



**TESTIMONY ON THE IMPACT OF COVID-19
ON NEW YORK STATE'S PRISONS & JAILS**

CONDUCTED BY

**THE SENATE STANDING COMMITTEE ON
CRIME VICTIMS, CRIME AND CORRECTIONS**

AND

THE SENATE STANDING COMMITTEE ON HEALTH

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Presented by:

**Karen L. Murtagh, Esq., PLS Executive Director
Prisoners' Legal Services of New York
41 State Street, Suite # M112
Albany, New York 12207
(518) 445-6050
kmurtagh@plsnyc.org**

I. INTRODUCTION

I would like to thank Senator Sepulveda, Chair of Crime, Crime Victims and Corrections and Senator Rivera, Chair of Health, and the members of their respective committees for convening this timely and critically important hearing regarding the impact of COVID-19 on New York's prisons and jails. I would also like to thank you for inviting Prisoners' Legal Services (PLS) to testify before you today. As many of you know, PLS' mission is to provide high quality, effective legal representation and assistance to indigent incarcerated New Yorkers and to help them secure their civil and human rights. Created by New York State in 1976 in response to the 1971 Attica prison uprising, PLS protects the civil and constitutional rights of incarcerated individuals and works to ensure respect for human dignity, thereby reducing the likelihood of another prison uprising, while helping incarcerated individuals prepare for successful reintegration into their communities upon release.

PLS currently has offices in Albany, Buffalo, Ithaca, Newburgh and Plattsburgh. The offices are located in proximity to most of the state's 52 prisons. PLS represents incarcerated individuals on issues relating to their conditions of confinement including: advocating for proper medical and mental health care; ensuring individuals are enrolled in educational, vocational and treatment programs; challenging illegal disciplinary hearings that result in solitary confinement and loss of good time; fighting to restore the visitation rights of parents with their children; and ensuring that the sentences of incarcerated individuals are calculated accurately. We also represent hundreds of individuals every year in deportation hearings.

II. PHASE ONE COVID-19: JANUARY – MARCH 2020

In 2019, between January 1 and September 1, PLS received 6,133 requests for assistance. This year, during that same time period, PLS received 7,539 requests for help. Of these 1,400 additional requests, 1,246 were from individuals concerned about COVID-19 related issues.

In the initial phase of the pandemic, PLS received hundreds of letters from people seeking early release due to COVID-19. Most of these individuals emphasized various medical conditions that made them particularly vulnerable to serious illness. Between January and March, PLS heard from over 400 individuals who had pre-existing medical conditions that made them vulnerable to contracting, and possibly dying from, COVID-19. The panic and the fear of death reflected in those letters and in calls from their family members is forever burned in the minds and souls of the PLS staff.

In response to these cries for help, PLS urged the Department of Corrections and Community Supervision (DOCCS) to authorize the immediate release of incarcerated individuals, especially those who were vulnerable to contracting COVID-19, whose presence in their communities would not adversely affect public safety.¹ We noted that the release of these individuals would limit the spread of the virus and save lives by reducing the size of the prison population and, in turn, allowing for increased social distancing.

In our communication with DOCCS, we pointed out that because prisons are incubators of air-borne diseases and because, by design, prisons house large numbers of people in confined spaces for prolonged periods of time, prisons are vectors for transmission both within the prisons and in the surrounding communities when infected staff carry the virus home at shift change. We

¹ PLS' lists of medically vulnerable individuals, as well as PLS' letter to Governor Cuomo & DOCCS Commissioner Annucci from John Kiernan, PLS Board Chair and Dr. Robert Greifinger, PLS Board Member and former Chief Medical Officer of DOCCS, encouraging the release of said individuals are available to your committees upon request.

asked that DOCCS immediately convene an Emergency Coronavirus Release Commission with the mission of releasing as many incarcerated individuals as possible, within the bounds of public safety.

Similarly, as you know, Senator Sepulveda and Assemblyman Weprin also proposed a wise and responsible plan for releasing people in state custody² and, joined by Senator Rivera and Assemblyman Gottfried, sent a similar letter to Parole Chair Tina Stanford urging her to use her “discretionary authority to conduct a rescue mission” by expediting the parole release of individuals who come before the board.³

The State’s ultimate response to the need to reduce the prison population was to create a COVID-19 early release program through which non-violent felony offenders who have not been convicted of sex offenses and who are within 90 days of their next possible release date are considered for release. Medical conditions themselves are not an independent basis for release consideration.⁴

Between January 1 and September 14, DOCCS’ population declined by 7,478. The decreased population is a culmination of early releases (approximately 1600), regularly scheduled

² See March 19, 2020 letter from Senator Sepulveda and Assemblyman Weprin to Governor Cuomo.

