

# *Legislative Performance Audit*

## *Committee*

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FOR IMMEDIATE RELEASE

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November 17, 2014

### **Nebraska Department of Correctional Services: Disciplinary Process, Programs, and Commitment Processes**

An audit of the Department of Correctional Services, released Monday by the Legislative Performance Audit Committee, found issues of concern with the reliability of DCS data regarding inmates, as well as the department's use of segregation. Additionally, the audit report recommended that the Legislature consider amending relevant commitment and corrections acts to ensure the evaluation procedures and definitions for potentially mentally ill and dangerous inmates and dangerous sex offenders are "clear and consistent."

Performance Audit Committee members, prompted largely by the 2013 DCS release of Nikko Jenkins, authorized an audit of the corrections department in January. Legislative concern about DCS' handling of Jenkins ultimately resulted in the initiation of two other investigations, with both of which the Audit Office coordinated its research.

The audit scope included an examination of the department's disciplinary process and use of segregation; the adequacy of inmate programming – such as substance abuse treatment and mental health services – and the relationship between parole decisions and the availability of programming. The scope also called for a comparison of the commitment processes under the Mental Health Commitment Act and the Sex Offender Commitment Act and of the processes the department uses to identify inmates who may be subject to civil commitments under the acts.

The Performance Audit Committee's report released Monday – which did not examine Jenkins' detention – stated that audit staff was unable to address scope questions related to disciplinary and segregation practices and the availability of programming due to the reliability of DCS data.

Sen. John Harms, chairman of the Performance Audit Committee said, "our Committee recommended that the Department of Correctional Services engage an independent, outside entity to conduct an audit of its data system, in order to ensure that accurate and reliable electronic data—particularly in the areas of programming, mental health diagnoses, and length of time individual inmates spend in different types of segregation—is available for both internal and external use." The Committee suggested in the report

that such an audit include technology issues and the processes and management of data collection and quality control.

Regarding segregation, the report found that while the amount of time in segregation inmates received for individual sanctions fell within established limits, the actual, aggregate time some inmates served in consecutive periods of disciplinary segregation or consecutive periods of disciplinary segregation and administrative confinement was much more time than the limitations on single sanctions suggested.

Sen. Harms said, citing this finding as well as testimony received by the LR 424 committee, “we believe the department should evaluate its use of segregation to ensure it reflects current national standards and best practices in the field.”

The report also found that while state law clearly identifies inmates who must be evaluated by the department prior to release to determine if they are dangerous sex offenders subject to civil commitment proceedings, state law provides no such guidance for the identification of inmates who may be mentally ill and dangerous and thus subject to commitment under the Mental Health Commitment Act. Thus, the identification by DCS staff of prisoners who should be evaluated as potentially mentally ill and dangerous requires a greater amount of professional judgment than that required for the determination of potentially dangerous sex offenders. The report also identified a major policy question regarding whether, under Nebraska law, a personality disorder is considered a mental illness.

Based on those findings and others, Sen. Harms said, “the Committee suggested that the Legislature consider whether existing differences in the two methods of commitment, as well as differences in definitions and notification processes, were intended or not. For any differences that are unintentional, we should consider bringing the acts into conformity with one another in order to achieve greater structure and consistency.”

The report, including the department response, is available on the Legislature's Web site, [nebraskalegislature.gov](http://nebraskalegislature.gov), in “Reports” > “Performance Audit,” and hard copies are available in the Legislative Audit Office on the 11<sup>th</sup> Floor of the State Capitol.



**Nebraska Department of  
Correctional Services:  
Disciplinary Process, Programs,  
and Commitment Processes**

**Performance Audit Committee  
Nebraska Legislature**

November 2014

## **Performance Audit Committee**

Senator John Harms, Chair  
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Audit reports are available on the Unicameral's Web site ([www.nebraskalegislature.gov](http://www.nebraskalegislature.gov)) or can be obtained from the Legislative Audit Office at (402) 471-1282.

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*Committee Report*

**Nebraska Department of Correctional  
Services: Disciplinary Process, Programs,  
and Commitment Processes**

***November 2014***

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***I. Committee Recommendations***



# **Audit Summary and Committee Recommendations**

## **Audit Summary**

In January 2014, the Legislative Performance Audit Committee directed the Legislative Audit Office to begin research on issues relating to the Department of Correctional Services (DCS). Based on that research, the Committee adopted the scope statement for this audit in July 2014. The Office coordinated its work with two other studies of the department to reduce the likelihood of duplication.

### *Unreliable Data*

After the scope statement was approved, the Audit Office determined that the electronic data needed to answer some of the audit questions had gaps and inconsistencies that made it unusable. We were unable within the audit timeframe to conduct the file reviews that would have been necessary to obtain the data, and, consequently, had to eliminate the following analyses from this study:

- Exploring whether mental illness/behavioral health diagnoses were related to the length and type(s) of segregation experienced by a sample of inmates;
- The extent to which a need for programming prevented inmates from being paroled, or resulted in inmates being required to complete programming as a condition of parole;
- The amount of time a sample of inmates spent in all types of segregation; and
- Historical waiting list information for selected types of inmate programming.

### *Department of Correctional Services Disciplinary Process*

Sections I and II of the report describe the process DCS uses to discipline inmates accused of misconduct while incarcerated as well as the results of a review of a sample of charges from 2013. The sample was selected to include a high number of charges that resulted in the sanctions of disciplinary segregation and loss of good time, because these sanctions were of special interest to policymakers. The sample

is not representative of all charges in 2013 and findings about the sample should not be generalized to all of the charges.

We make two findings relating to the disciplinary process itself. First, to issue a sanction of disciplinary segregation or loss of good time, DCS must find that the offense was “serious or flagrant.” However, DCS has no written guidelines about the types of behavior it considers to fall within these terms. Because disciplinary segregation and loss of good time are serious sanctions, we found that DCS should have such guidelines to promote consistency.

Second, we noted that Nebraska law allows DCS to place inmates in solitary confinement, which is defined as separation from the general population of inmates along with completely insulating the inmate from all sights and sounds. DCS told us that they no longer use this extreme form of segregation and agreed that the Legislature should consider removing the statutory provision that allows it.

The sample of 2013 charges we reviewed consisted of all of the charges for three offenses: assault, disobeying an order, and threatening behavior. We determined that these three offenses had the highest number of sanctions for disciplinary segregation and loss of good time.

Most of the findings relating to the sample are descriptive—they simply describe the charges and sanctions without making a judgment about whether the sanctions are “good” or “bad.” We reserved judgment because there are few standards in law or regulation to use for comparison. The only specific standards relating to disciplinary segregation and loss of good time (other than the definitions discussed above) are limits on how long those sanctions may be, and we found that sanctions we reviewed fell within the limits established in rules and regulations.

Because we knew that policymakers were interested in the amounts of time inmates spent in segregation and the amount of good time inmates lost, we noted that many of the inmates in our sample did not receive the maximum amount of either allowed by regulations. However, as DCS correctly notes in its written response to this report, there is no requirement that the maximum be used. We also found that some inmates

spend much more time segregated from the general population than the limitations on individual disciplinary sanctions suggest, because of consecutive periods of disciplinary segregation or a period of disciplinary segregation followed by a period of administrative confinement.

### *Programming*

Section III of the report describes statutory requirements relating to treatment and other programming DCS must provide to inmates. It also lists the programming available at each institution. We make two findings relating to the statutory framework for programming. First, we believe that the Legislature may have intended to allow the Parole Board to waive requirements that an inmate receive mental health treatment but that the bill passed by the Legislature did not, in fact, accomplish that intent. Second, for inmates who receive short sentences but require longer term treatment, it is impossible for DCS to meet the statutory requirement that inmates be provided with treatment before they become parole eligible.

### *Civil Commitment Acts*

Section IV describes and compares the processes for DCS to recommend commitment of inmates who are mentally ill and dangerous as well as those who are dangerous sex offenders. Section V describes the inmates referred for commitment in 2013.

Our comparison of the two processes identified a number of differences in the underlying statutes, which caused us to suggest that a review by the Legislature may be needed to determine which of the differences are intentional and should be preserved, and which are unintentional and should be made consistent. These differences include:

- The definition of mentally ill and dangerous is limited to those likely to be a danger in the near future, whereas the definition of dangerous sex offender applies to those potentially dangerous at any time;
- It is unclear whether the Legislature intended for the definition of mentally ill and dangerous to apply to

those with personality disorders, and DCS does not include such inmates in its referrals for possible commitment. In contrast, the definition of dangerous sex offender specifically includes individuals with personality disorders and DCS has referred such inmates for potential commitment.

- The process for identifying which inmates are potentially mentally ill and dangerous is much less structured than is the process for identifying potentially dangerous sex offenders. Additionally, requirements regarding the entities that must be notified when a potentially mentally ill and dangerous inmate is nearing release are not as specific as those for a dangerous sex offender nearing release.

The remainder of the report findings relate to the individual inmates who, in 2013, were referred by DCS for possible commitment under the two commitment acts. These findings give the reader an idea of the characteristics of the inmates recommended for commitment in that year.

## **Committee Recommendations**

The Committee anticipates that its recommendations will be incorporated into the work of the Department of Correctional Services Special Legislative Oversight Committee created by LR 424. If that Committee is continued by the Legislature, it will provide oversight of the department's efforts to comply with the Committee's recommendations. Following are the specific report findings and the Committee's recommendations.

### *Introduction*

**Finding #1:** Unreliable electronic data relating to programming received by inmates, individual behavioral health diagnoses, and inmate stays in segregation prevented us from being able to conduct some planned analyses. (pg. 5)

**Recommendation:** The Department of Correctional Services should determine the amount of staff time consistently available to maintain data quality, prioritize the data that is most important to have available electronically, and eliminate electronic data that is not of sufficient priority

to ensure that reliability is maintained. The department should also establish reasonable guidelines for managing data that include increasingly rigorous verification for data at a higher risk of including errors.

**Recommendation:** The department should engage an independent outside entity to conduct an audit of its existing data system: the technology, as well as the processes and management of data collection and quality control. The goal of the audit should be to identify the changes necessary to ensure the department is able to accurately compile electronic data into reports for internal and external use on key management and policy issues. Those issues should include programming recommended for inmates—such as whether recommended programming was completed or not, and if so, when (with special attention to inmates who have multiple periods of incarceration).

**Recommendation:** The Legislature should consider adopting a statutory requirement that the department maintain data on inmate programming in a manner that can be accurately compiled electronically.

*Section I: Disciplinary Process at the Department of Correctional Services*

**Finding #2:** The terms “serious” and “flagrant,” which describe the severity of misconduct that warrants disciplinary segregation or loss of good time, are not defined in statute. The Department of Correctional Services has no written guidelines for the types of behavior to which they should be applied. (pg. 11)

**Discussion:** It may not be possible or desirable to precisely define these terms, but there should be guidance about how to interpret them to help ensure that reasonable consistency in their application exists within each institution and across institutions.

**Recommendation:** The Legislature should consider amending the statutes to include more specific definitions of “serious” and “flagrant” as they relate to the behavior that may be sanctioned with disciplinary segregation and loss of good

time. The Legislature could also require DCS to define the terms in its regulations.

**Finding #3:** By law, the Department of Correctional Services may still use solitary confinement, which is segregated confinement with complete audio and visual deprivation; however, DCS officials state they no longer use solitary confinement. (pg. 12)

**Discussion:** Although the terms “solitary confinement” and “segregation” are often used interchangeably, DCS regulations distinguish solitary confinement from the other types of segregation. All types of segregation involve placing an inmate in a small cell apart from the general population. However, as defined in DCS regulations, solitary confinement goes one step further: the inmate’s cell has “solid, soundproof doors, and [deprives] the inmate of all visual and auditory contact with other persons.”

**Recommendation:** It is the Committee’s intent to eliminate solitary confinement from Nebraska law and to have DCS eliminate it from its regulations.

## *Section II: Analysis of Selected Charges and Sanctions*

Most of the findings in this Section describe the results of our review of a sample of charges issued in 2013 and specific recommendations are unnecessary. The individual findings are grouped by subject matter, with discussion at the end of each group. A general recommendation follows the last group.

### **Sanctions**

**Finding #4:** Tecumseh State Correctional Institute, Nebraska State Penitentiary, and Lincoln Correctional Center had most of the selected charges and also most of the charges that resulted in guilty dispositions. (pg. 21)

**Finding #5:** Most guilty determinations for the selected charges resulted in a single sanction, which was usually disciplinary segregation. For the guilty determinations that resulted in two sanctions, nearly all were disciplinary segregation and loss of good time. (pg. 23)

**Finding #6:** Loss of good time was most likely to result from a charge if the misconduct occurred at an adult male maximum security facility. (pg. 23)

**Finding #7:** None of the sanctions for either class of offenses exceeded the maximums allowed before December 21, 2013. (pg. 24)

**Finding #9:** Of the selected charges, loss of good time was issued most often for threatening behavior charges. (pg. 25)

**Finding #10:** Tecumseh State Correctional Institute, Lincoln Correctional Center, and Nebraska Correctional Youth Facility issued disciplinary segregation the most frequently. (pg. 26)

**Discussion:** We selected a sample of charges that were most likely to result in loss of good time and disciplinary segregation as sanctions. Because those sanctions may only be issued for more severe misconduct, it is not surprising that they were issued more at the maximum security institutions with adult male populations. (Because we selected this sample to give us a high proportion of the sanctions we were interested in, it is not representative of all the charges in 2013 and the results should not be generalized to all of the charges that year.)

### **Charges**

**Finding #11:** Of the selected charges, disciplinary segregation was issued for most of the assault and threatening behavior guilty determinations but less than half of the disobeying an order guilty dispositions. (pg. 27)

**Finding #12:** Tecumseh State Correctional Institute and Lincoln Correctional Center had much higher rates of disobeying an order guilty determinations resulting in disciplinary segregation than did the other institutions. (pg. 28)

**Discussion:** We cannot say conclusively what caused this difference. Possible reasons include differences in the way the institutions issue charges for different behaviors and that the

behavior determined to constitute Disobeying an Order was more serious than at the other institutions.

### **Length of Disciplinary Segregation and Loss of Good Time Sanctions**

**Finding #8:** Most of the loss of good time sanctions were for less time than the maximum allowed by regulation. For the Class 1 (assault) offenses, the sanctions were much less than allowed, and very few were non-restorable. (pg. 25)

**Finding #13:** Most of the disciplinary segregation sanctions were for much less time than the maximum allowed and none exceeded the maximums allowed. (pg. 30)

**Finding #14:** The amount of disciplinary segregation inmates in our sample received for individual sanctions fell within the established limits. However, some inmates spent much more time in consecutive periods of disciplinary segregation or in consecutive periods of disciplinary segregation and administrative confinement than the limitations on individual sanctions suggest. (pg. 32)

**Recommendation:** The Committee notes that the LR 424 Special Investigative Committee received testimony that best practices in the corrections field now discourage the use of extended inmate stays in segregation. The Committee believes the department should evaluate its use of segregation to ensure it reflects current national standards and best practices in the field.

### *Section III: Department of Correctional Services Programming*

**Finding #15:** The Legislature may have intended to allow the Parole Board to waive requirements for mental health treatment of inmates if the Board makes the treatment a requirement of parole; however, the plain language of the law does not allow this treatment to be waived. (pg. 35)

**Recommendation:** The Committee believes the question of whether or not the Parole Board should have the authority to waive requirements for mental health treatment should be

reevaluated, and expects that to be accomplished as part of the LR 424 Special Investigative Committee's work.

**Finding #16:** For inmates who receive short sentences that cause them to be parole-eligible on their first day of incarceration, it is impossible for the Department of Correctional Services to meet the statutory requirement that the inmate be provided with treatment prior to parole eligibility. (pg. 35)

**Recommendation:** The Legislature may want to revise this statute to account for those with short sentences.

*Section IV: Commitment Acts Overview & Section V: Department of Correctional Services Process for Identifying Inmates Under These Acts*

For ease of discussion, we combined the findings and recommendations for these two sections of the report, as they both discuss the commitment acts and the application of the acts. These findings all relate to potential policy questions and are grouped together by topic (their location in the report is noted by page numbers), followed by a discussion for each grouping.

**“Mentally Ill and Dangerous” and “Dangerous Sex Offender” Definitions**

**Finding #17:** Because the definition of mentally ill and dangerous is limited to inmates likely to be a danger in the near future, inmates who might be considered dangerous at a later time may not be suggested for commitment. (pg. 44)

**Finding #18:** It is unclear whether the Legislature intended for the definition of mentally ill and dangerous in the Mental Health Commitment Acts to include personality disorders. (pg. 45)

**Finding #19:** The Department of Correctional Services does not consider inmates with personality disorders for commitment under the Mental Health Commitment Act. Therefore, an inmate who, because of a personality disorder, is a danger to himself/herself or to others, as evidenced by recent acts or threats of violence, would not be suggested by

DCS for commitment as a mentally ill and dangerous person. (pg. 46)

**Discussion:** A major policy question we identified has to do with whether under Nebraska law a personality disorder is considered a mental illness. The inclusion of individuals with personality disorders in the definition of dangerous sex offender suggests a recognition by lawmakers that a personality disorder could make a person “likely to engage in repeat acts of sexual violence.” This raises the question: could a personality disorder make a person likely to engage in repeat acts of non-sexual violence?

Because the psychiatric profession is moving away from a bright-line distinction between clinical disorders and personality disorders, legislators may want to consider revising the definitions of “mental illness” and “dangerous sex offender” to better reflect updated standard practice in the behavioral health field.

**Recommendation:** The Legislature should take a closer look at the definitions of “mentally ill and dangerous” and “dangerous sex offender” to ensure that differences between the two statutes are intentional and desired.

### **Evaluation Process**

**Finding #20:** The Treatment and Corrections Act does not define the term “mental disease or defect” and contains no criteria the Department of Correctional Services should use in identifying offenders who should be evaluated by psychiatrists. (pg. 47)

**Finding #21:** The determination of inmates who should be evaluated as potentially mentally ill and dangerous persons requires a greater amount of Department of Correctional Services’ staff professional judgment than the determination of inmates who should be evaluated as potentially dangerous sex offenders. (pg. 48)

**Finding #24:** Since there are no statutory guidelines for mandatory evaluations under the Mental Health Commitment Act such as those laid out in the Sex Offender Commitment Act, the Department of Correctional Services

uses a variety of processes to identify potentially mentally ill and dangerous inmates who are nearing release. (pg. 54)

**Finding #23:** The recently created Discharge Review Team monitors and reviews inmates who the Department of Correctional Services believes could be dangerous or have other difficulties upon release, typically as they near discharge. (pg. 53)

**Discussion:** Our comparison of the commitment acts for mentally ill and dangerous individuals and dangerous sex offenders identified statutory differences that the Legislature may want to consider.

In general terms, we found that the process for identifying dangerous sex offenders is more structured and clear-cut than the process for identifying mentally ill and dangerous individuals. The latter may not lend itself to a process as structured as those for dangerous sex offenders—for instance, creating a list of criminal convictions that would trigger a mandatory evaluation for a mentally ill and dangerous person would not be as clear-cut as the list of convictions under the definition of dangerous sex offender—but clarification of certain definitions and the creation of a statutory framework for deciding when evaluations should occur may be warranted.

Additionally, it may be useful to consider whether existing differences in the processes were intended or not and for any that are unintentional, bringing the processes into conformity with one another to simplify the statutes. Since it has been 40 years since the original provisions of the Mental Health Commitment Act were enacted, it is very likely that there are some guidelines or best practices in other jurisdictions which could be adopted in Nebraska to achieve greater structure and consistency.

We believe that the recently created Discharge Review Team is a good step towards creating a more formal process for the review of potentially dangerous inmates nearing release; however, the Legislature may wish to create a statutory framework to assist DCS in this process.

**Recommendation:** The Legislature should consider harmonizing and potentially amending the Treatment and Corrections Act, the Mental Health Commitment Act, and the Sex Offender Commitment Act in order to ensure that the evaluation procedures and definitions regarding both possibly mentally ill and dangerous inmates and dangerous sex offenders are clear and consistent.

### **Notification**

**Finding #22:** There is no statutory requirement identifying which authorities should be notified regarding inmates near release who the Department of Correctional Services evaluated as potentially mentally ill and dangerous persons. There is also no precise time requirement for when DCS should provide this notification. (pg. 49)

**Finding #25:** The Department of Correctional Services may notify appropriate law enforcement agencies of the approaching release of inmates who are violent but not mentally ill. The department believes it is obligated to notify law enforcement and particular individuals of the impending release of inmates who have threatened to harm those individuals. (pg. 54)

**Recommendation:** The Legislature should consider if the Mental Health Commitment Act would benefit from the more formal notification processes contained in the Sex Offender Commitment Act and make statutory changes as needed.

### **File Review**

The remainder of the findings in this section present descriptive information about inmates DCS referred for possible commitment and no recommendations are needed.

**Finding #26:** In 2013, the Department of Correctional Services recommended 21 inmates for possible commitment under the Sex Offender Commitment Act. (pg. 55)

**Finding #27:** Two of the 21 inmates recommended by the Department of Correctional Services for possible commitment under the Sex Offender Commitment Act in 2013 were diagnosed with personality disorders only. (pg. 57)

**Finding #28:** None of the 21 inmates recommended by the Department of Correctional Services for possible commitment under the Sex Offender Commitment Act in 2013 completed their recommended programming. Four of these inmates did not have time within their sentences to complete the recommended treatment programs. (pg. 58)

**Finding #29:** In 2013, the Department of Correctional Services recommended six inmates for possible commitment under the Mental Health Commitment Act, significantly fewer than the 21 inmates DCS recommended for possible commitment under the Sex Offender Commitment Act. (pg. 59)

**Discussion:** There may be many factors that play a role in the difference in the number of commitments under the MHCA and the SOCA. Those factors likely include the more structured requirement for evaluations contained in the SOCA, which may result in more evaluations, and the inclusion of individuals with personality disorders, which broadens the pool of inmates considered for commitment.



***II. Legislative Audit Office Report***



*Legislative Audit Office Report*  
**Nebraska Department of Correctional  
Services: Disciplinary Process, Programs,  
and Commitment Processes**

***November 2014***

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## **INTRODUCTION**

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In January 2014, the Legislative Performance Audit Committee (Audit Committee) directed the Legislative Audit Office (Office) to conduct a preaudit inquiry into issues relating to the Department of Correctional Services (DCS). In a preaudit inquiry, the Office conducts background research and identifies draft scope statement questions for the Committee to consider adopting as a full performance audit.

The Committee was particularly interested in the department due to the release of an inmate named Nikko Jenkins, who was convicted of murdering four people shortly after release from the department's custody in the summer of 2013. A report by the Legislature's Ombudsman documented Mr. Jenkins' repeated threats to commit violence upon release, as well as his multiple requests for mental health treatment. The report also raised concerns about the number of years Mr. Jenkins was housed in segregation and his release directly from segregation to the public with no reentry preparation. The report noted the relatively small amount of good time the department withheld from Mr. Jenkins, despite incidents of serious misconduct.

Legislative interest in the department's handling of Mr. Jenkins' case grew and ultimately resulted in two other studies. One, a partnership with the Executive and Judicial branches, will be conducted by the Council of State Governments. Similar studies in other states have identified ways to safely reduce the inmate population through increased options to prevent incarceration and better reentry preparation. The other study, created by LR 424, was conducted by a special legislative investigatory committee that delved specifically into the department's management of Mr. Jenkins while he was incarcerated.

The Audit Office coordinated its research with the other studies and, in July 2014, the Performance Audit Committee adopted a formal scope statement for the performance audit. The scope questions address areas of interest to the LR 424 Committee, and the Audit Committee agreed to complete the report in November 2014 so that the investigative committee may incorporate it into its final report, due in December 2014.

After the scope statement was approved, we determined that the data needed to answer some of the audit questions was not sufficiently reliable for us to use. Following is a

description of the scope statement questions (in italicized text), the status of our work on them, and a description of data problems we encountered in answering them.

*Question 1. The Department of Correctional Services Disciplinary Process and Use of Segregation*

*The Office will describe the legal requirements governing the disciplinary process, especially as they relate to the punishments of disciplinary segregation and loss of good time. The Office will analyze data on loss of good time and disciplinary segregation as punishments, and segregation as a classification, identifying inmates with mental illness/behavioral health diagnoses. To the extent possible, the Office will draw conclusions about whether DCS is following the legal requirements.*

Status: Sections I and II of this report contain the description of the legal requirements governing the disciplinary process and a descriptive analysis of the loss of good time and disciplinary segregation sanctions for a sample of offenses. However, we were unable to conduct the portions of the analysis relating to mental illness/behavioral health diagnoses and length and type(s) of segregation experienced by a sample of inmates because we found the department's data relating to individual diagnoses and stays in segregation to be unreliable.

