



NEW YORK
CITY BAR

January 29, 2021

Via Email & Facsimile

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

The Honorable Bill de Blasio
Mayor of the City of New York
City Hall
New York, NY 10007

Dr. Howard Zucker, M.D., J.D.
New York State Commissioner of Health
New York State Department of Health
Corning Tower, Empire State Plaza
Albany, NY 12237

Dr. Dave A. Chokshi, MD, MSc
Commissioner
NYC Department of Health & Mental Hygiene
42-09 28th Street
Long Island City, NY, 11101

NYS COVID-19 Vaccine Distribution &
Implementation Task Force
New York State Department of Health
Corning Tower, Empire State Plaza
Albany, NY 12237

NYC Department of Health & Mental Hygiene
Vaccine Task Force
42-09 28th Street
Long Island City, NY, 11101

Re: Prioritizing COVID-19 Vaccine Distribution to Incarcerated People

Dear Governor Cuomo, Mayor de Blasio, Commissioner Zucker, Commissioner Chokshi and Members of the NYS COVID-19 Vaccine Distribution & Implementation Task Force and NYC Vaccine Task Force:

We write on behalf of the New York City Bar Association's Civil Rights Committee, Corrections & Community Reentry Committee, Criminal Courts Committee, and Criminal Justice Operations Committee. We urge you to prioritize providing the COVID-19 vaccine to incarcerated individuals who are not released into non-congregate facilities, and to do so at the same time as vaccination for correctional officers. We urge you to do so in the current phase – Phase 1b – of the New York City COVID-19 Vaccination Plan.

COVID-19 has spread with ferocity through all types of congregate living settings, including long-term care facilities, group homes, homeless shelters, prisons, and jails. The inherent difficulty in enforcing social distancing protocols in such settings contributes to higher rates of

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

COVID-19 transmission.¹ Accordingly, the Centers for Disease Control and Prevention (CDC)'s Advisory Committee on Immunization Practices reports that individuals in congregate living settings, including correctional or detention facilities, are at increased rates of transmission of COVID-19 and therefore it is wise for jurisdictions to vaccinate them "at the same time as the frontline staff."²

Prisons and jails have been hit particularly hard by the COVID-19 pandemic. Because of poor ventilation, irregular testing, inadequate medical resources, and difficulties implementing and enforcing hygiene standards and mask wearing, correctional systems have experienced greater challenges in containing the virus spread than other congregate living facilities.³ Indeed, nearly 20% of the prison population in the United States has tested positive for COVID-19; the infection rate in prisons is **five times higher** than that of the general population, and the age-adjusted mortality rate is **three times** that of the general population.⁴

In New York City, approximately 6% of incarcerated individuals have tested positive for COVID-19, and rates are on the rise.⁵ During the week of January 18th, more than 900 of the 34,000 incarcerated people in state-run prisons tested positive for COVID, with 283 people testing positive just in a four day span.⁶ Moreover, incarcerated individuals, disproportionately people of color, have high rates of asthma, hypertension, diabetes, and heart disease, and therefore are more likely to experience COVID-19 complications and death.^{7 8}

Despite these shocking statistics, the New York City Department of Health and Mental Hygiene ("NYC Health Department") has not yet recommended that incarcerated individuals be prioritized to receive the COVID-19 vaccine. Rather, state officials have indicated that New York State will exclude incarcerated individuals from Phase 1b.⁹ Yet, inexplicably, NYC Health

¹ Emily Wang, Lauren Brinkley-Rubinstein, Lisa Puglisi & Bruce Western, "Recommendations for Prioritization and Distribution of COVID-19 Vaccine in Prisons and Jails" (Dec. 16, 2020), https://justicelab.columbia.edu/sites/default/files/content/COVID_Vaccine_White_Paper.pdf (hereinafter *Vaccine Distribution in Prisons and Jails*). (All sites last visited Jan.29, 2021)

² "Interim Considerations for Phased Implementation of COVID-19 Vaccination and Sub-Prioritization Among Recommended Populations", Center For Disease Control and Prevention, (Dec. 23, 2020), <https://www.cdc.gov/vaccines/covid-19/phased-implementation.html>.

³ *Vaccine Distribution in Prisons and Jails*, *supra* note 1.

⁴ *Id.*

⁵ New York City Board of Correction Weekly COVID-19 Update, Week of December 19 – December 25, 2020, New York City Board of Correction (Dec. 29, 2020) <https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-12-19-12-25-20.pdf>.

⁶ Rosa Goldensohn, "State Prison COVID-19 Wave Grows as Inmates Wait for Vaccines", The City (Jan. 18, 2021), <https://www.thecity.nyc/2021/1/18/22237488/new-york-prison-covid-cases-grow-inmates-vaccines-cuomo>.

