

The Bronx
Defenders

BROOKLYN
DEFENDER
SERVICES

THE
LEGAL AID
SOCIETY
Justice in Every Borough.

NDS

NYCDS



APPELLATE
ADVOCATES

CAL
CENTER FOR APPELLATE LITIGATION

OAD

Via e-mail

January 27, 2021

The Honorable Andrew M. Cuomo
Governor of the State of New York
New York State Capitol Building
Albany, New York 12224

Re: Vaccination of People Held in Prisons and Jails

Dear Governor Cuomo:

As science and experience have both made clear, jails and prisons perpetuate the COVID-19 pandemic, both within prison walls and in the community at large, by creating dangerously unsafe conditions for all who live and work there. Yet as of today, New York has not included incarcerated people among the populations who may be vaccinated during Phase 1b of the vaccination program and has provided no plan whatsoever for when this population will be eligible for vaccination.¹ Your refusal to allow state and local health authorities to provide the vaccine to this high risk population recklessly endangers the lives of *all* New Yorkers by creating hotbeds for viral transmission, but most cynically and cruelly disregards the lives of the predominantly Black and Latinx people who comprise the incarcerated population. It is at best irrational to recognize the need to prioritize people in congregate settings, as your vaccination plan does, but to exclude people living in correctional congregate settings from that priority group. Equity, science and public health all demand that you reverse this dangerous and racist policy, and immediately allow vaccinations of all people held in New York's jails and prisons.

As you know, a court recently ordered New York State to offer the vaccine to one of the elders incarcerated in New York State prisons, holding that vaccination is part of the State's "nondiscretionary duty to treat [the] medical needs" of incarcerated people. *The People of the State of New York ex rel. Edward MacKenzie v. Tedford et al.*, 2021 NY Slip Op 21005 [Sup. Ct. Essex County, Jan. 18, 2021]. We expect more courts will see the injustice and harm of New York's policy and enter similar orders. However, we would achieve justice—and protection from this disease for thousands of people living and working in New York facilities and communities – far more quickly if the vaccination authority came from the Department of Health rather than waiting for the inevitable further orders from the judiciary.

¹See <https://www.governor.ny.gov/news/governor-cuomo-announces-additional-new-yorkers-individuals-75-and-older-can-begin-scheduling> (accessed January 11, 2021).

Justice in Every Borough.

New York’s Vaccine Policy is Deliberately Indifferent to Deaths and Disease in New York Prisons and Jails

New York prisons’ experience with the virus this fall shows how rapidly the contagion spreads in carceral settings. For example, on September 28, 2020, Elmira and Greene Correctional Facilities each reported *one* COVID-19 case. By December 2, these facilities had 605 and 162 incarcerated individuals, respectively, who tested positive. Overall, over 4,600 people in State custody have tested positive for COVID-19 since the pandemic began. There have been 30 deaths – 10 within the last month alone. While the Department of Corrections and Community Supervision (“DOCCS”) claims it has taken COVID-19 mitigation measures in the prisons, our clients tell otherwise—and the rampant spread of the virus shows that DOCCS does not have the virus under control. DOCCS already faces one federal class action about its abysmal COVID response at its “prison nursing home,” *Harper v. Cuomo*, Civil Action No. 9:21-cv-19 (LEK/ML), N.D.N.Y. (filed January 8, 2021), and several actions in the state appellate courts seeking relief from COVID. *People ex rel. Short o/b/o Frateschi et al. v. Fennessy et al.*, KAH 20-1420 [4th Dept. 2021]; *People ex rel. Tse o/b/o Alicea et al. v. Barometre et al.*, 2020 NY Slip Op 6280 [2d Dept. 2020].

In New York City’s jails, the first wave of COVID-19 led to more than 2,000 infections and at least 16 deaths among incarcerated people and jail staff.² Eighty four percent of the incarcerated individuals identify as Black and/or Hispanic.³ Conditions in the New York City jails grow more dangerous every day, as the population has now soared past 5100, reaching levels not seen since late March.⁴ As of January 24, 2021, there were 87 active COVID-19 infections being managed by CHS clinicians, and 422 incarcerated individuals who had been confirmed positive while in custody—a number not seen since months earlier in the pandemic.⁵ As of January 15, 2021, twenty percent of the entire city jail population was housed in a unit with a COVID-related designation: either exposed, symptomatic, or confirmed positive.⁶

The vaccine can halt this march of illness and death. DOCCS and medical authorities in local county jails, such as New York City’s Correctional Health Services, can deliver this lif-saving vaccine to people living in correctional facilities—if you authorize them to do so. New York State rightfully authorizes vaccinations of people living in congregate settings like homeless shelters, “where sleeping, bathing or eating accommodations must be shared with individuals and families who are not part of the same household.”⁷ New York jails and prisons certainly share those characteristics. The fact that you have not allowed medical staff in jails and prisons to use available vaccines to save these lives—as you have for less risk-laden categories of people or people in similar congregate settings—demonstrates an arbitrary and irrational disregard for people simply because they are incarcerated.

