



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Hawai'i

BY EMAIL

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Hawai'i Correctional Systems Oversight
Commission

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Re: requests to mitigate impact of COVID-19 in Hawai'i jails & prisons

Dear Chair Patterson and Commission Members:

The ACLU of Hawai'i Foundation (“**ACLU of Hawai'i**”) respectfully submits the following requests regarding the Hawai'i Correctional Systems Oversight Commission’s (“**Commission**”) ongoing work supervising the Hawai'i State Department of Public Safety (“**DPS**”) pursuant to Act 179, SLH 2019. Although the Hawai'i Supreme Court entered, on June 5, 2020, an “Order Concluding Matters” in SCPW-20-0000200 and SCPW-20-0000213, that order stated that “[f]urther issues regarding inmate populations at correctional facilities may be addressed through alternative means, including collaboration with the [Commission].” As of today, the threat posed by the ongoing COVID-19 pandemic has not meaningfully subsided,¹ and many DPS correctional facilities have not reduced their population levels to

¹ The State is in fact now experiencing a new spike in cases. See Rob Shikina, *Recent Spike in COVID-19 Cases Will Test Hawaii's Preparations*, Honolulu Star-Advertiser (June 15, 2020) <https://www.staradvertiser.com/2020/06/15/hawaii-news/recent-spike-in-covid-19-cases-will-test-hawaiis-preparations> (reporting “15 new cases Friday and 17 cases reported Saturday, which were the biggest single-day increases in the islands in nearly two months”). And based on reporting from today, prisons and jails remain weak links: “Cases of the coronavirus in prisons and jails across the United States have soared in recent weeks, even as the overall daily infection rate in the nation has remained relatively flat.” Timothy Williams, Libby Seline & Rebecca Griesbach, *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*, New York Times (June 16, 2020), <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html>.

below design capacity, as ordered by the Court.² Accordingly, the ACLU of Hawai‘i respectfully asks that you consider the below requests, which are aimed at mitigating the impact of COVID-19 in Hawai‘i jails and prisons.³

As context, the ACLU of Hawai‘i has a long history of advocating for the rights of people incarcerated in Hawai‘i jails and prisons. As one recent example, in 2017, the ACLU of Hawai‘i filed a complaint with the U.S. Department of Justice against the State of Hawai‘i concerning unconstitutional prison conditions and overcrowding.⁴ Earlier in its history, the ACLU of Hawai‘i, with the ACLU National Prison Project, filed suit in 1984 and obtained a consent decree on behalf of inmates housed at OCCC and the Hawai‘i Women’s Correctional Facility (now WCCC).⁵ The ACLU of Hawai‘i continues to advocate around jail- and prison-related issues today.

Request 1: immediately establish “design capacity” as the provisional maximum inmate population limit for each DPS correctional facility

One of the Commission’s express “powers and duties” is to “[e]stablish maximum inmate population limits for each correctional facility and formulate policies and procedures to prevent the inmate population from exceeding the capacity of each correctional facility.” Act 179, SLH 2019, § 3(b)(2). The ACLU of Hawai‘i requests that the Commission exercise its power under Act 179 and establish “design capacity”—*i.e.*, “the number of inmates and staff that are intended to occupy the space at any one time”⁶—as the maximum population limit for each

² The Court ordered that “[e]fforts shall be undertaken to reduce the inmate population of correctional centers and facilities to design capacity.” SCPW-20-0000200 & SCPW-20-0000213, Apr. 15, 2020 Interim Order at 2; *see also* Apr. 24, 2020 Third Interim Order at 2.

³ While the ACLU of Hawai‘i supports appointing an Oversight Coordinator as soon as possible, these are steps the Commission can and should take before any such appointment.

⁴ ACLU of Hawai‘i, Complaint (Jan. 6, 2016), <https://acluhawaii.files.wordpress.com/2017/01/acluhidojcomplaintprisonovercrowding.pdf>.

