

# *Essentials of Life*

*~ A Newsletter Dedicated to Helping Women Face the Challenges of Prison Life ~*



*Vol. 2, No. 1 February 2013*

*Published by Prisoners' Legal Services of New York*

*Hello Readers of Essentials of Life!*

**In this issue of EOL, we will discuss the rights given to prisoners by the State of New York. The next issue will discuss how to use the state courts to enforce your rights. We hope that these two articles will help you become more legally savvy!**

**Once again, we ask you to send us your thoughts about EOL, your prison experience and, if you have been released and returned to prison, your re-entry experience. Write a poem, an essay or a letter – we are interested in your thoughts and feelings!**

## **State Sources of Prisoners' Rights**

This is an introduction to the rights that prisoners in New York State are **accorded** (granted, given) by the New York State Constitution, New York State statutes and the regulations of the Department of Corrections and Community Supervision (DOCCS).

### **The New York State Constitution**

The New York State Constitution gives prisoners many of the rights that are also guaranteed by the federal constitution. The State Constitution is divided into 20 articles. Article 1 is known as the Bill of Rights, and includes those rights that are most well known, such as the rights to free exercise of religion and freedom of speech. Article 1 is broken down into sections; each section describes a particular right or group of rights. The State Constitution is published in McKinney's Laws of New York. In McKinney's Laws of New York Annotated, following each **section** (the symbol for section is "§" and the symbol for sections is "§§") is a set of **annotations** (notes). The annotations set forth summaries of the court decisions **interpreting** (discussing and analyzing) the rights set forth in the section. To find cases interpreting the various rights, you would ask the prison law library for a copy of the section dealing with the right that you are researching and its annotations. For instance, if you were interested in cases discussing the state constitutional right to free exercise of religion, you would ask the law library for a copy of Article 1, Section 3 of the New York State Constitution and the annotations thereto.

Many of the rights guaranteed by the State Constitution are also guaranteed by the Federal Constitution. The following is a list of rights included in the state Bill of Rights and their **federal counterparts** (the same federal right):

**The right to freedom of religion** is guaranteed by Article 1, §3 of the N.Y. Constitution. This right is also guaranteed by the 1<sup>st</sup> Amendment to the U.S. Constitution.

**The right to be free from cruel and unusual punishment** is protected by Article 1, § 5 of the N.Y. Constitution. This right is also guaranteed by the 8<sup>th</sup> Amendment to the U.S. Constitution.

**The right not to be deprived of liberty, property or life without due process of law** is guaranteed by Article 1, §7 of the N.Y. Constitution. This right is also guaranteed by the 14<sup>th</sup> Amendment to the U.S. Constitution.

**The right to freedom of speech** is protected by Article 1, §8 of the N.Y. Constitution. This right is also guaranteed by the 1<sup>st</sup> Amendment to the U.S. Constitution.

**The right to petition the government** is guaranteed by Article 1, §9 of the N.Y. Constitution. This right is also guaranteed by the 1<sup>st</sup> Amendment to the U.S. Constitution

**The rights to equal protection and to be free from discrimination based on race, religion or beliefs** are guaranteed by Article 1, §11 of the N.Y. Constitution. This right is also guaranteed by the 14<sup>th</sup> Amendment to the U.S. Constitution.

Ideally, prisoners' rights advocates would like the courts to interpret the requirements of the state constitution in a manner that is more protective of prisoners' rights than the federal courts' interpretation of the comparable federal constitutional right. Unfortunately, case law interpreting the New York State Bill of Rights – while sometimes using language that is different from the language used to interpret the comparable federal constitutional rights – shows that, in the area of prisoners' rights, the state constitutional guarantees have the same interpretations as the courts have given to the comparable federal rights. This means, for example, that a prisoner must produce evidence of deliberate indifference to a serious medical need whether she is trying to establish a Federal 8<sup>th</sup> Amendment violation or a State Article 1, §5 violation. See Thomas v. State, 814 N.Y.S.2d 564 (Ct. of Claims 2005); see also, Matter of Bunny v. Coughlin, 593 N.Y.S.2d 354 (3d Dep't 1993) (holding that the state standard for review of policies that restrict religious rights is the same as the federal standard); Matter of Lucas v. Scully, 526 N.Y.S.2d 927 (1988) (holding that the state standard for deciding whether a DOCS policy violates an inmate's right to freedom of speech under the state constitution is the same as the standard used to make the decision under the federal constitution).

