



11 Beacon Street, Suite 925
Boston, Massachusetts 02108
(617) 723-8455 *Voice*
(800) 872-9992 *Voice*
(617) 723-9125 *Fax*
<http://www.dlc-ma.org>

Western Office
32 Industrial Drive East
Northampton, MA 01060
(413) 584-6337 *Voice*
(800) 222-5619 *Voice*
(413) 584-2976 *Fax*
mail@dlc-ma.org

May 6, 2020

Francis V. Kenneally
Clerk of the Supreme Judicial Court
John Adams Courthouse
1 Pemberton Square, Suite 1400
Boston, MA 02108

Re: Amicus Letter of Disability Law Center in Support of Plaintiffs in *Foster, et al. v. Mici, et al.*, SJC-12935

Dear Clerk Kenneally:

The Disability Law Center (DLC) respectfully submits this letter as *amicus curiae* in support of Plaintiffs in the above-entitled action. DLC has a federal mandate as the Commonwealth's Protection and Advocacy agency¹ (P&A) to protect and advocate for individuals with disabilities, including those who are criminally and civilly detained in correctional facilities.

DLC is familiar with the needs of and issues faced by Massachusetts prisoners with disabilities, as well as the physical conditions within many state and county correctional facilities, through direct contact with individual prisoners and systemic work that includes conducting monitoring and investigations of correctional facilities pursuant to our federal authority and engaging in litigation.²

¹ This mandate was first codified through the passage of the Protection & Advocacy for People with Developmental Disabilities (PADD) Act, 42 U.S.C. § 15043(a). Congress extended the protections of the PADD Act, incorporating them by reference into legislation protecting persons with other forms of disabilities. This includes the: Protection & Advocacy for Mentally Ill Individuals (PAMII), 42 U.S.C. § 10805, Protection & Advocacy for Individual Rights (PAIR) Act, 29 U.S.C. § 794e(f), and the Protection & Advocacy for Individuals with Traumatic Brain Injury (PATBI) Act, 42 U.S.C. § 300d-53(k).

² See, e.g., *Briggs, et al. v. Mas. Dep't of Corr., et al.*, No. 1:15-cv-40162 (D. Mass.) (active class action on behalf of deaf and hard of hearing prisoners to appropriate accommodations; partial settlement reached and approved in 2019); *Disability Law Ctr. v. Mass. Dep't of Corr., et al.*, No. 07-10462, 960 F. Supp. 2d 271, 280-81 (D. Mass. 2012) (action challenging the practice of confining prisoners with mental illness in DOC segregation units);

The Protection and Advocacy System for Massachusetts

As this Court is keenly aware, Massachusetts correctional facilities hold a significant number of prisoners who fall within the high-risk groups more likely to develop serious illness or die if infected with COVID-19 due to age, medical condition, and/or disability. The prevalence and severity of chronic illness suffered by people who are incarcerated is the product of an array of societal realities that also correlate with incarceration (e.g., poverty, poor access to health care, substance use, race/ethnicity) and elements of life in correctional facilities (e.g., high-stress environment, institutional diet, and medical and mental health care resource constraints).³

In the Department of Correction (DOC), some of the most medically vulnerable individuals are housed in specialized units based on their need for medical care and/or assistance with activities of daily living. MCI-Shirley is the site of two such units – the Health Services Unit building houses both the Critical Stabilization Unit (CSU), which is the only unit in DOC intended to provide prisoners with long-term nursing home-level care, and one of two Nursing Care Units (NSUs), which house people who need assistance with some daily activities due to their disabilities, but do not require the level of medical observation and/or intervention of the NSU. MCI-Norfolk is the site of the other NSU.⁴

It is likewise well understood by this Court that contagions like COVID-19 introduced into correctional facilities can quickly infect large proportions of prisoners and staff. This is clearly the case in DOC facilities, as DOC concedes that 58% of its prisoners cannot maintain social distance due to their placement in multi-person cells and large dorms that require sleeping in close proximity.⁵ Still more prisoners have to share common toilets, sinks, and showers – especially, accessible bathrooms and showers and communal shower chairs. Unfortunately, the CSU and NSUs are among these congregate housing settings.⁶

Conditions at MCI-Shirley and MCI-Norfolk Signal Systemic Shortcomings that Pose Risks to the Prisoner Population and the General Public and Necessitate Court Intervention

On April 27, 2020, DLC notified DOC of our finding of probable cause to open investigations, pursuant to our federal authority, of MCI-Shirley and MCI-Norfolk based upon reports concerning the experiences of prisoners with a range of disabilities in both facilities.⁷ In addition

settlement agreement in 2011 requiring DOC to create and maintain sufficient secure treatment units to house prisoners with serious mental illness who would otherwise be in solitary confinement).