³ See March 20, 2020 letter from Senators Sepulveda and Rivera and Assemblymen Weprin and Gottfried to Parole Chairwoman, Tina Stanford.

⁴ An example of one of the individuals who is not, under the current release criteria, eligible for early release is a 60-year old female with COPD, chronic asthma and bronchitis. She is serving sentences for non-violent drug offenses. Her earliest release date is in August 2022. Despite her age and medical vulnerability, she remains incarcerated at this time. Another example is a 43-year old woman suffering from severe cardiac, pulmonary and renal disease. She is serving three years for attempted criminal possession of a controlled substance in the third degree. Her earliest release date is June 8, 2021. Rather than releasing her to parole supervision, on March 26, DOCCS sent our client to Mount Vernon hospital. There was no unusual medical need that required her to be in the hospital, i.e., no special tests or procedures, but because she needed to leave the facility three days a week for dialysis, due to COVID-19, DOCCS decided to limit traveling back and forth by hospitalizing her. Our client remained in the hospital for over four months before returning to prison. She reports that while she was hospitalized, she had no fresh air, no real exercise, no underclothes and no mail. She was allowed three calls a week, if the CO’s on duty chose to let her call. She said being at the hospital was like “death knocking at [her] door.”

releases and DOCCS' hold on accepting state readies during this timeframe. While we commend DOCCS' early release program in that it has helped in reducing the current prison population, PLS continues to urge DOCCS to consider a person's medical condition as a stand-alone factor in determining an individual's eligibility for release.

III. PHASE TWO OF COVID-19: MARCH - JUNE 2020

A. Predictable Complaints Regarding Covid-19

As noted, initially the letters PLS received focused mainly on requests for immediate release and questions about the nature of COVID-19 and how to avoid contracting the disease. As the world's understanding of COVID-19 evolved, so too did the concerns and questions we received from the incarcerated population.

In early March, when the medical guidance being issued by the CDC and other federal and state agencies was focused on cleaning, disinfecting and avoiding contagion, many of the letters we received reported that cleaning materials were unavailable, common areas were not being disinfected, hand sanitizer was not available, and people who were clearly ill were being allowed to remain in general population. We also received complaints from individuals who were actually disciplined for wearing homemade masks because, at that time, the importance of wearing masks was not yet understood.

Soon the lack of adequate testing and the refusal by members of the corrections staff to wear masks were added to list of concerns. On April 15, 2020, Governor Cuomo issued Executive Order 202.17 mandating the wearing of masks for all of New Yorkers when in public if unable to

socially distance;⁵ within days, PLS began receiving letters from hundreds of individuals throughout New York State’s prisons who had not been provided with masks.

By June, the letters were focused on the inability to socially distance, DOCCS’ failure to provide sufficient cleaning and disinfecting materials, officers not wearing masks, the lack of transparency with respect to the numbers of people tested and the results of those tests, the inability to attend necessary – and in some instances court ordered – educational, vocational or treatment programs, and the lack of adequate testing, especially in those facilities with vulnerable populations.

Some individuals also wrote letters about DOCCS’ quarantining and isolation policies regarding COVID-19, stating that in some circumstances DOCCS was placing COVID-19 positive individuals or individuals potentially exposed to COVID-19 in solitary confinement as a means to isolate them. We noted to DOCCS that while quarantining and isolating individuals is clearly necessary to prevent the spread of the virus, it is never appropriate to use solitary confinement as a form of medical isolation.⁶

Indeed, the distinctions between solitary confinement, medical isolation and quarantine are significant. Solitary confinement involves isolation, often in a very small cell – typically the size of a parking space – while simultaneously imposing punitive measures for alleged misbehavior such as denial of phone calls, visits, commissary, packages, recreation and access to personal property. The purpose of medical isolation, on the other hand, is simply to isolate a person who is COVID-19 positive to help prevent the spread of the disease throughout the prison.

⁵ “Effective at 8 p.m. on Friday, April 17, 2020 any individual who is over age two and able to medically tolerate a face-covering shall be required to cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance.” Executive Order 202.17

⁶ David Cloud, JD, MPH, Dallas Augustine, MA, Cyrus Ahalt, MPP, & Brie Williams, MD, MS, Amend, Changing Correctional Culture, “The Ethical Use of Medical Isolation – Not Solitary Confinement – to Reduce Covid-19 Transmissions in Correctional Settings” April 9, 2020, available at https://amend.us/wp-content/uploads/2020/04/Medical-Isolation-vs-Solitary_Amend.pdf (last accessed: 9.19.2020)

Quarantining “is the practice of separating and restricting the movement of people who may have been exposed to a contagious disease until results of a laboratory test confirm whether or not they have contracted the disease.”⁷ Unlike solitary confinement, there is no punitive element or purpose to medical isolation or quarantining. And because solitary confinement has been found to increase the risk of suicide and self-harm as well as having lasting adverse impacts to a person’s physical and mental health, solitary confinement should never be used as a substitute for medical isolation or quarantine.⁸ Equally important is the fact that the threat of placement in solitary will discourage people from reporting symptoms, which is behavior that is essential to reducing the risk of contagion in the prisons.

