

**MESSAGE FROM THE STAFF OF
PRISONERS' LEGAL SERVICES OF NY
REGARDING THE COVID-19 PUBLIC HEALTH EMERGENCY (6/24/20)¹**

The staff of Prisoners' Legal Services is extremely concerned about your health and safety and the health and safety of everyone in DOCCS custody during this pandemic. To that end, 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 reducing the prison population by selectively releasing people who are close to their release dates, medically compromised or in custody due to technical parole violations. Some of our proposals with respect to these concerns have been adopted.

Beginning in March, DOCCS and Governor Cuomo's office released some technical parole violators. In April, DOCCS and Governor Cuomo's office began considering for early release of individuals who are at least 55 years old, were not convicted of violent crimes and were within 90 days of their earliest release date. DOCCS has now eliminated the age requirement. While people who fit this criteria – nonviolent felony offenders within 90 days of their release dates – are being *considered* for release, early release is not automatic. Individuals must still have an address approved by parole before release and there are other criteria imposed that may result in denial of early release even if the individual otherwise qualifies for release. DOCCS says that consideration for early release if you are convicted of a nonviolent felony and within 90 days of your release is ongoing. If you believe you qualify for consideration, we urge you to contact your ORC to ensure that your address is approved.

DOCCS Re-Opening Plan: Programs, Transfers, and Visitation

In early June, DOCCS issued a re-opening plan and is posted on its website. This plan includes *gradually* reintroducing:

1. Non-essential staff in regions that have been approved for reopening;
2. Mental health programming, with both staff and prisoners required to wear masks;
3. Step-Down programs, with both staff and prisoners required to wear masks;
4. Staff-led programs such as ASAT, SOCT, and Transitional Services, with both staff and prisoners required to wear masks;

DOCCS is planning to continue the suspension of academic and vocational programming through the summer. The re-opening plan calls for lifting the suspension on academic and vocational programming at a later time.

DOCCS's re-opening plan includes slowly resuming internal transfers and movement, while instituting social distancing on transportation vehicles, with both staff and prisoners required to

¹ The coronavirus public health emergency and the actions being undertaken in response to it are continuously and rapidly changing. PLS can only represent that as of June 24, 2020, the information in this message is current and accurate.

wear masks. On a regional basis, DOCCS will be slowly accepting intake from the county jails. DOCCS's re-opening plan states that it is not going to accept new intake admissions from county jails where there is a current COVID-19 case. In addition, the person being transferred into DOCCS must be tested, along with a temperature check and medical assessment before being admitted to DOCCS.

DOCCS reports that in-person visitation will likely be suspended until all regions in New York have entered "Phase 3" of Governor Cuomo's plan for re-opening the state. Currently, New York City and Long Island are still in Phase 2. When visitation re-opens, DOCCS's plan includes the following:

- Visiting rooms will be re-configured to reduce the capacity by half to practice social distancing. Facilities with outside visiting areas will utilize such areas, if weather permitting;
- All visitors, incarcerated individuals and staff will be required to wear a mask during processing and during the visit. If a visitor does not have a mask, the visit will be denied;
- Visitors will be screened with the questionnaire and temperature check prior to being allowed to visit;
- There will be no physical contact between incarcerated individuals and the visitors until further notice;
- Visiting will be divided into specific segments of the population (i.e. alpha[betical] by name or numeric[al] by DIN) to ensure access for the entire population;
- Visitors will have to pre-register with the facility and obtain a confirmation that the visit has been scheduled;
- Each visit will be limited to two visitors with a maximum duration of two hours, with no cross visiting allowed;
- All movement in the visiting area will be controlled by staff to ensure social distancing;
- A minimum of one porter will be assigned to the area to disinfect each table as the visit is complete, as well as the vending machines and child area;
- The child area will be off-limits on the re-opening of visiting, but this restriction will be evaluated after 30 days; and
- The Family Reunion Program will remain closed, but this will be periodically reevaluated.

Inability to Program During Pandemic

DOCCS officials had initially stated that a prisoner's failure to program due to the virus-related program suspensions and "through no fault of the individual" would not carry adverse consequences, including the loss of eligibility for early release. More recently, however, DOCCS has revised their position. This revision is apparently because of the plan to re-open programs. DOCCS now states that it is not going to completely and fully credit all time that otherwise might have been spent programming had the programs not been suspended. We continue to urge DOCCS to reconsider this issue, but DOCCS is currently representing that they are only crediting the period of time between 3/16/20 and 4/10/20 to individuals who would otherwise have been actively programming in substance abuse treatment programs (ASAT, CASAT, IDDT). We have been informed that they are also crediting all time that would have been spent in *court-ordered* Shock. However, DOCCS is not crediting time that would have been spent in

other programs, such as ART. They are also not crediting time that would have been spent in vocational or educational programs, many of which contain mandatory certification of attendance periods under state or federal law.