⁵ The consent decree that was obtained as a result of the class action litigation required the State to reduce overcrowding; improve medical, dental, and mental health services; remedy unsafe environmental conditions and food services; and host semi-annual inspections of OCCC and WCCC by a panel of mutually-agreed upon experts. *See* Civil Rights Litigation Clearinghouse, University of Michigan Law School, “Case Profile: *Spear v. Waihee*,” (last visited June 16, 2020), *available at* <http://www.clearinghouse.net/detail.php?id=660>; Appendix A, Complaint at 2, *Spear v. Waihee*, Civ. No. 84-1104 (D. Haw. Sept. 14, 1984).

⁶ Corrections Population Management Commission, *2001 Annual Report* at 6 (Dec. 2001), <https://dps.hawaii.gov/wp-content/uploads/2013/12/report2001.pdf>.

DPS correctional facility and, in conjunction, establish policies and procedures sufficient to ensure that those limits are not exceeded. The ACLU of Hawai‘i also submits that such population limits be set *immediately*, on a provisional basis, without requiring further investigation.

As the ACLU of Hawai‘i and Lawyers for Equal Justice explained in an amicus brief before the Supreme Court, “*design* bed capacity” is justified as a population target, both because it more meaningfully enables adequate social distancing and hygiene measures and because the U.S. Supreme Court has also relied on such capacity limits in its rulings on prison overcrowding in California.⁷ And as the testimony of Dr. Pablo Stewart to the Hawai‘i Supreme Court clarified, “getting within each facility’s *operational* capacity is not enough. . . . [*D*]esign capacity is an appropriate” population limit “to impose for each DPS facility.”⁸ The Office of the Public Defender has also explained why, at a minimum, design capacity must be reached.⁹

Even though the Hawai‘i Supreme Court also ordered DPS to “reduce the inmate population of correctional centers and facilities to design capacity,” DPS’s efforts to achieve design capacity are falling short. As of June 15, 2020, at least five DPS facilities have population levels above design capacity.¹⁰ Of particular concern is that, during the last month alone, the number of people detained at the Oahu and Hawai‘i Community Correctional Centers has increased by 90 and 73 people respectively.¹¹ Further, DPS incorrectly appears to believe that operational capacity is a sufficient goal, expressing its “Occupancy Rate” as the “Inmate Head Count” divided by “Operational Capacity” (rather than “Design Capacity”).¹² The

⁷ SCPW-20-0000213, ACLU of Hawai‘i & LEJ Objections and Comments to Special Master’s Interim Report at 4-6 (Apr. 13, 2020).

⁸ SCPW-20-0000213, Stewart Decl. ¶¶ 27-28 (Apr. 13, 2020).

⁹ See SCPW-20-0000213, Exhibit 4 to Fourth Summary Report and Recommendations of the Special Master (Office of the Public Defender’s Report to the Special Master), at 3-5 (filed May 15, 2020).

¹⁰ See DPS, *Weekly Population Report* (June 15, 2020), <https://dps.hawaii.gov/wp-content/uploads/2020/06/Pop-Reports-Weekly-2020-06-15.pdf> (HCCC, KCCC, MCCC, OCCC, and HMSF all exceeding design capacity).

¹¹ Compare DPS, *Weekly Population Report* (June 15, 2020), <https://dps.hawaii.gov/wp-content/uploads/2020/06/Pop-Reports-Weekly-2020-06-15.pdf>, with DPS, *Weekly Population Report* (May 18, 2020), <https://dps.hawaii.gov/wp-content/uploads/2020/05/Pop-Reports-Weekly-2020-05-18.pdf>.

¹² *Id.*

Commission should ensure that DPS works towards achieving design capacity within each DPS facility.

Request 2: hire a third-party public health expert to inspect and establish a permanent, tailored population limit for each DPS correctional facility

Although the ACLU of Hawai‘i requests that the Commission immediately set “design capacity” as the population limit for each DPS facility, such a population limit may not be appropriate to meaningfully address the risks that COVID-19 continues to pose—the Commission may need to go farther. Indeed, as Dr. Stewart testified, “the process may require more” reductions in the population limits to “some percentage under 100% of design bed capacity.”¹³ To establish population limits that are meaningfully tailored to the unique characteristics of each DPS facility, the ACLU of Hawai‘i requests that the Commission hire one or more third-party public health experts to inspect each DPS facility and prepare *permanent* population limit recommendations for the Commission’s consideration.