Since the onset of the COVID-19 pandemic, PLS has regularly provided DOCCS with lists summarizing the COVID-19 related complaints we receive from incarcerated individuals. In addition, during regularly scheduled bi-weekly phone calls with the DOCCS’ Executive Team, we discuss these concerns and DOCCS provides updates on the status of coronavirus in the prisons. In turn, the Executive Team relays our concerns to facility superintendents during their weekly scheduled calls.

PLS’ advocacy surrounding COVID-19 in the prisons helped DOCCS address many of the initial complaints from the incarcerated population and their loved ones. Specifically, PLS requested, and DOCCS agreed to take, the following measures:

- Have investigators from the DOCCS’ Office of Special Investigations (OSI) randomly review videos from the video surveillance cameras throughout the prisons as part of its efforts to monitor staff compliance with COVID-19 protocols;

⁷ Id.

⁸ Along these lines, the Legislature should consider passage of the Humane Alternatives to Long Term Isolation (HALT) (A2500/S1623) (Aubry/Sepulveda), which would end long-term isolated confinement that also disproportionately impacts black and brown prisoners in New York State’s prisons.

- Ensure that adequate cleaning materials, hand sanitizer and masks are available to the incarcerated population;
- Ensure that common use areas and shared items such as phones, hand railings, etc., are adequately cleaned and disinfected;
- Create a COVID-19 dedicated webpage documenting DOCCS' efforts to manage the coronavirus within the prisons; and
- Increase testing at prisons where there are indications of rising infection rates and for certain more vulnerable populations.

B. Unintended Consequences of DOCCS' Response to COVID-19

During the spring of 2020, in addition to the day-to-day health and safety concerns faced by the incarcerated population, PLS began receiving dozens of letters regarding the numerous unintended consequences of COVID-19 – consequences that went far beyond the concern of contracting the virus.

In mid-March, in an effort to control the spread of the virus, DOCCS shut down all movement between prisons, limited intra-prison housing changes, ceased accepting state readies from the county jails and suspended all in-person prison programming and visitation. The complete suspension of educational, vocational and treatment programs and visitation, although necessary to control the spread of the virus, has had serious unforeseen consequences that have significantly and negatively impacted many of our clients.

1. The impact of the suspension of educational, vocational and treatment programs

Through no fault of their own, hundreds, if not thousands, of individuals who were successfully participating in educational, vocational and treatment programs were forced to stop programming in mid-March when DOCCS suspended all programs. Several individuals wrote to PLS reporting that as a result of the program suspension, they had lost their conditional release dates because they had failed to complete their Alcohol Substance Abuse Treatment (ASAT)

Programs. The sole reason they “failed to complete” their treatment program was because ASAT, like the other DOCCS programs, had been suspended. Similarly, many individuals lost release dates due to program suspensions that affected their eligibility for Limited Credit Time Allowances (LCTA), merit release and release following completion of the Shock Incarceration program.⁹ Below are just a few examples of individuals who lost their early release dates and have been required to remain in prison for months beyond their anticipated release dates:

- B.R.¹⁰ worked for 22½ months as a teacher’s aide to meet the 24-month vocational requirement for earning a Limited Credit Time Allowance. Due to the pandemic, the teaching program he worked in was suspended. Due to his failure to complete the vocational requirement, B.R.’s application for LCTA was denied. Had B.R. received his LCTA he would have been released on May 9. PLS advocated on B.R.’s behalf, noting that the failure to complete the program was not his fault and arguing that during a pandemic, it was irrational to keep him incarcerated for failing to finish the last 6 weeks of a 24-month work requirement. DOCCS never responded to us. Fortunately for B.R., his vocational program was re-started on 6/18/20 and he was able to complete his work requirement in August. B.R. reported that he went back to the LCTA board for reconsideration and was approved. He was given his LCTA and released on 9/8/20. Were it not for the program suspension, he would have been released 4 months earlier. While DOCCS has said that it does not want people to lose release dates due to COVID-19 related program suspensions, B.R.’s experience reveals a disconnect between DOCCS’ stated position and the agency’s actual conduct.
- T.J. is serving a 3-year sentence for a non-violent felony drug charge. Before coming into DOCCS custody, he was prescribed suboxone to treat his substance use disorder. Once in DOCCS custody, T.J.’s medication-assisted therapy (MAT) was terminated. He was sent to SHU in April for attempting to smuggle in suboxone. He is now out of SHU and waiting to be admitted into ASAT. While his conditional release date is not until August 2021, he has been told by his counselor that he will lose that release date because the waiting list for ASAT is so long that he will not be able to complete the 6-month program before his conditional release date. He has been told that he will likely have to remain in prison until his maximum release date in January 2022 because of the unavailability of the ASAT program. Meanwhile, he is not receiving any treatment or therapy for his substance use disorder. Ironically, if T.J. were on