#### Behavioral Health Diagnoses

For each inmate, a DCS database (NiCAMS) includes specific behavioral health diagnoses. Additionally, for inmates with certain behavioral health conditions (such as a major mental illness, sex offender conviction or diagnosis, and developmental disability) the database also allows DCS staff to check a box to indicate the condition applies to that inmate. DCS calls the checked boxes "flags." We found that data relating to specific inmate mental health diagnoses was not always up-to-date and did not always match the indicator flags (for example, an inmate with major mental illness flag who had no diagnoses of a major mental illness).

We selected examples of these situations and asked DCS to explain the differences. DCS behavioral health staff said the problems arose due to information being entered incorrectly into or not being updated in the electronic data system and

possible disagreements among staff regarding individual inmate's diagnoses, among other things.

### Segregation Data

For this analysis, DCS provided us with a list of each time the inmates in our sample were placed in segregation, along with the type and entry and exit dates, if applicable. However, we found that for inmates with multiple stays in segregation, it was often impossible to calculate the length of the individual stays or the total length of time in segregation due to overlapping dates. Additionally, based on questions raised at the exit conference about why we had not included an analysis of administrative confinement, we compared the segregation list with the data we used for the disciplinary segregation analysis. We found that a number of stays in segregation contained in the disciplinary segregation file were not in the segregation list, which should have contained all such stays. According to DCS, the problem likely results from staff not updating the information in the department-wide database.

### *Question 2. Parole-Readiness and Civil Commitment Acts*

*The Audit Office will assess whether a need for programming prevented inmates from being paroled or resulted in programming requirements added to their conditions of parole.*

*The Office will compare the commitment processes under the Mental Health Commitment Act and the Sex Offender Commitment Act and identify possible policy questions. The Office will also describe the process used by DCS to refer inmates for commitment under these acts and analyze cases of inmates recently reviewed by DCS for commitment.*

Status: We were unable within the original timeframe for this audit to complete the analysis of whether a need for programming prevented inmates from being paroled or added conditions to their parole because we found the department's data relating to whether an inmate had, in fact, completed programming prior to parole unreliable. The types of problems, including missing and inconsistent data, are the same as those discussed in detail regarding historic waiting lists for programming later in this section.

Section IV contains a comparison of the two commitment acts and Section V contains a description of DCS' commitment

process and an analysis of inmates referred for commitment in 2013.

### **Additional Research**

At the request of the LR 424 Special Investigative Committee, and as approved by the Performance Audit Committee, the audit scope statement also tasked the Office with gathering the following information and providing it to the LR 424 Committee as soon as possible (separate from the audit report):

- *Programs available for inmates at each institution, and*
- *Use of programming for substance abuse, violent offenders, and sex offenders since 2009, including historic waitlist data.*

Status: Section III contains an inventory of programs available for inmates at each institution. However, we were unable to rely on the programming data and complete the analysis of the use of programming by selected offenders since 2009. For this analysis, we received from DCS an electronic file showing, for each inmate, a description and date for: 1) programs recommended, 2) programs started, 3) programs completed, and 4) programs for which the inmate declined to participate. We received this information for two key program areas: violence programming and sex offender programming.

Many questions arose when we reviewed data for the violence reduction programming, including missing and inconsistent data regarding dates of entry and exit into and out of programming. For example, in some instances there was a date when a program was recommended and the date when the inmate completed the program, but no date showing when the inmate started the program. In addition, sometimes dates were out of sequence—such as program start dates that were later than program completion dates. These errors were compounded for inmates who had participated in, or been recommended for, multiple programs or who had been incarcerated multiple times. We discussed our concerns about the data with DCS staff, who confirmed that there were gaps and inconsistencies—and said they were due to problems converting the data from paper to electronic files. Because of the deficiencies in the violence reduction data, we did not attempt to analyze the sex offender treatment data.

**Finding #1:** Unreliable electronic data relating to programming received by inmates, individual behavioral health diagnoses, and inmate stays in segregation prevented us from being able to conduct some planned analyses.

Our findings and recommendations are contained in Section VI of the report.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on the audit objectives. The methodologies used are described briefly at the beginning of each section, with further detail provided as needed in Appendix B.

We appreciate the cooperation and assistance of the Department of Correctional Services staff during the audit.

## Institutions Administered by the Nebraska Department of Correctional Services

| Description/Population  | Location | Percent of Design Capacity (8/31/14) |
|---|----------|--------------------------------------|
| <p><b>Community Corrections Center - Lincoln (CCL)</b><br/>A work/educational release and work detail facility for men and women.</p>   | Lincoln  | 190%                                 |
| <p><b>Community Corrections Center - Omaha (CCO)</b><br/>A work/educational release and work detail facility for men and a limited number of women.</p>   | Omaha    | 171%                                 |
| <p><b>Diagnostic and Evaluation Center (DEC)</b><br/>A short term maximum security facility. State law requires adult males sentenced to the Nebraska Department of Correctional Services system to be housed at DEC for medical, psychological, and social assessment before being assigned to another facility.</p> | Lincoln  | 254%                                 |
| <p><b>Lincoln Correctional Center (LCC)</b><br/>A maximum and medium security facility for adult males. The LCC contains specialized housing units, including units for inpatient sex offender treatment and mentally ill and developmentally impaired inmates.</p>   | Lincoln  | 159%                                 |
| <p><b>Nebraska Correctional Center for Women (NCW)</b><br/>A maximum, medium, and minimum security facility. NCW is DCS' only secure facility for adult women. The NCW also serves the diagnostic and evaluation center for women newly admitted to the state correctional system.</p>                                | York     | 117%                                 |
| <p><b>Nebraska Correctional Youth Facility (NCY)</b><br/>A maximum, medium, and minimum security facility. NCY houses adolescent male inmates, up to age 21 years and 10 months, who were sentenced as adults. It also serves as the diagnostic and evaluation center for male inmates under the age of 18.</p>       | Omaha    | 109%                                 |
| <p><b>Nebraska State Penitentiary (NSP)</b><br/>A maximum, medium, and minimum security facility for adult male inmates.</p>  | Lincoln  | 183%                                 |
| <p><b>Omaha Correction Center (OCC)</b><br/>A medium and minimum security facility for adult male inmates.</p>  | Omaha    | 193%                                 |
| <p><b>Tecumseh State Correctional Institution (TSC)</b> A maximum and medium security facility for adult males. TSC houses Nebraska's Death Row inmates and has a special management unit that contains 194 beds for segregation and intensive management.</p>  | Tecumseh | 106%                                 |
| <p><b>Work Ethic Camp (WEC)</b><br/>An intensive supervision and minimum custody (security level minimum B) facility for adult male inmates. WEC inmates are preparing for probation, parole, or community custody. Inmates participate in work crews and programs designed to assist with community re-entry.</p>    | McCook   | 169%                                 |

Source: DCS Web site.

# **SECTION I: Disciplinary Process at the Nebraska Department of Correctional Services**

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In this section, we describe the disciplinary process used to sanction inmates who have committed offenses while incarcerated in the Nebraska Department of Correctional Services (DCS). In Section II, we report on our analysis of selected charges and related sanctions from 2013.

Discipline of inmates at DCS is governed by several sources: Nebraska statutes; DCS administrative regulations (ARs); and operational memorandums (OMs), which are developed by each facility in accordance with the ARs. It should be noted that DCS has both regulations which have gone through the public hearing process set forth in the Administrative Procedure Act, and regulations that have not. Our analysis is based on all of these sources as well as information obtained from DCS staff. Although there are a range of punishments which can be given depending on the severity of the misconduct, our report focuses on the loss of good time and disciplinary segregation. Those charges were of particular interest to policymakers, as discussed in the Introduction to this report.

## **The Disciplinary Process**

Under DCS regulations, the purpose of the disciplinary process is to regulate inmates' behavior within acceptable limits. Sanctions are imposed both to punish an inmate and to deter the inmate (and others) from engaging in future misconduct. Each sanction must be proportionate to the seriousness of the misconduct, with consideration of aggravating and mitigating circumstances as well as prior offenses for similar behavior.

At each correctional facility, there are two types of disciplinary bodies assigned to adjudicate misconduct actions. Unit Disciplinary Committees (UDCs) hear minor infractions and cannot discipline with a loss of good time or disciplinary segregation, while Institutional Disciplinary Committees (IDCs) hear misconduct actions involving more serious offenses which are likely to receive loss of good time or segregation as punishment. Appendix A to this report shows the differences between the UDC and IDC hearing processes, including the procedural characteristics of each. Because our

report focuses on loss of good time and disciplinary segregation, we limited our analysis to the IDC process.

IDCs consist of a single hearing officer or a committee of two or more individuals, at the warden's discretion. Currently, most of the larger institutions, including Tecumseh State Correctional Institute, Nebraska State Penitentiary, Lincoln Correctional Center, and the Diagnostic and Evaluation Center, have employees who serve as full-time hearing officers. At the Nebraska Correctional Center for Women, Nebraska Correctional Youth Facility, Omaha Correctional Center, and Work Ethic Camp, several employees are assigned this responsibility and may conduct hearings at more than one facility.

DCS categorizes inmate misconduct into specific violations in its Code of Offenses, which is contained in regulation. The amount of disciplinary segregation or loss of good time that may be issued as sanctions varies for different classes of offenses (*see Table 1.1*). Other types of sanctions are discussed more in the next subsection.

When DCS staff observe inmate behavior that could constitute one or more of the defined offenses, the staff may file a misconduct report or they may respond informally through filing of a lesser "incident report," documenting a warning, or simply discussing the behavior with the inmate. Whether to handle a matter informally or formally by writing a misconduct report is within the observing employee's discretion.

Once a misconduct report is filed, the facility warden's designee decides whether it is heard by the IDC or UDC. The severity of the offense and the repetitiveness of the behavior are both taken into consideration in making this decision. If it is heard by the IDC, an investigating officer is appointed to interview the inmate, giving the inmate written notification of the allegations, and the opportunity to make a statement and request representation and witnesses at the hearing. If the inmate chooses not to appear at the IDC hearing, the reason must be documented.

**Table 1.1. Offenses and Amount of Disciplinary Segregation and Loss of Good Time Allowed, Prior to December 21, 2013**

| Offenses  | Amount of Disciplinary Segregation and Loss of Good Time Allowed as Sanction  |
|---|---|
| <p><b>Class I</b><br/> Murder/manslaughter; mutinous actions; assault; possession or manufacture of dangerous contraband; escape; work stoppage/work strike; interference with or refusal to submit to a search; drug or intoxicant abuse; escape paraphernalia; destruction of property over \$500; extortion; sexual assault; cruelty to animals</p>  | <p>Confinement in disciplinary segregation for a definite period of time not exceeding 60 days, and/or Loss of good time not exceeding 3 months* for violations not involving assault or injury to a person. Loss of good time not exceeding 1 year for violations involving assault of injury to a person (may be designated as non-restorable).</p> |
| <p><b>Class II</b><br/> Bribery; drug paraphernalia; sexual activities; destruction of property valued between \$100 and \$500; disobeying an order; forgery or possession of forged documents; theft; use of threatening language or gestures/fighting; gambling or promoting gambling; unauthorized areas; improperly handling funds; improper use of transportation; failure to report law enforcement contacts; failure to work; medication abuse; mutilation of self or others; tattoo activities; gang/security threat group activity; false reporting; violation of passes or furloughs; possession of unauthorized electronic communication devices</p> | <p>Confinement in disciplinary segregation for a definite period of time not exceeding 45 days, and/or Loss of good time not exceeding 1 month and 15 days.*</p>  |
| <p><b>Class III</b><br/> Flares of tempers/minor physical contact; destruction of property under \$100; possessing or receiving unauthorized articles; swearing, cursing, or use of abusive language or gestures; tobacco products; selling, loaning, or giving items to others; violation of sanctions; violation of any signed program agreement; sanitation; disruption; violation of regulations; misuse of a computer</p>  | <p>Confinement in disciplinary segregation for a definite period of time not exceeding 30 days, and/or Loss of good time not exceeding 1 month.*</p>  |

Source: 68 NAC Chapter 5 and 68 NAC 6-0011 and DCS.

\*68 NAC 6-011 was amended, effective December 21, 2013, to double the amounts of good time that could be lost.

The investigating officer makes a recommendation to the hearing officer regarding whether or not the charges should be dismissed. Misconduct reports may contain multiple charges and it is common for one or more of the charges to be dismissed in these cases.

The IDC issues a sanction for each charge that is not dismissed. In selecting a sanction, the IDC must consider the seriousness of the misconduct, any aggravating and mitigating circumstances surrounding the inmate's behavior, as well as any prior offenses for the same or similar behavior. All sanctions must be reviewed and approved by the facility warden. The warden may not increase the severity of the sanctions imposed by the IDC, but may decrease or modify them.

Inmates may appeal an IDC action within 15 days of the decision. Appeals are reviewed by the Appeals Board for due process, findings of fact, evidence relied upon, and the impartiality of the hearing process. If any charges are dismissed or reversed, all records of the disciplinary action must be removed from the inmate's file. If the inmate is found guilty of only some of the charges, the disciplinary record must show which charges were dismissed.

### **Legal Parameters for Imposition of Loss of Good Time and Disciplinary Segregation**

Nebraska law states that loss of good time and disciplinary segregation may be imposed only for offenses determined to be flagrant or serious. Non-flagrant/non-serious offenses may be punished only with less severe penalties and losses of privileges, such as extra work duty, restriction from activities, verbal or written reprimand, or restitution. When imposing disciplinary segregation or loss of good time, DCS must document that the inmate's behavior constituted a flagrant or serious offense.

The terms "flagrant" and "serious" are not defined in statute or regulation, but a 1972 District Court case provides some context for how they should be applied. The case identified some actions that could be considered flagrant or serious in and of themselves (such as escape, fighting, and threatening the life of a corrections officer), and others that could be flagrant or serious at a high level of severity (such as

protesting and refusal to work).<sup>1</sup> Additionally, DCS has no written guidelines for applying these terms.

**Finding #2:** The terms “serious” and “flagrant,” which describe the severity of misconduct that warrants disciplinary segregation or loss of good time, are not defined in statute. The Department of Correctional Services has no written guidelines for the types of behavior to which they should be applied.

There are two ways an inmate may accumulate good time: (1) an inmate’s sentence is automatically reduced by six months for every year of his/her term and (2) an inmate may earn good time at the rate of three days per month after completion of the first year of incarceration, so long as the inmate maintains a certain standard of good behavior.<sup>2</sup> The department can take away automatic good time, but not earned good time.

Additionally, in some instances, good time may be restored to an inmate who has: (1) no Class I offenses for the past year, (2) no IDC misconduct reports for the past six months, and (3) no more than two UDC misconduct reports for the past six months. Good time is restored at the rate of up to 30 days for every continuous 30 day period that the inmate maintains a clear record, unless the warden recommends times exceeding 30 days, which must be approved by the DCS Director. Good time may not be restored if the IDC has designated it as non-restorable.

### **Solitary Confinement and Segregation**

DCS distinguishes between the terms “solitary confinement” and “segregation.” Solitary confinement, as it is defined in DCS regulations, deprives an inmate of any audio and visual contact with other inmates or staff. In contrast, inmates in different types of segregation are housed in a gallery of separate cells where they can have some interaction with other inmates and staff, although in some types of segregation, inmates can be confined to their cell for as much as 22 or 23 hours per day.

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<sup>1</sup> *McConnell v. Wolff*, 342 F.Supp. 616 (D. Neb. 1972).

<sup>2</sup> The inmate must not have been convicted of a Class I or Class II offense of more than three Class III offenses as defined by the DCS Code of Offenses. Neb. Rev. Stat. § 83-1,107(2)(b).

Although allowed by law to use solitary confinement for disciplinary purposes and for purposes of institutional control, DCS officials said they no longer use solitary confinement under any circumstances. Consequently, the types of segregation discussed in this report do not constitute solitary confinement as that term is defined in regulations.

**Finding #3:** By law, the Department of Correctional Services may still use solitary confinement, which is segregated confinement with complete audio and visual deprivation; however, DCS officials state they no longer use solitary confinement.

### *Types of Segregation*

DCS refers to inmates who are housed separately from the general population as “special management inmates.” As noted above, inmates may be placed in segregation through two distinct processes: 1) as part of the classification process, which determines where inmates will be housed based on the level of security required and other factors, and 2) through the disciplinary process as a sanction for certain types of offenses.

DCS regulations identify five categories of special management inmates: 1) Disciplinary Segregation; 2) Death Row; 3) Court-Imposed Segregation; 4) Immediate Segregation; and 5) Administrative Segregation, which includes four subgroups (*see Table 1.2*).

**Table 1.2. Categories of Special Management Inmates**

| <b>Types of Segregation for Special Management Inmates</b> |  |
|--|--|
| <b>Disciplinary Segregation</b>                            | Temporary separation from the general population due to violation of institution rules.  |
| <b>Death Row</b>   | Separation of inmates from the general population due to a sentence of death.  |
| <b>Court-Imposed Segregation</b>                           | Temporary separation from the general population as ordered by a court; usually no longer than 48 hours.   |
| <b>Immediate Segregation</b>                               | Temporary separation from the general population pending another event, e.g., investigation of a conduct violation, misconduct hearing, classification hearing, inmate safety, etc.  |
| <b>Administrative Segregation</b>                          | <ul style="list-style-type: none"> <li>• <b>Administrative Confinement</b> Inmates separated from the general population because they are considered a threat to other inmates and/or staff.</li> <li>• <b>Intensive Management</b> Most restrictive status, for inmates considered to be an immediate threat to other inmates and staff.</li> <li>• <b>Protective Custody</b> Confinement of an inmate for an indefinite period of time to protect the inmate from real or perceived threat of harm by others.</li> <li>• <b>Transition Confinement</b> Confinement of an inmate in a structured transition program.</li> </ul> |

Source: AR 201.05, AR 210.01 and DCS staff.

In some types of segregation, the inmate may work towards return to the general population, but in others, the inmate remains segregated unless there is a change in the conditions that caused the segregation to occur. For example, inmates in protective custody will remain segregated until they no longer need protection. Similarly, inmates in court imposed segregation will remain in segregation until the court changes its order, and inmates on death row remain until they are executed or their death sentence is changed.

In contrast, inmates in segregation for disciplinary reasons, as well as those in the administrative segregation categories, are promoted to “levels” based on their behavior, although they must remain at each level for the minimum designated time period. At each successive level, the inmate gains more privileges, such as increased recreation time outside of the cell, additional showers, and the authority to purchase personal items.

Promotion or demotion between levels is decided by a committee of mental health professionals and segregation unit staff. These decisions are based on the inmate’s behavior. Inmates may appeal a decision to the warden within seven days; however, the warden’s decision is final. Early release from segregation can also be granted by the warden due to overcrowding or when a reduction of time is granted for certain long-term segregation inmates.

#### *Administrative Segregation Classification and Review Process*

Classification is the process DCS uses to determine the appropriate institution and housing area for each inmate. Placement is based on a standard risk factor review process using a standardized objective scoring instrument to achieve consistent assignment. Factors considered include: criminal history, incarceration status, institutional adjustment record, institutional program and work participation, current health conditions, personalized plan, and any other relevant data. A personal conference with the inmate is also conducted. All inmates must have a regular classification review at least once every 12 months with certain exceptions.

Inmates receive an initial classification, which occurs within a few weeks of the inmate’s admission to DCS and may be reclassified at any time during their period of incarceration. According to DCS, inmates are rarely placed in segregation

initially. Placement in segregation generally occurs based on actions or concerns about safety of the inmate or others after the inmate has been placed in a DCS institution. Additional classification reviews may be conducted at the discretion of the appropriate reviewing body and all classification decisions may be appealed to the next higher authority within 15 days.

Table 1.3 shows the levels of administrative review used to assess whether an inmate should be placed or continued in, or removed from administrative segregation.

The UCC conducts the initial classification review after completion of 90 days of confinement; subsequent reviews occur on a different schedule depending on the type of confinement. Table 1.4 shows the schedule of reviews for all types of administrative segregation inmates.

**Table 1.3. Administrative Review for Inmates in Administrative Segregation Classification**

| <b>Authority</b>                                      | <b>Description</b>   |
|---|--|
| <b>Unit Classification Committee (UCC)</b>            | Consists of designated staff members from each unit. A majority of the committee makes the decision.   |
| <b>Institutional Classification Committee (ICC)</b>   | Designated senior staff representative of custody, programming, and intervention areas. The ICC reviews the UCC classification decision and makes a recommendation to the warden.  |
| <b>Warden</b>   | The warden’s decision is appealable within 15 days to the Administrative Segregation Review Board.   |
| <b>Administrative Segregation Review Board (ASRB)</b> | Twelve members designated by the Director but must include the Assistant Superintendent, the Assistant/Associate Warden, Deputy Warden or Warden. Three members review each appeal but none of the members can be from the same institution as the inmate. |
| <b>Director’s Review Committee (DRC)</b>              | Senior DCS staff appointed by the Director. ASRB decision is appealable by either the inmate or the warden to the DRC within 15 days.  |

Source: AR 201.05 (VII).

**Table 1.4. Review Schedules for Inmates in Administrative Segregation**

| <b>Type of Confinement</b>  | <b>Review Interval</b>  |
|---|---|
| <b>All Types – Initial Review</b>   | 90 days   |
| <b>Intensive Management, Administrative Confinement, Involuntary Protective Custody</b> | Every six months after the initial classification.  |
| <b>Voluntary Protective Custody</b>   | Annually after the first six month review.  |
| <b>Transitional Confinement</b>   | Every six months or sooner if program is completed.   |
| <b>Immediate Segregation</b>  | Reviewed only if confinement exceeds 24 hours; then reviewed within 72 hours of placement. (Cannot exceed 30 continuous days after the 72 hour review.) |

Source: AR 201.05(III)(C) and (VII)(B).

Status reviews also occur for all inmates classified into administrative segregation: once every seven days for the first 60 days of confinement and every two weeks after 60 continuous days. The purpose of these reviews is to ensure that inmates are receiving meals, yard time, medication, etc., and is not to determine whether an inmate continues to stay in administrative segregation. Inmates are given notice of the segregation status review and have the opportunity to appear before the UCC once a month at their reviews.



## **SECTION II: Analysis of Selected Charges and Sanctions**

In this section we report the results of our analysis of 2013 data on three selected inmate misconduct charges and the resulting sanctions. As explained in the Introduction to this report, we focused on the sanctions of disciplinary segregation and loss of good time in response to legislators' concerns arising out of the Nikko Jenkins case.

### **Overview**

The Department of Correctional Services (DCS) categorizes inmate misconduct in a Code of Offenses. The Code contains 46 offenses divided into three classifications, ranging from 1, which includes the highest or most serious offenses to 3, which includes the lowest or less serious offenses. To formally charge an inmate, a DCS staff member completes a Misconduct Report (MR), in which the staff member records both the incident and the potential charges.

MRs commonly include multiple charges and some or all of the charges may be dismissed. Each charge that results in a guilty disposition receives one or more sanctions. Table 2.1 shows an example of an MR where some charges are dismissed and others received sanctions.

**Table 2.1. Example of Multiple Charges on One Misconduct Report**

| <b>Offense Charged</b>   | <b>Dismissed?</b> | <b>Sanction</b>              |
|--|-------------------|------------------------------|
| <b>Violation of Sanctions</b>                                    | No                | Verbal warning and reprimand |
| <b>Swearing, Cursing, or Use of Abusive Language or Gestures</b> | No                | 30 days of room restriction  |
| <b>Disobeying an Order</b>                                       | Yes               | NA                           |
| <b>Violation of Regulations</b>                                  | Yes               | NA                           |

Source: Table prepared by the Legislative Audit Office with data from DCS.

In calendar year 2013, 5,401 inmates at the 10 DCS institutions were charged with 71,643 offenses. To review disciplinary segregation and loss of good time in depth, we selected a sample consisting of all charges for the offenses that most often resulted in those sanctions. The charges were assault, disobeying an order, and threatening behavior, which are defined in Table 2.2 (*see Appendix B for additional methodology information*).

**Table 2.2. Definitions of Charges Reviewed in this Report**

| <b>Term Used in this Report</b> | <b>DCS Code of Offenses</b>                         |  |
|---------------------------------|---|--|
|                                 | <b>Classification Number and Title</b>              | <b>Definition</b>  |
| <b>Assault</b>                  | 1C Assault  | Physical attack on another person; continuing a fight after the opponent is no longer participating; spitting or throwing bodily waste or bodily fluid on another person; or using a weapon, object or substance as a weapon in an assault or fight. |
| <b>Disobeying an Order</b>      | 2E Disobeying an Order                              | Disobeying a verbal or written order from an employee or refusing to comply immediately with an order.   |
| <b>Threatening Behavior</b>     | 2H Use of Threatening Language or Gestures/Fighting | Using language or gestures threatening physical harm to another person or fighting not covered by 1C.  |

Source: 68 NAC, Ch. 5.

Assault and threatening behavior are charges that convey a seriousness warranting the most severe punishments, but disobeying an order does not inherently suggest a need for a punishment like disciplinary segregation or loss of good time. However, because orders cover a range of circumstances (such as needing an inmate to make his bed compared to needing him to drop a knife), it follows that the sanctions for disobeying orders would also range from minimal to serious. To better understand the types of misconduct that resulted in a disobeying an order charge with these sanctions, we examined examples of these charges, which we discuss later in this section.