Precedent exists for such an approach during the ongoing COVID-19 pandemic. Other correctional systems have successfully relied on outside public health experts to inspect and assess the particular needs of specific correctional facilities.¹⁴ Such public health experts’ objectivity, expertise, and real-time, on-the-ground investigation have been instrumental in setting population limits and establishing other policies and procedures that are fair, effective, and balanced.¹⁵ The Commission should consider a similar approach as it establishes more-permanent population limits for each DPS facility.

¹³ SCPW-20-0000213, Stewart Decl. ¶ 29 (Apr. 13, 2020).

¹⁴ See, e.g., *Banks v. Booth*, Civ. No. 1:20-cv-849 (CKK), Consent Order Appointing Amicus, Doc. 34 (D.D.C. Apr. 9, 2020) (appointing two outside experts to provide information to provide information regarding “medical” and “environmental health & hygiene” issues in subject facilities, and authorizing unannounced, unencumbered inspections of such facilities); *Costa v. Bazron*, Civ. No. 19-3185 (RDM), Order & Attachment A, Docs. 68 & 68-1 (D.D.C. May 1, 2020) (appointing three public health experts as amici curiae to inspect the subject facility and “provide information to the Court” regarding facility’s COVID-19 “prevention & management” and “mental health care” policies and practices).

¹⁵ See, e.g., *Banks*, 2020 WL 1914896, at *2, *13 (incorporating amici’s final written report and granting relief “in line with the amici recommendations”); *Costa*, 2020 WL 2410502, at *1-3 (noting that *amici*’s “reports are remarkably thorough, balanced, and considered” and relying on the “sound professional judgment” of *amici* in deciding to extend and expand certain relief measures).

Request 3: the Commission should take steps to get DPS to immediately and meaningfully comply with its reentry-related mandates

Over the past few months, the ACLU of Hawai'i and Lawyers for Equal Justice (alongside other community advocates) have been advocating around DPS's statutory mandate to assist people exiting Hawai'i jails and prisons in reentering the community.¹⁶ As our letter to the Court explained, while DPS's mandates in this area are clear, DPS has failed to meet them during this pandemic.¹⁷ As one specific example, in the most recent 12-month period, 56% of people exiting jails and 46% of people exiting prisons did not have civil ID cards, even though Section 353H-32 of the Hawai'i Revised Statutes, which became law in 2017, states that DPS "*shall* issue civil identification cards" for people who are imminently exiting DPS facilities.¹⁸

The ACLU of Hawai'i reiterates the requests outlined in the May 12, 2020 letter, and requests that the Commission ensure that DPS immediately takes meaningful steps to come into compliance with its reentry-related mandates. Compliance would meaningfully improve the lives of those who are exiting DPS facilities amid the pandemic, which in turn would foster public health and safety.

Request 4: immediately implement a plan to increase COVID-19 testing in DPS correctional facilities

The pandemic has caused immense harm nationwide, but with a particularly sharp impact in carceral facilities: eight of the top ten largest clusters of cases in the U.S. are in prisons or jails.¹⁹ As an epidemiological model created by public health experts demonstrates, these facilities dramatically exacerbate the spread of COVID-

¹⁶ SCPW-20-0000213, Exhibit 12 to Fourth Summary Report and Recommendations of the Special Master (ACLU of Hawai'i and LEJ Letter re: Reentry Planning for People Returning to the Community from Hawai'i Jails and Prisons During The COVID-19 Pandemic) (filed May 15, 2020).

¹⁷ *Id.* at 3-6.

¹⁸ *Id.* at Attachment A (May 11, 2020 letter from ACLU of Hawai'i re: Department of Public Safety's Responsibility to Obtain Civil Identification Documents), at 2-3 (emphasis added).

¹⁹ *Coronavirus in the U.S.: Latest Map and Case Count*, New York Times (updated June 15, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#clusters> (table noting cumulative 11,135 cases connected to 8 correctional facilities nationwide).