⁹ “Shock is a six-month program similar to a military boot camp regimen. It incorporates intensive substance abuse treatment and academic education within a therapeutic community setting. DOCCS’ Shock Incarceration program for young adults provides a therapeutic environment where young non-violent offenders receive substance abuse treatment, academic education, and other help to promote their reintegration into the community.”

<https://doccs.ny.gov/willard-shock>

¹⁰ Initials are used to protect and maintain the confidentiality of PLS clients.

parole he would receive drug treatment and MAT as these would be a condition of his release.

- M.R. was court ordered to Shock and entered DOCCS custody on February 18, 2020. Following successful completion of the 6-month Shock program, individuals are released to parole supervision. Due to the suspension of transfers, M.R. remained in Elmira Reception Center and was unable to start Shock. On May 21, M.R. was transferred to a Shock program but was medically disqualified because of his epilepsy diagnosis. Because transfers were suspended a second time, M.R. remained at the Shock facility until July 28, when he was finally transferred to Mid-State and began an alternative program. M.R. reports that he had informed DOCCS staff at Elmira Reception Center of his medical condition, but the staff insisted on sending him to Shock despite his easily confirmed need for an alternative program. Further, he said he was never offered an alternative program at the Shock facility. Since M.R. did not begin the alternative program until August 3, he will spend a year in prison – double the amount of time that he and the sentencing court had, respectively, agreed to and intended when the sentence was imposed.
- F.G. was excited to be clean and sober and went to prison promising his son that he would get treatment and be home in time for his son's ninth birthday. Due to COVID-19, he started Shock late but was hoping that with credit for the time he waited in prison to be enrolled in the program, he would make it home for his son's birthday and thereby begin to make up for past transgressions. Had DOCCS given F.G. credit for the time he spent waiting to be transferred into Shock, he would have been able to be home for his son's birthday. F.G. was then told that he would not get credit for the time he waited; instead he would have to wait to see the parole board. F.G. was devastated to have disappointed his son once again.

We received dozens of letters and phone calls from other people with similar stories. There are likely hundreds more such stories from people who did not reach out to PLS.

As set forth in an April 22, 2020 letter to DOCCS and Parole,¹¹ while PLS recognizes DOCCS' duty to maintain safe and secure facilities, DOCCS also has a duty to address the far-reaching collateral consequences caused by the complete suspension of all programming – consequences that inexcusably extend a person's prison sentence. In the April 22nd letter, we noted that because successful program participation is a key factor of consideration in most DOCCS

¹¹ PLS' April 22, 2020 letter to DOCCS and Parole is available to your committees upon request.

early release decisions,¹² we were extremely concerned about the impact of the suspension of such programs on the incarcerated population's chances for release. We urged, and continue to do so here, that:

- Parole direct all Board members to take into account at all upcoming Parole Board hearings, including Merit Eligibility appearances, the mandated suspension of programs (as it relates to incomplete programming assignments resulting from the pandemic) when considering an incarcerated person's institutional record;
- DOCCS provide written guidance to all facility Time Allowance Committees (TACs) detailing how, when and why facility programming was suspended and further direct all TACs to take the suspension into account when considering an incarcerated person's programming progress and achievement in their time allowance decisions;
- DOCCS and Parole adopt a presumption when reviewing the institutional records of incarcerated persons, that everyone who was actively and successfully engaging in programs at the time the programs were suspended would have continued to progress and successfully complete those programs during the suspension;
- DOCCS promulgate revised guidelines for all facility staff who have been delegated to make discretionary time allowance determinations that account for the present programming suspension and related health crisis by relaxing the eligibility requirements for Presumptive Release, Merit Time, Supplemental Merit Time, and/or Limited Credit Time Allowances for those individuals who have been successfully participating in, but were otherwise unable to complete, a required programming assignment;
- DOCCS create an alternative program for incarcerated individuals who have to date been unable to begin participation in a required program and are now precluded from doing so to earn Merit, Supplemental Merit and/or a Limited Credit Time Allowance consideration. Such alternatives to programming could include in-cell study materials and remote program participation where feasible;
- DOCCS immediately begin exploring the possibility of conducting DOCCS programming remotely using facility tablets or other tele-communications technology. Where possible DOCCS should promptly begin conducting programs remotely; and
- DOCCS immediately develop and implement alternate programs for incarcerated individuals with court ordered programming such as Shock and Comprehensive Alcohol and Substance Abuse Treatment (CASAT). These individuals must be able to participate in their judicially mandated programs (in part to access the potential for early release that