Our sample consists of 9,196 charges (2,882 inmates) for the three selected offenses. Because we selected this sample to give us a high proportion of the sanctions we were interested in, it is not representative of all the charges in 2013 and the results should not be generalized to all of the charges that year. Additionally, within the timeframe for the audit, we were unable to examine individual inmate files or review other documentation that could have given us evidence to help explain the findings in this section. As a result, we simply state the findings with little additional discussion.

## Selected Charges, Data Analysis

Following are the results of our data analysis. The results are presented in four sections, each of which ends with discussion and findings. The four sections are:

1. Charges and Guilty Dispositions, by Institution,
2. Guilty Dispositions and Sanctions, by Charge,
3. Loss of Good Time, and
4. Disciplinary Segregation and Segregation as a Classification.

### 1) Charges and Guilty Dispositions by Institution

Three-quarters of the 9,196 selected charges occurred at four facilities: Tecumseh State Correctional Institution (22 percent), the Nebraska State Penitentiary (21 percent), the Lincoln Correctional Center (19 percent), and Omaha Correctional Center (13 percent). Each of the remaining six institutions had less than ten percent of the total charges (see *Table 2.3*).

**Table 2.3. Proportion of Charges at Each Institution**

| Institution                                   | Selected Charges |             |
|---|------------------|-------------|
| Tecumseh State Correctional Institution (TSC) | 2,000 (22%)      | 75%         |
| Nebraska State Penitentiary (NSP)             | 1,975 (21%)      |             |
| Lincoln Correctional Center (LCC)             | 1,714 (19%)      |             |
| Omaha Correctional Center (OCC)               | 1,188 (13%)      |             |
| Nebraska Correctional Center for Women (NCW)  | 648 (7%)         | 25%         |
| Diagnostic and Evaluation Center (DEC)        | 643 (7%)         |             |
| Nebraska Correctional Youth Facility (NCY)    | 550 (6%)         |             |
| Community Corrections Center – Lincoln (CCL)  | 219 (2%)         |             |
| Work Ethic Camp (WEC)                         | 152 (2%)         |             |
| Community Corrections Center – Omaha (CCO)    | 107 (1%)         |             |
| <b>Total:</b>                                 | <b>9,196</b>     | <b>100%</b> |

Source: Table prepared by the Legislative Audit Office with data from DCS.

Of the 9,196 selected charges, offenders were found guilty of 3,212 (35 percent);<sup>3</sup> the remaining 5,979 charges (65 percent) were dismissed.

Like the number of charges, the proportion of charges that resulted in guilty dispositions varied considerably among the institutions. The Community Corrections Center in Lincoln had the lowest percentage (8 percent) while the Tecumseh

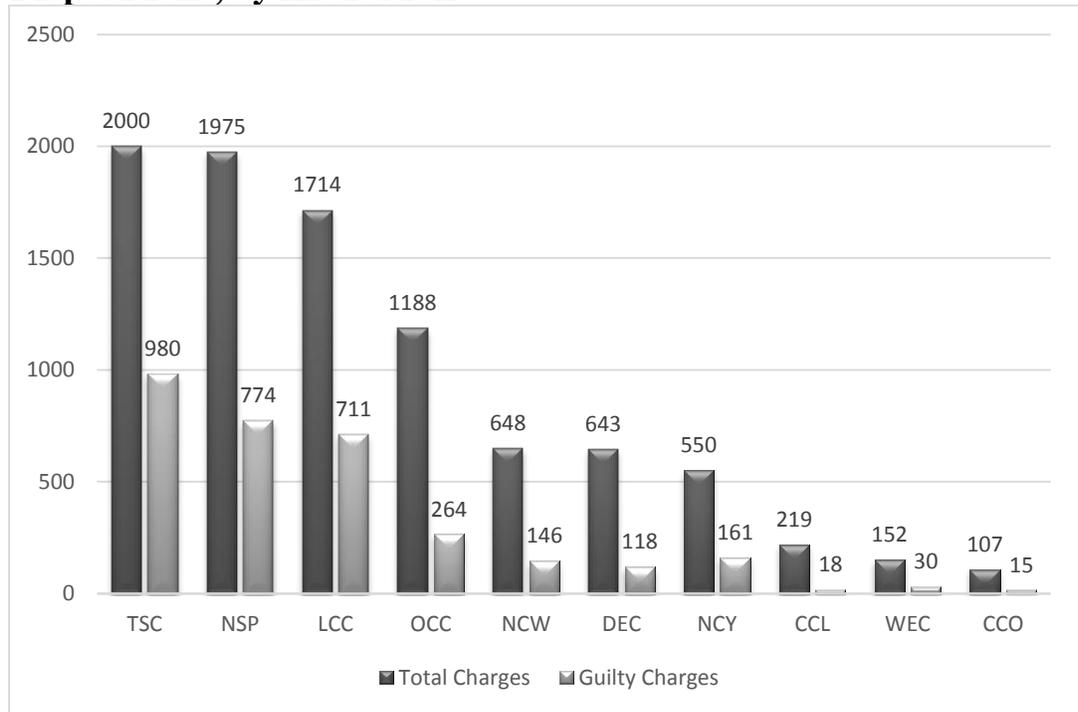
<sup>3</sup> There were five other guilty dispositions, but the sanction information provided by DCS was inconsistent and we eliminated them from our analysis.

State Correctional Institution (Tecumseh) had the highest (49 percent).

Of the four institutions that had the most charges, three (Tecumseh, the Nebraska State Penitentiary, and the Lincoln Correctional Center) also had the highest proportion of guilty dispositions—between 39 and 49 percent of the charges at each institution. At OCC, which was the fourth institution with a high number of charges, only 22 percent of the charges resulted in a guilty dispositions.

The breakdown of charges and guilty dispositions by institution is shown in Figure 2.4 and Table 2.5.

**Figure 2.4. Proportion of Selected Charges that Resulted in Guilty Dispositions, by Institution**



Source: Figure prepared by the Legislature Audit Office with data from DCS.

**Table 2.5. Proportion of Guilty Dispositions, for Selected Charges, by Institution**

| Institution           | TSC   | NSP   | LCC   | OCC   | NCW | DEC | NCY | CCL | WEC | CCO |
|-----------------------|-------|-------|-------|-------|-----|-----|-----|-----|-----|-----|
| <b>Total Charges</b>  | 2,000 | 1,975 | 1,714 | 1,188 | 648 | 643 | 550 | 219 | 152 | 107 |
| <b>Guilty Charges</b> | 980   | 774   | 711   | 264   | 146 | 118 | 161 | 18  | 30  | 15  |
| <b>Percent Guilty</b> | 49%   | 39%   | 41%   | 22%   | 23% | 18% | 29% | 8%  | 20% | 14% |

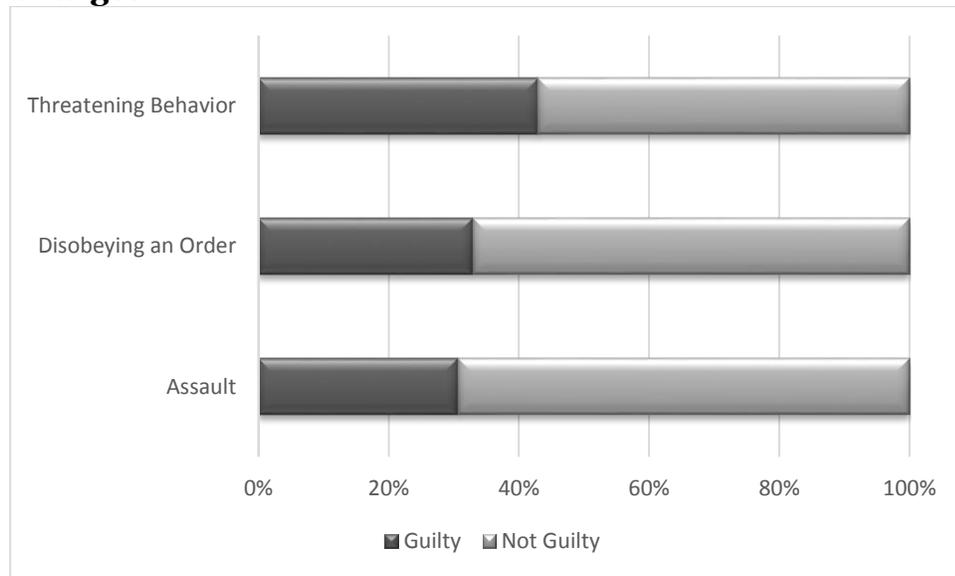
Source: Table prepared by the Audit Office with data from DCS.

**Finding #4:** Tecumseh State Correctional Institute, Nebraska State Penitentiary, and Lincoln Correctional Center had most of the selected charges and also most of the charges that resulted in guilty dispositions.

## 2) Guilty Dispositions and Sanctions by Charge

Of the 9,196 charges, disobeying an order made up about 70 percent. Threatening behavior made up another 22 percent, with assault making up the remaining 8 percent. The proportion of each of the three charges that resulted in guilty dispositions was fairly consistent, ranging from 31 percent for assault to 43 percent for threatening behavior (see Figure 2.6 for a breakdown for each charge).

**Figure 2.6. Proportion of Guilty Dispositions for Selected Charges**



Source: Figure prepared by the Legislature Audit Office with data from DCS.

## Sanctions

Of the 9,196 total charges, 3,212 resulted in a guilty disposition that resulted in one or more sanctions. Possible sanctions include a warning, restricting an inmate to their cell or excluding them from certain areas for a period of time, extra work duty and restitution, among other things. In addition, for misconduct found to be serious or flagrant, the inmate can be placed in disciplinary segregation or lose good time.

The 3,212 guilty dispositions resulted in 3,958 sanctions. About three-quarters (2,466 or 77 percent) received one sanction and the rest (746 or 23 percent) each had two sanctions.

*Charges that Resulted in a Single Sanction*

For the charges that resulted in a single sanction, the most common sanction was disciplinary segregation, which was issued for almost half (1,831 or 46 percent) of the guilty dispositions. The next most common sanctions were loss of good time and restriction of the offender to his or her cell or other designated area, each of which made up about 20 percent of all the sanctions. Much less common sanctions include, but are not limited to, warnings/reprimands and extra work duty (see Table 2.7).

**Table 2.7. All Sanctions for Selected Charges**

| <b>Sanction</b>                 | <b>Sanction Total</b> |
|---------------------------------|-----------------------|
| <b>Disciplinary Segregation</b> | 1,831 (46%)           |
| <b>Loss of Good Time</b>        | 761 (19%)             |
| <b>Room Restriction</b>         | 768 (19%)             |
| <b>Warning or Reprimand</b>     | 282 (7%)              |
| <b>Extra Duty</b>               | 223 (6%)              |
| <b>Other*</b>                   | 93 (2%)               |
| <b>Total:</b>                   | <b>3,958</b>          |

Source: Table prepared by the Legislative Audit Office with data from DCS.

\*The “Other” category consists primarily of restrictions on an inmate’s access to selected areas, such as the yard or gym.

*Charges with Two Sanctions*

Of the 3,212 guilty dispositions in our analysis, approximately one-quarter (746) resulted in two sanctions. In nearly all of those (713 or 96 percent), the sanctions were Disciplinary Segregation and loss of good time. For the remaining 33 guilty dispositions, the double sanctions consisted of:

- Loss of good time and restriction to cell (18),
- Disciplinary segregation and restriction to cell (10),
- Disciplinary segregation and loss of shower privileges (4), and
- Loss of good time and restriction to immediate living area (1).

**Finding #5:** Most guilty determinations for the selected charges resulted in a single sanction, which was usually disciplinary segregation. For the guilty determinations that resulted in two sanctions, nearly all were disciplinary segregation and loss of good time.

### 3) Loss of Good Time

Of the 3,212 guilty dispositions, 761 (24 percent) resulted in loss of good time. Inmates at LCC, Tecumseh and the State Penitentiary lost good time most often—37, 27, and 25 percent, respectively. At the remaining seven institutions, the amount of good time lost ranged from none (CCL and the Community Corrections Center in Omaha) to four percent (OCC and the Diagnostic and Evaluation Center).

The amount of good time lost per guilty disposition ranged from 15 days to one year; however, for the vast majority (90 percent) of the guilty dispositions, the amount lost was 45 days or less (*see Table 2.8 for the complete breakdown*).

**Table 2.8: Number of Times Selected Amounts of Good Time were Lost, by Institution**

| Institution                       | Days             |            |            |                 |           |               |               | Total             |
|-----------------------------------|------------------|------------|------------|-----------------|-----------|---------------|---------------|-------------------|
|                                   | 15               | 30         | 45         | 60              | 90        | 180           | 1 yr.         |                   |
| LCC                               | 0                | 246        | 17         | 2               | 15        | 0             | 1             | 281 (37%)         |
| TSC                               | 6                | 12         | 156        | 0               | 29        | 0             | 0             | 203 (27%)         |
| NSP                               | 8                | 120        | 46         | 0               | 15        | 0             | 1             | 190 (25%)         |
| OCC                               | 9                | 16         | 2          | 1               | 2         | 1             | 0             | 31 (4%)           |
| DEC                               | 0                | 27         | 0          | 0               | 0         | 0             | 0             | 27 (4%)           |
| NCW                               | 7                | 7          | 0          | 1               | 2         | 1             | 1             | 19 (2%)           |
| NCY                               | 3                | 3          | 1          | 0               | 1         | 1             | 0             | 9 (1%)            |
| WEC                               | 0                | 1          | 0          | 0               | 0         | 0             | 0             | 1 (<1%)           |
| <b>Total</b>                      | <b>33</b>        | <b>431</b> | <b>222</b> | <b>4</b>        | <b>64</b> | <b>3</b>      | <b>3</b>      | <b>761 (100%)</b> |
| <b>Time Period % of Total LGT</b> | <b>4%</b>        | <b>57%</b> | <b>29%</b> | <b>&lt;1%</b>   | <b>8%</b> | <b>&lt;1%</b> | <b>&lt;1%</b> |                   |
|                                   | <b>686 (90%)</b> |            |            | <b>74 (10%)</b> |           |               |               |                   |

Source: Table prepared by the Legislative Audit Office with data from DCS.

**Finding #6:** Loss of good time was most likely to result from a charge if the misconduct occurred at an adult male maximum security facility.

DCS regulations adopted through the Administrative Procedure Act process set limits on the amount of good time that may be lost for different types of offenses. There are two types of Class 1 offenses: those that involve assault or injury to another person and those that do not. The loss of good time allowed is greater for offenses that include assault or injury to another.

Effective December 21, 2013 (less than two weeks from the end of our review period), regulations were changed to increase the amount of good time an inmate could potentially lose for all offense classes. Of the charges we examined, only 19 resulted in loss of good time under the new rules, but none actually lost the higher amounts allowed by the new rule.<sup>4</sup> Because the vast majority of the charges we examined occurred under the old rules, this section reflects the rules as they were prior to the regulation change.

Under the old rule, an assault charge could have resulted in a loss of no more than one year of good time. Additionally, DCS may designate good time lost for assault as non-restorable, meaning the inmate cannot earn it back through good behavior.

Of the 157 assault charges that resulted in a loss of good time sanction, none resulted in a loss of more than one year of good time. Only three (two percent) resulted in a loss of one year and three others lost six months. The vast majority (151 or 96 percent) lost 90 days or less. In addition, only three of the charges in our sample resulted in lost non-restorable good time—one inmate lost one month, one lost six months, and one lost one year.

For Class 2 offenses, such as disobeying an order and threatening behavior, a charge could have resulted in a loss of up to forty-five days of good time. Of the 761 Class 2 charges in our sample that resulted in a loss of good time sanction, none resulted in a loss of more than forty-five days. Of the 761,

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<sup>4</sup> For example, although a Class II offense could have resulted in a loss of 90 days good time after the rule change, all of the Class II offenses we examined after the rule change resulted in a loss of 45 days or less. Forty-five days was the maximum loss of good time allowed under the old rules.

**Finding #8:** Most of the loss of good time sanctions were for less time than the maximum allowed by regulation. For the Class 1 (assault) offenses, the sanctions were much less than allowed, and very few were non-restorable.

According to DCS, there is an additional consideration in deciding whether to sanction an inmate with loss of good time. They believe that this sanction is less motivating to many inmates than are sanctions with a more immediate impact, such as loss of privileges and disciplinary segregation. Consequently, to the extent that one of their goals is managing inmate behavior, more immediate sanctions may be chosen over loss of good time.

Among the three selected charges, good time was lost most frequently for threatening behavior (67 percent), followed by assault (21 percent) and disobeying an order (12 percent) (see Table 2.9).

**Table 2.9: Number of Times Good Time was Lost for Selected Charges, by Institution**

| Institution                | Charge           |                     |                      | Ins. LGT Total    |
|----------------------------|------------------|---------------------|----------------------|-------------------|
|                            | Assault          | Disobeying an Order | Threatening Behavior |                   |
| LCC                        | 42               | 6                   | 233                  | 281               |
| TSC                        | 30               | 55                  | 118                  | 203               |
| NSP                        | 59               | 17                  | 114                  | 190               |
| OCC                        | 10               | 2                   | 19                   | 31                |
| DEC                        | 3                | 0                   | 24                   | 27                |
| NCW                        | 7                | 10                  | 2                    | 19                |
| NCY                        | 6                | 1                   | 2                    | 9                 |
| WEC                        | 0                | 0                   | 1                    | 1                 |
| <b>LGT Total by Charge</b> | <b>157 (21%)</b> | <b>91 (12%)</b>     | <b>513 (67%)</b>     | <b>761 (100%)</b> |

Source: Table prepared by the Legislative Audit Office with data from DCS.

**Finding #9:** Of the selected charges, loss of good time was issued most often for threatening behavior charges.

#### **4) Disciplinary Segregation and Segregation as a Classification**

As discussed in Section I, disciplinary segregation is a sanction that may be used for inmate misconduct, but

segregation is also a housing classification. Following the results of our analysis of disciplinary segregation, we discuss the relationship between segregation as a sanction and segregation as classification.

Although disciplinary segregation was the most common sanction overall for the charges we reviewed, the number of guilty dispositions that resulted in disciplinary segregation varied widely among the 10 institutions. Three institutions—the Community Corrections centers in Lincoln and Omaha and the Work Ethic Camp, which are all low security facilities—placed no inmates in disciplinary segregation.

At the remaining seven institutions, the proportion of disciplinary segregation sanctions issued ranged from 27 percent at the Diagnostic and Evaluation Center to 61 percent at Tecumseh (see Table 2.10 for the complete breakdown).

**Table 2.10. Disciplinary Segregation for Selected Charges, by Institution**

| Sanction                              | Institution |            |            |            |            |            |            | Total      |
|---------------------------------------|-------------|------------|------------|------------|------------|------------|------------|------------|
|                                       | DEC         | OCC        | NCW        | NSP        | NCY        | LCC        | TSC        |            |
| <b>Disciplinary Segregation (DS)</b>  | 39          | 86         | 50         | 332        | 76         | 528        | 720        | 1,831      |
| <b>All Sanctions</b>                  | 145         | 302        | 152        | 957        | 168        | 990        | 1,180      | 3,958      |
| <b>DS as a % of Institution Total</b> | <b>27%</b>  | <b>28%</b> | <b>33%</b> | <b>35%</b> | <b>45%</b> | <b>53%</b> | <b>61%</b> | <b>46%</b> |

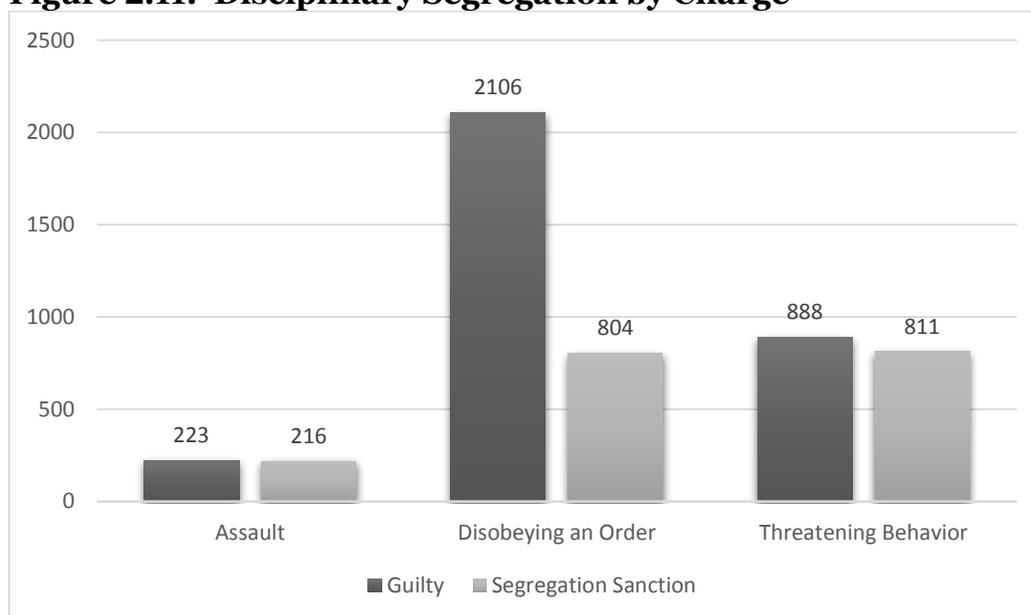
Source: Table prepared by the Legislative Audit Office with data from DCS.

**Finding #10:** Tecumseh State Correctional Institute, Lincoln Correctional Center, and Nebraska Correctional Youth Facility issued disciplinary segregation the most frequently.

#### *Disciplinary Segregation—by Charge*

For the seven institutions that used disciplinary segregation, assault and threatening behavior charges were far more likely to result in disciplinary segregation than were disobeying an order charges. Nearly all (97 percent) of the guilty dispositions on assault charges resulted in segregation and almost as many (91 percent) of the threatening behavior charges resulted in segregation. In contrast, segregation was used as a sanction for less than half (38 percent) of those charged with disobeying an order.

**Figure 2.11: Disciplinary Segregation by Charge**



Source: Figure prepared by the Legislative Audit Office with data from DCS.

**Finding #11:** Of the selected charges, disciplinary segregation was issued for most of the assault and threatening behavior guilty determinations but less than half of the disobeying an order guilty dispositions.

At the individual institutions, the proportion of guilty determinations for assault and threatening behavior charges resulted in segregation at high proportions, similar to the average for all institutions. However, while 38 percent of the disobeying an order charges resulted in segregation overall, the proportion at the individual institutions varied more. TSC and LCC had the highest percentages, 65 and 50 percent respectively; the other five institutions each had 20 percent or less (see Table 2.12).

**Table 2.12. Percentage of Guilty Determinations Resulting in Segregation**

| Institution | Assault | Disobeying an Order | Threatening Behavior |
|-------------|---------|---------------------|----------------------|
| <b>TSC</b>  | 100%    | 65%                 | 100%                 |
| <b>LCC</b>  | 98%     | 50%                 | 97%                  |
| <b>NSP</b>  | 97%     | 19%                 | 93%                  |
| <b>DEC</b>  | 75%     | 16%                 | 68%                  |
| <b>NCW</b>  | 91%     | 15%                 | 86%                  |
| <b>NCY</b>  | 100%    | 15%                 | 98%                  |
| <b>OCC</b>  | 87%     | 3%                  | 85%                  |

Source: Table prepared by the Legislative Audit Office with data from DCS.

**Finding #12:** Tecumseh State Correctional Institute and Lincoln Correctional Center had much higher rates of disobeying an order guilty determinations resulting in disciplinary segregation than did the other institutions.

We did not review the circumstances surrounding all of the individual charges and resulting sanctions in our sample so we cannot say conclusively what caused this difference. Possible reasons include differences in the way the institutions issue charges for different behaviors and that the behavior determined to constitute disobeying an order was more serious than at the other institutions.

As mentioned at the start of this section, we reviewed examples of disobeying an order charges from our sample to better understand the misconduct that could result in sanctions of disciplinary segregation and loss of good time. We found that lengthy histories of misconduct played a role in the sanctions. Following is a description of two of those examples, as well as two examples resulting in lesser sanctions for comparison.

In the first case, an inmate was disruptive and uncooperative while leaving the facility kitchen. Inmates are routinely searched upon entry and exit because of the likelihood that an inmate could remove an object that could be used as a weapon. The inmate refused to follow the corrections officer out and several times failed to follow instructions during the search.

The inmate was sanctioned to 45 days of disciplinary segregation and 45 days loss of good time for one disobeying an order charge and 15 days of disciplinary segregation for a charge of flares of temper/minor physical contact (the inmate was also charged with interference with a search and disruption of official duties, but those charges were dismissed). The Disciplinary Committee found the misconduct to be serious (and thus eligible for disciplinary segregation and loss of good time) because refusing to follow orders related to a search makes it difficult to find contraband which could endanger the lives of inmates and staff, especially in a high security area where knives are present.