³ See Pls.' Mot. for Prelim. Inj., Ex. 4, para. 8; Pls.' Proposed Findings of Fact, para. 14; World Health Organization, Prisons and Health (Eds. Stefan Enggist, Lars Møller, Gauden Galea and Caroline Udese, 2014), http://www.euro.who.int/data/assets/pdf_file/0005/249188/Prisons-and-Health.pdf.

⁴ The space available in these three units does not meet the demand of DOC's population. As a result, many prisoners with long-term care needs much reside in other prison infirmaries while waiting for CSU and NSU beds to open up. See Pls. Mot. for Prelim. Inj., Ex. 3, para. 9.

⁵ Findings of Fact of the Sup. Court (May 1, 2020), p. 8.

⁶ The CSU is made up of several single cells and several "wards," which are large rooms that generally hold between 3 and 6 prisoners. The NSUs are dorms that house approximately 15 prisoners at any given time.

⁷ The P&A statutes specifically authorize DLC to investigate incidents of abuse or neglect of individuals with disabilities under either of two circumstances: (1) when the agency receives a complaint; or (2) when it determines that there is probable cause – i.e., reasonable grounds to believe that individuals have been, or may be at significant risk of being subject to abuse or neglect. See 42 U.S.C. § 10805(a)(1)(A); 42 C.F.R. § 51.2; 42 U.S.C. § 15043(a)(2)(B); 45 C.F.R. § 1326.19; 29 U.S.C § 794e(f)(2); 42 U.S.C. § 300d-53(k). In this instance, both circumstances were true.

to housing the CSU and NSUs, it is important to highlight that MCI-Shirley has a high concentration of prisoners with disabilities in general population and is the only DOC facility with the capacity to provide dialysis.⁸ Moreover, the population of MCI-Norfolk “holds an older population serving prolong sentences who need significant medical care.”⁹ DLC described some of the reports received as follows¹⁰ in our April 27 letter:

According to reports, lack of appropriate assistance with activities of daily living for residents in the NCU[s] and CSU is now pervasive because the presence of inmate companions – who normally provide this assistance – has been greatly reduced and medical staff are not filling in the gaps. As a result, prisoners who are elderly and/or have disabilities are not getting help with necessary activities such as eating, toileting, bathing, and wheelchair transfers. At the same time reports indicate that the facilities are not taking sufficient steps to protect NCU and CSU residents against COVID-19 infection or to monitor and treat those who may have already contracted it. For example, the absence of help reportedly forced one prisoner with disabilities to, without personal protective equipment (PPE), feed another prisoner with significant disabilities who was showing symptoms of possible COVID-19 infection. Complaints also include medical staff having a prisoner with neurological disabilities take his own temperature with questionable reliability rather than opening his door.

Other reports pertain to a variety of issues [a]ffecting prisoners with disabilities at MCI-Shirley and MCI-Norfolk, ranging from prisoners with diabetes having to use dirty, shared glucometers and denial of medically-ordered special diets to unclean communal areas in housing units, which are still available to prisoners on a very limited basis to permit showering and access to telecommunications.¹¹

DLC continues to receive reports about these facilities that confirm that the problems have not been resolved and, particularly at MCI-Shirley, may be worsening as the virus continues to spread. Mr. Gregory Siverhus’ troubling account¹² evidences that DOC is denying prisoners with disabilities and chronic medical conditions in the CSU wards – including those who are also now suffering with symptoms of COVID-19 – access to regular, necessary medical care and assistance and subjecting them to unsafe and unsanitary conditions. Another recent report echoes that a large number of regular CSU residents are now COVID-19 positive, resulting in several deaths to date. As a result, the Health Services Unit is locked down and, reportedly, general population prisoners’ requests for medical treatment or assessments – aside from medications provided on the unit – are simply being denied absent emergency circumstances.

⁸ See Pls. Mot. for Prelim. Inj., Ex. 3, para. 6.

⁹ Pls. Mot. for Prelim. Inj., Ex. 3, para. 8

¹⁰ DLC did not provide detailed accounts of each report received due to our obligations under federal law. *See, e.g.*, 42 C.F.R. 51.45(a)(1)(iii) (requiring the P&A to keep confidential all information pertaining to the “[i]dentity of individuals who report incidents of abuse or neglect or furnish information that forms the basis for a determination that probable cause exists”); 45 C.F.R. 1326.28(b)(1)(iii) (requiring same).

¹¹ Letter from DLC to DOC (April 27, 2020), Joint App., No. 38, Ex. B.

¹² Affidavit of Gregory Siverhus, Joint App., No. 38, Ex. A.