¹² See Executive Law § 259-I (2) (c), which requires the Parole Board to review and deliberate upon an individual's institutional record, including their program goals and accomplishments, academic achievements, vocational training, and work assignments when making a release determination.

their sentences entail), while the ordinary operation of those programs remains otherwise suspended.

We also received reports that DOCCS was not providing any distance learning curriculum to individuals who are 21-years-of-age or younger and do not have a high school diploma or its equivalent. Based upon letters from incarcerated individuals, it was apparent that beginning in mid-March, DOCCS ceased providing students with any academic instruction due to the cancellation of all programs. In a letter dated May 5, 2020,¹³ we brought this issue to DOCCS' attention, noting that Executive Order 202.4 requires DOCCS to develop and implement a plan for alternative instruction that promotes the continuation of teaching and learning during the pandemic.

We suggested that DOCCS, like school districts across the State, implement the following to ensure compliance with federal and state education laws:

- Create alternative coursework that can be accessed and monitored remotely, mirroring the curriculum that would have been taught in academic classes;
- Provide students clear and concise instructions on how to complete daily, independent coursework, and feedback on completed assignments from the previous week;
- Develop coursework on an individual needs and ability basis, and modify students' Individualized Education Plans (IEPs) pursuant to the special education laws and regulations;
- Use different teaching modalities to ensure that curricula can be accessed by learners of different abilities, such as:
 - *Electronic Instruction via KA Lite*: An education platform created by Khan Academy that is currently downloaded on all tablets in the Tablet Program;
 - *Electronic Instruction via Videos*: In lieu of in-person lessons;
 - *Electronic Instruction via E-books*: A program to create long-term projects to improve reading comprehension and writing skills;
 - *Non-electronic Instruction via Printed Material*: Hard copy instructional packets to supplement electronic instruction and provide additional support and opportunities to practice; and
 - *Teacher-Student Communication*: Teachers should conduct weekly check-ins with

¹³ PLS' May 5, 2020 letter to DOCCS is available to your committees upon request.

students via email on the tablets. Emails should provide individualized feedback on previously completed work. Check-ins should also provide one-on-one support to address any comprehension issues identified by the teacher when grading completed work.

2. The impact of the suspension of mental health treatment and medical care

Mental Health Treatment

In May, PLS and Disability Rights New York (DRNY) contacted DOCCS regarding our concern about the risk of harm that the suspension of all out-of-cell programs posed to participants in mental health and therapeutic programs.¹⁴ We noted that individuals in the various special mental health units at DOCCS require continuing treatment and services to manage their behavioral health needs and that the lack of out-of-cell programming and resulting full-day cell confinement – which greatly increased isolation – exacerbated our clients’ mental health symptoms.

We again commend DOCCS’ efforts to mitigate the spread of COVID-19 by limiting the large gatherings of individuals in a congregate setting, but we also think there are safe alternatives to regular out-of-cell programming. In our letter, we urged DOCCS and the Office of Mental Health (OMH) to consider implementing the following procedures to deliver programming safely while also reducing the isolation of people in isolated confinement:

- Use tablets to deliver programs;
- Provide more frequent sessions with primary therapists;
- Utilize tele-mental health services;
- Allow individuals in segregated confinement to possess additional personal property items, such as books, therapeutic workbooks, puzzles, and games;
- Provide additional stamps to transmit and receive secure messages from family and loved ones;

¹⁴ PLS’ and DRNY’s letter to DOCCS is available to your committees upon request.