² Weekly COVID-19 Update: Week of December 26 – January 1, New York City Board of Correction, <https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-12-26-20-01-01-21.pdf>.

³ Weekly COVID-19 Update: Week of January 9 - January 15, New York City Board of Correction, <https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-01-09-01-15-21.pdf> (hereinafter “BOC Weekly Update: January 9-15”). *Id.*

⁴ *Id.*

⁵ CHS COVID-19 Data Snapshot: January 24, 2021, Correctional Health Services, <https://hhinternet.blob.core.windows.net/uploads/2021/01/CHS-COVID-19-data-snapshot-20210125.pdf>; compare to BOC Weekly Update: January 9-15, *supra*, at 15.

⁶ BOC Weekly Update: January 9-15, *supra*, at 23.

⁷ Phased Distribution of the Vaccine, New York State Department of Health, <https://covid19vaccine.health.ny.gov/phased-distribution-vaccine> (last visited January 26, 2021).

The danger is compounded by New York State and local authorities' failures to use available legal remedies to reduce the prison and jail populations during the pandemic. Having taken and maintained custody of thousands of people, the State has an affirmative duty to protect their health and safety. As the Supreme Court has made clear,

[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment . . .

DeShaney v. Winnebago Cty. Dep't. Soc. Servs., 489 U.S. 189, 199-200 (1989). “Contemporary standards of decency require no less.” *Helling v. McKinney*, 509 U.S. 25, 32 (1993) (citing *Estelle v. Gamble*, 429 U.S. 97, 103-104 (1976)). Conditions that pose an unreasonable risk of future harm violate the Eighth Amendment's prohibition against cruel and unusual punishment, even if that harm has not yet come to pass.

This is deliberate indifference: New York has the ability to protect lives, but lacks the political will.

New York's Practice Contravenes CDC Recommendations and the Example Set By Sister States and the Federal Government

Early in the pandemic, New York State was quick to criticize the federal administration when it ignored the recommendations of the Center for Disease Control and similar experts. Hypocritically, New York now ignores the mainstream medical view that recommends priority access to the vaccine in carceral settings⁸, and the CDC's clear guidance that incarcerated people and staff in carceral facilities receive the *same* priority access to the vaccine. According to the CDC:

Jurisdictions are encouraged to vaccinate staff and incarcerated/detained persons of correctional or detention facilities **at the same time** because of their shared increased risk of disease. Outbreaks in correctional and detention facilities are often difficult to control given the inability to physically distance, limited space for isolation or quarantine, and limited testing and personal protective equipment resources. Incarcerated or detained persons living in correctional and detention facilities may also be older or have high-risk medical conditions that place them at higher risk of experiencing severe COVID-19. COVID-19 outbreaks in correctional and detention facilities may also lead to community transmission.

Vaccinating staff and incarcerated/detained persons at the same time may also be more feasible than sequential vaccination of correctional or detention subpopulations. If it's not feasible to vaccinate all

⁸ American Medical Association, “AMA policy calls for more COVID-19 prevention for congregate settings,” <https://www.ama-assn.org/press-center/press-releases/ama-policy-calls-more-covid-19-prevention-congregate-settings> (accessed January 10, 2021).

staff and incarcerated or detained persons at the same time, sub-prioritization planning for vaccination within this group may be necessary based on facility-level or individual-level factors (such as, older age or having an underlying medical condition), or both, and should be coordinated with state and local health departments.⁹

New York's policy of providing the vaccine to correctional staff while withholding it from incarcerated people not only runs afoul of ethical and public health guidance, but also fosters conflict within the jails and prisons and destabilizes an already difficult environment. For all of these reasons, many states chose the path you have foregone, providing vaccinations for both incarcerated people and jail staff in the same phase of distribution.¹⁰ Indeed, even the federal Bureau of Prisons under the previous administration hewed more closely to public health guidance, and provided the vaccine to incarcerated people as well as staff.¹¹

