

COVID-19 Update

Prisoners' Legal Services of NY (May 11, 2021)¹

The staff of Prisoners' Legal Services is concerned about the health and safety of everyone in DOCCS custody during this pandemic. To ensure that your health and safety are protected, PLS, other prisoners' rights advocacy organizations and Legislators have been in regular contact with DOCCS, the Board of Parole and Governor Cuomo's office about our concerns, particularly with respect to 1) reducing the prison population by selectively releasing people, 2) increasing the amount and frequency of testing and 3) offering vaccinations to incarcerated individuals.

Changes in DOCCS Operations

Visitation: As a result of the decline in the overall positivity rate and the distribution of vaccines to the incarcerated population, DOCCS has lifted the suspension of visits.

Excerpt from the DOCCS Website:

The Department will resume visitation within our institutions starting Wednesday, April 28, 2021 in maximum security facilities, and all other locations on Saturday, May 1, 2021. This schedule will help ensure that incarcerated individuals with comorbidities that have chosen to receive the vaccine will be fully vaccinated when visitation resumes.

Recognizing the importance of family and visitation, while being mindful of the critical need to continue protecting staff and the incarcerated population within our facilities, we will resume visitation under the previously announced criteria:

- Visiting rooms will operate at half capacity to facilitate social distancing. Facilities with outside visiting areas will utilize such areas, if weather permits;
- All visitors, incarcerated individuals and staff will be required to wear a mask during processing and during the visit. Masks may be temporarily removed for processing, and while eating items purchased from the vending machine. Masks must not have any pictures, writings, or sayings on them. If a visitor does not have a mask, the visit may be denied;
- Visitors will be screened with the questionnaire and temperature check prior to being allowed to visit. In facilities with a hospitality center, the screening shall occur at the entrance to the hospitality center;
- Physical contact will not be allowed;

¹ The coronavirus public health emergency and the actions undertaken in response to it are continually changing. The information in this message is current and accurate through May 11, 2021, and supersedes prior versions of this message.

- Visiting will be divided into specific segments of the population (i.e., alpha by name or numeric by DIN) to ensure that each incarcerated individual can have two weekend visits per month, as published on our website. Weekday visiting at maximum security facilities will remain in place;
- Each visit will be limited to three adult visitors (unless the current facility policy specifies less) and one child, under the age of five, who must sit on an adult's lap, with no cross visiting allowed;
- Visitors must adhere to all travel advisories in place at the time of visitation, including individuals who have traveled to New York from another State (see Travel Advisory link below);
- All movement in the visiting area will be controlled by staff to ensure social distancing;
- Each table will be disinfected at the completion of a visit, as well as the vending machines, and other shared areas;
- The children's area will be off-limits on the re-opening of visiting, but this restriction will be periodically re-evaluated;
- Incarcerated individuals in quarantine or isolation will not be permitted to visit until they are determined to be recovered;
- Packages will be allowed in accordance with current policy; and
- Limits will be placed on the number of visitors at any one time in the hospitality center, processing area and pathways to visiting room, in order to maintain social distancing between persons.

NOTE: These provisions are subject to change and visitation could again be suspended should there be an increased infection rate at one or more facilities, if a region is placed in a red or orange micro cluster, or if conditions change in the community.

As we resume visitation, it is not only critical, but required, that all staff wear a mask while on duty and for all incarcerated individuals to wear a mask when leaving their cell or cube. The wearing of the mask is the single most important precaution any person can take in order to defeat COVID-19. All of us in this agency, whether staff, incarcerated individuals, or parolees, have worked very hard and made many difficult sacrifices in the fight against the COVID-19 pandemic. The last thing any of us want or

need is to lose any of the invaluable ground we thus far have gained against this terrible disease.

It is critical that we continue to follow the safety protocols that have been put in place for everyone's safety to stop the spread of COVID-19 and other respiratory viruses as follows:

- Wash your hands frequently with soap and water for at least 20 seconds;
- Social distance;
- Avoid touching your eyes, nose or mouth with unwashed hands, especially before you eat;
- Avoid close contact with people who are sick;
- Cover your cough or sneeze;
- Avoid sharing food and utensils;
- Report any symptoms promptly; and
- Wear your mask when on duty or not in your cell or cube.

The Department takes seriously its duty to ensure the safety and wellbeing of those that work, and live in our correctional facilities, as well as those who supervise or are supervised in the greater community of New York. During this difficult time, the Department is appreciative of everyone's patience and understanding as we continue to face this virus together.