- Allow increased phone calls to family and loved ones, and improve oversight to ensure implementation of any COVID-19-related phone call initiatives;
- Increase daily inmate recreation time;
- Restore privileges to people who have completed their sanctions yet remain housed in solitary confinement in a Special Housing Unit (SHU) or a Residential Mental Health Treatment Unit (RMHTU);
- Resume conducting out-of-cell clinical mental health interviews of individuals in SHU as cell-side encounters with mental health staff are not conducive to therapeutic interactions and are not confidential;
- Provide adequate personal protective equipment to patients and staff and utilize other measures to allow for the safe conduct of private, out-of-cell mental health interviews;
- Evaluate whether therapeutic mental health programs can be re-opened safely, with adequate personal protective equipment, increased sanitation, and other social distancing measures;
- As is currently being done in various school districts across the State, consider whether larger classrooms and well-ventilated areas may provide adequate space for social distancing and, in the current programming areas, whether DOCCS and OMH could stagger programming during periods of the day, to allow a small number of participants the opportunity to be outside of their cells and receive programming and education; and
- Prioritize the testing of incarcerated individuals and staff in the mental health and therapeutic programs.

Medical Care

Several incarcerated individuals have also written to PLS complaining about delays in obtaining necessary medical treatment due to the COVID-19 shut down. One individual (S.L.), had 19 of her teeth removed in December 2019 and was told she would be fitted for dentures in the near future. In July, S.L. used the DOCCS/PLS telephone program to call PLS.¹⁵ She reported

¹⁵ The Albion and Bedford Hills Telephone Programs involves a partnership between DOCCS and PLS where incarcerated women in each prison can sign up weekly to call PLS and speak to an attorney about their legal issues. Since its inception in 2014, more than 700 women have received legal assistance on numerous issues including evictions from pre-prison housing, identity theft, medical and mental health care and child visitation and custody.

that she is still without dentures. She further explained that access to medical care has been very limited due to the pandemic and that she has been repeatedly told that non-emergency treatment will not be provided as quickly as it was before the pandemic. We have submitted advocacy on S.L.'s behalf and are investigating the matter; however, to date she is still without dentures and (to our knowledge) has not even been advised of a date when she will receive them.

3. The impact of the suspension of visitation on the attorney/client relationship

Historically, PLS attorneys have traveled to the prisons to interview their clients about their claims, have them sign documents and take pictures or prepare them for court proceedings. Because of the risks associated with travel and going into the prisons, over the past six months our attorneys have had to rely on phone calls with our clients to prepare their cases.

DOCCS Directive #4423 allows for one 30-minute legal phone call a month. Since the onset of COVID-19, DOCCS has granted exceptions to this Directive to allow for more than one 30-minute phone call a month and, when necessary to prepare our clients for trial, DOCCS has extended the 30 minutes to one hour. However, while the Executive Team's policy is to allow these extensions, it is often the case that individual facilities refuse to accommodate our requests and we are required to seek the intervention of DOCCS' counsel's office every time this happens.

In addition, many of our cases involve extremely complex issues that, under normal circumstances would mandate an attorney spending upwards of a day with a client to prepare for trial. Many of our attorneys also rely on interpreters to communicate with their clients, which inevitably increases the time needed to conduct an interview.

The inability to sufficiently prepare a client for trial raises serious due process concerns for our clients and ethical concerns for our attorneys. For this reason, we have reached out to

DOCCS to request its cooperation in facilitating longer and more frequent electronic conferencing with incarcerated individuals and provide tele-conferencing when necessary.

We have learned that other legal services offices, such as the Albany County Public Defender's Office and the Federal Public Defender's Offices, have been authorized to have tele-visits with their clients at the Albany County and Rensselaer County Correctional Facilities. Both of these facilities utilize the IPwebvisitor device that allows the attorney and client to see each other while having a call. IPwebvisitor is a correctional video visitation system that allows professionals to visit incarcerated individuals on the internet from the convenience of their offices.

We have urged DOCCS to install the IPwebvisitor (or a similar system) to enable attorneys who need to communicate with their incarcerated clients to do so, especially in light of the fact that the limitation on attorney/client in-person visits may continue indefinitely. While we are working on a long-term solution to this issue, we ask that, in the interim, DOCCS adopt a policy that permits PLS attorneys to have more frequent and longer telephone calls or preferably video conferences with our clients to enable us to adequately prepare them for their court appearances. Doing so would protect our clients' rights to due process, access to courts and the health and safety of the incarcerated population, PLS staff, DOCCS staff and the local communities in which the staff lives.

IV. PHASE THREE OF COVID-19: JUNE – PRESENT

A. Medically Vulnerable Individuals Who Could Be Safely Released Continue to Be Held in Custody

We continue to receive letters from seriously medically vulnerable people who, due to their age and/or ailments could be safely released from DOCCS custody, as has been done with hundreds of others pursuant to Correction Law Section 73. We continue to encourage DOCCS to broaden the release criteria by considering for release medically vulnerable persons who:

- have served at least the minimum of their life term;
- are within six months of their earliest or next possible release date for a violent offense; or
- within one year of their earliest or next possible release date for a non-violent offense.

