CONST. amend. XIV.

⁷⁷ U.S. CONST. amend. VIII.

⁷⁸ See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (“[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical torture or a lingering death[.] ... In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.”)

⁷⁹ 42 U.S.C. § 12131 et seq.

⁸⁰ 29 U.S.C. § 701 et seq.

⁸¹ 20 U.S.C § 1400 et seq.

- The 21st Century Cures Act provides that the Attorney General may award grants to plan and provide for assessments and appropriate treatment and services to address inmate mental health and substance abuse needs.⁸² Grants also may be awarded to develop, implement, and enhance the availability of mental health care and substance abuse treatment services, alternatives to solitary confinement and segregated housing, provide for mental health screening and treatment for inmates in such restrictive custody, and employee training to identify and appropriately respond to incidents involving inmates with mental health and substance abuse disorders.⁸³
- The Prison Rape Elimination Act⁸⁴ includes provisions that limit disciplinary sanctions for juvenile residents, stating that “[r]esidents may be isolated from others only as a last resort when less restrictive measures are inadequate to keep them and other residents safe, and then only until an alternative means of keeping all residents safe can be arranged.”⁸⁵ The Act requires that that any young person separated or isolated as a disciplinary sanction or protective measure must receive daily large-muscle exercise; access to legally mandated educational programming or special education services; daily visits from a medical or mental health care clinician; and, to the extent possible, access to other programs and work opportunities.⁸⁶

2. *Nebraska State Authority*

- The Nebraska Administrative Code defines disciplinary segregation as “the status of confinement in a cell or other control unit facility separated from general population members insofar as practicable, as a result of a hearing on charges of misconduct pursuant to this Rule. Inmates housed in disciplinary segregation will have significantly fewer privileges than those housed in administrative detention.”⁸⁷
- The Nebraska Administrative Code defines solitary confinement as “the status of confinement in an individual cell having solid, soundproof doors, and depriving the inmate of all visual and auditory contact with other persons.”⁸⁸ Nebraska prohibits the use of solitary confinement for “disciplinary reasons,”⁸⁹ leaving the door open for solitary confinement for administrative reasons, or varying conditions.
- The Nebraska Revised Statute provides that “[e]xcept in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of flagrant or serious

⁸² 42 U.S.C. § 201 et seq.

⁸³ *Id.*

⁸⁴ 34 U.S.C. §§ 30301-30309.

⁸⁵ 28 C.F.R. § 115.342(b).

⁸⁶ 28 C.F.R. § 115.342(b).

⁸⁷ 68 NEB. ADMIN. CODE, ch. 6, § 016.

⁸⁸ 68 NEB. ADMIN. CODE, ch. 6, § 017.

⁸⁹ 68 Neb. Admin. Code, ch. 6, § 017.

misconduct, the chief executive officer may order that an inmate's reduction of term as provided in section 83-1,107 be forfeited or withheld and also that the inmate be confined in disciplinary segregation. During the period of disciplinary segregation, such inmate shall be put on an adequate and healthful diet. An inmate in disciplinary segregation shall be visited at least once every eight hours. No cruel, inhumane, or corporal punishment shall be used on any inmate."⁹⁰

- In 2015, the Nebraska state legislature passed LB598, a law that required the Corrections Department to use the least restrictive means when separating inmates from the general prison population to maintain safety and order.⁹¹ The regulations limit the infractions for which an inmate can be placed in restrictive housing and require regular reviews of inmates in restrictive housing, providing for more accountability.⁹² When an inmate has been isolated for 180 days, the inspector general must be notified (though the inspector general can also initiate a check at any point to determine who is under restriction and how long they have been isolated).⁹³
- Nebraska's Revised Statute, Chapter 83, §134.01 (2016) provides that juvenile facilities "shall submit a report quarterly to the Legislature on the number of juveniles placed in room confinement; the length of time each juvenile was in room confinement, the race, ethnicity, age, and gender of each juvenile placed in room confinement; facility staffing levels at the time of confinement; and the reason each juvenile was placed in room confinement."⁹⁴ The report shall specifically address each instance of room confinement of a juvenile for more than four hours, including all reasons why attempts to return the juvenile to the general population of the juvenile facility were unsuccessful."⁹⁵

III. SUMMARY OF TESTIMONY

A. Status of Nebraska Corrections Department of Correctional Services

1. Overcrowding

At the outset of the briefing, panelists expressed grave concern that Nebraska prisons are severely overcrowded. According to the Nebraska Department of Correctional Services, Nebraska prisons are currently at 160 percent capacity.⁹⁶ There are several facilities in the state that are overcrowded.

⁹⁰ Neb. Rev. Stat. Ann § 83-4114.01 (2) (West 2019).

⁹¹ LB 598, 104th Leg., 1st Sess. (Neb. 2015).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ NEB. REV. STAT. 83-4, §134.01 (2016).

⁹⁵ *Id.*

⁹⁶ Nebraska Department of Correctional Services, *Quarterly Population Summary, January – March 2019*, https://corrections.nebraska.gov/sites/default/files/ndcs_quarterly_data_sheet_fy19-q3_0.pdf.

For example, the intake facility Diagnostic and Evaluation Center, where prisoners start their time in order to be evaluated for which facility they should be transferred to for housing, is at 336 percent capacity; the Nebraska Correctional Center for Women is at 122 percent capacity; and the Omaha Correctional Center is at 197 percent capacity.⁹⁷ While these figures present an alarming concern, panelists stated that the issue of overcrowding within Nebraska's prisons is not new and has been a problem for nearly 20 years.⁹⁸ In recognition of the severe overcrowding and understaffed conditions in Nebraska's prisons, Amy Miller, Legal Director for ACLU Nebraska argued these practices are in violation of the Eighth Amendment for failing to provide care for Nebraska men and women in state prisons.⁹⁹ As such, ACLU and others entities have filed a lawsuit in 2017 against the Nebraska Department of Corrections and the Nebraska Board of Parole along with Nebraska Appleseed, the National Association for the Deaf, and co-counsel firms DLA Piper LLP, Rosen Bien Galvin & Grunfeld LLP.¹⁰⁰

Relative to overcrowding in Nebraska detention centers, Committee members inquired about the difference between the terms "design capacity" and "operational capacity" at Nebraska prisons. Ms. Miller responded that design capacity for Nebraska's prisons is set by architects or engineers and is linked to industry standards across similar facilities. Operational capacity is a subjective number set by corrections administrators who have knowledge of how many people their facilities can handle. She argued that operational capacity is "a substantive number that is chosen by folks that do not wish to have their feet held to the fire on design capacity" and that if prisons are overcrowded, state law will change on eligibility for parole and release.¹⁰¹

2. *Staffing Challenges*

Nebraska prisons are not only overcrowded, but panelists raised concern about understaffing. According to Ms. Miller, there are almost 300 vacant positions for the state prison system, 29 of which are vacant behavioral health services.¹⁰² On the other hand, Bob Houston, former director of the Nebraska Department of Correctional Services said that Nebraska fares better when compared with other states across the country. For example, he pointed to Oklahoma's current staffing ratio: 26 clinical psychologists for 27,000 inmates; and Nebraska has 13 for 4,700.¹⁰³ Current Nebraska Department of Correctional Services director, Scott Frakes, assured the Committee that since he came board, he has been committed to increasing behavioral health staffing. He said that since his tenure, he went from 140 behavioral health positions to 160 for a

⁹⁷ Ibid.