Mr. Siverhus is not the only prisoner to report a lack of access to vital information concerning their own COVID-19 status,¹³ infections within their facilities and units, or how they can preserve their health and safety during this public health crisis. Such lack of transparency and guidance to prisoners is another unnecessary barrier to infection control. Reportedly, though staff distributed surgical masks at MCI-Shirley and other facilities within the past two weeks, DOC has not provided prisoners direction concerning safe use, removal, storage, or reuse of these masks to prevent COVID-19 transmission. One prisoner with a chronic respiratory disease who is very concerned about contracting COVID-19 and conscientious about using his mask had no idea that infection could spread from his mask to his hands or to surfaces in his cell that make contact with the mask.

As DOC admits, correctional officers have not consistently utilized PPE.¹⁴ DLC has also received reports concerning correctional officers failing to wear their masks and gloves, even when handing out food trays and opening cell door traps. While it is unclear whether correctional officers received training on proper PPE usage, it seems clear that they are not following proper protocol. Intermittent misuse of PPE can have the same dire health consequences as complete refusal to wear PPE and cannot be adequately policed by monitoring on facility cameras.¹⁵

Finally, a review of all accounts – from prisoners, the media, and DOC – suggest that DOC’s COVID-19 testing practices to date are uneven, with expanded mobile testing only occurring in a few facilities with the highest numbers of positive cases and DOC asserting that it plans to conduct this testing at other facilities in the future.¹⁶ Publicly available data indicates that DOC has tested less than 20% of all prisoners, and of those tested, approximately 30% are COVID-19 positive.¹⁷ DOC is, thus, failing to use COVID-19 testing as an effective tool to stem the tide of infections and protect the health and safety of vulnerable prisoners and the community at large. The dramatic increase in positive cases where expanded testing has taken place, including at MCI-Shirley, is proof that this approach is inadequate. Expansion of mass testing of prisoners across the country has resulted in similar jumps in positive cases, revealing large numbers of asymptomatic prisoners who are nonetheless contagious and equally threatening to the health of other prisoners in high-risk groups.¹⁸

¹³ *Id.* at para. 18.

¹⁴ Findings of Fact of the Sup. Court (May 1, 2020), p. 9.

¹⁵ *Id.*

¹⁶ Deborah Becker, *Coronavirus Infections Double Among Prisoners at MCI-Shirley*, WBUR News (April 28, 2020), <https://www.wbur.org/commonhealth/2020/04/28/shirley-prison-coronavirus-infections>; Steph Solis, *Massachusetts Treatment Center in Bridgewater sees 70 more coronavirus cases after mobile testing*, MassLive (May 5, 2020), <https://www.masslive.com/coronavirus/2020/05/massachusetts-treatment-center-in-bridgewater-sees-70-more-coronavirus-cases-after-mobile-testing.html>.

¹⁷ See Special Master’s Weekly Report, App. at p. 15 (May 4, 2020), *CPCS & another v. Chief Justice of the Trial Court & others*, SJC-12926; Deborah Becker, *Almost 1,000 Prisoners Released In Mass. Amid Pandemic*, WBUR News (May 5, 2020), <https://www.wbur.org/news/2020/05/05/almost-1000-prisoners-released-in-mass-amid-pandemic>; ACLU of Massachusetts, *Tracking COVID-19 in Massachusetts Prison & Jails: Total Tests, Total Positive Tests*, <https://data.aclum.org/sjc-12926-tracker/>.

¹⁸ See Linda So, Grant Smith, *In four U.S. state prisons, nearly 3,300 inmates test positive for coronavirus -- 96% without symptoms*, Reuters (April 25, 2020), <https://www.reuters.com/article/us-health-coronavirus-prisons-testing-in/in-four-us-state-prisons-nearly-3300-inmates-test-positive-for-coronavirus-96-without-symptoms-idUSKCN2270RX>.

All of these reports and the evidence before this Court indicate a failure of DOC to implement sufficient and available precautions to inhibit the spread of COVID-19 within correctional facilities, including in the facilities and specific units that house significant numbers of prisoners who are elderly and/or disabled. Furthermore, these reports signal DOC's systemic failure to take reasonable steps to appropriately accommodate¹⁹ and prioritize the health, safety, and lives of prisoners with disabilities who are most vulnerable to lethal consequences of COVID-19.

The actions – or rather the lack of apparent action – of the Governor and the Executive Office of Public Safety and Security, in issuing public guidance, rules concerning testing and PPE, and plans for external oversight for correctional facilities likewise suggests a disparity in prioritization of protections for prisoners with disabilities. This is in stark contrast to the detailed COVID-19 Nursing Facility Accountability and Support plan issued on April 27, 2020 by the Governor and the Executive Office of Health and Human Services aimed at providing enhanced, robust protections for the population in the community almost identical in terms of medical need to prisoners housed in DOC's CSU and NSUs.