⁷ *Vaccine Distribution in Prisons and Jails*, *supra* note 1.

⁸ Roni Caryn Robin, "Prisons Are Covid-19 Hotbeds. When Should Inmates Get the Vaccine?", The New York Times (Nov. 30, 2020), <https://www.nytimes.com/2020/11/30/health/coronavirus-vaccine-prisons.html>.

⁹ Morgan McKay, "Confusion Over When New York Inmates Will Be Vaccinated", Spectrum News NY1 (Jan. 06, 2021), <https://www.ny1.com/nyc/all-boroughs/ny-state-of-politics/2021/01/06/confusion-over-when-new-york-inmates-will-be-vaccinated>.

Department has recommended prioritization of other people in congregate facilities, including correctional officers.¹⁰ There is no public health rationale for vaccinating other individuals who live in congregate facilities and correctional officers, but not those who are incarcerated. This decision is tantamount to a state declaration that the lives of those who are incarcerated matter less than the lives of others. For incarcerated individuals who remain at high risk because they are not released into safer non-congregate community settings, the vaccine is critical to safety and should be administered at the highest priority.

Neighboring states and federal prisons have been appropriately prioritizing the vaccination of incarcerated individuals. At least 27 states directly name inmates in their public plans for vaccination¹¹, and seven states—Connecticut, Delaware, Maryland, Massachusetts, Nebraska, New Mexico and Pennsylvania—have designated inmates as top-priority “Phase One” recipients for vaccines.¹² New Jersey began vaccinating incarcerated individuals back in December.¹³ Additionally, the Federal Bureau of Prisons (“BOP”) made the administration of the COVID vaccine in federal prisons a “top priority.”¹⁴ The COVID vaccine has already been delivered to staff and inmates at more than half of the BOP’s correctional facilities across the country, and all of the BOP’s facilities are expected to receive their first dose by mid-February.¹⁵

The NYC Health Department and the CDC consistently state that equity, fairness, and social justice must be considered in prioritizing who receives the COVID-19 vaccine. In its Interim COVID-19 Vaccination Plan, the NYC Health Department writes that “equity is at the core” of its vaccine operations, and that “[v]accine planning and allocation decisions must be made through an anti-racist and intersectional lens.”¹⁶ Similarly, the CDC identified four ethical principles to guide its decision-making when vaccine supply is limited: maximizing benefits and minimizing harms, mitigating health inequities, promoting justice, and promoting transparency.¹⁷

¹⁰ “Planned COVID-19 Vaccine Distribution in New York City”, New York City Department of Health and Mental Hygiene. (Jan. 3, 2021), <https://www.cdc.gov/vaccines/covid-19/downloads/new-york-city-jurisdiction-executive-summary.pdf> (indicating that residents and staff in nursing homes and other long-term care facilities, as well as “frontline essential workers who cannot physically distance and have frequent in-person contact with others,” will be prioritized in receiving the vaccine).

¹¹ Troy Closson, “The High-Risk Group Left Out of New York’s Vaccine Rollout”, The New York Times (Jan. 26, 2021), <https://www.nytimes.com/2021/01/26/nyregion/new-york-vaccine-prisons.html>.

¹² David Montgomery, “Prioritizing Prisoners for Vaccines Stirs Controversy”, The Pew Charitable Trusts (Jan. 5, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/01/05/prioritizing-prisoners-for-vaccines-stirs-controversy>.

¹³ Troy Closson, “The High-Risk Group Left Out of New York’s Vaccine Rollout”, The New York Times (Jan. 26, 2021), <https://www.nytimes.com/2021/01/26/nyregion/new-york-vaccine-prisons.html>.

¹⁴ “COVID-19 Vaccination Efforts Commended”, Federal Bureau of Prisons, (Jan. 16, 2021), https://www.bop.gov/resources/news/20210116_covid_vaccine_efforts_commended.jsp.

¹⁵ *Id.*

¹⁶ “Interim COVID-19 Vaccination Plan – Executive Summary”, New York City Department of Health and Mental Hygiene, <https://www.cdc.gov/vaccines/covid-19/downloads/new-york-city-jurisdiction-executive-summary.pdf>.

¹⁷ “How CDC is Making COVID-19 Vaccine Recommendations”, Centers for Disease Control and Prevention (Dec. 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations-process.html>.