⁹⁸ Amy Miller, Legal Director, ACLU of Nebraska, Written Statement for the Lincoln Briefing before the Nebraska Advisory Committee to the U.S. Commission on Civil Rights, June 13, 2019, at 2 (hereinafter Miller Statement); Jerall Moreland, testimony, *Briefing Before the Nebraska Advisory Committee to the U.S. Commission on Civil Rights, Lincoln, NE*, June 13, 2019, transcript, p. 128 (hereafter cited as *Lincoln Briefing*); Smith Testimony, *Lincoln Briefing*, p. 31.

⁹⁹ Miller Statement, at 2.

¹⁰⁰ *Sabata v. Nebraska Department of Corrections et al – Complaint* (August 16, 2017).

¹⁰¹ Miller Testimony, *Lincoln Briefing*, pp. 63-64.

¹⁰² Ibid., 57.

¹⁰³ Houston Testimony, *Lincoln Briefing*, p. 48.

prison population of 5,400.¹⁰⁴ Dr. Harbans Deol, medical director of the Nebraska Department of Correctional Services added that they have recruited university students from the University of Nebraska Medical Center and hired their first student in 2019.¹⁰⁵

As it relates to staffing, panelists believe the reason for understaffing is because of pay.¹⁰⁶ Senator Steve Lathrop explained that offering a competitive salary for positions in undeniably challenging work environments can attract qualified applicants.¹⁰⁷ In addition, Ms. Miller believes that if the Nebraska Department of Correctional Services was more forthcoming to the Nebraska legislature about needing an increase in appropriations, they would be better situated to attract more staff and fill the vacancies.¹⁰⁸

Clarifying their staffing challenges, Director Frakes of the Nebraska Department of Correctional Services explained that challenges with attracting qualified workers is not unique to Nebraska as his peers have been struggling to recruit behavioral health professionals in the “tough job market.”¹⁰⁹ He also shared that while there are recruiting challenges, he hopes that he will retain 75 percent of his staff who received a substantial increase in compensation.¹¹⁰ In addition to increasing pay, he noted that he implemented recommendations outlined in the Public Counsel report to hire a chief of psychiatry to improve programming and processes.¹¹¹

Ms. Miller argued that not only does pay determine staffing levels, but the work environment plays an important role in retaining staff. She said that mental health professionals reportedly left because they felt it was “too upsetting to work in a system that they think is not providing [] rehabilitation that they are called to do.”¹¹² She believes that employees at these facilities are overworked “[a]nd even the best goodwill of men and women working for the department are finding themselves severely strained by these intensely large numbers of people that they're trying to provide care to.”¹¹³ Ken Smith, staff attorney for Nebraska Appleseed agreed with Ms. Miller on the persistent mental health staff vacancies and that high staff turnover aggravate the already weighty challenges facing the mental health delivery system within the Nebraska Department of Correctional Services.¹¹⁴

In another account noting staffing related issues, a former corrections unit caseworker explained that he interviewed twice for a position with the mental health department of the Nebraska

¹⁰⁴ Frakes Testimony, *Lincoln Briefing*, p. 169.

¹⁰⁵ Deol Testimony, *Lincoln Briefing*, p. 195.

¹⁰⁶ Lathrop Testimony, *Lincoln Briefing*, p. 215; Moreland Testimony, *Lincoln Briefing*, p. 213.

¹⁰⁷ Lathrop Testimony, *Lincoln Briefing*, p. 215.

¹⁰⁸ Miller Testimony, *Lincoln Briefing*, pp. 57-58.

¹⁰⁹ Frakes Testimony, *Lincoln Briefing*, pp. 219-220.

¹¹⁰ *Ibid.*, 219.

¹¹¹ *Ibid.*, 171.

¹¹² Miller Testimony, *Lincoln Briefing*, p. 57.

¹¹³ *Ibid.*, 10.

¹¹⁴ Smith Testimony, *Lincoln Briefing*, p. 32.

Correctional Center for Women, but both times he was not hired despite their dire need to fill the position.¹¹⁵

3. *Delivery of Mental Health Programs*

As Nebraska state prisons experience overcrowding and understaffing, panelists believe the Nebraska Department of Correctional Services also face challenges with responding to the needs of the inmates with mental health issues. A frequently cited example is the Nebraska Department of Correctional Services' handling of diagnosing inmates going through the Diagnostic and Evaluation Center, the intake facility where prisoners receive initial evaluation for which facility they should be transferred to for housing, is beyond its designed capacity of 160 people but has an average daily population of 542.¹¹⁶ Current Nebraska Department of Correctional Services director said they are working to cut down wait list times to process inmates at the Diagnostic and Evaluation Center under 90 days and continue to by conducting a clinical assessment and mental health screening and believe they are improving.¹¹⁷ Additionally, Mr. Smith believes that after an individual is diagnosed, the Nebraska Department of Correctional Services' is not providing appropriate mental health treatment that addresses the issues underlying the specific mental health problems that people in prison are facing.¹¹⁸ He said that a correctional mental health system should have specifically defined levels of care sufficient to meet the needs of its population and along with defined parameters that ensures that inmates with mental health needs are receiving mental health treatment that is appropriate in its intensity, scope, duration and consistent with accepted clinical standards.¹¹⁹ For instance, Mr. Smith said a male prisoner, who had severe episodes brought on by his PTSD and bipolar disorder, was sent to a secure mental health unit when there was no evident clinical benefit to his stay and was later discharged to an even less clinical setting without adequate treatment planning.¹²⁰ Because of this, the individual engaged in serious self-injurious behavior that resulted in his hospitalization.¹²¹ Despite this situation, Director Frakes stated that they have approved a classification tool to ensure that they are sending inmates to the right locations that provides appropriate programming to meet their needs and hired Dr. Harbans Deol as medical director to review treatment programming.¹²²

There are several other examples that point to problematic delivery of mental health treatment. The use of five-point restraints is especially of concern. Ms. Miller detailed an account where an inmate expressed to correctional staff something that could be interpreted as a suicidal thought and was consequently placed in five-point restraints.¹²³ When she was released, she was placed into

¹¹⁵ Matt, Written Statement for the Lincoln Briefing before the Nebraska Advisory Committee to the U.S. Commission on Civil Rights, June 13, 2019, at 1. See *Appendix C*.

¹¹⁶ Smith Testimony, *Lincoln Briefing*, p. 32.

¹¹⁷ Frakes Testimony, *Lincoln Briefing*, p. 172.

¹¹⁸ Smith Testimony, *Lincoln Briefing*, p. 25.

¹¹⁹ Smith Testimony, *Lincoln Briefing*, p. 25.

¹²⁰ Smith Testimony, *Lincoln Briefing*, p. 27. Secure mental health units operates similar to a restrictive housing unit and lack the programming and resources necessary to function at an inpatient or residential level of care.

¹²¹ Smith Testimony, *Lincoln Briefing*, pp. 27-28.

¹²² Frakes Testimony, *Lincoln Briefing*, p. 174.