At the same time and despite this Court's urging, the evidence before the Court substantiates Plaintiffs' allegations that DOC, the Governor, and the Massachusetts Parole Board are not taking full advantage of mechanisms that can facilitate safe and even supervised release of prisoners in order to make more social distancing possible in correctional facilities and best protect those committed to correctional facilities and staff alike.²⁰

Unfortunately, Defendants' systemic failure to timely consider and prioritize the needs of and provision of reasonable accommodations to individuals with disabilities confined to correctional facilities is a longstanding problem. Such issues often continue unabated until addressed through litigation, intense public scrutiny, or some combination thereof. For instance, whether it has been stopping the prolonged and illegal use of seclusion and restraint on individuals with mental illness confined at Bridgewater State Hospital,²¹ creating alternative treatment units to solitary confinement for prisoners with serious mental illness,²² ending the commitment of women with substance use disorder to MCI-Framingham pursuant to G.L. c. 123, § 35,²³ ensuring that deaf

¹⁹ Notably, even the opportunity to earn good time credit during lockdown that Commissioner Mici highlighted fails to account for the needs of many prisoners with disabilities who may not be able to participate in journaling and denies them equal access to much-needed sentence reductions. Findings of Fact of the Sup. Court (May 1, 2020), p. 11. This option may be foreseeably inaccessible to, for example, deaf prisoners whose primary language is American Sign Language and lack proficiency in written English; prisoners with intellectual and developmental disabilities and learning disabilities; prisoners with degenerative neurological disabilities; prisoners with traumatic brain injury; and prisoners with painful or debilitating arthritis in their hands. The same barriers may also exist for prisoners with disabilities participating in the DOC "program in which inmates can obtain completion credit by educating themselves on COVID-19." *Id.* at p. 12.

²⁰ See *CPCS & another v. Chief Justice of the Trial Court & others*, SJC-12926, Slip Op. at 2 (April 28, 2020); Findings of Fact of the Sup. Court (May 1, 2020), p. 13; Stipulation as to Agreed Facts Between Plaintiffs and Governor Baker, paras. 1-2; ACLU of Massachusetts, Tracking COVID-19 in Massachusetts Prison & Jails: Total Releases, <https://data.aclum.org/sjc-12926-tracker/>.

²¹ See *Minich, et al. v. Spencer, et al.*, No. SUCV2015-00278, 2016 WL 3479000 (Mass. Super. 2016); DLC's agreement with the Commonwealth entered into in response to DLC's investigation of Bridgewater State Hospital, http://www.dlc-ma.org/wp-content/uploads/2017/11/DLC_Final_Agreement.pdf.

²² See *Disability Law Ctr. v. Mass. Dep't of Corr., et al.*, No. 07-10463-MLW, 960 F. Supp. 2d 271, 280-81 (D. Mass. 2012).

²³ See *Doe, et al. v. Baker, et al.*, No. 1:14-cv-12813 (D. Mass.).

and hard of hearing state prisoners have access to hearing aids, interpretation, and other necessary accommodations,²⁴ or making clear that the Americans with Disabilities Act requires the Parole Board to make reasonable modifications to its hearing and decision-making process to provide persons with disabilities a meaningful opportunity to obtain parole,²⁵ significant pressure has often been necessary for the Defendants to make meaningful reforms for individuals with disabilities who are imprisoned and civilly committed.

Conclusion

Based upon the foregoing, DLC has deep concerns for the well-being of everyone currently held in Massachusetts correctional facilities, and particularly for those with disabilities, and believes that the relief Plaintiffs seek is both reasonable and necessary to protect the health and safety of prisoners, those committed pursuant to Section 35, and the general public.

Respectfully submitted,

s/s Tatum A. Pritchard

Tatum A. Pritchard

BBO No. 664502

Disability Law Center

11 Beacon Street, Suite 925

Boston, MA 021

617-723-8455

tpritchard@dlc-ma.org

²⁴ See *Briggs v. Department of Correction*, No. 1:15-cv-40162 (D. Mass.).

²⁵ See *Crowell v. Mass. Parole Board*, 477 Mass. 106 (2017).

DECLARATION PURSUANT TO MASS. R. APP. P. 17(c)(5)

No party, party's counsel, or person or entity other than amicus curiae and its counsel, authored this brief in whole or in part, or contributed money intended to fund its preparation or submission. Neither amicus curiae nor its counsel has either represented any of the parties to this appeal in another proceeding involving similar issues, or been or represented a party in a proceeding or legal transaction at issue in the present appeal.

s/s Tatum A. Pritchard

Tatum A. Pritchard

CERTIFICATE OF SERVICE

I certify that on May 6, 2020, I served a copy of this letter electronically on all Parties via Odyssey File and Serve.

s/s Tatum A. Pritchard

Tatum A. Pritchard