



April 10, 2017

Governor Pete Ricketts  
P.O. Box 94848  
Lincoln NE 68509-4848

Dear Governor Ricketts:

We write regarding conditions of confinement within the Nebraska Department of Correctional Services (“DCS”) that violate state and federal law as well as the United States Constitution. These unlawful conditions persist despite repeated demands for improvement from experts, advocates, and others. Failure to remedy these legal violations—whether by implementing safe and effective techniques to reduce the prison population through diversion, earned credits, or parole or probation reform, or by immediately infusing adequate funds into the Department or by dramatically overhauling conditions of confinement at the facilities—will result in the undersigned filing suit. In the hope that this serious situation can be resolved without resort to litigation, we ask that you take immediate action to remedy the violations of law described in this letter.

The undersigned have committed to joining our expertise to bring suit if necessary. Our team includes the following:

Michael Bien is managing and co-founding partner of Rosen Bien Galvan & Grunfeld LLP where he concentrates his litigation practice on complex commercial litigation, class actions, constitutional and civil rights law. Mr. Bien was counsel in the landmark decision *Brown v. Plata*, in which the United States Supreme Court ordered California to significantly reduce the level of crowding in its prisons.

Howard A. Rosenblum is the Chief Executive Officer of the National Association of the Deaf, a nonprofit organization designed to empower Deaf and Hard of Hearing individuals. Mr. Rosenblum’s legal career has been focused on disability rights.

David Fathi is Director of the ACLU National Prison Project, which brings challenges to conditions of confinement in prisons, jails and other detention facilities. Mr. Fathi has worked in state and federal courts as well as international bodies on human rights violations.

Becky Gould is the Director of Nebraska Appleseed Center for Law in the Public Interest, a nonprofit organization that fights for justice and opportunity for all Nebraskans.

Danielle Conrad is Executive Director of ACLU of Nebraska, the state affiliate of the American Civil Liberties Union.

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Amy Miller is Legal Director for ACLU of Nebraska, the state affiliate of the American Civil Liberties Union.

The information in this letter is based on national and local studies of DCS, a review of materials provided via open records requests to ACLU, and our own interviews with current prisoners and tours of DCS facilities.

As detailed below, these sources reveal multiple violations of rights guaranteed by the Constitution, Nebraska statutes, and federal civil rights laws. The confinement of Nebraskans in DCS facilities under current conditions has no place in a civilized society and is creating unsafe conditions for the men and women in custody as well as the state employees working in those facilities.

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## APPLICABLE LEGAL STANDARDS

The Supreme Court has described the protections that convicted prisoners receive under the Eighth Amendment: “When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being...Contemporary standards of decency require no less.” *Helling v. McKinney*, 509 U.S. 25, 31-32 (1993) (quoting *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 199-200 (1989) and *Estelle v. Gamble*, 429 U.S. 97, 103-07 (1976)).

Further, Nebraska statutes require that DCS provide prisoners a community standard of health care. *See* Neb. Rev. Stat. 83-4,153 et seq.

When a violation of prisoners’ constitutional rights has been established, federal courts have plenary authority to order an effective remedy, including a reduction in the state’s incarcerated population. *See Brown v. Plata*, 563 U.S. 493 (2011) (affirming order that California reduce its prison population to 137.5% of design capacity within two years).

## UNLAWFUL CONDITIONS

DCS has long been overcrowded far beyond the number of prisoners that the facilities were designed to safely hold. Throughout the system, DCS facilities are at nearly 160% of design capacity, while some facilities are at nearly 200% of capacity and the Diagnostic and Evaluation Center is at over 270% of capacity.<sup>1</sup> This level of overcrowding is similar to the crisis California prisons were facing when the U.S. Supreme Court ordered the state to cut its prison population in *Brown v. Plata*.

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<sup>1</sup> Nebraska Department of Correctional Services Quarterly Data Sheet: <http://www.corrections.nebraska.gov/pdf/datasheets/2016/Datasheet%202016%204th%20Qtr.pdf>

The overcrowding in Nebraska has resulted in riots, deaths, escapes, assaults on staff and prisoners, and prisoners failing to get needed rehabilitation and programming. As described below, several specific conditions at DCS facilities violate federal and state law: (1) delay or denial of needed medical care, (2) delay or denial of needed mental health care, (3) violation of the rights of prisoners with disabilities under the Americans with Disabilities Act and the Rehabilitation Act of 1973, and (4) lengthy periods of solitary confinement.