In the second case, an inmate continuously screamed obscenities at a corrections officer despite being told repeatedly to stop. Again, the inmate was charged with

disobeying an order and three other charges—swearing, cursing, or using abusive language or gestures (abusive language), disruption of authorized duties, and violation of regulation.

The disobeying an order charge resulted in 45 days disciplinary segregation and 45 days of lost good time, while the abusive language charge resulted in 15 days disciplinary segregation. The other charges were dismissed. For the disobeying an order charge, the Disciplinary Committee found the misconduct to be flagrant because it was the tenth time in a six-month period that the inmate was found guilty of disobeying an order. For the abusive language charge, the Committee found the misconduct flagrant because it was the inmate's seventh abusive language offense in six months.

For comparison purposes, we also identified two examples of misconduct that resulted in disobeying an order charges with a lesser sanction.

In the first of these cases an inmate prevented a lobby door from closing. When he was instructed to secure the door, he argued with the corrections officer about whether he had to close the door. He was charged with disobeying an order and his sanction was a verbal warning and reprimand.

In the second case the inmate was told not to enter into the yard because hours were over. When the doors were opened for exiting inmates, the inmate went into the yard. The inmate was charged with disobeying an order, along with violation of regulations and unauthorized areas. The penalty for the disobeying an order charge was 10 hours of extra duty. The inmate also received a verbal warning for violation of regulations, while the unauthorized areas charge was dismissed.

### *Length of Disciplinary Segregation*

A majority of the disciplinary segregation sanctions were for 15 days or less (53 percent). Nearly three-quarters (72 percent) were for 30 days or less, and of the remaining 28 percent, most segregation lengths were for 31 to 45 days, with just 5 percent for 60 days (*see Table 2.13*).

**Table 2.13. Length of Disciplinary Segregation, by Institution**

| Institution  | Days                       |                            |                            |                          | Total                         |
|--------------|----------------------------|----------------------------|----------------------------|--------------------------|-------------------------------|
|              | 1-15                       | 16-30                      | 31-45                      | 60                       |                               |
| <b>TSC</b>   | 207                        | 102                        | 351                        | 60                       | 720                           |
| <b>LCC</b>   | 369                        | 120                        | 19                         | 20                       | 528                           |
| <b>NSP</b>   | 197                        | 83                         | 40                         | 12                       | 332                           |
| <b>OCC</b>   | 74                         | 10                         | 2                          | 0                        | 85                            |
| <b>NCY</b>   | 53                         | 17                         | 5                          | 1                        | 76                            |
| <b>NCW</b>   | 32                         | 8                          | 5                          | 5                        | 50                            |
| <b>DEC</b>   | 38                         | 1                          | 0                          | 0                        | 39                            |
| <b>Total</b> | <b>970</b><br><b>(53%)</b> | <b>341</b><br><b>(19%)</b> | <b>422</b><br><b>(23%)</b> | <b>98</b><br><b>(5%)</b> | <b>1,831</b><br><b>(100%)</b> |
|              | <b>1,311 (72%)</b>         |                            | <b>520 (28%)</b>           |                          |                               |

Source: Table prepared by the Legislative Audit Office with data from DCS.

DCS regulations limit the length of segregation that may be imposed for different offenses. Assault is one of the Class 1 (most serious) offenses, which may result in up to 60 days of disciplinary segregation and all of the inmates in our analysis who received 60 days had been found guilty of assault. Disobeying an order and threatening behavior are Class 2 (less serious) offenses for which an inmate may receive up to 45 days of segregation. None of the inmates in our analysis who were guilty of those charges received more than 45 days of segregation.

**Finding #13:** Most of the disciplinary segregation sanctions were for much less time than the maximum allowed and none exceeded the maximums allowed.

*Length of Time Inmates Spent in Segregation*

As explained earlier, disciplinary segregation and segregation as a classification (such as administrative confinement) are not the same thing. Disciplinary segregation is punishment for inmate misconduct—there are time limits on how long it may last, and an inmate has few privileges or opportunities for programming. Administrative confinement is a housing classification used when DCS determines it is necessary for the safety of an inmate or others in the institution. There is no time limit for how long it may last, and an inmate has more privileges and access to programming than would an inmate in disciplinary segregation.

While those distinctions are important, both types of segregation result in isolation of an inmate from advantages

available to general population inmates, such as socializing with others and full privileges and programming opportunities. We believe legislators, including those on the LR 424 Investigative Committee, are interested in the amount of time inmates are spending in segregation, regardless of the reason for it.

To that end, we had intended to analyze of a sample of inmates to show the total amount of time they had spent in all types of segregation during their incarceration. However, as discussed in the Introduction, we judged the segregation data we received from DCS to be unreliable, which prohibited us from being able to complete the analysis within the timeframe for the audit.

It was evident from the data, however, that some inmates spend much more time in segregation than is suggested by our analysis of the amount of disciplinary segregation issued as a sanction for an individual charge. To give the reader a sense of how much longer some inmates are in segregation—whether disciplinary or as a classification—we analyzed a few examples from the data we received, and double checked the information with DCS research staff.

In the DCS response to the draft audit report, the agency challenged our use of these examples, stating in part that “consecutive disciplinary segregation sanctions” are “not a common occurrence.” However, DCS provided no evidence to support that statement. Because we found the data unreliable, we do not believe it can readily be determined how often these situations occur. The agency did not disagree with our general point, which is that some inmates spend much more time segregated from the general population than is suggested by our review of individual disciplinary segregation sanctions.

Two examples of inmates in our sample who were placed in administrative confinement following disciplinary segregation show that inmates sometimes spend much more time in segregation than a single disciplinary sanction would suggest. One inmate served 40 days in disciplinary segregation for assault, was in segregation that was classified as disciplinary segregation and administrative confinement for 26 days, followed by 436 days in administrative confinement. Another inmate was sanctioned with 60 days of

disciplinary segregation for assault and four other charges.<sup>5</sup> Following release from disciplinary segregation, he served 287 days in administrative confinement.

Additionally, some inmates have multiple misconduct reports that result in consecutive stays in disciplinary segregation. For example, during a 28-month period, one inmate had 190 charges that resulted in guilty determinations, 28 of which resulted in separate disciplinary segregation sanctions. Of the total 762 days spent in disciplinary segregation, the longest stretch was for 415 days. The inmate was out of segregation for two days before being returned for another 179 days.

**Finding #14:** The amount of disciplinary segregation inmates in our sample received for individual sanctions fell within the established limits. However, some inmates spent much more time in consecutive periods of disciplinary segregation or in consecutive periods of disciplinary segregation and administrative confinement than the limitations on individual sanctions suggest.

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<sup>5</sup> The inmate received five disciplinary segregation sanctions, which were to run concurrently, so the total sanction was for 60 days.

## **SECTION III: Department of Correctional Services Programming**

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By law, the Department of Correctional Services (DCS) must provide treatment services to offenders housed in its facilities. In general terms, the DCS director must establish programs to prepare and assist eligible offenders to become responsible citizens upon release from custody. DCS is required to provide structured programming for all inmates, which can include work programs, vocational training, behavior management and modification, and substance abuse counseling. Programs and treatment services must address, among other things, mental health or psychiatric disorders and drug/alcohol use and addiction.

The specific programming requirements are contained in the Nebraska Treatment and Corrections Act (Act).<sup>6</sup> The Act also outlines how the department is to determine appropriate treatment plans for individual offenders.

The Act provides that, upon admission, each inmate is to receive a “physical examination and a thorough examination” that includes, among other considerations, the inmate’s psychological and social history and the motivation of his or her offense. A report of the findings is to be submitted to the warden of the institution to which the offender is assigned, and the document must include recommendations for medical and psychological treatment and educational training, among other programming recommendations.

Within 60 days of the initial security classification and assignment of the inmate to a specific facility, all available information is to be reviewed and a department-approved “personalized program plan” created. The Act requires that the department provide programming that enables inmates to comply with their personalized program plans. Personalized programming may include substance abuse treatment, mental and psychiatric services, or any other treatment services considered necessary and appropriate by the department.

Upon receiving his or her personalized program plan, an inmate is asked, in writing, to accept or deny any recommended treatment. If the inmate accepts the

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<sup>6</sup> Neb. Rev. Stat §§ 83-170-83-1,135.

recommendation, he/she is placed on a waiting list for the treatment program at that time.

The Act requires the department to provide recommended substance abuse therapy and psychological treatment prior to the offender's first parole eligibility date. If the Parole Board finds the department did not provide adequate access to the substance abuse therapy prior to the eligibility date, the board may waive that requirement if, as a condition of parole, the offender agrees to complete therapy recommended by the board. The statute does not give the Parole Board the ability to waive the requirement for psychological treatment.

The plain language of the statute indicates that the requirement that DCS provide services can only be waived with regard to substance abuse treatment. It states:

“If the board finds that the department did not provide adequate access or availability to the committed person prior to the first parole eligibility date, the board **may waive the requirement of section 28-416** only if, as a condition of parole, the committed person agrees to attend and complete therapy which is recommended by the board.”

Section 28-416 refers only to substance abuse treatment, so only substance abuse treatment may be waived.

However, the Statement of Intent for the bill that added mental health services to this statute (LB 274, 1997) clearly states the introducer's intent that if the Board finds that DCS does not provide access or availability to mental health treatment, the requirement is waived if the offender agrees to therapy approved by the Board. The Statement of Intent says the intent of the bill is that “no offender is denied parole eligibility because mental health treatment was not made available by the Department of Correctional Services.” There was no hearing testimony or floor debate on the bill so no other intent can be inferred.

In contrast to the stated intent, the actual language of LB 274 did not, in fact, change the language of this section to ensure that mental health treatment is included in the waiver provision.

**Finding #15:** The Legislature may have intended to allow the Parole Board to waive requirements for mental health treatment of inmates if the Board makes the treatment a requirement of parole; however, the plain language of the law does not allow this treatment to be waived.

DCS staff also alerted us to another problem with this statute: it requires that the recommended treatments be provided prior to the offender's first parole eligibility date; due to short sentences, however, some offenders come into the correctional system parole-eligible, making it impossible for DCS to meet this requirement. By law, an inmate is parole-eligible when the offender has served one-half the minimum term of his or her sentence and due to good time, DCS reduces the term of an offender by six months for each year of the offender's term, barring any reduction for misconduct. As a very basic example, if an offender has a minimum one year sentence and is credited half a year as good time, that inmate is parole-eligible from the day he or she enters into DCS' custody. We found this was the case with some of the inmates DCS referred for commitment under the statutes relating to mentally ill and dangerous inmates and inmates determined to be dangerous sex offenders, which we discuss in Section V.

**Finding #16:** For inmates who receive short sentences that cause them to be parole-eligible on their first day of incarceration, it is impossible for the Department of Correctional Services to meet the statutory requirement that the inmate be provided with treatment prior to parole eligibility.

## **Program Inventory**

Following is the program inventory available to inmates in the custody of DCS and the programs offered at each institution. These programs are broken into the following categories: mental health treatment, sex offender services, substance abuse treatment, physical health treatment, health education, general education, skilled jobs, and programs. We also included a list of inmate clubs, which are not considered treatment but can provide constructive activities for inmates. Appendix C provides brief descriptions and defines the program-related acronyms used in the table, as provided by DCS. Appendix D contains a table containing information regarding who (either DCS or an outside entity) administers or delivers each individual program.

| Program Name   | Department of Correctional Services Institution |     |     |     |     |     |     |     |     |     |          |
|--|---|-----|-----|-----|-----|-----|-----|-----|-----|-----|----------|
|  | CCL   | CCO | DEC | LCC | NCW | NCY | NSP | OCC | TSC | WEC | CSI Whse |
| <b>Mental Health Treatment</b>                             |   |     |     |     |     |     |     |     |     |     |          |
| Aggression Replacement Training (ART)                      |   |     |     |     |     | x   |     |     |     |     |          |
| Anger Management   | x   | x   |     | x   |     | x   |     | x   |     |     |          |
| Anxiety Management   |   |     |     | x   |     |     |     | x   |     |     |          |
| ExPLORE  |   |     |     |     |     |     |     |     | x   |     |          |
| Crisis Intervention  | x   | x   | x   | x   | x   | x   | x   | x   | x   | x   |          |
| GRIP (Grudge Reduction and Improved Personal Relationship) |   |     |     |     |     | x   |     |     |     |     |          |
| Mental Health Unit   |   |     |     | x   | x   |     |     |     |     |     |          |
| METEOR Program   |   |     |     | x   |     |     |     |     | x   |     |          |
| Mood Management  |   |     |     |     |     |     |     | x   |     |     |          |
| Outpatient Mental Health Clinic Services                   | x   | x   | x   | x   | x   | x   | x   | x   | x   | x   |          |
| Violence Reduction Program                                 |   |     |     |     |     |     | x   |     |     |     |          |
| <b>Sex Offender Services</b>                               |   |     |     |     |     |     |     |     |     |     |          |
| bHeLP  | x   |     |     |     | x   |     | x   | x   |     |     |          |
| Continuing Care  | x   | x   |     | x   | x   |     | x   | x   |     |     |          |
| iHeLP  |   |     |     | x   |     |     |     |     |     |     |          |
| oHeLP  | x   |     |     |     | x   |     | x   | x   |     |     |          |
| <b>Substance Abuse Treatment</b>                           |   |     |     |     |     |     |     |     |     |     |          |
| Continuing Care  | x   |     |     | x   |     |     | x   | x   | x   |     |          |
| Drug and Alcohol Education                                 |   |     |     |     |     | x   |     | x   |     |     |          |
| Non-Residential Treatment                                  | x   |     |     |     |     |     |     | x   | x   | x   |          |
| <i>Outpatient</i>  | x   |     |     |     |     |     |     | x   | x   | x   |          |
| <i>Intensive Outpatient</i>                                | x   |     |     |     |     |     |     | x   | x   | x   |          |
| Residential Treatment                                      |   |     |     |     | x   |     | x   | x   | x   |     |          |
| <b>Physical Health Treatment</b>                           |   |     |     |     |     |     |     |     |     |     |          |
| Chemotherapy   |   |     | x   |     |     |     | x   |     |     |     |          |
| Dentistry  |   |     | x   | x   | x   | x   | x   | x   | x   |     |          |
| Dialysis   |   |     |     |     |     |     | x   |     |     |     |          |

| Program Name                                     | Department of Correctional Services Institution |     |     |     |     |     |     |     |     |     |          |
|--|---|-----|-----|-----|-----|-----|-----|-----|-----|-----|----------|
|  | CCL   | CCO | DEC | LCC | NCW | NCY | NSP | OCC | TSC | WEC | CSI Whse |
| <b>Physical Health Treatment (cont)</b>          |   |     |     |     |     |     |     |     |     |     |          |
| Medical Clinics                                  | X   |     | X   | X   | X   | X   | X   | X   | X   | X   |          |
| Optometry  |   |     | X   | X   | X   |     | X   | X   | X   |     |          |
| Skilled Nursing Facility                         |   |     | X   |     |     |     | X   |     | X   |     |          |
| <b>Health Education</b>                          |   |     |     |     |     |     |     |     |     |     |          |
| Dental Care                                      | X   | X   | X   | X   | X   | X   | X   | X   | X   | X   |          |
| Diabetes   | X   | X   | X   | X   | X   | X   | X   | X   | X   | X   |          |
| Emergency Preparedness                           | X   | X   | X   | X   | X   | X   | X   | X   | X   | X   |          |
| HIV/AIDS   | X   | X   | X   | X   | X   | X   | X   | X   | X   | X   |          |
| Healthy Lifestyles                               | X   | X   | X   | X   | X   | X   | X   | X   | X   | X   |          |
| Hepatitis  | X   | X   | X   | X   | X   | X   | X   | X   | X   | X   |          |
| Hygiene  | X   | X   | X   | X   | X   | X   | X   | X   | X   | X   |          |
| K-2  | X   | X   | X   | X   | X   | X   | X   | X   | X   | X   |          |
| MRSA   | X   | X   | X   | X   | X   | X   | X   | X   | X   | X   |          |
| Medication Abuse                                 | X   | X   | X   | X   | X   | X   | X   | X   | X   | X   |          |
| Men's Sexual Health                              | X   | X   | X   | X   |     | X   | X   | X   | X   | X   |          |
| Nutrition  | X   | X   | X   | X   | X   | X   | X   | X   | X   | X   |          |
| STIs   | X   | X   | X   | X   | X   | X   | X   | X   | X   | X   |          |
| Smoking Awareness                                | X   | X   | X   | X   | X   | X   | X   | X   | X   | X   |          |
| TB   | X   | X   | X   | X   | X   | X   | X   | X   | X   | X   |          |
| Women's Health                                   | X   | X   |     |     | X   |     |     |     |     |     |          |
| Women's Sexual Health                            | X   | X   |     |     | X   |     |     | X   |     |     |          |
| <b>General Education</b>                         |   |     |     |     |     |     |     |     |     |     |          |
| Access to Post-Secondary Education Programs      | X   | X   |     | X   | X   | X   | X   | X   | X   | X   |          |
| Adult Basic Education/Adult Secondary Education  | X   | X   |     | X   | X   | X   | X   | X   | X   | X   |          |
| Beginning Typing                                 |   |     |     | X   | X   | X   |     | X   |     |     |          |
| Computer Literacy                                |   |     |     | X   | X   | X   |     | X   | X   |     |          |
| English Second Language/English Language Learner |   | X   |     | X   | X   | X   | X   | X   | X   |     |          |
| Fractions Refresher                              |   |     |     | X   | X   | X   |     | X   |     | X   |          |

| Program Name                                   | Department of Correctional Services Institution |     |     |     |     |     |     |     |     |     |          |
|--|---|-----|-----|-----|-----|-----|-----|-----|-----|-----|----------|
|  | CCL   | CCO | DEC | LCC | NCW | NCY | NSP | OCC | TSC | WEC | CSI Whse |
| <b>General Education (cont)</b>                |   |     |     |     |     |     |     |     |     |     |          |
| High School                                    |   | X   |     | X   | X   | X   | X   | X   | X   | X   |          |
| Inside-Out Program (Peru State College)        |   |     |     |     |     |     |     |     | X   |     |          |
| Job Skills                                     |   |     |     | X   | X   | X   |     | X   | X   | X   |          |
| Math Basics                                    |   |     |     | X   | X   | X   |     | X   |     | X   |          |
| Math Enrichment                                |   |     |     | X   | X   | X   |     | X   |     | X   |          |
| Math Refresher                                 |   |     |     | X   | X   | X   |     | X   |     | X   |          |
| <b>Skilled Jobs</b>                            |   |     |     |     |     |     |     |     |     |     |          |
| CSI  | X   | X   |     | X   | X   |     | X   | X   | X   |     |          |
| <i>Administration</i>                          | X   |     |     |     |     |     | X   |     | X   |     |          |
| <i>Braille</i>                                 |   |     |     |     |     |     | X   |     |     |     |          |
| <i>Cleaning Crew</i>                           | X   | X   |     |     | X   |     |     |     | X   |     |          |
| <i>DOR Crew</i>                                | X   | X   |     |     |     |     |     |     |     |     |          |
| <i>Laundry</i>                                 |   |     |     | X   | X   |     | X   | X   | X   |     |          |
| <i>License Plates</i>                          |   |     |     |     |     |     | X   |     |     |     |          |
| <i>Metals</i>                                  |   |     |     |     |     |     | X   |     |     |     |          |
| <i>Military Crew</i>                           | X   |     |     |     |     |     |     |     |     |     |          |
| <i>NRD Crew</i>                                | X   |     |     |     |     |     |     |     |     |     |          |
| <i>Prairie Gold</i>                            | X   |     |     |     |     |     |     |     |     |     |          |
| <i>Printing</i>                                |   |     |     | X   |     |     |     |     |     |     |          |
| <i>Sewing</i>                                  |   |     |     |     | X   |     |     | X   | X   |     |          |
| <i>Sign</i>                                    |   |     |     |     |     |     | X   |     |     |     |          |
| <i>Soap</i>                                    |   |     |     |     |     |     | X   |     |     |     |          |
| <i>TEK Industries</i>                          |   |     |     | X   |     |     | X   |     |     |     | X        |
| <i>Upholstery</i>                              |   |     |     |     |     |     | X   | X   |     |     |          |
| <i>Wood</i>                                    |   |     |     | X   |     |     | X   | X   | X   |     |          |
| <i>Warehouse</i>                               | X   |     |     |     | X   |     |     | X   | X   |     |          |
| Food Service                                   | X   |     |     | X   | X   |     | X   | X   | X   | X   |          |
| Inmate Medical Porter (CNA)                    |   |     | X   | X   | X   |     | X   | X   | X   |     |          |
| Maintenance                                    | X   |     |     | X   | X   |     | X   | X   | X   | X   |          |
| <b>Programs</b>                                |   |     |     |     |     |     |     |     |     |     |          |
| 7 Habits on the Inside                         |   |     |     |     | X   | X   |     |     | X   | X   |          |
| Addicted Brain                                 |   |     |     |     |     |     |     | X   |     |     |          |
| Alternatives to Violence                       | X   |     |     | X   |     |     | X   | X   |     |     |          |
| Business Tech                                  |   |     |     |     |     |     |     |     |     | X   |          |
| Character Building through Responsible Changes |   |     |     |     |     | X   |     |     |     |     |          |

| Program Name                           | Department of Correctional Services Institution |     |     |     |     |     |     |     |     |     |          |
|--|---|-----|-----|-----|-----|-----|-----|-----|-----|-----|----------|
|  | CCL   | CCO | DEC | LCC | NCW | NCY | NSP | OCC | TSC | WEC | CSI Whse |
| <b>Programs (cont)</b>                 |   |     |     |     |     |     |     |     |     |     |          |
| Cognitive Thinking                     |   |     |     |     |     |     |     | X   |     | X   |          |
| Common Sense Parenting                 |   |     |     | X   | X   |     | X   | X   | X   |     |          |
| Communication Skills                   |   |     |     |     |     |     |     | X   |     |     |          |
| Dog Handler Program                    |   |     |     | X   | X   | X   | X   | X   |     |     |          |
| Domestic Violence                      |   |     |     |     |     |     | X   |     |     |     |          |
| Financial Peace University             | X   | X   |     |     |     |     |     | X   |     |     |          |
| Horticulture                           |   |     |     |     |     | X   |     | X   |     |     |          |
| InsideOut Dads                         |   |     |     | X   |     | X   | X   | X   | X   | X   |          |
| Living Well                            | X   | X   | X   | X   | X   | X   | X   | X   | X   | X   |          |
| Love and Logic                         |   |     |     |     | X   |     |     |     |     |     |          |
| Mentoring Program                      |   |     |     |     |     | X   | X   |     |     |     |          |
| Money Smart                            |   |     |     |     | X   |     |     |     |     |     |          |
| Nursery                                |   |     |     |     | X   |     |     |     |     |     |          |
| Planning with a Purpose                |   |     |     |     |     |     | X   | X   |     |     |          |
| Power of Peace                         |   |     |     |     | X   |     |     |     |     |     |          |
| PreRelease Discharge Planning          | X   | X   | X   | X   | X   | X   | X   | X   | X   | X   |          |
| ProStart Culinary Arts                 |   |     |     | X   | X   | X   |     | X   |     |     |          |
| Released and Restored                  | X   |     |     | X   | X   |     | X   | X   |     |     |          |
| Restrictive Housing Levels Program     |   |     |     | X   | X   | X   | X   |     | X   |     |          |
| SISTA                                  |   |     |     |     | X   |     |     |     |     |     |          |
| Stress Management                      |   |     |     |     |     |     |     | X   |     |     |          |
| Thinking for a Change                  |   |     |     |     |     | X   |     |     |     |     |          |
| Transformation Project (GP)            |   |     |     |     |     | X   |     | X   |     | X   |          |
| Transformation Project (Rest. Housing) |   |     |     | X   |     |     | X   |     | X   |     |          |
| Victim Impact                          |   |     |     | X   | X   | X   | X   | X   |     | X   |          |
| WaY Writing Program                    |   |     |     |     |     | X   |     |     |     |     |          |
| Welding Training                       |   |     |     |     |     |     |     |     |     | X   |          |
| Within My Reach                        |   |     |     | X   | X   |     | X   | X   | X   |     |          |

| Program Name                 | Department of Correctional Services Institution |     |     |     |     |     |     |     |     |     |          |
|------------------------------|---|-----|-----|-----|-----|-----|-----|-----|-----|-----|----------|
|                              | CCL   | CCO | DEC | LCC | NCW | NCY | NSP | OCC | TSC | WEC | CSI Whse |
| <b>Inmate Clubs</b>          |   |     |     |     |     |     |     |     |     |     |          |
| 7th Step                     |   |     |     |     |     |     | X   |     | X   |     |          |
| Alcoholics Anonymous         | X   |     |     | X   | X   | X   | X   | X   | X   | X   |          |
| Fellowship                   |   |     |     |     | X   |     |     | X   |     |     |          |
| Harambee                     |   |     |     | X   |     |     | X   | X   | X   |     |          |
| Hobby                        |   |     |     | X   | X   |     | X   | X   | X   |     |          |
| <i>Stamp Collectors</i>      |   |     |     |     |     |     |     |     | X   |     |          |
| Islamic                      |   |     |     |     |     |     |     | X   |     |     |          |
| Mata                         |   |     |     | X   |     |     | X   | X   | X   |     |          |
| NASCA                        |   |     |     | X   |     |     | X   | X   | X   |     |          |
| Narcotics Anonymous          | X   |     |     |     | X   |     |     | X   |     |     |          |
| Standing Together on Purpose |   |     |     | X   |     |     |     |     |     |     |          |
| Survivors                    |   |     |     |     | X   |     |     |     |     |     |          |
| Toastmasters                 |   |     |     |     |     |     | X   |     | X   |     |          |
| Veterans                     |   |     |     |     |     |     | X   | X   | X   |     |          |

## **SECTION IV: Commitment Acts for “Mentally Ill and Dangerous” Persons and for “Dangerous Sex Offenders”**

In this section and Section V, we discuss the statutory processes that govern the commitment of inmates to mental health or sex offender treatment upon their release from the correctional system.