Although DOCCS does have the authority and discretion to withhold credit during the program suspensions, we have been investigating whether there is any legal entitlement or right to program credit for substance abuse programming such as ASAT for individuals with substance use disorders during these periods when the programs were suspended due to the public health crisis. Generally, there is no legal entitlement to these programs. We do believe that for individuals who are court-ordered to Shock or Willard, there is a legal entitlement to the benefit of those sentences. If you were court-ordered to these programs, you should immediately speak to your counselor and request a response in writing.

Some individuals have noted that during the program interruptions, DOCCS required individuals in program housing to abide by other rules associated with that residence and program. DOCCS has kept program pay rates the same. With the exception of court-ordered Shock and Willard, neither of these facts alter the discretion DOCCS has with respect to whether to afford any program credit during the suspension periods.

Accordingly, with the anticipated resumption of programs, hopefully few people will be directly adversely affected by the program interruptions. However, if based upon a specific failure to program that was made impossible due to the public health crisis and through no fault of your own, the TAC takes away good time, or Parole denies release, you should object, appeal the denial, file a grievance, and also write to Donald Venettozzi, Director of Special Housing / Inmate Discipline at DOCCS Central Office, 1220 Washington Avenue, Albany, NY 12227.

Lawsuits for Release 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 seeking the release of prisoners serving sentences imposed by state court judges. To date, the lawsuits have not led to the release of any state sentenced prisoner. The reasoning used by these courts to deny relief varies, but is rooted generally in various procedural and substantive legal hurdles. Lawsuits seeking more tailored relief, for example the release of pre-trial detainees and people charged with technical parole violations, have been more successful.

Our administrative advocacy efforts, however, do not preclude bringing a lawsuit at a later date should there be significant legal and/or factual developments. As you all know, we are in uncharted, rapidly changing waters and, because of that, we are continually monitoring the situation in the NYS prisons and 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 protecting, to the greatest extent possible, the health and safety of the incarcerated population.

Throughout the pandemic, we have demanded that DOCCS take immediate measures to reduce the spread of the virus in the prisons by reducing the number of people in custody, providing regular access to soap, clean towels, cleaning supplies, and hot water and, most recently, increasing the amount of testing.

We asked DOCCS to be more transparent in reporting COVID-19 cases within the prison and urged DOCCS to create a COVID-19 dedicated webpage to provide detailed and updated information related to COVID-19. On April 10, DOCCS went live with its COVID-19 webpage. See: <https://doccs.ny.gov/doccs-covid-19-report>. This website continues to be updated.

Posted on DOCCS' COVID-19 website is a listing, updated daily, of COVID-19 positive cases for incarcerated individuals, parolees and DOCCS staff. More recently, in response to pressure from PLS and other prisoners' rights advocates, DOCCS began providing information on the spread of the virus within each prison. The information on incarcerated individuals includes the number of prisoners tested, the number of positive and negative test results, the number of prisoners who have died and the number of prisoners who have recovered.

Reducing the Spread of the Virus

On May 6, DOCCS began providing all incarcerated individuals with surgical-type masks to further reduce the risk of secondary transmission of COVID-19. Correction officers, parole officers and civilian staff are required to wear masks while on duty.

According to its website, DOCCS continues to implement enhanced cleaning/sanitizing measures and disinfecting procedures for office surfaces and devices consistent with the Centers for Disease Control and Prevention and New York State Department of Health guidelines.

In addition, DOCCS uses the protocol below for reducing the spread of the virus:

- Incarcerated individuals who have been exposed to an individual who has tested positive for COVID-19 are quarantined for 14 days;
- Incarcerated individuals who show symptoms of COVID-19 are tested.
- Individuals who test positive for COVID-19 are placed in isolation rooms in the facility medical unit or other available areas.
- Individuals who need medical care beyond that which can be provided in a facility are transferred to local hospitals.

Contact with Loved Ones and Family

On March 14, DOCCS first suspended all personal visits. Because in-person visits are still suspended, DOCCS will continue to provide:

- Five (5) free stamps per week for use in accordance with Directive #4422, Inmate Correspondence Program;
- Two (2) free secure messages per week via electronic tablet, with additional stamps as part of their bundles;
- Three (3) free 30-minute phone calls per week in accordance with Directive #4423 Inmate Telephone Calls (the Directive governing phone calls for people in general confinement); and
- Starting Wednesday, April 15, 2020 and every Wednesday thereafter until further notice, every secure message sent by a friend or family member on Wednesday will be

accompanied with a free prepaid stamp that will allow the incarcerated individual to reply to the sender.

PLS continues to urge DOCCS to increase access to free stamps, emails, and phone calls during the suspension of visits. Specifically, we have called upon DOCCS to provide unlimited postage, emails and phone calls without charge.

General Population Tablet Program.

On April 27, DOCCS expanded the offerings to the incarcerated population to include:

- One free movie rental each Monday available for seven days; and
- One free game each Monday available for download. Once the game is downloaded, it will remain in the incarcerated individual's account until the individual deletes it.