B. Continued Programming Issues

Many people continue to be held in prison beyond their release dates due to DOCCS' suspension of programming. The Correction Law sets forth very few requirements for programs such as CASAT and ASAT; thus, there is nothing preventing DOCCS from simply deeming these individuals to have satisfied the program requirements for purposes of merit time. In other words, DOCCS creates the program requirements and is free to change them. Indeed, DOCCS has a great degree of discretion in this regard, as evidenced by the decision to give participants in ASAT, CASAT and Integrated Dual Disorder Treatment (IDDT) a month's worth of credit for the period during which programs were suspended.¹⁶ At a minimum, such credit should be given to all individuals who would have continued participating in other programs that were likewise suspended due to COVID-19.

It bears emphasizing that this problem disproportionately affects women, and many of our clients have had to explain to their minor children that they will not be home by the start of the school year as they had expected. This fall, at a time when families in NYS are struggling to provide childcare during the suspension of in-person K-12 schooling, many households will be missing a parent due solely to the discretionary policy decisions of DOCCS.

The State's response to the pandemic has also interfered with programming and early release eligibility in less obvious ways. PLS recently heard from an individual whose application

¹⁶ See DOCCS memo dated May 18, 2020 from Deputy Commissioner of Program Services Jeff McKoy to the "Incarcerated Population," wherein Deputy McKoy states the following: "At this time, for ALL substance abuse treatment services, i.e. ASAT, CASAT, IDDT, etc. **four weeks (3/16/2020 – 4/10/2020) of COVID-19 program suspension time shall be assessed toward satisfactory time eligibility criteria.**" (Emphasis in original.)

for work release was denied because he had an open warrant from Queens.¹⁷ This is a fairly common complaint, and PLS generally provides such individuals with forms for filing a speedy trial motion. However, the speedy trial deadlines of the criminal procedure law remain suspended by the Governor's executive orders. This means many individuals will be denied eligibility for work release, community service and certain in-prison work assignments due to their inability to dispose of a previously issued warrant.

All of the above issues, could easily be corrected internally by DOCCS. To date, however, DOCCS has not ameliorated these situations. As such, Legislative intervention may be necessary to prevent individuals from remaining in prison for longer than was intended by the courts which sentenced them.

C. Serious Access to Justice Delays

PLS has a number of cases in litigation in both state and federal courts. Most of these courts are requiring court appearances and trials to take place remotely using Microsoft Teams, Zoom, or some other internet service that provides for virtual appearances. In several of the cases that PLS is currently litigating, DOCCS has asserted that it does not have computers or software that would allow its employees to testify remotely. The Attorney General has taken the position that DOCCS' employees cannot testify from the Attorney General's offices. As a result, court appearances and trials are being adjourned, many for at least six months. DOCCS' employees' purported lack of access to computers and software is also impacting all scheduled remote depositions and trials where DOCCS and/or its employees are defendants.

¹⁷The criterion that an individual participating in temporary release not have any open warrants is found in DOCCS' regulations; the temporary release statute does not prohibit the temporary release of individuals with open warrants.

The issue of attorney visits also continues to be a problem as we attempt to balance the health and safety of PLS staff attorneys with the needs of our clients. In addition to providing representation to incarcerated individuals on issues associated with their conditions of confinement, PLS also represents all individuals being held in New York State prisons and individuals at the Buffalo Federal Detention Facility (BFDF) in Batavia, NY who are facing deportation hearings.¹⁸ Despite the fact that most courts across the country suspended hearings and trials when COVID-19 hit the U.S., hearings continue at various New York State prisons via the Institutional Hearing Program¹⁹ and at all ICE detention facilities across the country, including Ulster, Downstate and Bedford Hills Correctional Facilities and BFDF in Batavia, NY.

All of our immigration clients – including those detained at BFDF solely for alleged immigration violations – continue to face isolating conditions and significant obstacles to meaningful access to legal counsel. There is no access to confidential video calls and all in person visitation (other than limited, non-contact legal visits) remains suspended. This prevents meaningful access to counsel, as our clients are forced to go to trial by phone and video technology with attorneys whom they may have never met in person.

Moreover, we have increasing concerns about our clients with mental health issues who are being held at BFDF where adequate mental health care is not provided. The mental health conditions of many BFDF clients have significantly deteriorated since the COVID-19 outbreak, perhaps as a result of increased isolation and the use of solitary confinement as a disciplinary sanction. It is increasingly difficult to ascertain the true nature of what these clients are facing

¹⁸ While this hearing is focused on the impact of COVID-19 on New York’s prisons and jails, we feel that it is incumbent upon us to also bring to the Legislature’s attention the issues faced by those being held in federal facilities within New York.