This section presents an overview of the relevant statutes, primarily the Nebraska Mental Health Commitment Act, the Sex Offender Commitment Act, and the Nebraska Treatment and Corrections Act. The two commitment acts apply broadly to individuals and entities that may play a role in committing persons under the acts. The Nebraska Treatment and Corrections Act sets forth responsibilities specific to the Department of Correctional Services (DCS) to identify the inmates who are near discharge and who may meet the standards for commitment.<sup>7</sup> We also discuss differences among the three acts that may raise policy questions for the Legislative Performance Audit Committee’s consideration.

In Section V, we present the results of a file review of the 27 inmates referred by the department for commitment under the two acts in 2013.

### **The Mental Health and Sex Offender Commitment Acts—Overview**

In general terms, the Nebraska Mental Health Commitment Act (MHCA) provides for the treatment—potentially against a person’s will—of individuals determined to be mentally ill and dangerous. Similarly, the Sex Offender Commitment Act (SOCA) provides for treatment—also potentially involuntarily—of individuals determined to be dangerous sex offenders. Under both acts, the required treatment may be either inpatient or outpatient.

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<sup>7</sup> Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 71-901 to 71-963; Sex Offender Commitment Act, Neb. Rev. Stat. §§ 71-1201 to 71-1226; Nebraska Treatment and Corrections Act, Neb. Rev. Stat. §§ 83-170-83-1,135. State law also provides for the involuntary civil commitment and treatment of developmentally disabled persons, but the law, the Developmental Disabilities Court-Ordered Custody Act, is rarely invoked for DCS inmates, according to DCS.

Two key definitions are common to the commitment acts and the Treatment and Corrections Act:

**“Mentally ill and dangerous”** refers to a person with a mental illness or a substance dependency that causes him or her to pose a substantial risk of serious harm to themselves or others in the “near future,” as evidenced by recent acts or threats of violence. In this context, mental illness is defined as a psychiatric disorder characterized by a severe or substantial impairment of a person’s mental and emotional processes that interferes with the person’s ability to meet the ordinary demands of living or jeopardizes the safety or well-being of others.

**“Dangerous sex offender”** refers to a person who suffers from a mental illness or personality disorder that makes him or her likely to repeatedly commit acts of sexual violence and who is unable to control the behavior. The Treatment and Corrections Act specifies that a person with a mental illness may be a dangerous sex offender if he or she has been convicted at least once for a sex offense, whereas a person with a personality disorder may be a dangerous sex offender if he or she has been convicted at least twice of a sex offense. The definition of mental illness is the same as that in the MHCA; however, personality disorder is not defined in statute.<sup>8</sup> DCS uses the definition of personality disorder found in the Diagnostic and Statistical Manual of Mental Disorders (DSM), which contains the classification of mental disorders used by mental health professionals in the United States.

Under both acts, the initial step in the commitment process is that any person who believes another person to be mentally ill and dangerous or a dangerous sex offender may communicate that belief to a county attorney. If the county attorney concurs, he or she may file a petition in the district court to commit the subject of the petition to inpatient or outpatient treatment.

Commitment petitions are heard by three-member mental health boards, created by the presiding judges in each district court judicial district. Chaired by attorneys, the other members may include representatives of any two of the following occupations (but not more than one from each):

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<sup>8</sup> There appears to be an additional difference in the two definitions because substance dependency is included as an element of the definition of “mentally ill and dangerous” but not in the definition of “dangerous sex offender.” Neb. Rev. Stat. § 71-1203. However, the Nebraska Supreme Court has stated that substance dependency may, in fact, be an element of the dangerous sex offender definition. *In re Interest of G.H.*, 279 Neb. 708, 781 N.W. 2d 438 (2010).

physician, psychologist, psychiatric nurse, licensed clinical social worker, licensed independent clinical social worker, licensed independent mental health practitioners, or a layperson with a demonstrated interest in mental health or substance abuse issues.

An individual committed as either mentally ill and dangerous or a dangerous sex offender may only be released from the commitment by the mental health board.

*The Mental Health Commitment Act and the Sex Offender Commitment Act: Differences with Potential Policy Implications*

The MHCA and the SOCA share nearly identical legal and operational processes, such as the burden of proof in commitment proceedings and the filing of periodic progress reports with the mental health boards regarding committed persons. In addition, as has already been noted, the two acts use the same definitions of “mental illness” and “dangerous sex offender.”

Despite these similarities, the two commitment acts differ in several significant ways. We identified three differences that raise potential policy issues:

1. Elements of the definitions of the terms mentally ill and dangerous and dangerous sex offender,
2. The process used for evaluating inmates, and
3. Requirements regarding authorities who must receive notification of a commitment decision.

Following is a discussion of each of these differences.

### **Definitions**

The definitions of mentally ill and dangerous and dangerous sex offender have obvious differences in that one focuses exclusively on individuals who are dangerous due to their propensity to commit sex offenses. However, there are two ways in which the definition of mentally ill and dangerous persons is potentially narrower than the definition of dangerous sex offender.

First, as stated previously, for an individual to be committed because he or she is mentally ill and dangerous, that person must be found to be mentally ill or substance dependent in a way that causes him or her to pose a danger to others or to

himself or herself in the *near future*. The imminence of the danger must be manifested by evidence of recent violent acts or threats of violence or by placing others, or himself or herself, in reasonable fear of such harm.

By contrast, the definition of a dangerous sex offender is more open-ended regarding both the timing of possible future violence and the evidence required to support the likelihood of this violence—DCS need only determine that an individual, because of a mental illness or personality disorder, is likely to commit repeat acts of sexual violence *at some point in the future*. The evidence required to support this determination is that the person has been convicted of at least one sexual offense at some point in the past (one sexual offense conviction is required for those with a mental illness, two convictions are required for those with a personality disorder)—there is no requirement for evidence of *recent* threats or behavior.

This difference in requirements between the two definitions means that inmates DCS believes might be dangerous at some later time, but not necessarily in the *near* future, may not be considered for commitment as mentally ill and dangerous. The difference in not requiring *recent* threats or acts under the definition of dangerous sex offender is not as significant as it might seem on its face, however, as Nebraska courts have held that there is no definite time period to determine if an act is “recent” for the purposes of the mentally ill and dangerous statute. Instead, the courts have found that each case should be decided based upon the relevant facts and circumstances.<sup>9</sup>

**Finding #17:** Because the definition of mentally ill and dangerous is limited to inmates likely to be a danger in the near future, inmates who might be considered dangerous at a later time may not be suggested for commitment.

The second difference is that the definition of dangerous sex offender explicitly includes persons with personality disorders, while the definition of mentally ill and dangerous contains no mention of personality disorders. Before continuing the discussion of this difference, some understanding of the meaning of these terms will be helpful.

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<sup>9</sup> *In re Interest of Kochner*, 266 Neb. 114, 662 N.W.2d 195 (2003). Courts have found that events that occur 5 to 10 years ago could be found to be “recent” under the law. *In re Interest of Blythman*, 208 Neb. 51, 302 N.W.2d 666 (1981), *In re Interest of Michael U.*, 14 Neb. App. 918, 720 N.W.2d 403 (2006).

In general terms, the psychiatric profession defines some types of mental conditions as clinical disorders and other types of mental conditions as personality disorders. However, there is ongoing debate in the psychiatric profession about whether to remove what some in the field consider the “artificial” diagnostic distinctions between clinical disorders and personality disorders. The most recent revision of the DSM (the handbook used by health care professionals to diagnose mental disorders) removed “the arbitrary boundaries between personality disorders and other mental disorders,” as “there is no fundamental difference between disorders” that were previously assessed separately.<sup>10</sup>

The legislative history for the SOCA indicates that legislators intended the inclusion of personality disorders in the definition of dangerous sex offender to be a way of expanding the definition to enable the state to more easily commit persons likely to perpetrate sex offenses, but who might not be found mentally ill and dangerous. Given that intention, one can interpret the definition of mentally ill and dangerous as not including personality disorders.

On the other hand, the definition does not explicitly exclude personality disorders, so conceivably, a person with a personality disorder could be found to fit the definition. We found no legislative intent language suggesting whether the Legislature intended the definition of mentally ill and dangerous to include personality disorders or not.

**Finding #18:** It is unclear whether the Legislature intended for the definition of mentally ill and dangerous in the Mental Health Commitment Act to include personality disorders.

In practice, the department does not consider inmates with personality disorders for commitment under the MHCA. Therefore, an inmate who, because of a personality disorder, is a danger to himself/herself or to others, as evidenced by recent acts or threats of violence, would not be suggested by DCS for commitment as a mentally ill and dangerous person.

The result is that the pool from which DCS may identify mentally ill and dangerous inmates is smaller (clinical disorders only) than the pool from which it identifies

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<sup>10</sup> American Psychiatric Association, *Personality Disorders Fact Sheet—DSM 5*, 2013, <http://www.dsm5.org/Documents/Personality%20Disorders%20Fact%20Sheet.pdf>

dangerous sex offenders (clinical disorders and personality disorders).

**Finding #19:** The Department of Correctional Services does not consider inmates with personality disorders for commitment under the Mental Health Commitment Act. Therefore, an inmate who, because of a personality disorder, is a danger to himself/herself or to others, as evidenced by recent acts or threats of violence, would not be suggested by DCS for commitment as a mentally ill and dangerous person.

### **Evaluation Processes**

Another important difference between the two commitment processes is the more structured process in statute for DCS to use for identifying dangerous sex offenders compared to the process for identifying mentally ill and dangerous offenders.

#### *Department of Correctional Services Identification and Evaluation of Sex Offenders*

Nebraska law explicitly identifies DCS inmates who are subject to mandatory sex offender evaluations. Under the Treatment and Corrections Act, DCS inmates are subject to these evaluations, if they have been:

- Convicted of first-degree sexual assault or first-degree sexual assault of a child,
- Two or more convictions for crimes requiring registration under the Sex Offender Registration Act, provided one of the offenses is among the nine enumerated in the Treatment and Corrections Act,
- Convicted of sex crimes against a minor and have refused to participate in, or successfully complete, sex offender treatment programming offered at DCS, or
- Twice convicted of failure to comply with the sex offender registration requirements of Nebraska or similar requirements in other states.

In addition, another statute, the Sex Offender Registration Act, requires DCS to evaluate persons who have been convicted of crimes requiring sex offender registration but who have refused to participate in sex offender treatment

programming at DCS.<sup>11</sup> DCS may also conduct non-mandatory evaluations of sex offender inmates, but this is a rarity according to behavioral health administrators.

*Department of Correctional Services Identification and Evaluation of Mentally Ill and Dangerous Inmates*

In sharp contrast to the explicit guidelines for the identification and mandatory evaluation of potentially dangerous sex offenders, there is very little guidance in statute regarding the identification of inmates that are potentially mentally ill and dangerous. The Treatment and Corrections Act simply states that the DCS director is to promptly commence civil commitment proceedings for inmates near discharge who have been found—by two psychiatrists designated by the director—to have a “mental disease or defect” that would cause them to be a danger to the public or to themselves. The Act does not define mental disease or defect and contains no criteria DCS should use in identifying offenders who should be evaluated by psychiatrists.

**Finding #20:** The Treatment and Corrections Act does not define the term “mental disease or defect” and contains no criteria the Department of Correctional Services should use in identifying offenders who should be evaluated by psychiatrists.

In lieu of statutes that clearly define the individuals who are to be evaluated by DCS behavioral health staff, the department relies on a variety of practices to identify and monitor these offenders during their custody and as they near their scheduled release dates. These practices are described more fully in Section V of this report.

The consequences of the difference in the evaluation processes is that the determination of inmates who should be evaluated as potentially mentally ill and dangerous persons requires a greater amount of professional judgment to be exercised by DCS staff than the determination of inmates who should be evaluated as potentially dangerous sex offenders. DCS behavioral health administrators described the identification of potentially dangerous sex offenders as a “straightforward” process in comparison to the less clear-cut

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<sup>11</sup> Neb. Rev. Stat. § 29-4014. The Sex Offender Registration Act applies to persons who have been found guilty of, or pled no contest to, an array of sex crimes, including the attempt to commit those crimes.

process in the identification and evaluation of potentially mentally ill and dangerous inmates.

**Finding #21:** The determination of inmates who should be evaluated as potentially mentally ill and dangerous persons requires a greater amount of Department of Correctional Services' staff professional judgment than the determination of inmates who should be evaluated as potentially dangerous sex offenders.

### **Notice**

The last of the important differences we identified between the commitment acts' processes relates to which authorities receive notice of the evaluations of inmates under the two processes.

By law, the results of evaluations of potentially dangerous sex offenders must be provided to three people: the Attorney General, the county attorney of the county where an inmate is incarcerated, and the county attorney who prosecuted the offender. The results are to be delivered in writing no later than 150 days prior to the inmate's scheduled release date. In contrast, there is no statutory requirement regarding the authorities to be notified regarding inmates near release who DCS determines to be potentially mentally ill and dangerous persons. Jurisdictional questions could arise as a consequence of the absence of direction in the law regarding the appropriate county attorney to notify.

This lack of clarity is caused by the absence of a statutory designation of which county attorney must file the initial commitment petitions—the county attorney of the county where the prison is located, the original prosecuting attorney, or the county attorney of the county in which the inmate wants to reside upon release. Moreover, some discharging mentally ill and dangerous offenders have convictions in multiple counties, further complicating jurisdictional questions.

Additionally, state law sets forth precise time schedules for the evaluation of potentially dangerous sex offenders—at least 180 days prior to scheduled release—and for the notification of authorities of the evaluation results—no later than 150 days prior to scheduled release. By contrast, for inmates who may be dangerous because of a mental illness, statutory language is relatively vague regarding the timing of DCS mental health

evaluations and of department procedures for offenders found to be subject to commitments. Statute only directs DCS to “promptly” commence commitment proceedings for individuals “about to be released” if two psychiatrists designated by the director determine the inmate would pose a danger to the public or himself or herself because of a mental illness.

**Finding #22:** There is no statutory requirement identifying which authorities should be notified regarding inmates near release who the Department of Correctional Services evaluated as potentially mentally ill and dangerous persons. There is also no precise time requirement for when DCS should provide this notification.

#### **Section IV Conclusions/Discussion**

Our comparison of the commitment acts for mentally ill and dangerous individuals and dangerous sex offenders identified statutory differences that the Legislature may want to consider. As stated previously, the differences with policy implications we identified include:

- Elements of the definitions of the terms mentally ill and dangerous and dangerous sex offender, including whether a personality disorder is a mental illness;
- The process used for evaluating inmates; and
- Requirements regarding authorities who must receive notification of a commitment decision.

In general terms, we found that the process for identifying dangerous sex offenders is more structured and clear-cut than is the process for identifying mentally ill and dangerous individuals. The latter may not lend itself to a process as structured as those for dangerous sex offenders—for instance, creating a list of criminal convictions that would trigger a mandatory evaluation for a mentally ill and dangerous person would not be as clear-cut as the list of convictions under the definition of dangerous sex offender—but clarification of certain definitions and the creation of a statutory framework for deciding when evaluations should occur may be warranted. Additionally, it may be useful to consider whether existing differences in the processes were intended or not, and for any that are unintentional, bringing the processes into conformity with one another to simplify the statutes.



## **SECTION V: Department of Correctional Services’ Process for Identifying “Mentally Ill and Dangerous” Persons and “Dangerous Sex Offenders”**

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In this section, we describe the Department of Correctional Services’ (DCS) application of the Treatment and Corrections Act in the identification of inmates nearing discharge who may be dangerous because of a mental illness. We also discuss the results of our file review of inmates DCS suggested for commitment under the Mental Health Commitment Act (MHCA) and the Sex Offender Commitment Act (SOCA).

### **Application of Acts**

As discussed in the previous section, Nebraska statutes require the department to identify any inmates nearing discharge who would pose a danger to themselves or others because of a mental illness or because they are dangerous sex offenders. The department fulfills these obligations using different assessment processes.

#### *Assessment Processes Applicable to All Offenders*

The process for determining treatment needs for all offenders begins with the initial appraisal, or intake process, for new inmates. Department regulations require licensed mental health staff to assess offenders within 14 days of incarceration. These assessments include psychological testing; review of medical, mental and psychiatric treatment histories and histories of violence; and interviews of inmates to determine intellectual functioning and any mental health issues disclosed by the inmate. If needed, staff may conduct a more thorough mental health evaluation.

Based on the appraisals, the department creates personalized plans for each inmate that may include treatment recommendations to address inmates’ behavioral health needs. The department may encourage inmates to complete recommended mental health and substance abuse treatment, but inmate participation is typically voluntary.

The staff categorize inmates as low- or high-risk of having behavioral health problems. For inmates designated as low-risk, staff either make no treatment recommendations or recommend general programming to help prepare inmates for re-entry into their communities.

Mental health staff refer higher risk inmates to specialized review teams relating to mental illness (the Mental Illness Review Team), sex offenses (the Clinical Sex Offender Review Team), and violence (the Clinical Violent Offender Review Team). All incoming inmates convicted of sex offenses are referred to the Clinical Sex Offender Review Team, though the review team may make a recommendation of no treatment for individual sex offenders. The teams make programming recommendations based on the appraisals and evaluations conducted at the intake facilities and on any other available, relevant records. Substance abuse supervisors make treatment recommendations for inmates with substance abuse issues. A fourth review team, the Clinical Substance Abuse Review Team, makes treatment recommendations, generally after the intake process and usually if substance abuse staff present differing treatment recommendations or if inmates disagree with the recommendations.

After completion of the intake process, inmates are transferred to correctional institutions to serve their sentences.

*Assessment Processes for the Sex Offender Commitment Act and the Mental Health Commitment Act Evaluations*

As discussed in Section IV, the Treatment and Corrections Act clearly identifies the inmates who are subject to mandatory, dangerous sex offender evaluations for possible commitment under the SOCA.<sup>12</sup> In contrast, the Treatment and Corrections Act provides the department little guidance in identifying potentially mentally ill and dangerous inmates. DCS instead relies on a number of sources to identify these individuals. For example, inmates' conduct in treatment or general institutional behavior may put them on the "radar" of mental health staff. Mental health professionals meet with inmates who have committed violent acts, or threatened violence—as reflected in an incident report or misconduct report—to determine if the behavior is indicative of an underlying mental illness. If needed, staff may consider a more formal evaluation of an inmate.

Individuals assigned to the Mental Health Unit (MHU), which houses male inmates with severe, chronic mental illnesses or social or developmental impairments that make them unable

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<sup>12</sup> Neb. Stat. § 83-174.02(1)(a-d); Neb. Rev. Stat. § 29-4014 of the Sex Offender Registration Act requires mandatory evaluations of inmates who refuse to participate in sex offender treatment programming.

to interact with the general inmate population,<sup>13</sup> are also closely monitored. According to DCS, MHU residents account for the majority of inmates determined by the department to be mentally ill and dangerous. Suicidal inmates, inmates diagnosed with a major mental illness or a severe non-major mental illness, and inmates with a pattern of institutional violence are also closely monitored. In addition, mental health staff are apprised of the other review teams' evaluation of inmates.

Mental health administrators track these inmates on a centralized spreadsheet, accessible to mental health staff. In addition, the names of offenders who raise strong concerns for psychologists are placed on a list maintained by a panel of four or five psychologists, referred to as the Discharge Review Team. This team, created in the fall of 2013, monitors and reviews inmates of concern, typically as they near discharge. These individuals include dangerous inmates, inmates with serious mental illnesses and histories of violent behavior caused by the illness, and inmates who may not be mentally ill or dangerous but about whom mental health staff have questions. Inmates on the list are not presumed to be mentally ill. The list typically includes inmates who are within two years of discharge, but it may also include offenders with longer periods before release. Inmates whose behavior improves are removed from the list.

**Finding #23:** The recently created Discharge Review Team monitors and reviews inmates who the Department of Correctional Services believes could be dangerous or have other difficulties upon release, typically as they near discharge.

If the Discharge Review Team decides an inmate nearing release should be evaluated to determine if he or she is mentally ill and dangerous, the team will select a psychologist to conduct an evaluation.<sup>14</sup> If the psychologist determines the inmate to be mentally ill and dangerous, the department will

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<sup>13</sup> Adult female inmates experiencing emotional or behavioral instability or with chronic mental health issues may be referred to the Strategic Treatment and Reintegration (STAR) Unit at York. The department planned to establish Secure Mental Health Units at least two institutions before 2015. These units will offer stabilization and treatment of inmates to enable them to return to the MHU or to the general prison population, according to DCS.

<sup>14</sup> To better ensure the objectivity of the evaluation, the Discharge Review Team usually prefers to appoint a psychologist not involved with an inmate's ongoing treatment, according to DCS.

refer the case to a county attorney to consider commitment proceedings.

**Finding #24:** Since there are no statutory guidelines for mandatory evaluations under the Mental Health Commitment Act such as those laid out in the Sex Offender Commitment Act, the Department of Correctional Services uses a variety of processes to identify potentially mentally ill and dangerous inmates who are nearing release.

In the event that DCS determines that an inmate does not meet their criteria to be determined mentally ill and dangerous, DCS still may notify appropriate law enforcement agencies of the approaching release of inmates who are violent. A DCS behavioral health administrator said the department has an obligation to notify law enforcement and the appropriate individuals of the impending release of inmates threatening to harm specific people.

**Finding #25:** The Department of Correctional Services may notify appropriate law enforcement agencies of the approaching release of inmates who are violent but not mentally ill. The department believes it is obligated to notify law enforcement and particular individuals of the impending release of inmates who have threatened to harm those individuals.

### **Inmates Referred by the Department of Correctional Services for Commitment**

In 2013, DCS referred 27 inmates for commitment under the mentally ill and dangerous and dangerous sex offender statutes. We reviewed selected information from those inmates' files to describe more specifically what DCS reviews in making these determinations as well as the characteristics of the inmates who are referred. In our review, we looked at the following information: criminal history; mental health diagnosis, including any testing or risk assessments done for the evaluation; the recommended programming and whether it was satisfactorily completed; any misconduct incidents reported during incarcerations; and, for those found to be mentally ill and dangerous, evidence of imminent threat to themselves or others, as required by statute.

Because information from these inmates' records is confidential medical information, we are unable to report on

the unique characteristics of each individual. Instead, we provide aggregate information about each group.

As noted in Section IV, DCS is responsible only for referring an inmate to the county attorney, who then decides whether or not to file a petition in district court requesting the mental health board commit the offender. An inmate committed by the board is no longer in the custody of DCS and DCS does not track how many of the referred are, in fact, committed.

#### *Dangerous Sex Offender Referrals*

In 2013, DCS conducted 120 statutorily required psychological evaluations and identified 21 of these inmates as meeting the statutory criteria of a dangerous sex offender. All inmates found to be dangerous sex offenders were male.

**Finding #26:** In 2013, the Department of Correctional Services recommended 21 inmates for possible commitment under the Sex Offender Commitment Act.

A list of the crimes that resulted in these individuals being incarcerated in 2013, presented from most common to least common, is shown in Table 5.1. The most commonly committed crime for these individuals was first-degree sexual assault of a child. Third-degree sexual assault was the second most common.<sup>15</sup> Appendix D to this report lays out the criminal code definitions for each crime.

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<sup>15</sup> The number of inmates found to be dangerous sex offenders convicted of each crime is not included in the tables because it could identify these individuals.

**Table 5.1: Convicted Crimes\* of those Found by DCS to be Dangerous Sex Offenders**

| <b>Crime</b>                                  |
|---|
| First-Degree Sexual Assault of a Child        |
| Third-Degree Sexual Assault                   |
| Sexual Assault of a Child                     |
| Attempted First-Degree Sexual Assault         |
| Attempted Second-Degree Sexual Assault        |
| First-Degree Sexual Assault                   |
| Possession of Child Pornography               |
| Third-Degree Sexual Assault of a Child        |
| Violation of Sex Offender Registry Act        |
| Abuse of a Vulnerable Adult                   |
| Assault of an Officer                         |
| Child Abuse                                   |
| Enticement by Electronic Communication Device |
| Failure to Comply with Community Supervision  |
| Second-Degree Sexual Assault of a Child       |
| Terroristic Threats                           |

Source: Legislative Audit Office review of DCS files.