In partnership with its phone and tablet vendor, DOCCS will continue to provide the following free services through May 31, 2021:

- **Phone Calls:** Each week, through at least May 31, 2021, incarcerated individuals in general confinement will receive three (3) free calls of up to fifteen-minutes each. The calls are available beginning at 7:00 a.m. on Saturday and are associated with the first three calls made during each week. If you do not use the calls during the week they are made available, you cannot carry forward the unused calls. Individuals serving a disciplinary confinement sanctions will be provided access to the phone as per policy;
- **Secure Message Stamps:** Each incarcerated individual with access to a general confinement tablet and kiosk will continue to receive two (2) free stamps to use for secure messaging per week (this is not available to individuals serving a disciplinary confinement sanction). Stamps are added to your account on Friday afternoon and do not accumulate; that is, if you do not use them during the week that they become available, you will lose them;
- **Free Pre-paid Reply Wednesdays:** Through at least May 31, 2021, every secure message sent by a friend or family member on Wednesdays will be accompanied with a free pre-paid stamp that will allow the incarcerated individual to reply to the message; and
- **Newsstand application:** There is no change for access to the Newsstand. The previously enacted free one-month subscription to the Newsstand application has been extended for the time being. Users must update their tablets to receive the Newsstand app and subscribe

to the service before they can download updates. Updates will be available daily via the kiosk.

DOCCS is also providing each incarcerated individual with the equivalent of 2 free USPS one-ounce postage stamps. Unused postage cannot be carried over to the next week.

Eligibility for Early Release: DOCCS is currently continuing to **consider** for early release non-violent felony offenders who have not been convicted of sex offenses and who are within 90 days of a release date. People who meet the eligibility criteria will be evaluated for release; they are not entitled to release. In addition to the requirement that individuals have a parole approved address, there are other factors that may result in denial of early release even if an individual otherwise meets the threshold eligibility requirements.

Consideration for early release is on a rolling basis. That means that as eligible individuals approach the 90-day mark, DOCCS will review the other factors to determine whether they will be released. If you believe you qualify for early release consideration, we urge you to contact your ORC to make sure that your proposed release address will be approved.

DOCCS is also considering for early release pregnant and postpartum women who are nonviolent felony offenders who have not been convicted of sex offenses and who would otherwise be released within 6 months. To be released, women who meet the criteria must have stable housing and health care.

As of February 26, DOCCS had granted early release from prison to 3,032 individuals. As of April 30, an additional 62 people had been granted early release, for a total of 3,094.

The Impact of the Pandemic-Related Suspension of Programs: As of the end of February, 2021, DOCCS has resumed group programming at most facilities. As of March 12, a few prisons remain on pause due to local outbreaks of the virus. Where group programs are suspended, DOCCS presents some of its education, vocation and drug treatment programs by means of written materials, such as workbooks, and materials on the tablets.

To date, lawsuits challenging the impact of the suspension of programming that is required for release has been unsuccessful. *See, e.g., Matter of Brandon Franz v. Anthony Annucci*, 2021 WL 97607 (Sup. Ct. Albany Co. Jan. 21, 2021) (Court rejects challenge to denial of merit time that plaintiff argued was due the suspension of programs) and *People ex rel. Dusten Rhodes v. William Fennessy*, Index No. 2020-002262 (Sup. Ct. Oneida Co. Dec. 2, 2020) (finding that because there are no statutory deadlines for enrolling an individual in shock incarceration, DOCCS' failure to enroll the petitioner until 5½ months after his Shock eligibility date was permissible.)

Transfers: On March 31, due to the reduction in COVID-19 cases in the community and within DOCCS facilities, transfers of individuals from the county jails to DOCCS resumed.

Vaccines: In late February, DOCCS began offering the COVID-19 vaccine to incarcerated individuals who are ages 65 and over. DOCCS is now offering the vaccine to everyone in its custody. As of April 30, DOCCS has vaccinated roughly 5,252 incarcerated individuals. See the *PLS Vaccination Fact Sheet* to learn about the safety and efficacy of the vaccinations.

Testing For COVID-19: In consultation with the NYS Department of Health, DOCCS developed an asymptomatic surveillance testing plan (ASTP). This plan calls for testing a number of incarcerated individuals from multiple housing units in each facility every weekday, in order to avert potential outbreaks and target resources to facilities and housing units identified as potential problems. The ASTP is in addition to testing individuals who display symptoms and those who have been exposed to an individual who tested positive. While tests are voluntary, as a precaution, DOCCS will place individuals who refuse the test in isolation for 14 days.