### **State Laws Conferring and Affecting Prisoners' Rights**

The primary collections of law that impact on prisoners are the Correction Law; the Executive Law (Article 12-B of the Executive Law sets forth the provisions pertaining to the Division of Parole); the Criminal Procedure Law; the Penal Law; the Civil Practice Law and Rules; 7 N.Y.C.R.R. (New York Code,

Rules and Regulations), Chapters I through XXII (the regulations enacted by DOCCS); and 9 N.Y.C.R.R., Subtitle CC (the regulations of the Division of Parole). Here, in order to discuss the structure of state law, we focus on the Correction Law and the DOCCS regulations.

## **The Correction Law**

The Correction Law is a **compilation** (group) of laws that controls the operation of the DOCCS. The Correction Law, also known as Chapter 43 of the Laws of New York, is arranged by subject matter. Each subject matter grouping is called an article. The articles are further divided into sections, and the sections into subsections. For instance, Article 26 of the Correction Law is **titled** (called) Temporary Release Programs for State Correctional Facilities. This article consists of 11 sections, numbered from §851 through §861. Article 26-A is the article in the Correction Law pertaining to Shock Incarceration. It consists of three sections: §§865 – 867.

The Correction Law, like all of the laws in New York State, is published in McKinney’s Consolidated Laws of New York (McKinney’s). Following each section of the law in the **annotated** (with notes) version of McKinney’s are short summaries of the case decisions interpreting that section. Many of the sections (and sometimes Articles) also have a “Practice Commentary,” a summary of the section (or Article), its purposes and the issues raised by the language of section or by conflicts with other sections of law. If you want to see the case law interpreting a particular section of the Correction Law, or the practice commentary, you can ask the law library for the annotations and/or the practice commentary to the section that is of interest to you.

Among the sections of the Correction Law that might be of interest are:

- § 23            **Transfer of Inmates from One Correctional Facility to Another:** This section gives the Commissioner the power to confine a prisoner in any prison that the Commissioner deems appropriate.
  
- §§100 - 109   **Interstate Corrections Compact:** These sections, found in Article 5-A, permit a state that is a member of the compact to transfer prisoners to any other state that is a member of the compact. (New York is a member of the compact).
  
- §113           **Funeral and Deathbed Visits:** This section authorizes DOCCS to allow prisoners to attend funerals and make deathbed visits in New York, at DOCCS’ expense, if necessary, where the deceased or ill individual is an immediate family member or a prisoner’s guardian.
  
- §116           **Inmates’ Funds:** This section requires that on a weekly basis, DOCCS deposit the inmate funds received over the preceding week in a bank, and authorizes DOCCS to use the interest earned on these accounts “for welfare work among the inmates.” It also requires the Commissioner to notify the State Crime Victims Board if any prisoner has more than \$10,000.00 in his/her account.

§125 **Inmate's Money, Clothing and Other Property:** This section imposes a duty on the Commissioner to put any money that a prisoner has with him/her when s/he comes into custody into an account and to return the money when s/he leaves DOCCS custody. The section also requires that DOCCS provide each prisoner, upon discharge from DOCCS custody, with clothing having a value of \$40.00 or less, transportation to the county from which s/he was committed to DOCCS custody and at least \$40.00 in cash.

§136 **Correctional Education:** This section requires that DOCCS provide each prisoner with the educational program which seems most likely to further the prisoner's process of socialization and rehabilitation.

§137 **Program of Treatment Control and Discipline:** Pursuant to this section, DOCCS is:

1. required to establish program and classification procedures designed to assure the assessment of each prisoner;
2. required to assign each prisoner to a program that is most likely to assist him/her to refrain from violating the law in the future;
3. required to provide each prisoner with a sufficient quantity of wholesome and nutritious food and clothing suited to the season and weather;
4. required, whenever possible, to house each prisoner in a single cell or in a dormitory.
5. required to refrain from subjecting prisoners to degrading treatment, and not to allow any officer to inflict blows upon a prisoner except in self defense or to suppress a revolt;
6. allowed to use all suitable means to defend its employees, to maintain order, to enforce discipline and to prevent escape when prisoners act violently toward other people, injure or attempt to injure property, attempt to escape or fail to obey a direct order; and
7. allowed to house a prisoner separate from other prisoners who are participating in programs, for such period as may be necessary to maintain order and discipline. Prisoners in segregated housing must be provided with adequate nutritious food, sanitary living conditions to the extent required to preserve health, and daily medical monitoring.