\*This list includes only those crimes that resulted in these individuals' being incarcerated in 2013. Some individuals were convicted of several counts of each charge and some had several different crimes for which they were convicted.

Table 5.2 lists the relevant prior criminal histories of these individuals, in alphabetic order. The vast majority of the inmates found to be dangerous sex offenders had previous criminal convictions of a sexual nature, in addition to the crimes for which they were incarcerated in 2013.

**Table 5.2: Relevant Prior Crimes of those Found by DCS to be Dangerous Sex Offenders**

| <b>Crime</b>                                     |
|--|
| Attempted First-Degree Sexual Assault of a Child |
| Attempted Sexual Assault of a Child              |
| First-Degree Sexual Assault of a Child           |
| Incest with a Minor                              |
| Indecent Acts                                    |
| Indecent Solicitation of a Child                 |
| Possession of Child Pornography                  |
| Second-Degree Sexual Assault                     |
| Sexual Abuse of a Child                          |
| Sexual Assault                                   |
| Sexual Assault of a Child                        |
| Solicitation of a Prostitute                     |
| Violation of Sex Offender Registry Act           |

Source: Legislative Audit Office review of DCS files.

The majority (19) of those inmates found to be dangerous sex offenders had one of two mental health diagnoses: paraphilia or pedophilia. Pedophilia is sexual attraction to minors. Paraphilia can refer to sexual attraction to minors, but also includes types of atypical attraction not specific to minors. Eleven of the 19 were also diagnosed with personality disorders (ten with antisocial personality disorders, one schizoid personality disorder). The remaining two inmates were diagnosed with personality disorders only (see Table 5.3).

**Table 5.3: Mental Health Diagnoses of Inmates Found to be Dangerous Sex Offenders**

| Mental Health Diagnosis       | Total     |
|-------------------------------|-----------|
| Paraphilia                    | 14        |
| Pedophilia                    | 5         |
| Other (Personality Disorders) | 2         |
| <b>Total:</b>                 | <b>21</b> |

Source: Legislative Audit Office review of DCS files.

**Finding #27:** Two of the 21 inmates recommended by the Department of Correctional Services for possible commitment under the Sex Offender Commitment Act in 2013 were diagnosed with personality disorders only.

None of those determined to be dangerous sex offenders had completed their recommended programming, although four of them did not have sufficient time within their sentences to complete the treatment programs required.

The number of misconduct reports for these inmates ranged from none to 147 (which included nine sexual activity misconduct reports) (see Table 5.4).

**Table 5.4. Misconduct Reports for Inmates Found to be Dangerous Sex Offenders**

| Number of Misconduct Reports | Number of Inmates |
|------------------------------|-------------------|
| 0                            | 2                 |
| 1-10                         | 8                 |
| 11-20                        | 4                 |
| 21-30                        | 3                 |
| Over 31*                     | 4                 |
| <b>Total:</b>                | <b>21</b>         |

Source: Legislative Audit Office review of DCS files.

\*These four inmates received 35, 66, 68 and 147 misconduct reports.

**Finding #28:** None of the 21 inmates recommended by the Department of Correctional Services for possible commitment under the Sex Offender Commitment Act in 2013 completed their recommended programming. Four of these inmates did not have time within their sentences to complete the recommended treatment programs.

We did not review case files of the 99 other offenders DCS reviewed but did not refer for commitment. Because the statutory criteria dictating which inmates must be reviewed is very specific, it is likely that the criminal history for those offenders is similar to the histories of the inmates who were, in fact, referred for commitment. According to the DCS administrator of the sex offender services program, the key difference between the two groups is that those who are not referred have actively engaged in the recommended programming or otherwise taken constructive steps to mitigate the risk they pose to others.

#### *Mentally Ill and Dangerous Referrals*

As discussed previously in this section, the evaluation by DCS of inmates for possible identification as mentally ill and dangerous is completely at DCS' discretion. Due to this, DCS was unable to provide us with the total number of inmates evaluated for possible identification for commitment under the MHCA. Based on their discretionary reviews, DCS identified six soon-to-be released inmates in 2013 as mentally ill and dangerous.<sup>16</sup>

There were both male and female inmates found to be mentally ill and dangerous. The breakdown between male and female inmates is not reported to avoid possible identification of inmates.

The criminal history of the six individuals found to be mentally ill and dangerous was wide-ranging, from theft by shoplifting (third offense) to assault on an officer. The other crimes committed by these individuals were theft by unlawful taking (third offense or more), robbery with use of a deadly weapon, stalking, and drug possession.

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<sup>16</sup> Four other individuals were found by DCS to be mentally ill and dangerous, through reviews they were asked to perform for "safe keepers" (individuals sent to DCS by a county and can be at any point of the judicial process) and "90 day evaluations" (people who usually have already been found guilty and are awaiting sentencing). There was also one inmate that was suggested for commitment under the developmental disability commitment statutes, according to DCS.

Half of the inmates found to be mentally ill and dangerous had mental health diagnoses that would be considered a major mental illness as defined by DCS: schizophrenia spectrum, psychotic disorder, and severe mood disorder.<sup>17</sup> The other three inmates had mental health diagnoses that could rise to the level of a major mental illness depending on the severity of the illness.

Only one of the inmates had successfully completed the recommended programming, and one inmate's sentence was too short for completion of the suggested treatment program.

The number of misconduct reports for these six inmates ranged from none to 380.

Regarding the evidence of imminent threat required under the Mental Health Commitment Act as discussed in Section IV, three of the inmates were considered to be a danger to themselves (evidenced by hallucinations, suicide attempts, and self-harming behaviors, including not taking prescribed medications). Two inmates were considered to be a danger to others (evidenced by the conduct of one during incarceration—which resulted in 380 misconduct reports, including five for assault—and by the other's recent criminal behavior prior to incarceration). DCS found that the final inmate could be a danger to both self *and* others, as the individual was not eating or taking medications and had a recent history of violence prior to incarceration, which was for a short period of time.

**Finding #29:** In 2013, the Department of Correctional Services recommended six inmates for possible commitment under the Mental Health Commitment Act, significantly fewer than the 21 inmates DCS recommended for possible commitment under the Sex Offender Commitment Act.

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<sup>17</sup> Major mental illness is defined by DCS as a DSM-IV-TR diagnosis of one or more of the following: psychotic disorder, schizophrenia-spectrum disorder, or a mood disorder with psychotic features, or a DSM-IV-TR diagnosis of one or more of the following and meeting the threshold for high severity: bipolar disorder, depressive disorder, other mood disorder, posttraumatic stress disorder, obsessive compulsive disorder, panic disorder, or other anxiety disorder.

There may be many factors that play a role in the difference in the number of commitments under the MHCA and the SOCA. Those factors likely include the more structured requirement for evaluations contained in the SOCA, which may result in more evaluations, and the inclusion of individuals with personality disorders, which broadens the pool of inmates considered for commitment.

### Appendix A: Unit Disciplinary Committee and Institutional Disciplinary Committee Hearing Processes

| Type of Hearing | Type of Infraction   | Misconduct Report                          | Investigatory Hearing                             | Notice of Hearing | Evidence   | Sanctions   | Record                               | Appeal                         |
|-----------------|--|--|---|-------------------|--|---|--------------------------------------|--------------------------------|
| <b>UDC</b>      | Minor – those involving no loss of good time or imposition of disciplinary segregation | Within 72 hours of infraction or discovery | Within 7 days of infraction or discovery          | 24 hours          | No witnesses; representative only appointed if unit manager thinks inmate cannot represent himself | Verbal reprimand; written warning; extra duty without pay up to 20 hours; room restriction up to 21 days; restriction from certain activities (not worship, dining hall, group/individual therapy & school for more than 21 days per infraction); & restitution up to \$100 | Not tape recorded but written record | Warden reviews but no appeal   |
| <b>IDC</b>      | Major – those likely to result in loss of good time/disciplinary segregation           | Within 72 hours of infraction or discovery | Within 7 business days of infraction or discovery | 24 hours          | Can have documents; witnesses; representative  | Loss of good time/disciplinary segregation depending on type of offense as set forth in Chapter 6; also, extra duty, restriction, reprimand, restitution.   | Tape recorded and written record     | Appeal to "DCS Appeals Board." |



## **APPENDIX B: Section II Methodology**

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### **Charges Most Likely to Result in Loss of Good Time or Disciplinary Segregation Sanctions**

To identify the offenses most likely to result in these sanctions, we requested from the Department of Correctional Services (DCS) data for 2013 on the each offense that resulted in these sanctions as well as the number of times each sanction was issued for each offense. We then selected the three charges with the most of both sanctions.

| <b>Charge Description</b>                        | <b>Percentage of Charges that Resulted in*</b> |                                 |   |
|--|--|---------------------------------|---|
|  | <b>Loss of Good Time</b>                       | <b>Disciplinary Segregation</b> | <b>Loss of Good Time &amp; Disciplinary Segregation</b> |
| Use of Threatening Language or Gestures/Fighting | 45%  | 27%                             | 59%   |
| Assault  | 14%  | 7%                              | 18%   |
| Disobeying an Order                              | 8%   | 26%                             | 8%  |

\*Percentages refer to the charges that resulted in that sanction. For example, of the 1,160 charges that resulted in loss of good time, 521 (45%) of those charges were Use of Threatening Language or Gestures/Fighting.

We reviewed the information from DCS and found that it appeared complete and internally consistent (the correct and logical data in all the fields, etc.). We did not take any additional steps to verify the data.

### **Data Reliability**

For other parts of the audit, we found the data unreliable and chose not to use them. First, data relating to specific inmate mental health diagnoses was not always up-to-date and did not always match an indicator that the inmate had a major mental illness. Second, there were gaps and inconsistencies in data showing programming recommended for inmates; the status of the programming (whether the inmate accepted or refused it); if accepted, when started and, if applicable, when completed. In both instances, there were apparent gaps in the information as well as pieces of information for a single inmate that did not seem to match. We reviewed additional information and confirmed the apparent flaws.

It is also worth noting that during the course of the audit, the Omaha World Herald newspaper released a story showing that the department had failed to adopt the method of calculating good time required by the Nebraska Supreme Court. While this disclosure might be used to cast doubt on the reliability of all DCS data, it is important to remember that the problem was not with the accuracy of the electronic data, it was with the decision about how good time calculations would be made. In other words, the good time data may

have accurately reflected the department's calculations; it was the calculations themselves that were incorrect.

### **Charges in 2013**

The data from DCS contained 9,201 of the selected charges. However, five charges for one inmate had neither been dismissed nor found guilty (the inmate had been transferred to a county court because of additional charges; no action would be taken on the DCS charges until he was returned to DCS custody). We took those five charges out and reported 9,196 charges in 2013.

# **APPENDIX C: Department of Correctional Services Program & Inmate Club Descriptions**

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## ***Information provided by DCS***

### **Mental Health Treatment**

- ***Aggression Replacement Training (ART) at NCYF:*** This program is an empirically validated intervention for youth. It is only available at the Nebraska Youth Correctional Facility (NCYF).
- ***Anger Management:*** Anger management is a 12-session program that focuses on managing emotions. This program is recommended in cases where emotional dysregulation is clear. No further referral to CVORT is required after program completion.
  - ***Anger Management with Review:*** Anger management is a 12-session program that focuses on managing emotions. This program is recommended in more complex cases where emotional dysregulation is part, but not all, of the clinical picture. A referral to CVORT (Clinical Violent Offender Review Team) is requested upon program completion in order to consider other potential service recommendations.
- ***Anxiety Management:*** A group therapy program aimed at teaching inmates skills to manage anxiety.
- ***ExPLORE:*** Exercises in Principled Living for Offender Re-Entry. A Mental Health group offered to offenders who have completed the METEOR program. It uses schema therapy and cognitive therapy to develop additional skills and intervention strategies to facilitate movement into the action and maintenance stages of change. It is a rolling group and offenders can join at any time. There are 11 core topic areas that are covered in group. Additional contacts occur outside of group in between group sessions. It asks for more in-depth therapeutic work in an effort to gain an understanding of their character traits, their strengths and weaknesses and core beliefs that guide their behavior. It offers continued opportunity to practice new skills and alternative ways to think in challenging situations.
- ***Crisis Intervention:*** All NDCS staff are trained to respond to crisis situations. Anyone available in MH at the time of a crisis will cover and is fully qualified to make this kind of an assessment and intervention. In addition, a licensed Mental Health Practitioner and Psychologist are available 24 hours per day to provide mental health contact for any crisis situation or for those identified as requiring an evaluation and referral. Typically, inmates needing evaluation and referral are newly arrived commitments, inmates returned from a Community Corrections Center, Parole Violators, and Safekeepers. However, this service is also used to intervene with inmates already in the facility who are mentally ill and decompensate.

- ***Grudge Reduction and Improved Personal Relationship Group (GRIP)***: A ten-session mental health treatment group which is available to all inmates who are interested in learning how grudges are formed and can be dismantled. Essentially an introduction to the art and practice of forgiveness, GRIP uses a combination of lecture, discussion, structured reflection exercises, coping skills building to help participants engage in the process of forgiving a person of their choice. GRIP lesson topics include the following: (1) The Case for and against Forgiveness, (2) Formation of Grievance Narratives, (3) What Forgiveness is/is not, (4) Whispering the Emotional Brain, (5) Blocks to Forgiveness—the Old Stuff, (6) Recovering my Humanity and the Humanity of the Offender, (7) Forgiveness and Unenforceable Rules, (8) Recovering my Original Positive Intention, and (9) HEAL Method of Forgiveness. Inmates also watch the movie, *Les Miserables*, which provides them with a story that captures the transformational power of forgiveness and which can help ground, motivate, and direct their own attempts to forgive others.
- ***Mental Health Unit***: The Mental Health Unit is a structured therapeutic community designed to provide services to inmates with chronic mental health issues, developmental disabilities and/or social deficits, who may have demonstrated difficulty adjusting to incarceration. Program goals may include learning to understand and manage mental illness, criminal thinking/behavior, and improving coping and/or social skills, with the goal of integration in the general prison population. The Mental Illness Review Team (MIRT) is involved in the screening and referral of mentally ill offenders to this program.
- ***METEOR Program***: Motivation Enhancement Through Engagement, Openness, and Respect. A motivational re-entry program/group run by mental health. The group attempts to facilitate movement from pre-contemplation to preparation stage of change. It attempts to get offenders to refocus and develop plans of change so they can best take advantage of other rehabilitation opportunities. It has been used in offender re-entry and is currently offered in an effort to assist with transition out of RHUs. It is 12 sessions over six weeks (six group and six brief individual contacts). It is targeted for offenders who have had long term RHU placements or who have had difficulties staying out of RHU for any significant amount of time.
- ***Mood Management***: The NCYF Mood Management Group is a ten-session, cognitive behavioral program that provides inmates with a structured approach to processing difficult emotions such as anxiety, shame, anger, hurt, and depression. The emotional processing model teaches participants how to move from the “stage,” where they tend to be caught in the immediacy of powerful emotion and destructive impulses, to the “balcony,” where triggers are identified and distorted thinking patterns are changed. Participants are provided with an opportunity to learn specific coping skills such as the following, abdominal breathing, progressive muscle relaxation, peaceful place imagery, grounding techniques, and self-

soothing methods. Participants are referred for participation in the mood management group based on their display of coping skills deficits.

- ***Outpatient Mental Health Clinic Services:*** Individual sessions conducted by a Psychologist and/or licensed Mental Health Practitioner to address topics such as mood management, anxiety reduction, stress management skills, relaxation skills, mindfulness skills, grief counseling, emotional regulation, symptom management, treatment recommendations, etc. Depending on the clinically determined level of need, these contacts may result in additional individual sessions, psychological testing, referral to a Psychiatrist, medical and/or screening for a specific behavioral health program. This also involves the completion of initial psychological evaluations for new commitments, Parole Board evaluations, community custody promotion evaluations, and 90-day evaluations for the County Courts, upon request. They also perform 14-day mental health appraisals for all of the same returning populations. Youthful offenders are assessed upon their arrival.
- ***Violence Reduction Program (VRP):*** VRP is a residential program for the most instrumentally violent offenders. This one-year program entails over 100 clinical sessions, and approximately 200 hours of service delivery, per inmate. VRP is available only at NSP.

### **Sex Offender Services**

- ***Bibliotherapy Healthy Lives Program (bHeLP):*** This program is recommended for individuals whom CSORT (Clinical Sex Offender Review Team) determines to have a low risk of sexually reoffending, relative to other sex offenders. Over the course of nine weeks, bHeLP participants complete a set of materials, which is then reviewed by the facilitators and discussed in group.
- ***Continuing Care (CC):*** Continuing care may be recommended for individuals who have completed a sex offender program at NDCS and, in some cases, the Regional Center Program. Continuing Care is intended to help individuals maintain their treatment gains as they prepare for re-entry into the community.
- ***Inpatient Healthy Lives Program (iHeLP):*** iHeLP is recommended for individuals determined to be at the highest risk for re-offense, relative to other sex offenders. The program takes between 24-36 months to complete, and participants live on a specialized unit at the Lincoln Correctional Center (LCC). Participants complete individual projects and practice new skills while attending group and individual therapy.
- ***Outpatient Healthy Lives Program (oHeLP):*** The oHeLP program is recommended for individuals whom CSORT determines to have a moderate risk for re-offense, relative to other sex offenders. oHeLP is conducted in a group format, and participants present their work on program materials and projects to

the other members. This program takes approximately 12 months to complete, although individual completion times may vary.

### **Substance Abuse Treatment**

- ***Continuing Care, Outpatient Alcohol/Drug:*** The program is offered at the Community Correction Center in Lincoln and in Omaha, the Nebraska State Office Building and Trabert Hall in Lincoln. Outpatient Services provides ongoing treatment to parolees/inmates who have completed a higher level of care. Group members in two-hour sessions, twice a week and for six weeks. Sessions are offered in the morning, afternoon and evening to accommodate work schedules. Approximately 725 people complete treatment through this service each year.
- ***Drug/Alcohol Education:*** Offered weekly at the Nebraska Corrections Youth Facility in Omaha and licensed by alcohol and drug counselors. The drug program is designed to educate young offenders about the drugs most frequently used by youth. Group members attend 75 minute sessions one day a week for four weeks. The drug education program started at the youth facility in October 2013.
- ***Non-Residential:*** Non-residential substance abuse treatment addresses the needs of low- and moderate-risk inmates, who require less intensive levels of care. Non-residential programs are modeled after residential treatment programming, and may last anywhere between five and 12 weeks.
- ***Residential:*** Residential substance abuse treatment is an intense six-month program for high-risk inmates, based on a systematic cognitive-behavioral approach to promote change in criminal thinking. This type of programming is delivered through substance abuse classes, as well as group and individual counseling.

### **Programs**

- ***7 Habits on the Inside:*** A 10-week training course for inmates that motivates them to make plans, goals and behavioral changes which will make them less likely to return to prison.
- ***Addicted Brain:*** A program consisting of three phases and are dually focused on a 12-step based substance abuse education, recovery, and relapse prevention treatment in conjunction with an additional emphasis on criminal thinking/choices/behavior patterns. The approach in each program is evidenced-based, holistic, and includes a variety of disciplines to assist inmates with any issues related to substance abuse.
- ***Alternatives to Violence:*** Assists inmates in learning to manage strong feelings, deal more effectively with risk and danger, build good relationships with other people, communicate well in difficult situations and understand why conflict happens.

- **Business Tech:** Participants learn Excel, PowerPoint, Entrepreneurial Venture, Records Management and Input Keyboarding Technology.
- **Character Building through Principled Choices and Responsible Living (CPR):** A ten-session mental health treatment group, which is available for use in association with Pawsitive Outcomes, i.e., the NCYF dog training program. CPR introduces participants to a set of core principles for successful, pro-social living whose complete internalization would be inconsistent with a criminal life-style. CPR uses a combination of lecture, structured reflection exercises, and group discussion to promote the inmate's development and internalization of a more pro-social identity. Topics addressed in CPR include the following: (1) Bonds in Human Relationships, (2) Principles for Successful Living, (3) Fully Human Thinking, (4) Delaying Immediate Gratification, (5) Dealing with Disrespect, (6) Building a Healthy Relationship, Emotional Awareness, (7) Emotional Regulation, (8) Empathy, and (9) Parenting for Non-Violence. Inmates also watch the movie, *The Horse Whisperer*, which is used throughout the course as a guide to reflection on the dynamics of building a healthy relationship with a dog with a troubled history. A structured discussion of *The Horse Whisperer* is also used to stimulate personal reflection on their own process of coming to grips with and overcoming their own traumatic and/or troubled personal histories.
- **Cognitive Thinking:** *No description provided by DCS.*
- **Common Sense Parenting:** Another "Destination ... Dad" offshoot, *Common Sense Parenting* teaches participants alternatives to problem behavior, as well as skills that foster positive behavior and discourage negative behavior.
- **Communication Skills:** *No description provided by DCS.*
- **PreRelease/Discharge Planning:** Inmates in this program work with staff to develop individualized plans to address housing and other areas—including employment, educational, finances, mental health, substance abuse, medication needs and social support—to ensure a seamless, successful transition from incarceration to release.
- **Dog Handler Program:** Inmates accepted into this program become responsible for the training, feeding, sheltering, grooming, sanitation and control of dogs from a local Humane Society or animal shelter. The dogs are then made available for adoption as pets or, for the dogs so trained, as service animals. The Dog Handler program helps inmates increase their vocational skills, anger management, decision-making processes, and sense of personal responsibility.
- **Domestic Violence:** Covered in the "Within My Reach" class and taught by instructors trained and certified by the Domestic Violence Coalition.

- ***Financial Peace University:*** The program helps inmates get out of debt, gain control of their money, and learn new behaviors toward money that are founded on commitment and accountability. Financial Peace University has been used in corrections institutions nationwide and is geared for inmates and their financial situations during incarceration and upon reentry into society.
- ***Horticulture:*** Through this program, inmates learn skills related to growing vegetables and other plants. The produce is served to the inmate population, adding a healthy, and cost-savings benefit. Graduates often assist Correctional Services maintenance staff in grounds keeping.
- ***InsideOut Dads:*** Part of the “Destination ... Dad” program developed and sponsored by Christian Heritage, this class is intended to raise awareness of the importance of fatherhood among incarcerated men and to help them develop and strengthen bonds with their children.
- ***Living Well:*** A volunteer workshop for inmates diagnosed with chronic medical conditions focused on improving the individual’s ability to self-manage his health. Teaches healthy living skills, goal setting, etc. This is a six-week course offered once or twice a year, based on the availability of instructors.
- ***Love and Logic/Common Sense Parenting:*** Participants learn to focus on the “head and the heart” by using logical, practical methods to change children’s behavior while using unconditional love.
- ***Mentoring Program:*** This program pairs NCYF youth with positive role models who demonstrate good citizenship and appropriate behavior in difficult situations.
- ***Money Smart:*** This computer-based instruction (CBI) program is designed to provide information about basic personal financial management.
- ***Nursery at NCCW:*** The nursery is a specialized housing unit for women who give birth while incarcerated. Women who apply and meet specific criteria may live in this unit and take care of their children during the first months of their lives.
- ***Planning with a Purpose:*** This program teaches critical thinking skills and explores how various faith practices influence constructive decision-making. The primary areas of emphasis are: goal-setting; short and long-range planning to attain the goal, including attainable achievement measures throughout; delayed gratification techniques; interpersonal communication; and conflict resolution skills to create a reasoned response rather than a rash reaction to life’s myriad situations. Participants create a plan for living a productive, moral, ethical and legal life in the community after their release. Participants serving longer sentences create a plan for living and contributing positively to the community in which they live inside the facility.
- ***Power of Peace:*** *No description provided by DCS.*

- ***ProStart Culinary Arts:*** This two-year course teaches inmates culinary art and basic restaurant management skills. ProStart is a nationally recognized program; participants who complete the program receive credentials that are likely to increase their chances of gainful employment upon release.
- ***Released and Restored:*** This program prepares inmates for life after release by focusing on jobs, money management and housing.
- ***Restrictive Housing Levels Program:*** Participants include prisoners in restrictive housing units, other than protective custody, court-ordered restrictive housing, or death row. Participants may be promoted or demoted to different levels, based on their behavior, as they transition from restrictive housing to the general population. Promotions mean additional property allowances and privileges. Demoted inmates lose these incentives.
- ***SISTA:*** SISTA stands for Sisters Informing Sisters about Topics on AIDS. It is a once a week, two hour session, for six weeks that gives the women the knowledge (HIV/AIDS, Assertiveness, Coping, Behavioral Self-Management), skills and pride to actively protect themselves from becoming infected with the AIDS virus. Over the years the course has expanded to include topics of birth control, STIs, self-esteem, and relationships. It has become a much sought after class to attend as the women seem to come away with a sense of empowerment, confidence, and pride.
- ***Stress Management:*** *No description provided by DCS.*
- ***Thinking for a Change:*** *No description provided by DCS.*
- ***Transformation Project:*** A reentry initiative founded on the transformation that occurred in the life of Malcolm X while he was incarcerated, the project provides inmates in restrictive housing units self-guided study modules to help them develop plans to achieve the behavioral expectations of the units and to transition to the general prison population. Group sessions for the general population are designed to help inmates plan for reentry into society.
- ***Victim Impact:*** Participating inmates learn to focus on their roles in their crimes and the effects the crimes had on their victims and communities.
- ***WaY Writing Program:*** Inmates in this program learn to express their inner feelings appropriately and turn them into an art form that can benefit others.
- ***Welding Training:*** Inmates learn basic welding during nine-week classes.
- ***Within My Reach (Relationships):*** Also part of the “Destination ... Dad” program, *Within My Reach* focuses on positive relationship building, conflict resolution skills, and effective listening and communicating techniques.