### Medical Care

DCS facilities are woefully understaffed, lacking both sufficient health care staff on-site and adequate access to outside specialists and medical facilities. According to the most recent available data, DCS has at least 19 medical staff vacancies, meaning it lacks doctors, dentists, nurses and other essential medical professionals.<sup>2</sup> These levels of vacancies have not significantly changed since the 2014<sup>3</sup> and 2015<sup>4</sup> reports by the Department of Correctional Services Special Investigative Committee.

We have reviewed medical records of prisoners who have waited months to be seen by a doctor for a prescription they were receiving before being incarcerated, prisoners who have waited half a year for treatment of a fractured bone, and many other prisoners whose serious medical needs have gone unmet. The system is simply too overcrowded and too understaffed to promptly and effectively deal with serious medical needs, leaving prisoners to grow sick or debilitated and increasing their long term need for care.

### Mental Health Care

DCS facilities have an acute need for more mental health staff to address the significant unmet needs of prisoners who are mentally ill. According to the Department of Justice, approximately 61% of state prisoners have a mental health diagnosis.<sup>5</sup> This means the need for adequate mental health staff is acute at DCS. People who have been placed in solitary confinement for long periods (discussed below) also have additional need for mental health counseling and treatment.

Staffing levels for mental health and behavioral health staff have been inadequate for several years. According to data provided by DCS in June 2016, there were 34

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<sup>2</sup> “2015/2016 Annual Report,” Office of Inspector General of the Nebraska Correctional System p. 16.

[http://nebraskalegislature.gov/FloorDocs/104/PDF/Agencies/Inspector\\_General\\_of\\_the\\_Nebraska\\_Correctional\\_System/600\\_20160915-141014.pdf](http://nebraskalegislature.gov/FloorDocs/104/PDF/Agencies/Inspector_General_of_the_Nebraska_Correctional_System/600_20160915-141014.pdf)

<sup>3</sup> [http://www.nebraskalegislature.gov/pdf/reports/committee/select\\_special/lr424\\_2014/lr424\\_report.pdf](http://www.nebraskalegislature.gov/pdf/reports/committee/select_special/lr424_2014/lr424_report.pdf)

<sup>4</sup> [http://www.nebraskalegislature.gov/pdf/reports/committee/select\\_special/lr34\\_2015/lr34\\_report.pdf](http://www.nebraskalegislature.gov/pdf/reports/committee/select_special/lr34_2015/lr34_report.pdf)

<sup>5</sup> “Mental Health Problems of Prison and Jail Inmates,” Bureau of Justice Statistics Special Report. December 2006. <https://www.bjs.gov/content/pub/pdf/mhppji.pdf>

vacancies out of 161 positions—and more psychologists have left their positions since then.<sup>6</sup> These levels of vacancies have not significantly changed since the 2014<sup>7</sup> and 2015<sup>8</sup> reports by the Department of Correctional Services Special Investigative Committee.

We have reviewed mental health records of prisoners who have been taken off anti-psychotic medications and given nothing in their place, prisoners who following a serious suicide attempt have been denied mental health counseling, and prisoners who have been medicated into a nonresponsive zombie-like state. The system is too overcrowded and too understaffed to promptly and effectively deal with serious mental health needs, leaving prisoners to decompensate and become more acutely mentally ill, increasing their long term need for care.

### Violations of the ADA and the Rehabilitation Act

DCS facilities are not meeting their obligations under the American with Disabilities Act and the Rehabilitation Act of 1973. For example, the Lincoln Correctional Center is not wheelchair accessible. DCS' own commissioned expert report by Dr. Bruce Gage (2015) acknowledged this failure and the fact that the lack of wheelchair accessibility limits access to the mental health unit established there.

We have interviewed prisoners who are blind, are deaf, or use a wheelchair, all of whom have needs for auxiliary aids and services that are going unmet. These prisoners are not receiving the accommodations they need and to which they are legally entitled.

### Solitary Confinement

Nebraska DCS facilities are using solitary confinement for periods far longer than recommended by mental health experts and have more people placed in solitary than most states.