§138 **Institutional Rules and Regulations:** This section requires the Commissioner to publish and post in every prison, in English and Spanish, all rules and regulations that define and prohibit conduct by inmates. It also requires that the Commissioner give each prisoner a copy of the rules and regulations. The rules must be specific and give prisoners actual notice of the conduct that is prohibited and the range of disciplinary sanctions that can be imposed for violation of each rule. The law permits prisoners to be punished only for violations of published and posted rules. The law prohibits DOCCS from punishing prisoners for advocating for changes in DOCCS's policies, conditions, rules, or regulations or laws affecting prison conditions.

§139 **Grievance Procedures:** This section of the law requires that the Commissioner establish grievance resolution committees at each prison and that he establish a grievance procedure.

- §146      **Persons Allowed to Visit Correctional Facilities:** Other than a number of people, who by virtue of their professional status are permitted to visit prisons, only those persons who the Commissioner authorizes to visit, by means of regulations, will be allowed to enter correctional facilities.
- §147      **Alien Inmates:** Within 3 months of receiving custody of a prisoner who is not authorized to be in the United States, the Commissioner is required to notify U.S. Immigration and make a recommendation as to whether the prisoner should be deported.
- §170      **[Inmate Labor] Contract Prohibited:** This section prohibits the State from entering into contracts which would use prisoners as workers, except to produce goods for and provide services to, the State of New York.
- §171      **Inmate Employment:** This section allows the Commissioner to require prisoners to work up to 8 hours a day, six days a week, except that no prisoner may be required to work on Sundays or public holidays.
- §187      **Inmate Earnings:** This section requires the Commissioner to set up a system of pay grades, based on the value of the work, according to which prisoners will be paid. It also requires the Commissioner to set up an inmate account system.
- §401      **Establishment of Programs for Mentally Ill Inmates:** This section authorizes the Commissioner of DOCCS and the Commissioner of Mental Health, to establish programs in correctional facilities for the treatment of mentally ill prisoners who do not need to be hospitalized.
- §402      **Commitment of Mentally Ill Inmates:** This section outlines the procedures for emergency and non-emergency hospitalization of mentally ill prisoners.
- §610      **Freedom of Worship:** This section guarantees prisoners the right of free exercise of religion.
- §611      **Birth and Care of Infants:** This section states that when a woman is about to give birth, she must be taken out of the prison for medical care. It also provides that after giving birth, a mother may keep her child with her in prison for up to a year, unless the woman is physically unable to care for the baby.
- §803      **Good Behavior Allowances (Good Time):** This section permits prisoners serving indeterminate sentences to earn up to 1/3 of their maximum term of imprisonment as good time, and those serving determinate sentences to earn up to 1/7 of the determinate sentence as good time, and thereby reduce the maximum (or determinate) term by 1/3 (or 1/7). The section also establishes a merit time sentence reduction.

§805 **Earned Eligibility Program:** This section requires that the Commissioner review the prison records of eligible prisoners to determine whether they should be issued certificates of earned eligibility.

§§851 - 861 **Temporary Release Programs:** The sections in this article define who is eligible to participate in temporary release programs, the various temporary release programs – ranging from funeral visits to work release programs – procedures for applying for temporary release programs, and **consequences** (results) of violating the conditions of temporary release.