## Inmate Clubs

- **7<sup>th</sup> Step:** This program prepares inmates for release.
- **Alcoholics Anonymous:** A support group for inmates with drinking problems.
- **Fellowship:** Volunteers facilitate the Protestant Religious Education once a month.
- **Harambee:** African Cultural Organization is a group that primarily deals with the African American population. It helps young men to explore the root of their cultural heritage; past, present and future. This group heavily emphasizes the need for education as well as taking responsibility for one's own life.
- **Islamic:** A Muslim religious education group.
- **Mata:** Mexican Awareness through Association. Their purpose shall be to initiate cultural studies of the Hispanic people and to provide suitable programs and opportunities for developing self-improvement within the MATA group, with emphasis on communication, identification and orientation to social expectations and community adjustments.
- **NASCA:** Native American Spiritual and Cultural Awareness Group. Purpose is to initiate cultural studies of various Native American Indian tribes, and to provide suitable programs and opportunities for developing self-improvement within the NASCA group, with orientation to social expectations and community adjustments.
- **Narcotics Anonymous:** A support group for inmates addicted to narcotics.
- **Standing Together on Purpose (STOP):** This club activity promotes reduction in recidivism by teaching, learning, debating, and developing plans for what inmates can do using effective communication and understanding that racism in any form is counterproductive to true harmony.
- **Survivors:** Offered through recreation at NCCW; a group of inmates that plans activities and special events.
- **Toastmasters:** These clubs help participants improve public speaking, communication and leadership skills.
- **Veterans:** This is a social group for inmates who have served in the military.

## **APPENDIX D: Administration of Department of Correctional Services' Programs**

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Following is a table containing information regarding who (either the Department of Correctional Services [DCS] or an outside entity) administers or delivers each individual program. Appendix C provides brief descriptions for the programs, as provided by DCS. (Note: Acronyms used in the table are defined in Appendix C.)

| <b>Type of Treatment or Programming</b>                          | <b>Administered/Delivered by</b> |                       |                                     |
|--|----------------------------------|-----------------------|-------------------------------------|
|  | <b>DCS</b>                       | <b>Outside Entity</b> | <b>Either DCS or Outside Entity</b> |
| <b>Mental Health Treatment</b>                                   |                                  |                       |                                     |
| Aggression Replacement Training (ART)                            | X                                |                       |                                     |
| Anger Management   | X                                |                       |                                     |
| Anxiety Management   | X                                |                       |                                     |
| EXPLORE  | X                                |                       |                                     |
| Crisis Intervention  |                                  |                       | X                                   |
| GRIP (Grudge Reduction and Improved Personal Relationship Group) | X                                |                       |                                     |
| Mental Health Unit   | X                                |                       |                                     |
| METEOR Program   | X                                |                       |                                     |
| Mood Management  | X                                |                       |                                     |
| Outpatient Mental Health Clinic Services                         |                                  |                       | X                                   |
| Violence Reduction Program                                       | X                                |                       |                                     |
| <b>Sex Offender Services</b>                                     |                                  |                       |                                     |
| bHeLP  | X                                |                       |                                     |
| Continuing Care  | X                                |                       |                                     |
| iHeLP  | X                                |                       |                                     |
| oHeLP  | X                                |                       |                                     |
| <b>Substance Abuse Treatment</b>                                 |                                  |                       |                                     |
| Continuing Care  | X                                |                       |                                     |
| Drug and Alcohol Education                                       | X                                |                       |                                     |
| Non-Residential Treatment  | X                                |                       |                                     |
| <i>Outpatient</i>  | X                                |                       |                                     |
| <i>Intensive Outpatient</i>                                      | X                                |                       |                                     |
| Residential Treatment  | X                                |                       |                                     |
| <b>Physical Health Treatment</b>                                 |                                  |                       |                                     |
| Chemotherapy   | X                                |                       |                                     |
| Dentistry  | X                                |                       |                                     |
| Dialysis   | X                                |                       |                                     |

| Type of Treatment or Programming                 | Administered/Delivered by |                |                              |
|--|---------------------------|----------------|------------------------------|
|  | DCS                       | Outside Entity | Either DCS or Outside Entity |
| <b>Physical Health Treatment (cont)</b>          |                           |                |                              |
| Medical Clinics                                  | X                         |                |                              |
| Optometry  | X                         |                |                              |
| Skilled Nursing Facility                         | X                         |                |                              |
| <b>Health Education</b>                          |                           |                |                              |
| Dental Care                                      | X                         |                |                              |
| Diabetes   | X                         |                |                              |
| Emergency Preparedness                           | X                         |                |                              |
| HIV/AIDS   | X                         |                |                              |
| Healthy Lifestyles                               | X                         |                |                              |
| Hepatitis  | X                         |                |                              |
| Hygiene  | X                         |                |                              |
| K-2  | X                         |                |                              |
| MRSA   | X                         |                |                              |
| Medication Abuse                                 | X                         |                |                              |
| Men's Sexual Health                              | X                         |                |                              |
| Nutrition  | X                         |                |                              |
| STIs   | X                         |                |                              |
| Smoking Awareness                                | X                         |                |                              |
| TB   | X                         |                |                              |
| Women's Health                                   | X                         |                |                              |
| Women's Sexual Health                            | X                         |                |                              |
| <b>General Education</b>                         |                           |                |                              |
| Access to Post-Secondary Education Programs      |                           | X              |                              |
| Adult Basic Education/Adult Secondary Education  | X                         |                |                              |
| Beginning Typing                                 | X                         |                |                              |
| Computer Literacy                                | X                         |                |                              |
| English Second Language/English Language Learner | X                         |                |                              |
| Fractions Refresher                              | X                         |                |                              |
| High School                                      | X                         |                |                              |
| Inside-Out Program (Peru State College)          |                           | X              |                              |
| Job Skills                                       |                           | X              |                              |
| Math Basics                                      | X                         |                |                              |
| Math Enrichment                                  | X                         |                |                              |
| Math Refresher                                   | X                         |                |                              |

| Type of Treatment or Programming               | Administered/Delivered by |                |                              |
|--|---------------------------|----------------|------------------------------|
|  | DCS                       | Outside Entity | Either DCS or Outside Entity |
| <b>Skilled Jobs</b>                            |                           |                |                              |
| CSI  | X                         |                |                              |
| <i>Administration</i>                          | X                         |                |                              |
| <i>Braille</i>                                 | X                         |                |                              |
| <i>Cleaning Crew</i>                           | X                         |                |                              |
| <i>DOR Crew</i>                                | X                         |                |                              |
| <i>Laundry</i>                                 | X                         |                |                              |
| <i>License Plates</i>                          | X                         |                |                              |
| <i>Metals</i>                                  | X                         |                |                              |
| <i>Military Crew</i>                           | X                         |                |                              |
| <i>NRD Crew</i>                                | X                         |                |                              |
| <i>Prairie Gold</i>                            | X                         |                |                              |
| <i>Printing</i>                                | X                         |                |                              |
| <i>Sewing</i>                                  | X                         |                |                              |
| <i>Sign</i>                                    | X                         |                |                              |
| <i>Soap</i>                                    | X                         |                |                              |
| <i>TEK Industries</i>                          |                           |                | X                            |
| <i>Upholstery</i>                              | X                         |                |                              |
| Warehouse                                      | X                         |                |                              |
| <i>Wood</i>                                    | X                         |                |                              |
| Food Service                                   |                           |                | X                            |
| Inmate Medical Porter (CNA)                    |                           | X              |                              |
| Maintenance                                    |                           |                | X                            |
| <b>Programs</b>                                |                           |                |                              |
| 7 Habits on the Inside                         | X                         |                |                              |
| Addicted Brain                                 | X                         |                |                              |
| Alternatives to Violence                       |                           | X              |                              |
| Business Tech                                  |                           | X              |                              |
| Character Building through Responsible Changes |                           |                | X                            |
| Cognitive Thinking                             | X                         |                |                              |
| Common Sense Parenting                         |                           | X              |                              |
| Communication Skills                           | X                         |                |                              |
| Dog Handler Program                            |                           |                | X                            |
| Domestic Violence                              | X                         |                |                              |
| Financial Peace University                     |                           |                | X                            |
| Horticulture                                   | X                         |                |                              |
| InsideOut Dads                                 |                           | X              |                              |
| Living Well                                    | X                         |                |                              |

| Type of Treatment or Programming       | Administered/Delivered by |                |                              |
|--|---------------------------|----------------|------------------------------|
|  | DCS                       | Outside Entity | Either DCS or Outside Entity |
| <b>Programs (cont)</b>                 |                           |                |                              |
| Love and Logic                         |                           | X              |                              |
| Mentoring Program                      |                           |                | X                            |
| Money Smart                            |                           | X              |                              |
| Nursery                                | X                         |                |                              |
| Planning with a Purpose                |                           | X              |                              |
| Power of Peace                         | X                         |                |                              |
| PreRelease                             |                           |                | X                            |
| ProStart Culinary Arts                 | X                         |                |                              |
| Released and Restored                  |                           | X              |                              |
| Restrictive Housing Levels Program     | X                         |                |                              |
| SISTA                                  | X                         |                |                              |
| Stress Management                      | X                         |                |                              |
| Thinking for a Change                  | X                         |                |                              |
| Transformation Project (GP)            | X                         |                |                              |
| Transformation Project (Rest. Housing) | X                         |                |                              |
| Victim Impact                          |                           |                | X                            |
| WaY Writing Program                    |                           | X              |                              |
| Welding Training                       |                           | X              |                              |
| Within My Reach (Relationships)        |                           | X              |                              |

| <b>Inmate Clubs</b>          |
|------------------------------|
| 7th Step                     |
| Alcoholics Anonymous         |
| Fellowship                   |
| Harambee                     |
| Hobby                        |
| <i>Stamp Collectors</i>      |
| Islamic                      |
| Mata                         |
| NASCA                        |
| Narcotics Anonymous          |
| Standing Together on Purpose |
| Survivors                    |
| Toastmasters                 |
| Veterans                     |

## **APPENDIX E: Criminal Code Definitions**

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Following are the statutory sections that contain the descriptions of, and definitions, for the crimes committed by those found by the Department of Correctional Services to be dangerous sex offenders in 2013, as listed in Table 5.1 in Section V of the report. Only the crimes listed in Table 5.1 are included in this Appendix, as the prior committed crimes in Table 5.2 may have been committed in other states with different criminal codes and definitions.

### **28-311.01. Terroristic threats; penalty.**

(1) A person commits terroristic threats if he or she threatens to commit any crime of violence:

(a) With the intent to terrorize another;

(b) With the intent of causing the evacuation of a building, place of assembly, or facility of public transportation; or

(c) In reckless disregard of the risk of causing such terror or evacuation.

(2) Terroristic threats is a Class IV felony.

**Source:** Laws 1986, LB 956, § 11.

### **28-318. Terms, defined.**

As used in sections 28-317 to 28-322.04, unless the context otherwise requires:

(1) Actor means a person accused of sexual assault;

(2) Intimate parts means the genital area, groin, inner thighs, buttocks, or breasts;

(3) Past sexual behavior means sexual behavior other than the sexual behavior upon which the sexual assault is alleged;

(4) Serious personal injury means great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ;

(5) Sexual contact means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party. Sexual contact shall also include the touching of a child with the actor's sexual or intimate parts on any part of the child's body for purposes of sexual assault of a child under sections 28-319.01 and 28-320.01;

(6) Sexual penetration means sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen;

(7) Victim means the person alleging to have been sexually assaulted;

(8) Without consent means:

(a)(i) The victim was compelled to submit due to the use of force or threat of force or coercion, or (ii) the victim expressed a lack of consent through words, or (iii) the victim

expressed a lack of consent through conduct, or (iv) the consent, if any was actually given, was the result of the actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor;

(b) The victim need only resist, either verbally or physically, so as to make the victim's refusal to consent genuine and real and so as to reasonably make known to the actor the victim's refusal to consent; and

(c) A victim need not resist verbally or physically where it would be useless or futile to do so; and

(9) Force or threat of force means (a) the use of physical force which overcomes the victim's resistance or (b) the threat of physical force, express or implied, against the victim or a third person that places the victim in fear of death or in fear of serious personal injury to the victim or a third person where the victim reasonably believes that the actor has the present or future ability to execute the threat.

**Source:** Laws 1977, LB 38, § 33; Laws 1978, LB 701, § 1; Laws 1984, LB 79, § 3; Laws 1985, LB 2, § 2; Laws 1995, LB 371, § 3; Laws 2004, LB 943, § 4; Laws 2006, LB 1199, § 4; Laws 2009, LB97, § 11.

### **28-319. Sexual assault; first degree; penalty.**

(1) Any person who subjects another person to sexual penetration (a) without the consent of the victim, (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or (c) when the actor is nineteen years of age or older and the victim is at least twelve but less than sixteen years of age is guilty of sexual assault in the first degree.

(2) Sexual assault in the first degree is a Class II felony. The sentencing judge shall consider whether the actor caused serious personal injury to the victim in reaching a decision on the sentence.

(3) Any person who is found guilty of sexual assault in the first degree for a second time when the first conviction was pursuant to this section or any other state or federal law with essentially the same elements as this section shall be sentenced to a mandatory minimum term of twenty-five years in prison.

**Source:** Laws 1977, LB 38, § 34; Laws 1978, LB 748, § 5; Laws 1993, LB 430, § 1; Laws 1995, LB 371, § 4; Laws 2006, LB 1199, § 5.

### **28-319.01. Sexual assault of a child; first degree; penalty.**

(1) A person commits sexual assault of a child in the first degree:

(a) When he or she subjects another person under twelve years of age to sexual penetration and the actor is at least nineteen years of age or older; or

(b) When he or she subjects another person who is at least twelve years of age but less than sixteen years of age to sexual penetration and the actor is twenty-five years of age or older.

(2) Sexual assault of a child in the first degree is a Class IB felony with a mandatory minimum sentence of fifteen years in prison for the first offense.

(3) Any person who is found guilty of sexual assault of a child in the first degree under this section and who has previously been convicted (a) under this section, (b) under section 28-319 of first degree or attempted first degree sexual assault, (c) under section 28-320.01 before July 14, 2006, of sexual assault of a child or attempted sexual assault of a child, (d) under section 28-320.01 on or after July 14, 2006, of sexual assault of a child

in the second or third degree or attempted sexual assault of a child in the second or third degree, or (e) in any other state or federal court under laws with essentially the same elements as this section, section 28-319, or section 28-320.01 as it existed before, on, or after July 14, 2006, shall be guilty of a Class IB felony with a mandatory minimum sentence of twenty-five years in prison.

(4) In any prosecution under this section, the age of the actor shall be an essential element of the offense that must be proved beyond a reasonable doubt.

**Source:** Laws 2006, LB 1199, § 6; Laws 2009, LB97, § 12.

**28-320. Sexual assault; second or third degree; penalty.**

(1) Any person who subjects another person to sexual contact (a) without consent of the victim, or (b) who knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his or her conduct is guilty of sexual assault in either the second degree or third degree.

(2) Sexual assault shall be in the second degree and is a Class III felony if the actor shall have caused serious personal injury to the victim.

(3) Sexual assault shall be in the third degree and is a Class I misdemeanor if the actor shall not have caused serious personal injury to the victim.

**Source:** Laws 1977, LB 38, § 35; Laws 1978, LB 701, § 2; Laws 1995, LB 371, § 5.

**28-320.01. Sexual assault of a child; second or third degree; penalties.**

(1) A person commits sexual assault of a child in the second or third degree if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older.

(2) Sexual assault of a child is in the second degree if the actor causes serious personal injury to the victim. Sexual assault of a child in the second degree is a Class II felony for the first offense.

(3) Sexual assault of a child is in the third degree if the actor does not cause serious personal injury to the victim. Sexual assault of a child in the third degree is a Class IIIA felony for the first offense.

(4) Any person who is found guilty of second degree sexual assault of a child under this section and who has previously been convicted (a) under this section, (b) under section 28-319 of first degree or attempted first degree sexual assault, (c) under section 28-319.01 for first degree or attempted first degree sexual assault of a child, or (d) in any other state or federal court under laws with essentially the same elements as this section, section 28-319, or section 28-319.01 shall be guilty of a Class IC felony and shall be sentenced to a mandatory minimum term of twenty-five years in prison.

(5) Any person who is found guilty of third degree sexual assault of a child under this section and who has previously been convicted (a) under this section, (b) under section 28-319 of first degree or attempted first degree sexual assault, (c) under section 28-319.01 for first degree or attempted first degree sexual assault of a child, or (d) in any other state or federal court under laws with essentially the same elements as this section, section 28-319, or 28-319.01 shall be guilty of a Class IC felony.

**Source:** Laws 1984, LB 79, § 1; Laws 1991, LB 23, § 1; Laws 1996, LB 645, § 14; Laws 1997, LB 364, § 6; Laws 2006, LB 1199, § 7.

**28-320.02. Sexual assault; use of electronic communication device; prohibited acts; penalties.**

(1) No person shall knowingly solicit, coax, entice, or lure (a) a child sixteen years of age or younger or (b) a peace officer who is believed by such person to be a child sixteen years of age or younger, by means of an electronic communication device as that term is defined in section 28-833, to engage in an act which would be in violation of section 28-319, 28-319.01, or 28-320.01 or subsection (1) or (2) of section 28-320. A person shall not be convicted of both a violation of this subsection and a violation of section 28-319, 28-319.01, or 28-320.01 or subsection (1) or (2) of section 28-320 if the violations arise out of the same set of facts or pattern of conduct and the individual solicited, coaxed, enticed, or lured under this subsection is also the victim of the sexual assault under section 28-319, 28-319.01, or 28-320.01 or subsection (1) or (2) of section 28-320.

(2) A person who violates this section is guilty of a Class ID felony. If a person who violates this section has previously been convicted of a violation of this section or section 28-308, 28-309, 28-310, 28-311, 28-313, 28-314, 28-315, 28-319, 28-319.01, 28-320.01, 28-813.01, 28-833, 28-1463.03, or 28-1463.05 or subsection (1) or (2) of section 28-320, the person is guilty of a Class IC felony.

**Source:** Laws 2004, LB 943, § 3; Laws 2006, LB 1199, § 8; Laws 2009, LB97, § 13.

**28-386. Knowing and intentional abuse, neglect, or exploitation of a vulnerable adult; penalty.**

(1) A person commits knowing and intentional abuse, neglect, or exploitation of a vulnerable adult if he or she through a knowing and intentional act causes or permits a vulnerable adult to be:

- (a) Physically injured;
- (b) Unreasonably confined;
- (c) Sexually abused;
- (d) Exploited;
- (e) Cruelly punished;
- (f) Neglected; or
- (g) Sexually exploited.

(2) Knowing and intentional abuse, neglect, or exploitation of a vulnerable adult is a Class IIIA felony.

**Source:** Laws 1988, LB 463, § 39; Laws 1997, LB 364, § 7; Laws 2012, LB1051, § 15.

**28-707. Child abuse; privileges not available; penalties.**

(1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:

- (a) Placed in a situation that endangers his or her life or physical or mental health;
- (b) Cruelly confined or cruelly punished;
- (c) Deprived of necessary food, clothing, shelter, or care;
- (d) Placed in a situation to be sexually exploited by allowing, encouraging, or forcing such minor child to solicit for or engage in prostitution, debauchery, public indecency, or obscene or pornographic photography, films, or depictions;
- (e) Placed in a situation to be sexually abused as defined in section 28-319, 28-319.01, or 28-320.01; or
- (f) Placed in a situation to be a trafficking victim as defined in section 28-830.

(2) The statutory privilege between patient and physician, between client and professional counselor, and between husband and wife shall not be available for excluding or refusing testimony in any prosecution for a violation of this section.

(3) Child abuse is a Class I misdemeanor if the offense is committed negligently and does not result in serious bodily injury as defined in section 28-109 or death.

(4) Child abuse is a Class IIIA felony if the offense is committed knowingly and intentionally and does not result in serious bodily injury as defined in section 28-109 or death.

(5) Child abuse is a Class IIIA felony if the offense is committed negligently and results in serious bodily injury as defined in section 28-109.

(6) Child abuse is a Class III felony if the offense is committed negligently and results in the death of such child.

(7) Child abuse is a Class II felony if the offense is committed knowingly and intentionally and results in serious bodily injury as defined in such section.

(8) Child abuse is a Class IB felony if the offense is committed knowingly and intentionally and results in the death of such child.

(9) For purposes of this section, negligently refers to criminal negligence and means that a person knew or should have known of the danger involved and acted recklessly, as defined in section 28-109, with respect to the safety or health of the minor child.

**Source:** Laws 1977, LB 38, § 146; Laws 1982, LB 347, § 10; Laws 1993, LB 130, § 3; Laws 1993, LB 430, § 3; Laws 1994, LB 908, § 1; Laws 1996, LB 645, § 15; Laws 1997, LB 364, § 9; Laws 2006, LB 1199, § 9; Laws 2010, LB507, § 3; Laws 2012, LB799, § 2; Laws 2013, LB255, § 1.

**28-931. Assault on an officer, emergency responder, certain employees, or a health care professional in the third degree; penalty.**

(1) A person commits the offense of assault on an officer, an emergency responder, a state correctional employee, a Department of Health and Human Services employee, or a health care professional in the third degree if:

(a) He or she intentionally, knowingly, or recklessly causes bodily injury:

(i) To a peace officer, a probation officer, a firefighter, an out-of-hospital emergency care provider, or an employee of the Department of Correctional Services;

(ii) To an employee of the Department of Health and Human Services if the person committing the offense is committed as a dangerous sex offender under the Sex Offender Commitment Act; or

(iii) To a health care professional; and

(b) The offense is committed while such officer, firefighter, out-of-hospital emergency care provider, or employee is engaged in the performance of his or her official duties or while the health care professional is on duty at a hospital or a health clinic.

(2) Assault on an officer, an emergency responder, a state correctional employee, a Department of Health and Human Services employee, or a health care professional in the third degree shall be a Class IIIA felony.

**Source:** Laws 1982, LB 465, § 5; Laws 1997, LB 364, § 11; Laws 2005, LB 538, § 3; Laws 2010, LB771, § 6; Laws 2012, LB677, § 3; Laws 2014, LB811, § 20.

**28-1463.03. Visual depiction of sexually explicit conduct; prohibited acts; affirmative defense.**

(1) It shall be unlawful for a person to knowingly make, publish, direct, create, provide, or in any manner generate any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

(2) It shall be unlawful for a person knowingly to purchase, rent, sell, deliver, distribute, display for sale, advertise, trade, or provide to any person any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

(3) It shall be unlawful for a person to knowingly employ, force, authorize, induce, or otherwise cause a child to engage in any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

(4) It shall be unlawful for a parent, stepparent, legal guardian, or any person with custody and control of a child, knowing the content thereof, to consent to such child engaging in any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

(5) It shall be an affirmative defense to a charge brought pursuant to subsection (1) of this section if the defendant was less than eighteen years of age at the time the visual depiction was created and the visual depiction of sexually explicit conduct includes no person other than the defendant.

(6) It shall be an affirmative defense to a charge brought pursuant to subsection (2) of this section if (a) the defendant was less than eighteen years of age, (b) the visual depiction of sexually explicit conduct includes no person other than the defendant, (c) the defendant had a reasonable belief at the time the visual depiction was sent to another that it was being sent to a willing recipient, and (d) the recipient was at least fifteen years of age at the time the visual depiction was sent.

**Source:** Laws 1978, LB 829, § 1; R.S.1943, (1979), § 28-1463; Laws 1985, LB 668, § 3; Laws 2009, LB97, § 18.

**28-1463.04. Violation; penalty.**

(1) Any person who is under nineteen years of age at the time he or she violates section 28-1463.03 shall be guilty of a Class III felony for each offense.

(2) Any person who is nineteen years of age or older at the time he or she violates section 28-1463.03 shall be guilty of a Class ID felony for each offense.