¹²³ Miller Testimony, *Lincoln Briefing*, pp. 15-16

solitary confinement with no clothing except for a Velcro blanket and was released when staff was available to tend to her.¹²⁴ As part of the Nebraska Department of Correctional Services' efforts to improve services, Dr. Deol stated that their goal is to have zero restraints used on inmates as there are other alternatives that could be used.¹²⁵ Similarly, a former corrections unit caseworker said that he witnessed staff failing to give inmates their medication due to technical issues with the new electronic system used to distribute.¹²⁶ On one occasion, an inmate was taken off of her medication for over a month due to a clerical error and had to go into the mental health unit for stabilization.¹²⁷ Additionally, the mental health unit is supposed to provide daily mental health treatment to inmates, but instead, he said that staff play movies for inmates in replacement of actual therapy.¹²⁸

Another related issue to receiving mental health care within the state prison system is that Mr. Smith believes inmates have no effective means to convey their mental health issues to corrections staff in a timely manner.¹²⁹ There are two mechanisms that facilitate prisoner-to-staff communication on mental health issues: the Inmate Interview Request form and formal grievances.¹³⁰ Prisoners expressed concern regarding the lack of confidentiality, mental health issues being triaged by staff, and delays with communication (or it never reaching appropriate staff).¹³¹ Moreover, correctional officers are not trained mental health professionals and often do not have qualifications to review the request and determine when or if to convey it to mental health staff.¹³²

Similarly, prisoners are required to receive information at orientation on how to submit a formal grievance; however, many report to have little understanding on how the process works, what to use it for, and when to use the process versus submitting an Inmate Interview Request.¹³³ Generally, inmates often do not receive any help from corrections staff and typically receive help from other inmates who have gone through the process.¹³⁴

The lack of correctional staff, including mental health staff, to provide treatment and/or programming to inmates also impacts their schedule to be released on parole. In many cases, inmates miss their opportunity to be released on time because they have not complied with their sentencing.¹³⁵ In some cases, individuals will be waitlisted for several years,¹³⁶ sometimes beyond their parole date which leave them in prison without any rehabilitation services. In one case, an individual, who was in solitary confinement for up to four years was up for parole consideration,

¹²⁴ Miller Testimony, *Lincoln Briefing*, p. 17.

¹²⁵ Deol Testimony, *Lincoln Briefing*, p. 188.

¹²⁶ Matt, Written Statement for the Lincoln Briefing before the Nebraska Advisory Committee to the U.S. Commission on Civil Rights, June 13, 2019, at 1.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ Smith Testimony, *Lincoln Briefing*, p. 28.

¹³⁰ Smith Testimony, *Lincoln Briefing*, p. 28.

¹³¹ Smith Testimony, *Lincoln Briefing*, pp. 28-30.

¹³² *Ibid.*

¹³³ *Ibid.*, 30.

¹³⁴ *Ibid.*, 31.

¹³⁵ Moreland Testimony, *Lincoln Briefing*, p. 151.

¹³⁶ Miller Testimony, *Lincoln Briefing*, p. 66.

but was deferred by the parole board because he did not complete his programming even though programming was not offered to individuals placed in solitary confinement.¹³⁷ Mr. Houston explained that inmates are typically eligible for parole based on one-half the minimum term of his/her sentence and programs are offered as they get closer to their parole date.¹³⁸ He said that by the time they are eligible for parole and programming is made available, these individuals sometimes postpone participating in programs or those programs are filled up.¹³⁹ In some cases, individuals enrolled in those programs do not qualify for parole because those individuals did not show up and/or never completed it.¹⁴⁰

The Nebraska Department of Correctional Services is closely monitored by the state's independent public counsel's office. Jerall Moreland, Deputy Ombudsman for institutions for the Office of Public Counsel discussed a previous audit of state prison facilities' handling of medical services provided to inmates that was triggered by complaints, and the improvements implemented by the Nebraska Department of Correctional Services. He noted that since the release of the report, Director Frakes implemented many of the initiatives discussed in the report, but he believes there are still deficiencies.¹⁴¹ These include: individuals have not been properly diagnosed as developmentally disabled or having a co-occurring diagnosis with mental illness because of the lack of behavioral health staff; there is insufficient testing to identify diagnoses; there is a lack of continuum of care notes inserted in individualized plans in place for diagnosed profiles; the number of seriously mentally ill inmates in the state correctional system is still unknown and is necessary to assess their needs and proper housing arrangements; far too many seriously mentally ill inmates are being placed in solitary confinement; and more work is needed to identify strategies for successful transition to lower-level placements—not only within corrections but also when inmates are transitioning back into the community.¹⁴²

Mr. Moreland outlined a few recommendations to address these issues. He recommended to require statutory language to conduct a department-wide needs assessment in mental health services; and implement training to ensure that the Division of Behavioral Health of the Department of Health and Human Services establish a training program to ensure that staff are equipped to respond to signs of mental illness and substance abuse and to emphasize the importance of reducing the stigma of mental illness. He also recommended that correctional staff receive this training as part of their annual training curriculum requirements¹⁴³ Mr. Moreland also pointed out that the Lincoln Correctional Center should increase out-of-cell time for individuals, despite it being classified as restrictive housing.¹⁴⁴

While many panelists spoke to the deficiencies of the Nebraska Department of Correctional Services, corrections leadership believe they exceed the community standard of care and working

¹³⁷ Ibid., 67.

¹³⁸ Houston Testimony, *Lincoln Briefing*, pp. 60-61.

¹³⁹ Ibid.

¹⁴⁰ Houston Testimony, *Lincoln Briefing*, pp. 60-61.

¹⁴¹ Moreland Testimony, *Lincoln Briefing*, p. 149.

¹⁴² Moreland Testimony, *Lincoln Briefing*, pp. 150-153.

¹⁴³ Moreland Testimony, *Lincoln Briefing*, pp. 150-153.

¹⁴⁴ Moreland Testimony, *Lincoln Briefing*, pp. 153.

to get better at it by implementing several improvements and aspire to implement additional plans.¹⁴⁵ For instance, Director Frakes explained that through an independent needs assessment ordered by the state in 2015,¹⁴⁶ his staff was able to implement many of the recommendations put forth by the Public Counsel's office that dealt with treatment for inmates with substance abuse, sex offenders, and violent offenders. Director Frakes explained that they have greatly decreased their assessment for clinical treatment and that substance abuse assessments have been performed even quicker.¹⁴⁷ This due in part because they use a "validated evidence-based risk needs assessment tool," separate from their clinical assessment, for all inmates to determine the risk to reoffend and then determine the appropriate programming.¹⁴⁸

Other improvements include the providing medications to formerly incarcerated individuals to decrease recidivism. Dr. Deol advocated to provide formerly incarcerated individuals with two refills to ensure they can afford the medications for at least 90 days.¹⁴⁹ They have also addressed the immediate needs of incarcerated individuals who are seriously mentally ill by adopting a hospital-type model to provide acute level of care, subacute level of care, an residential type of care by designating five beds to be open at all times for individuals who are decompensating and implemented a transfer process of that individual.¹⁵⁰

Utilizing technological improvements to meet the needs of inmates with mental health issues, Dr. Deol indicated that they may implement telepsychiatry in the future to remedy the shortage of behavioral health staff.¹⁵¹ In addition, they have moved to electronic medical records and improved their data collection across the agency, especially accounting for the use of solitary confinement that involves details about who is housed, why they were placed there, duration, and accounting of mental health interaction on a weekly basis.¹⁵²

B. Use of Solitary Confinement

Generally, panelists raised concerns regarding the use of solitary confinement. Ms. Miller cited research conducted by Yale Law found Nebraska's number of prisoners in solitary and the length of their stay in solitary, has been among the highest in the nation for several years.¹⁵³ Nebraska is 3rd in the country for percentage of male prisoners in solitary confinement¹⁵⁴ and ranks 12th in the country for female prisoners in solitary confinement.¹⁵⁵ Ms. Miller argued that if nothing is

¹⁴⁵ Frakes Testimony, *Lincoln Briefing*, p. 177.