Whether it is labelled solitary confinement, restrictive housing, or segregation, DCS has been placing far too many people in isolation for too long. Even short terms in solitary can result in significant mental health harms. Ultimately, people placed in solitary are not deterred from future bad behavior—solitary increases the chance they may behave violently in the future.<sup>9</sup> Indeed, the “behavior of incarcerated people [in solitary] as a reaction to the strains, frustrations, and pains of imprisonment combined

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<sup>6</sup> Annual Report of the Inspector General, id.

<sup>7</sup> See FN 2.

<sup>8</sup> See FN 3.

<sup>9</sup> “Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives,” Vera Institute (May 2015), page 20. <http://cloud.quallsbenson.com/uploads/solitary-confinement-common-misconceptions-and-emerging-safe-alternatives.pdf>

with little access to mitigating factors” can “lead them to become more, not less, violent.”<sup>10</sup>

According to the Vera Institute of Justice, during a two-year period ending June 2015, the average daily population in any type of restrictive housing was 13.9% of the total DCS population.<sup>11</sup> Most states have single digit percentages in restrictive housing.<sup>12</sup> The Vera Institute study revealed that DCS is placing many people in solitary for trivial offenses such as “swearing” and “disobeying an order.”<sup>13</sup>

We have interviewed prisoners with a developmental disability, prisoners who are blind, three teenagers, prisoners with an untreated psychotic disorder and countless others who have been subjected to solitary confinement for three, six, or twelve months. More disturbingly, we have interviewed prisoners who have been in solitary for two, three, four or five years. The system is too overcrowded and too understaffed to provide appropriate care to provide rehabilitation to these individuals to safely transition them back to general population.

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## CONCLUSION

The need for action to remedy the crisis in Nebraska’s prisons has been well documented for many years. A few examples since 2014 include reports issued by the Department of Correctional Services Special Investigative Committee, by the Justice Reinvestment Working Group, by the Nebraska Ombudsman, by the Nebraska Inspector General of Prisons, by the Vera Institute, by the National Institute of Corrections, by Disability Rights Nebraska, and by the ACLU of Nebraska.

Despite the fact that your administration has been on notice about the severe problems within DCS facilities, the conditions have not improved and constitute cruel and unusual punishment. The continued pattern of inhumane treatment and deficient conditions at DCS facilities present an invitation to legal action. Current conditions jeopardize public safety, the wellbeing of corrections staff, and the health, safety, and lives of those serving a sentence.

We urge you to immediately declare an emergency pursuant to Neb. Rev. Stat. 83-962, allocate emergency funding to the Department of Corrections to permit DCS to

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<sup>10</sup> Id.

<sup>11</sup> “The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the Nebraska Department of Correctional Services.” November 2016.  
<http://www.corrections.nebraska.gov/pdf/Vera%20Institute%20Final%20Report%20o%20NDCS%2011-01-16%20v2.pdf>

<sup>12</sup> Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison,” The Liman Program, Yale Law School, Association of State Correctional Administrators. August 2015.  
[https://law.yale.edu/system/files/documents/pdf/asca-liman\\_administrative\\_segregation\\_report\\_sep\\_2\\_2015.pdf](https://law.yale.edu/system/files/documents/pdf/asca-liman_administrative_segregation_report_sep_2_2015.pdf)

<sup>13</sup> “Safe Alternatives,” id.

fill the current staff vacancies, and with all deliberate speed correct the constitutional and legal violations enumerated above. In the fall of 2016 ACLU of Nebraska requested the opportunity to meet with you and about these issues and you declined the meeting. You have continued to oppose needed remedial legislation to address the overcrowding crisis and have failed to put forward any legislative proposals to provide a meaningful and comprehensive solution.

It is our sincere hope this matter can be resolved without resort to legal action but you must be advised that ACLU of Nebraska has committed itself to filing suit if there are not immediate and concrete steps taken by your administration.

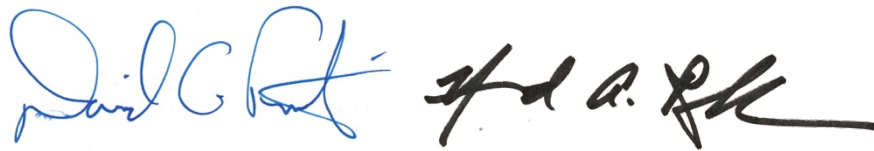
Please advise within ten (10) days of your intentions.

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cc: Nebraska State Senators  
Director Scott Frakes  
Nebraska Attorney General Doug Peterson