## **DOCCS Regulations**

Based on the responsibilities imposed by the Correction Law, the DOCCS Commissioner has adopted regulations. The regulations are published in Title 7 of the New York State Codes, Rules and Regulations (7 N.Y.C.R.R.). The regulations are divided into chapters by subject matter. Chapter V, Procedures for Implementing Standards of Inmate Behavior and for Granting Good Behavior Time Allowances, is divided into four subchapters: A) Procedures for Implementing Standards for Inmate Behavior, B) Procedures for granting Good Behavior Allowances, C) Standards for Inmate Behavior and D) Merit Time. The chapters and subchapters are further divided into parts. At the end of Title 7 is a section called Annotations: Case Notes and Administrative Notes. The Annotations Section is arranged numerically by Part Number. Under each Part number, is a summary of the case decisions interpreting the regulation. For example, Part 305.3 is entitled “Use of restraints, generally.” In the annotations section of Title 7, under the heading Part 305.3, is a summary of the court’s holding in Malik v. Wilhem, 552 N.Y.S.2d 59 (3d Dep’t 1990). The summary states that in Malik v. Wilhelm, the court held that where the petitioner became belligerent in the special housing unit and threatened to assault a guard, and where the petitioner had a long history of threats and assaultive behavior toward staff, the restraint order imposed pursuant to 7 N.Y.C.R.R. §305.3(a) was appropriate and constitutional as it was rationally related to legitimate penological interests,.

If you think that your rights under the regulations may have been violated, you can research this issue by giving the law library the part or chapter number of the regulation at issue, and asking for a copy of the regulation and its annotations. Regulations that are of particular interest to prisoners include:

Part 130 **Transfer of Foreign Nationals:** This regulation establishes the procedures for determining whether inmates who are foreign nationals can be voluntarily transferred to their home countries.

Chap. IV **Visitation:** The regulations in this chapter establish who can visit an inmate and the procedures for arranging and conducting visits, entering the prison, and for terminating, suspending and revoking visits.

Chap. V **Standards of Inmate Behavior and Good Behavior Allowances:** This Chapter sets forth the inmate rules, procedures for conducting disciplinary and superintendent’s hearings, procedures for making good time allowances and procedures for making merit time decisions.

- Chap. VI     **Special Housing Units:** This chapter discusses admission to various special housing units – including disciplinary, detention, protective custody and administrative segregation – and the permissible conditions of confinement in those units.
- Chap. VIII    **Institutional Programs:** This chapter sets forth the rules governing the following programs: inmate grievances, marriages during incarceration, media review, education, inmate correspondence, inmate telephone calls, and packages.
- Chap. IX     **Institutional Security:** This chapter sets forth the rules governing the “Central Monitoring Case [CMC] designation process,” the procedures to be used when contraband drugs are found, and the urinalysis testing program.
- Chap. X      **Facility Administration:** This chapter sets forth the rules governing personal property claims, double-celling and the minimum provisions for health and morale.
- Chap. XI     **Shock Incarceration:** This chapter sets forth the regulations that control participation in and removal from the Shock Incarceration Program.
- Chap. XII    **Temporary Release:** This chapter describes the various short and long term temporary release programs, eligibility requirements and procedures for removal from the programs.
- Chap. XXI    **Earned Eligibility:** This chapter describes the Earned Eligibility Program and its procedures.
- Chap. XXII   **Presumptive Release:** This chapter describes the Presumptive Release Program and the procedures governing the program.

### **Use of the State Constitution, Statutes and Regulations**

To get relief from the state courts, when you sue, you must identify the right that has been violated and the individual whose conduct led to the violation. The rights that you have through state law are **derived** (come from) the state constitution, statutes, and regulations. For example, if you are not allowed to practice certain aspects of your religion – such as wearing an atheist pendant – and you want a court to order DOCCS to allow you to wear it, you could bring a case in state supreme court alleging that DOCCS’ policy of not allowing you to wear that pendant violates your rights under the New York State Constitution, Article 1, §3 and §601 of the Correction Law. To research this issue, you could request the annotations to these statutes.

**EOL**  
**c/o Prisoners' Legal Services of New York**  
**114 Prospect Street**  
**Ithaca, NY 14850**

If you enjoyed reading this issue of *Essentials of Life* and would like to receive your own copies, free of charge, write to us and ask that we add you to our mailing list. You can write to us at:

Prisoners' Legal Services of New York  
Attention: EOL Staff  
114 Prospect Street  
Ithaca, NY 14850

Please notify *EOL* each time you are transferred. DOCCS will not forward *EOL*.

***Essentials of Life Staff***  
***Editors: Betsy Hutchings, Esq., Karen L. Murtagh, Esq.***  
***Production and Copy Editing: Aleta Albert***