¹⁴⁶ *Ibid.*, 170.

¹⁴⁷ *Ibid.*, 172.

¹⁴⁸ *Ibid.*, 173.

¹⁴⁹ Deol Testimony, *Lincoln Briefing*, p. 187.

¹⁵⁰ Deol Testimony, *Lincoln Briefing*, p. 189.

¹⁵¹ *Ibid.*, 186.

¹⁵² *Ibid.*, 174.

¹⁵³ Miller Testimony, *Lincoln Briefing*, pp. 17-18. "Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell," The Association of State Correctional Administrators (October 2018), https://law.yale.edu/system/files/documents/pdf/Liman/asca_liman_2018_restrictive_housing_revised_sept_25_2018_-_embargoed_unt.pdf. (Hereafter cited as *Reforming Restrictive Housing*).

¹⁵⁴ *Reforming Restrictive Housing*, p. 18, Figure 6.

¹⁵⁵ *Reforming Restrictive Housing*, p. 20; Figure 8.

done on behalf of the State corrections department, these statistics will increase despite legislative scrutiny, lawsuits, and the number of suicides that have happened.¹⁵⁶

Ms. Miller also expressed concern over the number of suicides attempted and completed so far, which may continue to occur if the use of solitary confinement persists. Sharing a story regarding two suicides committed in Tecumseh Prison, Ms. Miller stated that the prison is required to check on every prisoner on a roster who are in solitary confinement, meaning a visual check of their well-being.¹⁵⁷ However, based on the State's inspector general investigation, some checks were not conducted at all or were checked in a brief manner without an actual examination of the person.¹⁵⁸ In one scenario, an incarcerated individual was not seen by any kind of mental health professional for any of the 40 days prior to the committed suicide.¹⁵⁹ Despite the individual having a known and serious mental health condition, prison officials kept the inmate in solitary confinement for months.¹⁶⁰ Included in this individual's file was written documentation seeking support that stated that no one would help him.¹⁶¹ Ms. Miller believes that if there was adequate staffing, many of the suicides could have been prevented. She said, "between the lack of intervention, the long time in solitary [confinement], and the cries for help, what we believe is that long placement in solitary confinement not only makes currently mentally ill people more likely to commit suicide, but it takes currently healthy people and may push them to suicid[al] thinking."¹⁶² Dr. Deol said that they are improving suicide prevention by creating a suicide prevention hotline for the family members of formerly incarcerated individuals and of inmates.¹⁶³

Panelists warned that even prisoners with no current mental health diagnosis that are placed into solitary confinement are still very likely to develop a mental health diagnosis, even more so for certain demographics. For example, Mr. Smith said that "the current iteration of solitary confinement for youth in Nebraska comes with extreme sensory deprivation at a time in the development of a young life where that is extraordinarily and often irreversibly detrimental to their mental health and well-being."¹⁶⁴ Ms. Miller also said that mental health professionals warn that juveniles who are deprived of peer to peer contact can have a lifelong negative impact and higher chances of recidivism.¹⁶⁵ She cited that youth are in solitary confinement for 248 hours. She went on to state that young men of color are more likely to end up in solitary confinement¹⁶⁶ and that "someone who starts out their sentence at Nebraska Correctional Youth Facility who ends up in solitary confinement is much more likely to then be made permanently damaged in a way that might result in his reoffending later again as an adult."¹⁶⁷

¹⁵⁶ Miller Testimony, *Lincoln Briefing*, p. 18.

¹⁵⁷ *Ibid.*, 13-14.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ Miller Testimony, *Lincoln Briefing*, p. 14.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*, p. 13.

¹⁶³ Deol Testimony, *Lincoln Briefing*, p. 189.

¹⁶⁴ Smith Testimony, *Lincoln Briefing*, p. 70.

¹⁶⁵ Miller Testimony, *Lincoln Briefing*, p. 55.

¹⁶⁶ *Ibid.*, 55-56.

¹⁶⁷ *Ibid.*, 55.

Testimony from formerly incarcerated inmates explained that they experienced difficulty with having normal interactions with people after being in solitary confinement, agreed that it has damaging effects, and called for the end of the use of solitary confinement of adults and especially of juveniles.¹⁶⁸ They also conveyed that “solitary confinement is a regressive and inadequate approach to the human condition.”¹⁶⁹

Former corrections leadership commented on the use of solitary confinement and argued that it is warranted under certain circumstances. For example, Mr. Houston expressed that assaulting staff is “a sure way to get to solitary confinement.”¹⁷⁰ He also explained that when violent interactions arise between inmates, solitary confinement is a better solution to protect them from getting retaliated against from other inmates.¹⁷¹

Other discussion concerning the use of solitary confinement dealt with the practice of double celling people¹⁷² as there may be predatory behavior between prisoners. In response, a member of the public questioned its use because he understood it as a torture tactic if used for more than 15 days.¹⁷³ This understanding was based on discussions with a volunteer he met who was former Iraq prisoner of war.¹⁷⁴

Also included in the discussion of the use of solitary confinement was the state’s recent criminal justice reform that bans the use of solitary confinement on vulnerable populations that include people with a serious mental health diagnosis under 19, pregnant women, and individuals with a developmental disability or traumatic brain injury.¹⁷⁵

C. Re-entry, Discharge, and Rehabilitative Programming for Inmates and Formerly Incarcerated Individuals

Panelists discussed the need for re-entry, discharge, and rehabilitative programs as well as the impact that these programs have on incarcerated and formerly incarcerated individuals. Muirne Heaney, managing attorney at the Legal Aid of Nebraska, provides services to individuals who need legal aid including, ex-offenders, people recently released from incarceration, and people with criminal records. She says, “the conditions prisoners face and the services they receive while incarcerated directly affect their [] ability to truly succeed at re-entry upon leaving prison.”¹⁷⁶ She often sees ex-offenders who struggle with several issues such as getting food stamps, being estranged from families, child support debt, lack of affordable housing, and couching in other

¹⁶⁸ Maria B. Williams, President, Legal Director, Nexus Derechos Humanos Attorneys, Written Statement for the Lincoln Briefing before the Nebraska Advisory Committee to the U.S. Commission on Civil Rights, June 13, 2019, at 1-9.

¹⁶⁹ *Ibid.*, 2.

¹⁷⁰ Houston Testimony, *Lincoln Briefing*, p. 77.

¹⁷¹ *Ibid.*

¹⁷² Placing two inmates in one cell together.

¹⁷³ Fielmann Testimony, *Lincoln Briefing*, p. 132.

¹⁷⁴ *Ibid.*

¹⁷⁵ Miller Testimony, *Lincoln Briefing*, pp. 19-20.