Reducing the Spread of the Virus: Wearing masks is one of the most effective measures for reducing the spread of COVID-19. DOCCS reports that it has provided all incarcerated individuals with surgical-type masks as well as washable cloth masks. Individuals can request replacement masks if the masks that they were given are damaged. DOCCS requires correction officers, parole officers and civilian staff to wear masks while on duty. Incarcerated individuals are encouraged to wear masks and are required to wear them during movement, visits, and programming.

We at PLS strongly encourage you to wear a mask. Medical science has demonstrated that masks are an important and effective measure for controlling the spread of the virus. Masks protect the person who wears the mask as well as those who come into contact with him or her.

Scientists have not determined that people who recover from COVID-19 are immune from getting the virus a second time. Several people have been infected twice and many people do not have antibodies to the virus after they recover. **For this reason, even people who have recovered from COVID-19 should continue to wear masks and maintain 6 feet between themselves and others.**

New York State and Federal Lawsuits Relating to COVID-19

Due to the danger of widespread COVID-19 infection in prisons, there have been numerous lawsuits in state and federal courts throughout the United States seeking the release of prisoners serving sentences imposed by state court judges. To date in New York, the lawsuits have led to the release of only one New York State prisoner; the court granted bail pending appeal to an individual in DOCCS custody. The defendant has a medical condition that, if he is infected with COVID-19, is likely to cause his death. The decision in the case, *People v. George Garcia*, 70 Misc.3d 206 (Sup. Ct. N.Y. Co. Oct. 8, 2020), is reported in *Pro Se*, Vol. 31, No. 1.

The reasoning used by the courts to deny release varies, but is rooted generally in obstacles created by various procedural and substantive legal principles. Lawsuits seeking relief for people who are not in state prison, for example pre-trial detainees and people charged with technical parole violations, have been more successful.

In January 2021, incarcerated individuals at Adirondack C.F. and the group Release Aging Prisoners in Prison (RAPP) brought a class action lawsuit alleging, among other claims, that the defendants were violating the Eighth Amendment rights of incarcerated individuals at Adirondack to adequate medical care. Represented by the Prisoners' Rights Project of the Legal Aid Society and lawyers from Relman Colfax, PLLC, the plaintiffs moved for a preliminary injunction with respect to conditions and practices that they claimed unnecessarily increased the risk that they would contract COVID-19. On March 1, 2021, the magistrate-judge before whom the motion was pending denied the plaintiff's motion for a preliminary injunction in *Harper v. Cuomo*, 9:21-cv-00019 (N.D.N.Y. March 1, 2021), finding that 1) the plaintiffs were unlikely to succeed on the merits of their claims, 2) the plaintiffs would not suffer irreparable harm if preliminary relief were not granted, and 3) the plaintiffs had not shown a clear likelihood that they will succeed in establishing that the Adirondack officials were deliberately indifferent to the incarcerated population's health or safety. On April 23, 2021, the District Court Judge adopted the magistrate-judge's report and recommendation in its entirety. *See, Harper v. Cuomo*, 2021 WL 1540483 (N.D.N.Y. April 23, 2021).

PLS has not ruled out bringing a lawsuit should there be significant legal and/or factual developments that change the current legal landscape. We continue to monitor the situation in the NYS prisons and are closely watching what is happening in courts across the country. Our goal is to take whatever action we believe is the most likely to result in, to the greatest extent possible, the protection of the health and safety of the incarcerated population.

PLS Offices and the Prisons in Each Office's Service Area

ALBANY, 41 State Street, Suite M112, Albany, NY 12207

Bedford Hills, CNYPC, Coxsackie, Eastern, Edgecombe, Great Meadow, Greene, Hale Creek, Hudson, Marcy, Mid-State, Mohawk, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Walkill, Walsh, Washington, Woodbourne.

BUFFALO, 14 Lafayette Square, Suite 510, Buffalo, NY 14203

Albion, Attica, Collins, Gowanda, Groveland, Lakeview, Orleans, Rochester, Wende, Wyoming.

ITHACA, 114 Prospect Street, Ithaca, NY 14850

Auburn, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard.

NEWBURGH, 10 Little Britain Road, Suite 204, Newburgh, NY 12550

Downstate, Fishkill, Green Haven.

PLATTSBURGH, 24 Margaret Street, Suite 9, Plattsburgh, NY 12901

Adirondack, Altona, Bare Hill, Clinton, Franklin, Gouverneur, Moriah Shock, Ogdensburg, Riverview, Upstate.