Health and Equity Principles Require Prioritization of Jails and Prisons For Vaccination

The Johns Hopkins Bloomberg School of Public Health likewise has elaborated on the well-established bioethical bases for prioritizing vaccination of incarcerated people.¹² These include not only maximization of public health outcomes, but also the needs to treat individuals equitably and fairly, and to promote legitimacy, trust and ownership in a pluralistic society. As the Johns Hopkins scientists noted, the history of inequity health care heightens the challenge of the present moment:

[W]e are currently in the midst of a national reckoning on racial injustice, prompted by cases of police brutality and murder. The structural racism that is the root cause of police brutality is also the root cause of the disproportionate impact of the current pandemic on people of color and people living in poverty. Although structural racism was as present in the 2018 and previous influenza epidemics as it is today, the general public acknowledgment of racial injustice was not. Longstanding societal and economic inequities and structural racism in health systems have been barriers to disadvantaged populations gaining access to healthcare, contributing to their lack of trust in governments and public health authorities to meet their needs. . . .

Ongoing social discord that continues to divide the country along political fault lines has also played a role in perceived fairness and transparency related to vaccine allocation and potential differences in vaccine acceptance and uptake across populations. Lastly, as COVID-19 vaccines will arrive after a sustained

⁹ <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/vaccine-faqs.html>

¹⁰ Some states that follow the CDC guidance that New York ignores include Pennsylvania (<https://www.health.pa.gov/topics/Documents/Programs/Immunizations/PA%20Interim%20Vaccine%20Plan%20V.4.pdf>); Massachusetts (<https://www.mass.gov/info-details/covid-19-vaccine-distribution-timeline-phase-overview>); Illinois (<<https://www.dph.illinois.gov/sites/default/files/COVID19/IL%20COVID-19%20Vaccination%20Plan%20V4.20210110.pdf>>, at 15); and Rhode Island (<https://us2.campaign-archive.com/?u=ece9b1661b3bf3b864a6894d1&id=4db3bc9633>).

¹¹ United States Bureau of Prisons, "COVID-19 Vaccination Efforts Commended," https://www.bop.gov/resources/news/20210116_covid_vaccine_efforts_commended.jsp (accessed January 25, 2021).

¹² Johns Hopkins Bloomberg School of Public Health, Interim Framework for COVID-19 Vaccination Allocation and Distribution in the United States, August 2020, at 2,30-31, https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2020/200819-vaccine-allocation.pdf (accessed January 11, 2021).

period of social and economic disruption, many of the associated burdens will fall disproportionately on already disadvantaged communities. Past thinking and strategies regarding allocation of scarce vaccines and resources have not sufficiently addressed these longstanding inequities or their consequences for vaccine acceptance and uptake among the populations who most need the vaccine. New approaches are needed, and this crisis has created an opportunity for positive change.¹³

Conclusion

New York State's cruel policy of providing vaccines to people held in group settings like shelters and nursing homes but not jails or prisons, and to correctional staff but not incarcerated individuals, is inhumane. It is also a public policy failure, as here we are with vaccines, but complete silence from the State about the plan for providing the vaccine to one of the most at risk populations. Your plan is costing lives as people are dying in New York State prisons from preventable COVID-19 illnesses.

We demand that you change this policy effective immediately and authorize vaccinations for people held in jail and prison custody. If you do not change your policy, we will have no choice but to seek legal remedies for our clients. We further request that you meet with us immediately to detail your plans for vaccination pursuant to this policy.

Very best regards,

Tina Luongo
Attorney-in-Charge
Criminal Defense Practice
The Legal Aid Society

Laurette Mulry
Attorney in Charge
Legal Aid Society of Suffolk County

Robert Dean
Attorney in Charge
Center for Appellate Litigation

Caprice R. Jenerson
President & Attorney-in-Charge
Office of the Appellate Defender

Paul Skip Laisure
Attorney-in-Charge
Appellate Advocates

¹³ *Id.* at 2.

Lisa Schreibersdorf
Executive Director
Brooklyn Defender Services

Justine J. Olderman
Executive Director
The Bronx Defenders

Alice Fontier
Managing Director
Neighborhood Defender Service of Harlem

Stan Germán
Executive Director
New York County Defender Services

N. Scott Banks
Attorney In Chief
Legal Aid Society of Nassau County