¹⁷⁶ Heaney Testimony, *Lincoln Briefing*, p. 35.

debt.¹⁷⁷ These problems, Heaney explains, are barriers to successful re-entry for ex-offenders with a mental illness but for those without one as well.¹⁷⁸

One of the offerings at Legal Aid of Nebraska includes programming to help reduce child support debt and another focuses on more involved legal matters. The first program was in collaboration with the Department of Health and Human Services to provide programming to inmates to help reduce child support debt upon entry into prison.¹⁷⁹ Through this program Legal Aid was able to eliminate multi-thousand-dollar child support debt for an ex-offender whose identity had been stolen.¹⁸⁰ The second program, the Clean Slate Project, is an active reintegration and re-entry effort aimed at ex-offenders and involves several stakeholders such as community colleges, community organizations, churches, clinical law students, and pro bono law firms and counsel with the goal to use existing law to address barriers ex-offenders face with respect to employment, housing, and access to their families.¹⁸¹ Through this collaborative effort, ex-offenders receive assistance on how to set aside convictions and seal dismissed criminal records, complete a pardon application, and modifying existing child support orders to allow for visitation between ex-offenders and their children.¹⁸²

Offering a similar perspective, Bradley Meurrens, Public Policy Director at Disability Rights Nebraska testified to findings in a 2014 report of Disability Rights Nebraska¹⁸³ which focused on the importance of re-entry and discharge planning and the relationship between community-based mental health service systems and correction facilities.¹⁸⁴ Meurrens believes that not only is re-entry programming critical, but discharge planning is also instrumental to the success of an ex-offender's re-integration into the community.¹⁸⁵ In particular, it is especially important for those with mental illness because they are most vulnerable during their first few weeks; formerly incarcerated individuals with mental illness face a 12-fold increased risk of death in the first two weeks after release and a released prisoner's unmet need for mental health care often precipitates renewed contact with police.¹⁸⁶ Thus, assisting inmates to plan for and build key support networks, as well as to access services, are determinants of a successful transition to the community.¹⁸⁷ Mr. Meurrens recommends that re-entry planning should incorporate long-term efforts to help criminal justice involved individuals build the skills needed to successfully transition back to the community like programming to improve an ex-offender's reading skills and receiving general education.¹⁸⁸ As for discharge planning, he recommends short-term planning before releasing an inmate should include locating housing and planning for employment.¹⁸⁹ In addition, he stated that

¹⁷⁷ Ibid., 37.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid., 39.

¹⁸⁰ Ibid.

¹⁸¹ Ibid., 38.

¹⁸² Ibid., 38-39.

¹⁸³ Meurrens, B; and Hochheiser, J., *Selected Issues in Mental Health and Corrections: A Collection and Summary of Research*. Disability Rights Nebraska (2014). Available at:

<https://www.disabilityrightsnebraska.org/resources/publications.html>

¹⁸⁴ Meurrens Testimony, *Lincoln Briefing*, p. 88

¹⁸⁵ Ibid., 89-90.

¹⁸⁶ Ibid., 90.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

an integrated and comprehensive approach to planning for re-entry is essential to the successful integration of released inmates into their communities and should be multifaceted as inmates with mental illness face unique social, family, and financial situations post release.¹⁹⁰ He also noted that the report calls for a systemic coordinated and integrated framework to service provision because the corrections, mental health, and substance use disorder systems each have their own screening and assessment tools and research-based practices.¹⁹¹ He concluded, “A lack of a formal collaboration among service systems hampers access to vital services and further diminishes prospects for successful re-entry.”¹⁹²

Mr. Meurrens also testified to the relationship between the delivery of community-based mental health services and corrections. He stated that community-based mental health service systems can work to stem the introduction of the individuals with mental illness to the criminal justice system and can be a key component to break the cycle of recidivism.¹⁹³ However, “failing to provide early intervention and adequate ongoing treatment and supports, a mental health systems routine operation perpetuates the crisis cycle that places people at risk of police intervention.”¹⁹⁴ He cautions that when an individual returns to the community after incarceration and they experience disruptions in the continuity of medical care, rates of reincarceration increase and lead to poorer and more costly health outcomes.¹⁹⁵ Panelists added that this is of concern because behavioral and mental health treatment programs are less available and sometimes unavailable in rural parts of the state¹⁹⁶ and it is likely that there are even fewer or no specialized programming exists that is culturally specific, trauma informed, and are equipped to serve the limited English proficient population.¹⁹⁷ On the brighter side, Mr. Meurrens praised the state for reinstating needed Medicaid coverage to ex-offenders as many states across the nation terminate coverage when someone is incarcerated.¹⁹⁸

Offering a service provider perspective, Kasey Moyers, Executive Director of Mental Health Associations of Nebraska testified to the benefits of peer-to-peer counseling her organization offers to inmates and ex-offenders. Mental Health Associations of Nebraska has staff consisting of 45 individuals, some of whom live with mental health conditions, substance abuse disorders, trauma, and many were formerly incarcerated and now work within the Nebraska Department of Correctional Services.¹⁹⁹ The Nebraska Department of Correctional Services allows Mental Health Associations of Nebraska to work with the general population of inmates and those in restricted housing to provide peer support to inmates dealing with significant mental health issues. She believes that “if [inmates] can have somebody that understands ... where they’re coming from, they’ll engage with [Mental Health America staff] a little bit differently.”²⁰⁰ This is evident by testimony received from a Mental Health Association employee, Jason Witmer, who was formerly

¹⁹⁰ Ibid., 91.

¹⁹¹ Ibid., 92.

¹⁹² Ibid., 93.

¹⁹³ Ibid., 94.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid., 95.

¹⁹⁶ Heaney Testimony, *Lincoln Briefing*, p. 35.

¹⁹⁷ Moyer Testimony, *Lincoln Briefing*, p. 106.

¹⁹⁸ Meurrens Testimony, *Lincoln Briefing*, p. 97.

¹⁹⁹ Ibid., 98.

²⁰⁰ Ibid., 99.

incarcerated and benefited from Mental Health America's peer to peer counseling. Witmer said that peer counseling enabled him to break free from his gang loyalty, encouraged him to better himself, and will curb recidivism.²⁰¹ Director Frakes agreed that peer counseling is valuable program and noted that they hope to expand the program to Tecumseh, the Lincoln Correctional Center, and the Women's Facility.²⁰²

Ms. Moyers described four programs offered to inmates. The first is the Wellness Recovery Action Plan, which is centered on empowering and holding inmates responsible for their mental health and substance abuse recovery. Her staff provides this program in four of the state corrections facilities. The second program, Intentional Peer Support, focuses on inmates with long-term sentences. Her staff trained individuals with long-term sentences to provide peer support to inmates and assist in situations that require de-escalation without the use of force. She said that in a few instances, her trainees successfully de-escalated interactions between inmates to the point that did require corrections offices to get involved. In addition, her organization owns two transitional homes for ex-offenders with mental health issues and substance abuse issues. She has also focused on providing support to inmates who have been in restricted housing for long periods of time as part of their individualized discharge planning. Previously, she worked with an individual before he was released and upon release assisted by picking him up from the corrections center and connecting him to resources.

D. Criminal Justice Reform Efforts

Senator Steve Lathrop, chair of the Judiciary Committee, testified to three criminal justice reform bills the Committee worked on in the 2019 legislative session. He discussed two bills that consider the absence of available mental health care in the community which result in incarcerating individuals with mental illness in county jails or in the Nebraska Department of Correctional Services. The first bill, LB376, was introduced by state Senator Curt Friesen and requires or compels the Nebraska Department of Correctional Services to accept, as safekeepers, or under the safekeeper program, people who, as determined by the sheriff or other county official, "cannot safely serve his or her sentence or otherwise be safely kept in a particular place of confinement if the place of confinement is not staffed or equipped to safely keep the prisoner for any reason, but not limited to, the medical or mental health needs of a prisoner or because the prisoner presents a danger to himself, herself, or others."²⁰³ The impetus to this bill stems from the lack of services available beyond Gran Island and because many county sheriffs recognize the need to send individuals with serious mental illness to receive medical attention instead of keeping them incarcerated in county jails.²⁰⁴

The second bill, LB240, was introduced by Senator Matt Hansen and focuses on the mental competency process for a defendant to stand trial. The bill provides that mentally ill defendants may receive care in a facility other than a jail or another state-owned facility, and be committed to

²⁰¹ Witmer Testimony, *Lincoln Briefing*, p. 126.