¹⁹ See U.S. Department of Justice, Executive Office of Immigration Review Institutional Hearing Program Fact Sheet at: <https://www.justice.gov/eoir/page/file/1023101/download> last accessed on 9.17.2020.

(from symptoms to treatment in the facility) by phone. Clients with the most serious mental health conditions are unable to communicate effectively by phone.

In addition, decisions in cases at the immigration court level (whether the client is in DOCCS or ICE custody) often depend on our clients' credibility, which is often determined by non-verbal cues, such as eye contact, demeanor, etc. In addition to all of the due process concerns we have in proceeding this way, the merits of our clients' claims are disadvantaged when we cannot see our clients before and during trial. This is especially difficult for clients with mental health or cognitive issues, for whom the effectiveness of communication by phone is unreliable.

As we are still very concerned about transmission rates, confidential video access to clients would be tremendously helpful at all of the facilities.

D. Testing Continues to be The Best Way to Identify, Isolate and Prevent the Spread of COVID-19

We applaud DOCCS for increasing the testing of the incarcerated population but continue to advocate for a system of regular mass testing. For the past several months, DOCCS has stated that it is following CDC testing guidelines and is testing everyone housed in Regional Medical Units (RMUs), the Senior Living dorm at Ulster Correctional Facility, the entire Adirondack Correctional Facility population, pregnant women and those who are symptomatic or identified through contact tracing. DOCCS also has engaged in either one-time testing (those aged 55 years and over, "hotspot" facilities, etc.) or small-scale surveillance testing (e.g., the testing of select groups of people who likely have a higher risk of contagion such as barbers, cosmetologists, hospice aids, etc.). However, because prisons, like nursing homes – both of which are closed facilities that struggle with social distancing and house vulnerable populations – should develop a surveillance testing plan for all individuals in DOCCS custody.

E. Recommendations

Based on the letters we have received from thousands of incarcerated individuals and the hundreds of phone calls we have received from their loved ones concerning the impact of COVID-19 on the incarcerated population, together with PLS' decades of experience in advocating on behalf of New York's prison population, we make the following recommendations:

1. Require DOCCS to consider for early release individuals who are medically vulnerable and within a year of their next release date;²⁰
2. Amend the statutory criteria considered by the parole board and the merit time statutes so that the failure to complete a program, due to no fault of the individual, cannot be held against the individual at their parole board hearing;
3. If the failure to complete certain programming is the only factor keeping a person in prison, require DOCCS and/or Parole to release that person to community supervision immediately, imposing as a condition of release that the person obtain the requisite treatment or programming in the community;
4. If necessary, temporarily suspend or modify any statute governing release criteria for DOCCS and Parole during the COVID-19 emergency, if compliance with such statute would prevent, hinder, or delay the possibility of release to parole, post-release supervision, temporary release, merit release, LCTA release, conditional release, etc.;
5. As the Governor's Executive Order requires school districts across the State, require DOCCS to develop and implement a remote learning plan for all incarcerated students;
6. To increase accountability and transparency, mandate that DOCCS post timely and accurate information, including testing and test results, on the DOCCS COVID-19 webpage;
7. Mandate that DOCCS, in partnership with the State Department of Health develop a surveillance testing plan for all individuals in custody;

²⁰ Along these lines, the Legislature should also consider the passage of three bills that have already been introduced that would help reduce the prison population and increase DOCCS' ability to provide an environment where social distancing is possible for those in its care. Those bills are as follows: **Less is More Parole Bill** (S01343C/A05493-B) (Benjamin/Mosely). Modifies the standard of evidence and certain other procedures when determining whether to revoke the community supervision of a person. **Fair and Timely Parole** (S.00497A/A.4346) (Rivera/Weprin). Relates to findings of the state board of parole necessary for discretionary release of incarcerated persons on parole. Creates presumption for release. **Elder Parole** (S.2144/A.9040) (Hoylman/De La Rosa). Relates to parole eligibility for certain incarcerated individuals age 55 or older.

8. Prohibit DOCCS from using any form of solitary confinement as a substitute for medical quarantine or medical isolation; and
9. Mandate that DOCCS provide video access to attorneys representing incarcerated individuals and that both DOCCS and the Attorney General's office obtain the technology necessary to proceed with virtual/remote litigation and court proceedings.

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Respectfully submitted by,

Karen L. Murtagh

Karen L. Murtagh, Esq., PLS Executive Director
Prisoners' Legal Services of New York
41 State Street, Suite # M112
Albany, New York 12207
(518) 445-6050
kmurtagh@plsny.org