(3) Any person who violates section 28-1463.03 and has previously been convicted of a violation of section 28-1463.03 or section 28-308, 28-309, 28-310, 28-311, 28-313, 28-314, 28-315, 28-319, 28-319.01, 28-320.01, 28-813, 28-833, or 28-1463.05 or subsection (1) or (2) of section 28-320 shall be guilty of a Class IC felony for each offense.

**Source:** Laws 1978, LB 829, § 2; R.S.1943, (1979), § 28-1464; Laws 1985, LB 668, § 5; Laws 2009, LB97, § 19.

**28-1463.05. Visual depiction of sexually explicit acts related to possession; violation; penalty.**

(1) It shall be unlawful for a person to knowingly possess with intent to rent, sell, deliver, distribute, trade, or provide to any person any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

(2)(a) Any person who is under nineteen years of age at the time he or she violates this section shall be guilty of a Class IIIA felony for each offense.

(b) Any person who is nineteen years of age or older at the time he or she violates this section shall be guilty of a Class III felony for each offense.

(c) Any person who violates this section and has previously been convicted of a violation of this section or section 28-308, 28-309, 28-310, 28-311, 28-313, 28-314, 28-315, 28-319, 28-319.01, 28-320.01, 28-813, 28-833, or 28-1463.03 or subsection (1) or (2) of section 28-320 shall be guilty of a Class IC felony for each offense.

**Source:** Laws 1985, LB 668, § 4; Laws 1986, LB 788, § 2; Laws 2004, LB 943, § 7; Laws 2009, LB97, § 20.

**29-4011. Violations; penalties; investigation and enforcement.**

(1) Any person required to register under the Sex Offender Registration Act who violates the act is guilty of a Class IV felony.

(2) Any person required to register under the act who violates the act and who has previously been convicted of a violation of the act is guilty of a Class III felony and shall be sentenced to a mandatory minimum term of at least one year in prison unless the violation which caused the person to be placed on the registry was a misdemeanor, in which case the violation of the act shall be a Class IV felony.

(3) Any law enforcement agency with jurisdiction in the area in which a person required to register under the act resides, has a temporary domicile, maintains a habitual living location, is employed, carries on a vocation, or attends school shall investigate and enforce violations of the act.

**Source:** Laws 1996, LB 645, § 11; Laws 2006, LB 1199, § 24; Laws 2009, LB285, § 10.



### ***III. Fiscal Analyst's Opinion***



# State of Nebraska

OCT 23 2014

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## LEGISLATIVE AUDIT

PATRICK J. O'DONNELL  
 Clerk of the Legislature

NANCY CYR  
 Director of Research

MARTHA CARTER  
 Legislative Auditor

JOANNE PEPPERL  
 Revisor of Statutes

MICHAEL CALVERT  
 Legislative Fiscal Analyst

MARSHALL LUX  
 Ombudsman

October 23, 2014

Martha Carter, Legislative Auditor  
 Legislative Audit Office  
 Box 94604, State Capitol  
 Lincoln, NE 68509

Dear Martha,

You sent me the Performance Audit Office Draft Report: "Nebraska Department of Correctional Services: Disciplinary Process, Programs, and Commitment Processes", September 2014.

As required by Neb.Rev.Stat. Section 50-1210, you requested my opinion whether your Office's recommendations can be implemented by the agency within its current appropriation.

It is my opinion that any additional duties required of the Department of Correctional Services will require additional resources. The amount of additional resources would depend on the degree of changes your recommendations would require the Department of Correctional Services to make in their operations, which is unknown at this time. Therefore, your Office's recommendations cannot be implemented by the agency within its current appropriation.

If you require anything else, please let me know.

Sincerely,

Michael Calvert  
 Legislative Fiscal Analyst



## ***IV. Background Materials***



## **BACKGROUND MATERIALS**

The “background materials” provided here are materials (in addition to the Office’s report) that were available to the Committee when it issued the findings and recommendations contained in Part I of this report. They include:

- The agency’s response to a draft of the Office’s report; and
- The Legislative Auditor’s summary of the agency’s response.



# STATE OF NEBRASKA

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## DEPARTMENT OF CORRECTIONAL SERVICES

Michael L. Kenney

Director



Dave Heineman  
Governor

November 5, 2014

Martha Carter  
Legislative Performance Audit Committee  
P.O. Box 94604, State Capitol  
Lincoln, NE 68509

Dear Ms. Carter,

This letter is in response to the draft performance audit report received by our office on September 23, 2014, titled "Nebraska Department of Correctional Services: Disciplinary Process, Programs and Commitment Processes" and the audit closeout meeting held on October 16, 2014. The letter was originally submitted on October 22, 2014, but has been revised and resubmitted pursuant to an agreement with the Legislative Performance Audit Committee to reflect the changes made to the report after our exit conference. The response from the Department, as requested by the committee, for inclusion in the published version of the report is attached.

I would first like to express my support for the performance audit process and feel that it is a useful tool to ensure that agency policy and practice is in line with statute and to identify areas where improvements can be made. I would also like to commend the Performance Audit Committee staff for their professionalism and demeanor in the conduct of the research for this report. I particularly appreciated their awareness and understanding of the Department's other responsibilities and the demands this project placed on Department staff in addition to their normal duties.

Before I move onto a discussion of the specifics of the report, I would like to make a statement regarding the findings contained in the report. As a tool intended to be utilized by policymakers to make decisions, I found many of the findings in the report to be too general and lacking in specificity to be useful to policymakers as a decision making tool or by the Department to make improvements to existing practices. An example of this would be the use of the phrase "unreliable data" in several findings in the report. Without additional detail, the phrase "unreliable data" provides little to no guidance as to how the data or data system needs to be improved. Is the data simply not available? Is it inconsistent in content? Is the

unreliability a reflection of data entry errors or was the system never designed to track the information requested by the committee? Including even a short description of how the data could be improved so that the desired analysis could be conducted would vastly improve the usefulness of the findings to the Department and the Legislature.

In the same vein, many of the findings in the report utilize vague terms such as “some” or “most” when the exact information is available in the text of the report. An example of this would be the finding on page 3 which indicates that “some” of the committee’s planned analyses could not be performed due to unreliable data, while the text on the same page clearly shows that there were three planned analyses that could not be performed: the mental illness/behavioral health diagnosis, the question of whether a need for programming prevented inmates from being paroled, and the use of programming for substance abuse, violent offenders and sex offenders since 2009. I can see no reason not to include this specific information in the report’s findings when available and particularly when the detail is included in the text of the report. I feel this lack of detail is problematic and potentially misleading.

In conclusion, I want to thank you again for the opportunity to provide feedback on the performance audit process. I look forward to improving NDCS’s processes based upon the recommendations found in the report.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Kenney", written in a cursive style.

Mike Kenney  
Director  
Nebraska Department of Correctional Services

Below are the Department's responses to the specific findings in the report:

## **INTRODUCTION**

**Finding #1:** Unreliable data relating to programming received by inmates and to specific behavioral health diagnoses prevented us from being able to conduct some planned analyses

**Response:** This finding should be clarified to state that unreliable "electronic" data ... prevented us from being able to conduct some of the planned analyses." Accurate, reliable data is available for every inmate in the NDCS system in their individual case file. The ability to aggregate this individual case file data for analysis is a limitation of the NDCS data system, developed in the 1990's, of which the Department is aware and taking steps to address. The Department also made parole board decision-making data available to the committee, which contains information as to whether or not parole was denied due to the failure to complete programming, but the committee appears to have not utilized this data for reasons unknown to the Department.

## **Section I: Disciplinary Process at the Department of Correctional Services**

**Finding #2:** The terms that describe the severity of misconduct that warrants disciplinary segregation and loss of good time are not defined in statute and DCS has no written guidelines for their application.

**Response:** The Department agrees that there is no current statutory definition or administrative regulation defining the terms "serious" or "flagrant". The Department does, however, have written policies governing the imposition of disciplinary segregation which comply with the due process requirements laid out by the Supreme Court in the *Wolff v. McDonnell* case. It is also important to note that there is no evidence in the report that these terms are being misapplied or being utilized arbitrarily or capriciously.

**Finding #3:** By law, DCS may still use solitary confinement, which is segregated confinement with complete audio and visual deprivation; however, DCS officials state they no longer use solitary confinement.

**Response:** NDCS does not utilize solitary confinement in any form and would support removing this language from statute.

## Section II: Analysis of Selected Charges and Sanctions

### Sanctions

**Finding #4:** TSC, NSP, and LCC had most of the selected charges and also most of the charges that resulted in guilty dispositions.

**Response:** NDSC does not dispute this finding. However, the use of the term “most” in the finding is unnecessary and potentially misleading when the actual statistics are contained in the report. The percentage of the selected charges coming from TSC, NSP and LCC is 62% as shown in table 2.3 on page 19 of the report. TSC had 49% of charges result in a guilty disposition, LCC had 41% and NSP had 39% guilty dispositions in comparison to the 35% average across all institutions, as shown in table 2.5.

**Finding #5:** Most guilty determinations for the selected charges resulted in a single sanction, which was usually disciplinary segregation. For the guilty determinations that resulted in two sanctions, nearly all were disciplinary segregation and loss of good time.

**Response:** NDCS agrees with this finding, but would point out that the charges selected for review represent only 12.8% of all of the misconduct reports filed during 2013 and were chosen because they are likely to result in these sanctions as noted on page 65: “We selected a sample of charges that were most likely to result in loss of good time and disciplinary segregation as sanctions.... (Because we selected this sample to give us a high proportion of the sanctions we were interested in, it is not representative of all the charged in 2013 and the results should not be generalized to all of the charges that year.)”

**Finding #6:** Loss of good time was most likely to result from a charge if the misconduct occurred at an adult male maximum security facility. Inmates also lost higher amounts of good time at these facilities.

**Response:** As maximum security institutions house the most serious and high risk offenders, the fact that there are more misconduct reports at these institutions is not surprising. It is also important to note that while good time was taken more often at these institutions, good time was taken as a sanction in only 24% of the selected guilty dispositions.

**Finding #7:** None of the sanctions for either class of offenses exceeded the maximums allowed before December 21, 2013.

**Response:** NDCS agrees with this finding.

**Finding #8:** Most of the loss of good time sanctions were for less time than the maximum allowed by regulation. For Class I offenses, the sanctions were much less than allowed, and very few were non-restorable.

**Response:** NDCS agrees with this finding, but would note that there is no requirement that the maximum sanction be imposed for a disciplinary violation, that each case is to be considered on its merits, and that good time can only be taken for serious and flagrant rule violations.

**Finding #9:** Of the selected charges, loss of good time was issued most often for threatening behavior charges.

**Response:** A more accurate finding would be that threatening behavior charges resulted in more total good time sanctions. The frequency of good time sanctions for threatening behavior charges cannot be inferred from the data in the report as the comparison does not take into consideration the total number of charges of each type. A more useful comparison would look at the percentage of assault, disobeying an order, and threatening behavior charges resulted in loss of good time as a sanction.

**Finding #10:** The institutions that issued disciplinary segregation most frequently were the maximum security adult male facilities. These facilities also issued the longest disciplinary segregation sanctions. The Nebraska Youth Facility, a maximum security facility for youth charged as adults, also had a high number of disciplinary segregation sanctions, but sanctions were for shorter periods of time. (pg. 26)

**Response:** The Department agrees with this finding.

### Charges

**Finding #11:** Of the selected charges, disciplinary segregation was issued for most of the assault and threatening behavior guilty determinations but less than half of the disobeying an order guilty dispositions.

**Response:** NDCS does not disagree with this finding but feels including the actual percentages in the finding is more accurate than using terms such as most, much, or less than half. The

actual percentages are 97% for assault, 91% for threatening behavior and 38% for disobeying an order.

**Finding #12:** TSC and LCC had much higher rates of disobeying an order guilty determinations resulting in disciplinary segregation than did the other institutions.

**Response:** NDCS does not disagree with this finding but feels including the actual percentages in the finding is more accurate than using terms such as most, much, or less than half. The rate at TSC is 65% and LCC is 50%, while the highest percentage from among the other institutions is 19%.

### **Length of Disciplinary Segregation and Loss of Good Time Sanctions**

**Finding #13:** Most of the disciplinary segregation sanctions were for much less time than the maximum allowed and none exceeded the maximums allowed.

**Response:** NDSC agrees with this statement and would add that due to the wide variety of activities that may constitute a specific offense, as well as the range of situations that occur within the correctional environment, not all rule violations are deserving of loss of good time, let alone the maximum amount. Additionally, a number of alternate sanctions, including extra duty, restriction, reprimand, and restitution, are available to hearing officers in order to discipline inmates for offenses not deserving of LGT. Oftentimes, these immediate sanctions have more immediate impact on inmate behavior and provide correctional officers with a more effective and appropriate method of discipline.

**Finding #14:** Although the individual sanctions we reviewed fell within the legal limits, some inmates spend much more time in segregation than those individual sanctions suggest.

**Response:** The Department does not disagree that there are instances in which highly disruptive inmates commit repeated serious or flagrant rules violations and receive multiple misconduct reports resulting in consecutive disciplinary segregation sanctions. However, this is not a common occurrence. This finding also unnecessarily blurs the distinction between disciplinary segregation and administrative confinement by referencing examples involving administrative confinement when the entirety of section II of the report "Analysis of Selected Charges and Sanctions" focuses on disciplinary segregation.

## **Section III: Department of Corrections Programming**

**Finding #15:** The Legislature may have intended to allow the Parole Board to waive requirements for mental health treatment of inmates if the Board makes the treatment a requirement of parole; however, the plain language of the law does not allow this treatment to be waived.

**Response:** NDCS agrees with this finding and would support legislative action to allow waiver of this requirement.

**Finding #16:** For inmates who receive short sentences that cause them to be parole-eligible on their first day of incarceration, it is impossible for DCS to meet the statutory requirement that the inmate be provided with treatment prior to parole eligibility.

**Response:** NDCS agrees with this finding and would support legislative action to amend this requirement.

## **Section IV: Commitment Acts Overview & Section V: DCS Process for Identifying Inmates Under These Acts**

### **“Mentally Ill and Dangerous: and “Dangerous Sex Offender” Definitions**

**Finding #17:** Because the definition of mentally ill and dangerous is limited to inmates likely to be a danger in the near future, inmates who might be dangerous at a later time may not be suggested for commitment.

**Response:** NDCS agrees this is an accurate characterization of the standard, but questions whether or not it is appropriate to commit individuals who are not currently dangerous as well as whether it could be done constitutionally.

**Finding #18:** It is unclear whether the Legislature intended for the definition of mentally ill and dangerous in the MHCA to include personality disorders. (pg. 47)

**Response:** While it may be unclear as to whether or not the legislature intended to include personality disorders within the definition of mentally ill and dangerous under the Mental Health Commitment Act when originally adopted, it is very clear that the legislature in 2006 felt that the MHCA definition did not include personality disorders when it adopted the Sex Offender Commitment Act. As noted on page 47 of the report, “The legislative history of the Sex Offender Commitment Act indicates that legislators intended the inclusion of personality

disorders in the definition of dangerous sex offender to be a way of expanding the definition to enable the state to more easily commit persons likely to perpetrate sex offenses, but who might not be found mentally ill and dangerous.”

**Finding #19:** DCS does not consider inmates with personality disorders for commitment under the MHCA. Therefore, an inmate who, because of a personality disorder, is a danger to himself/herself or to others, as evidenced by recent acts or threats of violence, would not be suggested by DCS for commitment as a mentally ill and dangerous person.

**Response:** NDCS does not disagree with this statement and feels it is worth exploring what occurs in the larger mental health community in Nebraska regarding this issue. NDCS would also welcome discussion of expanding the MHCA to explicitly include personality disorders in order to remove any question on this issue.

**Finding #20:** The Treatment and Corrections Act does not define the term “mental disease or defect” and contains no criteria DCS should use in identifying offenders who should be evaluated by psychiatrists.

**Response:** NDCS provides the community standard of care for all inmates under its supervision and would defer to the legislature on whether additional criteria specifying who should be evaluated by psychiatrists for potential commitment should be placed in statute.

**Finding #21:** The determination of inmates who should be evaluated as potentially mentally ill and dangerous persons requires a greater amount of NDCS staff professional judgment than the determination of inmates who should be evaluated as potentially mentally ill and dangerous persons than in the determination of inmates who should be evaluated as potentially dangerous sex offenders.

**Response:** NDCS agrees that there is a less structured statutory process for the determination of inmates who should be evaluated as potentially mentally ill and dangerous than for dangerous sex offenders. Licensed medical professionals make the determination in both instances based upon their professional medical judgment. It is also important to note that there is no list of crimes which identify people as potentially mentally ill and dangerous as there are with dangerous sex offenders, which makes setting up criteria for who should be evaluated much more difficult.

## **Notice**

**Finding #22:** There is no statutory requirement identifying which authorities should be notified regarding inmates near release who DCS evaluated as potentially mentally ill and dangerous persons. There is also no precise time requirement for when DCS should provide this notification.

**Response:** NDCS does not disagree that there are limited statutory requirements for which authorities should be notified regarding inmates near release who are potentially mentally ill and dangerous and the timeframe for such notice in comparison to the sex offender commitment act. NDCS has taken steps on its own initiative to make sure that such notice is provided in a timely manner through the creation of the Discharge Review Team but would welcome further discussions to make the requirements for these two acts consistent with each other.

## **Section V: DCS Process for Identifying “Mentally Ill and Dangerous” Persons and “Dangerous Sex Offenders”**

**Finding #23:** The recently created Discharge Review Team monitors and reviews inmates who DCS believes could be dangerous or have other difficulties upon release, typically as they near discharge.

**Response:** NDCS agrees with this finding.

**Finding #24:** Since there are no statutory guidelines for mandatory evaluations under the MHCA such as those laid out in the SOCA, DCS uses a variety of processes to identify potentially mentally ill and dangerous inmates who are nearing release.

**Response:** NDCS agrees that there are no statutory guidelines in this area, but would reiterate that unlike the SOCA, there are no offense based criteria which can identify mentally ill and dangerous individuals to be evaluated for commitment.

**Finding #25:** In 2013, DCS recommended six inmates for possible commitment under the MHCA, significantly fewer than the 21 inmates DCS recommended for possible commitment under the SOCA. (pg. 62)

**Response:** NDCS agrees with this finding but would add that a significant factor in this disparity is that evaluations under the SOCA are triggered by the offense of conviction rather than behavior of the individual, something that is not possible to put in place for potentially mentally ill and dangerous individuals due to their wide-ranging criminal history as indicated on page 61 of the report.

**Finding #26:** In 2013, DCS recommended 21 inmates for possible commitment under the SOCA.

**Finding #27:** Two of the 21 inmates recommended by DCS for possible commitment under the SOCA in 2013 were diagnosed with personality disorders only.

**Finding #28:** None of the 21 inmates recommended by DCS for possible commitment under SOCA in 2013 completed their recommended programming. Four of these inmates did not have time within their sentences to complete the recommended treatment programs.

**Finding #29:** In 2013, DCS recommended six inmates for possible commitment under the MHCA, significantly fewer than the 21 inmates DCS recommended for possible commitment under the SOCA

**Response to findings 26-29:** NDCS does not disagree with the factual statements in these findings but would support the commentary in the discussion that there are numerous factors that may explain these differences, some of which are beyond the scope of this audit.

## **Legislative Auditor's Summary of Agency Response**

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This summary meets the requirement of Neb. Rev. Stat. § 50-1210 that the Legislative Auditor briefly summarize the agency's response to the draft audit report and describe any significant disagreements the agency has with the report or recommendations.

At the exit conference for this audit, DCS provided a number of suggestions for improving the draft report, and we incorporated most of them into a revised draft. DCS had the opportunity to review the revised draft and made a few additional suggestions, which we included in the final report. The DCS written response contained additional comments and suggestions and this summary responds to those.

Most of the comments in the DCS written response are suggestions and additional information, not corrections to the audit work or the findings. DCS did not directly respond to the one recommendation directed at the agency (that they prioritize data in order to ensure accuracy); however, the director's letter attached to the response indicates his willingness to make improvements based on the report recommendations.

### *Use of General Terms in Findings*

DCS expressed concerns about our use of terms like "some" or "most" in findings, in place of exact figures, but provides no examples of how the use of such terms could be problematic. We believe using general terms in the findings makes them more easily understandable. As the DCS response acknowledges, the more specific figures are easily accessible in the report text, for readers who want that level of detail.

### *Data Unreliability*

DCS had concerns about our use of the phrase "unreliable data" in the first draft report, suggesting that it did not provide enough detail about the nature of the data problems. We note that Appendix B to the draft report contained a brief description of the types of problems we encountered. In addition, during the audit, we discussed each problem with one or more DCS staff, so there are people within the agency who are aware of the problems we found. However, we had no objection to including additional detail in the report and added it to the revised draft.

DCS made three other statements about data reliability. The first is that individual inmate case files contain reliable information but the data system they have is inadequate to pull that information together. We did not review data in individual inmate files and cannot attest to its accuracy. Additionally, while there may be problems with the department's data system, the bulk of the problems we encountered were not aggregation problems. Instead, the data in the computer system was either entered incorrectly initially (and not discovered through any data checks) or was entered correctly but not updated when an inmate's circumstances changed.

Second, DCS states that they made parole board decision-making data available to use

that we did not use “for reasons unknown to the Department.” This statement is incorrect: We discussed problems in the parole data with the Department’s Research Manager.

Third, DCS asked that our finding about data reliability (#1) be revised to state that we found “electronic” data unreliable, and we did so.

### *Definitions of “Serious” and “Flagrant”*

**Finding #2:** The terms serious and flagrant, which describe the severity of misconduct that warrants disciplinary segregation or loss of good time, are not defined in statute. DCS has no written guidelines for the types of behavior to which they should be applied.

DCS agrees with this finding but notes that the audit report contains no evidence that the terms are being misapplied or used arbitrarily or capriciously. DCS is correct; however, it needs to be clear that the reason there is no evidence in the report about how the terms are being applied in practice is that the audit did not analyze that. Therefore we have no evidence—good or bad—about how the terms are being applied.

What we do know is that there are no guidelines for the type of inmate misconduct that DCS considers to be “serious” or “flagrant” as those terms are used in issuing disciplinary segregation and loss of good time sanctions. As we discussed with DCS at the exit conference, we are not suggesting a rigid code. The guidelines should describe the types of behavior or other circumstances (number of offenses, etc.) that generally would be considered “flagrant” or “serious.” The guidelines could also allow for exceptions, but if so, they should require a written explanation of the reasons for the exception in each case.

### *Use of Data Sample*

**Finding #5:** Most guilty determinations for the selected charges resulted in a single sanction, which was usually disciplinary segregation. For the guilty determinations that resulted in two sanctions, nearly all were disciplinary segregation and loss of good time.

DCS agrees with the finding but qualifies that the charges we reviewed were only a small portion of all charges in 2013, and reiterates text from the body of the report stating that the findings should not be generalized to the whole population of sanctions that year. We agree and believe it is clear in the report that findings about the sample of charges we reviewed should not be generalized to all charges in 2013. The sample was selected to provide a high number of offenses that resulted in disciplinary segregation or loss of good time, because of policymaker’s interest in those sanctions.

**Finding #9:** Of the selected charges, loss of good time was issued most often for threatening behavior charges.

DCS challenged the accuracy of this finding, suggesting that we were using the data from the sample we reviewed to comment about how often loss of good time was issued as a sanction for all threatening behavior charges in 2013. We were not, and we think it is clear that the meaning of the finding is that threatening behavior charges in our sample

resulted in more loss of good time than did the other two charges.

### *Segregation*

**Finding #14:** The amount of disciplinary segregation inmates in our sample received for individual sanctions fell within the established limits. However, some inmates spend much more time in consecutive periods of disciplinary segregation or in consecutive periods of disciplinary segregation and administrative confinement than the limitations on individual sanctions suggest.

At the exit conference and in its written response, DCS expressed concerns that we were not doing enough to distinguish disciplinary segregation from administrative confinement. Although we believed we had made the distinction between the two types of segregation clear in our original draft report, we agreed to (and did) add additional language making that point. DCS also stated that the “entirety” of Section 2 of the report “focuses on disciplinary segregation.” That statement is inaccurate as the section also describes other types of segregation, including administrative confinement.

As noted in the Introduction to the report, we would have included more analysis of other types of segregation had the electronic data been sufficiently reliable to permit that. We included examples of inmates who experienced longer stays because of multiple disciplinary segregation sanctions, or disciplinary segregation sanctions followed by administrative confinement, to give a more complete picture of inmates’ experiences.

DCS also states that consecutive disciplinary segregation sanctions are “not a common occurrence,” but provides no evidence to support that statement. However, even if DCS is correct, the report makes no statement about the frequency of such cases. As stated in the report text, the examples are included to give the reader the understanding that while DCS is following its policies related to the length of individual disciplinary segregation sanctions, in some cases the actual time an inmate spends segregated from the general population is much longer than those individual sanctions suggest.

Note: In some instances the DCS response does not reflect revised finding language. The finding language in this summary is the final language that appears in the report.