19.²⁰ And as public health experts have made clear, no response to COVID-19 can be meaningful or effective without across-the-board testing identifying staff and incarcerated people who are infected with the virus.²¹ As one infectious-disease specialist notes, “If you don’t do testing, you’re flying blind.”²² Universal testing is necessary to arrest the spread of the virus inside these facilities, and just as importantly, to prevent the continued spread of the virus from jails and prisons back into the community over the upcoming months.

So far, however, DPS’s COVID-19 testing practices have been abysmal. In the three months since the pandemic began, DPS has tested only 42 people across all of its facilities (including Saguaro Correctional Center in Arizona), out of 4,331 people presently incarcerated in DPS facilities.²³ This means that less than 1% of the currently incarcerated population has been tested for COVID-19. The ACLU of Hawai‘i requests that the Commission take steps to ensure that DPS commits to “full testing” in all DPS jails and prisons until the threat of the pandemic has meaningfully subsided.²⁴

Request 5: eliminate medical co-payments, with or without COVID-19

Hawai‘i is one of the many states in which incarcerated people are expected to pay co-payments for physician visits, medications, and testing.²⁵ Given the minuscule wages earned by people incarcerated in jails and prisons, even a \$3 co-

²⁰ See ACLU, *COVID-19 Model Finds Nearly 100,000 More Deaths Than Current Estimates, Due to Failures to Reduce Jails*, ACLU (Apr. 2020), <https://www.aclu.org/report/flattening-curve-why-reducing-jail-populations-key-beating-covid-19>.

²¹ See, e.g., Shannon Firth, *COVID-19 Testing Lags in Prisons and Jails*, MedPage Today (May 8, 2020), <https://www.medpagetoday.com/infectiousdisease/covid19/86391>.

²² Timothy Williams, Libby Seline & Rebecca Griesbach, *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*, New York Times (June 16, 2020), <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html>.

²³ *COVID-19 Testing: Inmate Report*, DPS Health Care Division (updated June 15, 2020), <https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/#gallery-3>.

²⁴ “Full testing” means testing by medical personnel of all staff and currently incarcerated people and any newly admitted people, including any necessary follow-up testing recommended by medical staff. Additionally, the testing process should be overseen by health staff and reported to public health authorities, and the public, with appropriate HIPAA protections in place.

²⁵ Wendy Sawyer, *The Steep Cost of Medical Co-Pays in Prison Puts Health At Risk*, Prison Policy Initiative (Apr. 19, 2017), <https://www.prisonpolicy.org/blog/2017/04/19/copays> (Hawai‘i has a \$3 co-pay, which, at the prison minimum wage of \$0.25 per hour, requires 12 hours of work for one co-pay).

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pay can greatly deter people from seeking medical care within Hawai'i jails and prisons.

However, where Hawai'i stands nearly alone is in its response to COVID-19. While practically every state has suspended medical co-payments in response to the COVID-19 pandemic, “[o]nly two states have not suspended medical co-pays for people in state prisons: Nevada and Hawaii.”²⁶ As the Office of the Public Defender has already stated, DPS’s inaction on medical co-payments despite COVID-19 is “unconscionable, and frankly embarrassing.”²⁷ The ACLU of Hawai'i requests that the Commission take steps to ensure that DPS eliminates medical co-payments, not just during the ongoing pandemic, but after, as many other states have already started doing.

* * *

Taking the above-requested action would meaningfully improve public safety and public health, by protecting both people incarcerated in Hawai'i jails and prisons and the broader community, during the ongoing COVID-19 pandemic.

We thank you for the opportunity to submit this written testimony, and for your continued work in overseeing DPS. We look forward to submitting further testimony in the future. If you have questions or comments, please contact Wookie Kim at 808-522-5905 or wkim@acluhawaii.org, or Mateo Caballero at 808-522-5908 or mcaballero@acluhawaii.org.

Sincerely yours,



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²⁶ Prison Policy Initiative, *Responses to the COVID-19 Pandemic: Prisons Eliminating Medical Co-Pays* (last updated June 10, 2020), <https://www.prisonpolicy.org/virus/virusresponse.html>.

²⁷ SCPW-20-0000213, Exhibit 4 to Fourth Summary Report and Recommendations of the Special Master (Office of the Public Defender’s Report to the Special Master), at 5 (May 15, 2020).