Beginning Friday, May 1, incarcerated individuals will receive a free month's subscription to the vendor's Newsstand application. The Newsstand provides access to local and world news, sports and current events. The tablet must be updated to receive the Newsstand application and to subscribe to the service. Daily updates are available via kiosks.

Changes in State Court Operations

On March 20, 2020, New York Governor Cuomo issued Executive Order 202.8. **The terms of this order were extended on April 7 and 16, May 6, and June 8.** This Executive Order tolled – stopped the clock running – on **all state court filing deadlines**, including *state* statutes of limitations, **currently through midnight on July 6, 2020.**

Changes in State Statutes of Limitations and Court Filing Deadlines

This suspension includes any state statute of limitation for commencing actions that are set by Criminal Procedure Law, the Family Court Act, the Civil Practice Law and Rules, the Court of Claims Act, the Surrogate's Court Procedure Act, and the Uniform Court Acts, or by any other statute, local law, ordinance, order, rule, or regulation.

Example: On March 20, you received a decision on a Tier III appeal. The four-month statute of limitation on your Article 78 would normally begin running on March 20. Due to the suspension of statutes of limitation, the clock stopped running on that deadline on March 20 and will start running again on July 6, 2020. Thus, in the example, you will have 4 months from July 6, within which to file an Article 78 petition. In effect, the period during which all these deadlines are tolled does not count toward your deadline.

Effective June 10, 2020, Administrative Order 121/20 allows unrepresented parties (*pro se* litigants) can file, serve, and be served by non-electronic means (paper filings). If you are represented, you will be required to file through the New York State Courts Electronic Filing System (NYSCEF). This is a change from the March 22, 2020 Administrative Order that only allowed for "essential" filings in the courts. The list of Essential Proceedings is still listed below. However, many courts are conducting limited in-person hearings, with many appearances instead taking place via video or teleconference.

Changes to the State Court Appeals Process

Appellate Divisions, All Departments

All departments of the Appellate Division have expanded their requirements for electronic filing. However, *pro se* incarcerated litigants are considered “exempt litigants” under 22 NYCRR 1245.5 (Joint Rules of the Appellate Division on Electronic Filing) and do not have to participate in electronic filing. However, given the rapidly changing rules about submitting paper copies, we recommend you contact the Appellate Division you will be filing in and request any rules about submitting paper copies and other requirements for *pro se* incarcerated litigants.

All departments of the Appellate Division are accepting filings in essential and non-essential matters.

First Department

Beginning on May 27, 2020, the First Department is operating as a Virtual Court. It has resumed operations, including calendaring appeals and motions and scheduling conferences. On May 8, 2020, the court rescinded its order temporarily suspending perfection and filing deadlines. The deadlines in September through December 2020 are reinstated. The court has continued to suspend requirements for submitting paper copies of records, appendices and briefs.

The court now requires all appeals originating from civil matters in Bronx and New York Counties to be submitted via NYSCEF, beginning on June 1, 2020.

The June special term runs between June 1 and June 26, 2020. All calendared matters will be on submission or argued via Skype. There will be no adjournments.

Second Department

Filing deadlines relating to the perfection of non-actively managed civil appeals remain suspended as of the court’s June 10, 2020 Administrative Order. However, the order lifts the suspension of deadlines for any pending civil matters, including the filing of response and reply briefs. The court encourages litigants to make digital filings whenever possible. Oral arguments are being conducted via teleconference.

Criminal Appeals

The deadlines for briefs which were due to be filed between 3/16/20 and 3/31/20 is 7/6/20;
The deadlines for briefs which were due to be filed between 4/1/20 and 4/15/20 is 7/20/20; and
The deadlines for briefs which were due to be filed between 4/16/20 and 5/6/20 is 8/3/20.
Paper copy filings may be made.

Third Department

On May 22, 2020, the court vacated its earlier orders suspending the deadlines for perfection, filing and other deadlines. The deadlines for perfection are now:

If your deadline to perfect was due:

March 17 – March 27

March 30 – April 10

April 13 – April 24

April 27 – May 6

May 11 – May 22

It is now due:

July 8

July 15

July 22

July 29

August 5

For any answering or responding brief due on or after May 26 through June 22, the deadline is extended an additional 45 days. An extension of time to perfect an appeal after June 22 will require an application or motion under 22 NYCRR 1250.9(b) and 22 NYCRR 850.9(c). Any pending motions for extensions of time made before March 17, 2020 are granted for an addition 45 days.

The above schedule does not apply to any deadline ordered by the Court after March 17, 2020. If the court ordered a particular deadline in your case, the court-ordered deadline shall control.

Fourth Department

On April 13, 2020, the court rescinded its earlier order suspending perfection, filing, and other deadlines. If your deadline to perfect was after May 22, 2020, that deadline remains in place. All hearings and appearances are being conducted via teleconference.

Effective July 1, 2020, the court is requiring electronic filing for appeals of family court and criminal court matters.

Changes to Federal Court Procedures

The federal courts have not announced comparable tolling provisions. You are still responsible for complying with statutes of limitations and deadlines relating to federal court claims and filings.