To further help the most at-risk communities, the NYC Health Department implemented its COVID-19 Equity Action Plan, declaring:

While every New Yorker has been profoundly affected by COVID-19, the disproportionate impact on Black, Latino, immigrant and low-income communities is unacceptable and must be addressed. The disproportionate impact is compounded by underinvestment and structural racism rooted in existing social, economic and health systems. Now is the time to help our fellow New Yorkers and the rest of the world understand the consequences of social inequity. We are only as healthy and secure as our least healthy and most at-risk community.¹⁸

Principles of equity (and public health, as discussed below) require that incarcerated individuals receive priority access to the COVID-19 vaccine. It is not possible to improve health equity with regard to COVID-19 vaccination without prioritizing incarcerated people in vaccine distribution plans,¹⁹ as Black, Latinx, and Indigenous communities make up a disproportionate population of those incarcerated.

It is the NYC Health Department's responsibility to include incarcerated individuals among those prioritized: “[g]iven the epidemiology of infection and the responsibility of the government for adequate healthcare standards in prisons and jails, prioritization of vaccine distribution for incarcerated people is critical.”²⁰ Numerous credible authorities support this position:

- Experts from the nation's top universities drafted a report that recommends that states prioritize “vaccine distribution to all incarcerated people at the same stage as correctional officers (essential workers/first responders) or higher.”²¹
- The Council on Criminal Justice recommends that incarcerated individuals be prioritized and provided early access to COVID-19 vaccines.²²
- The American Medical Association calls for priority access to the COVID-19 vaccine for incarcerated people.²³

¹⁸ “Overview of the NYC Department of Health and Mental Hygiene’s COVID-19 Equity Action Plan”, New York City Department of Health and Mental Hygiene, (June 5, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-equity-action-plan.pdf>.

¹⁹ *Vaccine Distribution in Prisons and Jails*, *supra* note 1.

²⁰ *Vaccine Distribution in Prisons and Jails*, *supra* note 1.

²¹ *Id.*

²² “Experience to Action: Reshaping Criminal Justice After COVID-19”, Council on Criminal Justice (Dec. 2020), https://assets.foleon.com/eu-west-2/uploads-7e3kk3/41697/final_report_-_designed.83f2289da58b.pdf.

²³ Press Release: 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>.

- The Johns Hopkins Bloomberg School of Public Health lists incarcerated people as a priority group in its Interim Framework for COVID-19 Vaccine Allocation and Distribution in the United States.²⁴
- The National Academies of Sciences, Engineering, and Medicine recommends older adults in prisons receive the vaccine in Phase 1b.²⁵
- WHO SAGE lists those in “detention facilities,” as a priority group,²⁶ noting that “even if the restriction of their liberty is justified, that does not justify leaving unaddressed the elevated risk associated with being incarcerated.”²⁷

The latter four sources, which expressly recommend that incarcerated individuals be prioritized in receiving the COVID-19 vaccine, informed CDC’s discussions on who should receive COVID-19 vaccines when supply is limited. It is worth noting that New York City’s COVID-19 Vaccination Plan mirrors that of the CDC.

If the NYC Health Department is to live up to its goals of equity, social justice, and containing COVID-19, it must prioritize the vaccination of incarcerated individuals. To administer vaccinations to correctional officers without also vaccinating incarcerated individuals only exacerbates and perpetuates both the dangers of COVID-19 and the racial disparities the NYC Health Department purports to address. We therefore urge this Task Force to include incarcerated individuals in Phase 1b of the NYC COVID-19 Vaccination Plan, alongside correctional officers and those in other types of congregate living facilities.

Thank you for your time and attention to this matter.

Respectfully,

Civil Rights Committee
Zoey Chenitz & Kevin Jason, Co-Chairs

²⁴ Eric Toner et al., “Interim Framework for COVID-19 Vaccine Allocation and Distribution in the United States”, The Johns Hopkins Center for Health and Security (August 2020), https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2020/200819-vaccine-allocation.pdf.

²⁵ “Framework for Equitable Allocation of COVID-19 Vaccine”, The National Academy of Sciences, Engineering and Medicine, (Oct. 2020), https://www.nap.edu/resource/25917/Framework%20for%20Equitable%20Allocation%20of%20COVID-19%20Vaccine_Highlights.pdf.

²⁶ “Who SAGE Values Framework for the Allocation and Prioritization of COVID-19 Vaccination”, World Health Organization (Sept. 14, 2020), https://apps.who.int/iris/bitstream/handle/10665/334299/WHO-2019-nCoV-SAGE_Framework-Allocation_and_prioritization-2020.1-eng.pdf.

²⁷ “WHO SAGE Roadmap for Prioritizing Uses of COVID-19 Vaccines in the Context of Limited Supply”, World Health Organization (Nov. 13, 2020), https://www.who.int/docs/default-source/immunization/sage/covid/sage-prioritization-roadmap-covid19-vaccines.pdf?Status=Temp&sfvrsn=bf227443_2&ua=1.

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