²⁰² Frakes Testimony, *Lincoln Briefing*, p. 176.

²⁰³ LB 376, 106th Leg., 1st Sess. (Neb. 2019).

²⁰⁴ Lathrop Testimony, *Lincoln Briefing*, p. 157.

private mental health facilities and on an outpatient-basis, in order to receive proper care and to restore competency.²⁰⁵

According to testimony he received, individuals who went through the process waited for as long as 100 days and others who had to wait sometimes waited in solitary confinement to get their competency restored.²⁰⁶ Senator Lathrop argues that state facilities are violating people's civil rights by failing to address this population's needs in a timely manner.

The third bill, LB739, introduced by Senator Tony Vargas addresses the Nebraska Department of Correctional Services' use of restrictive housing on vulnerable populations.²⁰⁷ The bill provides a review process and strategy for allowing a person confined to restrictive housing to appeal to a board independent of the Nebraska Department of Correctional Services.²⁰⁸ Senator Lathrop noted that the bill required fiscal considerations and portions of LB739 were amended into LB686.²⁰⁹ LB686 would prohibit the Nebraska Department of Correctional Services from placing seriously mentally ill inmates and other "vulnerable" prisoners in solitary confinement and would allow judges in areas where there are no problem-solving courts to sentence offenders to intensive probation sentences that could wipe out a criminal charge.²¹⁰ Moreover, the bill would give counties more alternatives of where to send mentally ill inmates besides state-owned treatment facilities, which have long waiting lists.²¹¹

IV. FINDINGS AND RECOMMENDATIONS

Among their duties, advisory committees of the U.S. Commission on Civil Rights are authorized to advise the Commission (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.²¹²

Below, the Committee offers to the Commission a summary of concerns identified throughout the Committee's inquiry. Following these findings, the Committee offers several recommendations that apply to federal agencies and state actors for the Commission to consider.

A. Findings

12. There is no defined system of care within the state prison system. Without these parameters, there is no sound way of ensuring that inmates with mental health needs are receiving mental health treatment that is appropriate in its intensity, scope, duration and

²⁰⁵ LB 240, 106th Leg., 1st Sess. (Neb. 2019).

²⁰⁶ Lathrop Testimony, *Lincoln Briefing*, p., 158-160.

²⁰⁷ LB 739, 106th Leg., 1st Sess. (Neb. 2019).

²⁰⁸ *Id.*

²⁰⁹ Lathrop Testimony, *Lincoln Briefing*, p. 162.

²¹⁰ LB 686, 106th Leg., 1st Sess. (Neb. 2019); Neb. Rev. Stat. § 83-173.03.

²¹¹ LB 686, 106th Leg., 1st Sess. (Neb. 2019).

²¹² 45 C.F.R. § 703.2.

consistent with accepted clinical standards.²¹³ For example, a male prisoner with a mental illness was sent to a secure mental health unit, which operates similar to a restrictive housing unit, and lacks programming and resources necessary to function at an inpatient or residential level of care.

13. Inmates have no effective means to convey their mental health needs to corrections staff in a timely manner. Within the prison system, there are two mechanisms that facilitate prisoner-to-staff communication on mental health issues: (i) Inmate Interview Request form and (ii) formal grievances.²¹⁴ Prisoners expressed concern regarding the lack of confidentiality, mental health issues being triaged by staff, and delays with communication (or it never reaching appropriate staff). In a related treatment access issue, correctional officers are not trained mental health professionals and often do not have qualifications to review the request and determine when or if to convey it to mental health staff. This is of concern because prisoners are at risk of having mental health issues persist while they are deprived from communicating with staff at the facility who are situated to provide psychological or psychiatric treatment.
14. Prisoners are required to receive information at orientation on how to submit a formal grievance, however many report to have little understanding on how the process works, what to use it for, when to use the process versus submitting an Inmate Interview Request (IIR). This is particularly acute at the youth facility. Generally, inmates often do not receive any help from corrections staff. The most common way an inmate with a mental health issue receives help in filling out the IIR is by seeking and receiving it from another inmate.²¹⁵
15. While the Nebraska Department of Correctional Services is working to cut down wait list times to process inmates at the Diagnostic and Evaluation Center under 90 days by conducting clinical assessments,²¹⁶ inmates continue to experience long waitlists to receive appropriate treatment planning.²¹⁷ This is especially of concern because testimony indicated that inmates have waited months to be assigned to appropriate detention centers and receive appropriate treatment.
16. Inmates who are scheduled to be considered for parole often miss their opportunity to be released. The most cited reason is because they have not complied with their sentencing, which often requires receiving mental health treatment and/or rehabilitative programming, and miss the opportunity to be released.²¹⁸ In some cases, individuals will be waitlisted for several months because of a shortage in personnel to provide treatment and/or rehabilitative

²¹³ Smith Testimony, *Lincoln Briefing*, p. 25.

²¹⁴ *Ibid.*, 20.

²¹⁵ Smith Testimony, *Lincoln Briefing*, p. 31.

²¹⁶ Frakes Testimony, *Lincoln Briefing*, p. 172.

²¹⁷ Smith Testimony, *Lincoln Briefing*, p. 25.

²¹⁸ Moreland Testimony, *Lincoln Briefing*, p. 151.

programming,²¹⁹ sometimes beyond their parole date which leave them in prison without any rehabilitation services.

17. Nebraska uses Medicaid to provide cost-effective mental health services to individuals after they have been released and suspect Medicaid eligibility for inmates as opposed to terminating Medicaid coverage when they are incarcerated. This is important because it can more easily ensure that enrollment is reinstated when incarcerated individuals are released and that formerly incarcerated individuals can immediately access health care without a gap in coverage.²²⁰
18. Nationwide, state detention centers and county jails have become the de facto mental health institutes of the state.²²¹ In Nebraska state prisons are overcrowded and experience challenges with responding to the needs of the inmates with mental health issues. According to the Nebraska Department of Correctional Services, state prisons are at 160 percent capacity and the most overcrowded facility is the Diagnostic and Evaluation Center.²²² Fifty-six percent of Nebraska inmates suffer from a mental illness, 16 percent suffer from a serious mental illness, and 25 percent of male inmates and 50 percent of female inmates are on psychotropic medication.²²³
19. Sheriffs expressed concern over incarcerating individuals with behavioral and mental illness because they are unequipped to address their needs. Moreover, there are little to no community alternatives to provide care to these individuals especially in rural areas.²²⁴
20. Nebraska has a severe shortage of mental health and behavioral health care providers.²²⁵ In addition, behavioral and mental health treatment programs are less available and sometimes unavailable in rural parts of the state.²²⁶ Not only is there a shortage of behavioral health and mental health providers across the state,²²⁷ it is very likely the state has even fewer or no specialized programming exists that is culturally specific, trauma informed, and serves the limited English proficient population.²²⁸
21. Testimony indicated the use of solitary confinement has damaging effects on all prisoners, especially for vulnerable populations, and should be discouraged. Prisoners with mental

²¹⁹ Miller Testimony, *Lincoln Briefing*, p. 66.

²²⁰ Meurrens Testimony, *Lincoln Briefing*, p. 97.

²²¹ Deol Testimony, *Lincoln Briefing*, p. 179.

²²² Miller Testimony, *Lincoln Briefing*, p. 10.

²²³ Heaney Testimony, *Lincoln Briefing*, p. 36. <https://www.apnews.com/cd7af73286204fc7a37e3dfeaed08f98>

²²⁴ Lathrop Testimony, *Lincoln Briefing*, pp. 156-157.

²²⁵ *Ibid.*, 78; Legislative Counsel Bureau, *Regionalizing the Mental Health System in Nebraska: Considerations and Options*, p. 7, available at:

<https://www.leg.state.nv.us/Division/Research/Publications/InterimReports/2017/Bulletin17-06.pdf>; Lathrop Testimony, *Lincoln Briefing*, p. 155.

²²⁶ Heaney Testimony, *Lincoln Briefing*, p. 35.

²²⁷ Lathrop Testimony, *Lincoln Briefing*, p. 155.

²²⁸ Moyer Testimony, *Lincoln Briefing*, p. 106.

health conditions placed in solitary confinement can exacerbate their conditions even further. Placing youth in solitary confinement at a time when their brains are still developing make them susceptible to the prolonged psychological stress that can inhibit development of parts of the brain and can cause irreparable damage. Even prisoners with no current mental health diagnosis that are placed into solitary confinement are still very likely to develop a mental health diagnosis.

22. The occurrence of completed suicides and attempted suicides because of the lack of corrections staff to monitor and treat individuals is concerning. Testimony indicated that inmates who did not receive well-being checks and/or were not diagnosed with co-occurring mental health disorders have significant safety implications.

B. Recommendations

Among their duties, advisory committees of the Commission are authorized to advise federal agencies (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws; and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.²²⁹ In keeping with these responsibilities, and in consideration of the testimony heard on this topic, the Nebraska Advisory Committee respectfully submits the following recommendations to the Commission:

7. The U.S. Commission on Civil Rights should send this report and issue recommendations to the U.S. Department of Justice to:
 - a. Enforce the Americans with Disabilities Act and ensure all corrections facilities are ADA accessible.
 - b. Enforce the Civil Rights of Institutionalized Persons Act, particularly the standards concerning juveniles.
8. The U.S. Commission on Civil Rights should send this report and issue recommendations to the U.S. Department of Health and Human Services to:
 - a. Enforce the Affordable Care Act and provide any other source of care for the mental health of inmates and released prisoners that is available to it.
9. The U.S. Commission on Civil Rights should send this report and issue recommendations to the U.S. Congress to:
 - a. Provide appropriations for the Bureau of Justice Assistance Edward Byrne Memorial Justice Assistance Grant Program to fund state and local jurisdictions with critical funding necessary to support a range of program areas including law enforcement, prosecution, indigent defense, courts, crime prevention and

²²⁹ 45 C.F.R. § 703.2 (a).

education, corrections and community corrections, drug treatment and enforcement, planning, evaluation, technology improvement, and crime victim and witness initiatives and mental health programs and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams.

10. The U.S. Commission on Civil Rights should send this report and issue recommendations to the Nebraska Legislature to:
 - a. Continue to expand Medicare access.
 - b. Provide equitable funding for mental and physical health services to respond to the absence of funding in rural areas of the state.
 - c. The Judiciary Committee and the Appropriations Committee of the Nebraska State Legislature should commission an independent study to determine the estimated cost of fully addressing the mental health needs of incarcerated individuals in the state. The study should:
 - i. include consideration of addressing the mental health impact of current conditions such as overcrowding;
 - ii. include consideration of legal financial vulnerabilities facing the state if the state fails to address such concerns;
 - iii. be initiated within 120 days of the publication of the Committee's report.
 - d. Provide any other source of care to address the mental health of inmates and released prisoners that is available.
 - e. Provide adequate funding to expand the Omaha Correctional Center as it currently has eight beds per cell and is not an ADA accessible unit.
 - f. Pass comprehensive criminal justice reform that includes examining each point of contact people with mental illnesses have with the criminal justice system, measures that would decrease the number of individuals serving time in state prisons, and use of solitary confinement.
 - g. Continue funding re-entry and rehabilitative programs in the community, especially those that are culturally competent and trauma-informed.
 - h. Pass legislation to abate use of consecutive periods in solitary confinement on juveniles.
11. The U.S. Commission on Civil Rights should send this report and issue recommendations to the Nebraska Governor to:
 - a. Require mandatory training at all levels of the judicial and legal system on serious mental illness and crisis intervention.

- b. Provide appropriations to the Nebraska Department of Correctional Services and local jails to increase funding to hire and retain corrections staff that includes behavioral health professionals.
12. The U.S. Commission on Civil Rights should send this report and issue recommendations to the Nebraska Department of Correctional Services to:
- a. Commit to and develop creative incentives to hire and retain behavioral health staff.
 - b. Require law enforcement to receive training on how to identify persons with mental illness and crisis intervention skills to de-escalate a mental health crisis.
 - c. Review policy on use of solitary confinement and restrain policy.
 - d. Revise procedure for people with mental illnesses to communicate with corrections staff in a confidential and expeditious manner.
 - e. Develop tracking system to identify how many seriously mentally ill inmates are in the prison and jail system. Accounting for these individuals will assist with addressing accessibility to mental health programs and behavioral health programs.
 - f. Comply with the Civil Rights of Institutionalized Persons Act, particularly the standards concerning juveniles.
 - g. Continue providing suicide prevention to support formerly incarcerated and their families.
 - h. Expand peer to peer mentoring programs for inmates.
 - i. Review suicide prevention policy and take appropriate steps to decrease the number of suicides.

V. ADDENDUM: PRISONS AND THE COVID-19 PANDEMIC

(Included July 27, 2020)

In March 2020, just as our report concerning mental health care for people who are incarcerated under the authority of the Nebraska Department of Correctional Services (NDCS) was submitted by this Committee to the US Commission on Civil Rights, the novel coronavirus, or COVID-19, arrived. COVID-19 poses an existential challenge to health care systems even under the most ideal of circumstances, but in the context of incarceration—with major recorded outbreaks in Tennessee, Arkansas, New Jersey, Michigan, Texas, and elsewhere—this risk has the potential to be higher than that for the general population. Related to some of the areas of specific concern raised by our

report, that risk is not merely higher, but exponentially so. With that in mind, we have taken the decision to attach and affix to its substantive conclusions this additional statement on the potential implications of COVID-19 for our general findings. In crafting this statement, we note that COVID-19's implications for physical health are substantial, but in keeping with the mental health emphasis of the earlier main report, our comments here focus on issues like worry, isolation, and sense of vulnerability that COVID-19 and the response to it can exacerbate. In these domains, the case number of identified infections can substantially undercount a much broader effect on the mental well-being of inmates.

According to the NDCS Coronavirus Health Update of July 3rd, 2020, there were only 8 positive tests out of 894 tested, a positivity rate of 0.89%. However, a closer examination of the methodology for this testing suggests some areas of concern for its efficacy in determining how widespread COVID-19 may be among staff members and particularly among the population of people who are incarcerated. The update indicates that testing for people who are incarcerated occurs in terms of three triggers. These are (a) medical indication, pursuant to work release, (b) close contact with a COVID-19 patient, and/or (c) prior to a medical procedure. Our report, while focused on mental health, noted that there was a potential for some communicative breakdowns in how people who are incarcerated would be able to access available health care services. To the extent that such structural impediments and inefficiencies are occurring, they would certainly also impact the likelihood that a given inmate would be tested. First, only a limited segment of people who are incarcerated would be eligible for work release. Second, the only means to contact trace pursuant to a known COVID-19 patient would be if that patient's condition were indeed known, which means that such a person would have to meet these criteria themselves. Finally, only a certain percentage of people who are incarcerated would presumably be undergoing a "medical procedure" and, without a clear definition of what that term covers (it could range from ANY medical interaction to only the most invasive like surgery), it is unclear what the scope of testing coverage would be in terms of that rubric. In some studies, half or slightly more than half of those infected are asymptomatic, with another 20-30% having mild-to-moderate symptoms. Those who are symptomatic have relatively long periods before the visible onset of those symptoms and remain potential vectors for infection even after symptoms have been ameliorated. We have some concerns about the capacity of the current system to determine how many people who are incarcerated might be COVID-19 positive in any case.

On March 25th, 2020, NDCS Director Scott Frakes and NDCS Medical Director Dr. Harbans Deol made a video for the inmates where they laid out their strategies for managing COVID-19 among this population. At the time of the video, no cases had been officially recorded within the system. They emphasized washing hands and cleaning surfaces and noted the provision of additional soap for that. They stated that a person currently incarcerated who had symptoms associated with COVID-19, or who believed they did, should seek medical attention. The success of this proposed strategy, as we mentioned, rests upon the effectiveness of the communicative process for the medical needs of said population reaching the medical professionals in a timely manner. Dr. Deol

stated “We have, we have ordered test kits and they will be arriving, and we will be testing people based on the clinical conditions. So {If} there is a need, we will test folks as well. I do want to make sure, assure you, that if you do occur [experience] some of those symptoms we talked about, you really need to seek medical attention as you’ve done in the past.” In the case of COVID-19, the presence of overt symptoms is generally understood to constitute evidence of prior infection that could have been as much as two weeks before, with a high likelihood of asymptomatic spread in the meantime. It is clear not everyone will be tested, and that testing will proceed upon the presence of certain “clinical conditions.” There is no explicit definition of these, but the discussion proceeds next to the need for swift action by those inmates presenting symptomatically. If the “clinical conditions” prompting testing are the presence of symptoms among inmates who so report, there could and would likely already be additional infected inmates.

Then, there is the question of isolation. Dr. Deol said “I do want to also make sure, that we might, there might be {the} possibility, that we might have to isolate some folks...” No further elaboration is made as to the circumstances under which inmates might be isolated. One must assume that included first and foremost among the candidates would be those inmates with positive test results and other inmates who need to be quarantined because of exposure to the former. How that would work, given the inherent structure and spatial limitations of correctional facilities (which, as our main report notes, are currently overcrowded), as well as the expensive higher level of care necessary for COVID19 patients, is an important question. Reinforcing this concern is the fact that the video did not mention “social distancing”. It **was** mentioned in analogous video material for visitors, staff, and administration, but not for the population in question, likely owing to the particularities of their confinement. Nor were masks mentioned, which complicates matters further. (This may be attributable to the fact that the science favoring mask wearing emerged after March.) Dr. Deol indicated that COVID-19 is marked by its proliferation through airborne droplets and could be inhibited by the wearing of facial protection. While staff will employ these, people who are incarcerated do not appear to have that option.

The good news to this point (July 2020) is that, despite some of these areas of general concern, actual viral spread among said population is officially stated as being under control in NDCS. The first case among inmates was recorded as May 12th and, as of now, the official count has eight inmates infected. Yet, even with the small numbers so far, COVID-19 has implications for the matters we discussed in our report, acting largely as a “multiplier.” Specifically:

We believe that many of the mental health matters discussed in our original report might be dealt with in part by the cultivation of a closer relationship between NDCS, the Nebraska Department of Health and Human Services (DHHS), and/or UNMC. For example, they might be able to assist with the monitoring of conditions related to both mental health and COVID-19, as well as the interplay between them.

Two of the important known “triggers” for mental health patients are anxiety and fear. COVID-19 clearly confronts anyone, including people who are incarcerated, with substantial occasion for

both. It is therefore necessary that whatever systems of monitoring are already in place with regard to the mental health issues discussed in the main report, be redoubled, as any negative conditions are likely to be exacerbated by concern about the virus and any and all measures that are being taken on this population's behalf to treat it and/or contain its spread. This includes fear held by said population about becoming ill themselves, but also their worry about loved ones and the sense of powerlessness to do anything about from behind prison walls.

The potential need for COVID-19-related isolation has the likelihood of even further eroding the capacity of the system to dedicate facilities or parts of facilities for the exclusive and effective provision of mental health services. NDCS facilities are substantially overcrowded at this point. The March 2020 NDCS Quarterly Report described the system as at 158% of design capacity (and counted 36 behavioral health staffing vacancies). The process of finding space (and staffing) to negotiate a COVID-19 response (including a mental health response) has had to proceed in the face of existing overcrowding and other challenges.

In cases where mental illness and COVID-19 overlap, there is danger in the isolation imposed by the disease. It potentially becomes a new rationale for solitary confinement. Our main report details the potential health risks involved in solitary confinement. Preliminary studies involving the necessary isolation of COVID-19 patients who are not presently incarcerated, chronicle negative mental health effects. Several health care facilities are now trying to get the most able of quarantined COVID-19 patients out of bed for short periods during the day, making sure that they have some modicum of human interaction and agency, trying to mitigate these effects. Should mental illness and COVID-19 overlap in this way in the NDCS context, it will be necessary to have both physical health and behavioral health specialists involved in administering care across both populations.

The latter point reinforces the relative scarcity of personnel and resources to maintain and recruit personnel who can serve in these vital capacities.

To our general recommendations in the main report, let us add just two point here. First, COVID-19 is likely having mental health effects in NDCS facilities that, in turn, the system needs to attend to. But second, let us clarify that the necessity for resources for the COVID-19 response, cannot be 'generated' by siphoning any additional resources away from the already challenged effort to shore up mental health care in the NDCS system. COVID-19 means that there is more to do, but it does not undo any of the needs for attention to the mental health of people who are presently incarcerated that was already noted in our main report.

VI. APPENDIX

A. June 13, 2019 Briefing Agenda & Minutes

B. June 13, 2019 Briefing Transcript

C. Written Testimony

1. *Amy Miller, Legal Director, ACLU*
2. *Bradley A. Meurrens, Public Policy Director, Disability Rights Nebraska*
3. *Mario B. Williams and Jenipher R. Jones, NDH Lawyers*
4. *Charity Upchurch, Member of the Public*
5. *Jeremiah, Member of the Public*
6. *Teresa, Member of the Public*
7. *Matt, Member of the Public*
8. *Jessica Stoner, Member of the Public*

Appendix documents are available at:

<https://www.facadatabase.gov/FACA/apex/FACAPublicCommitteeDetail?id=a0zt0000001hMKXAA2>

**Nebraska Advisory Committee to the
United States Commission on Civil Rights**



U. S. Commission on Civil Rights

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