



MOUNTAIN
STATE
JUSTICE



March 26, 2021

Brian Abraham, Esq.
Chief of Staff for Governor Jim Justice
Sent via email to: brian.r.abraham@wv.gov

Dear Brian,

As you may know, a number of advocacy groups, including Mountain State Justice, Inc. and the American Civil Liberties Union of West Virginia, have over the past several months urged the state to prioritize vaccinations for people who are incarcerated.¹ COVID-19 is devastating the incarcerated population and poses a vastly greater threat in forced congregate living environments than it does for the population at large.² On March 22, 2021, Governor Justice announced that any state resident that is 16 or older is now eligible for the vaccine.³ However, it appears that the state has yet to release a plan that provides for a timeline during which those that are incarcerated can expect to have access to vaccines.

A federal court in February granted a preliminary injunction to incarcerated plaintiffs who challenged the constitutionality of Oregon's COVID-19 vaccine prioritization plan.⁴ In doing so, the Court found that those residing in correctional facilities should be entitled to the same prioritization as those that live and work in congregate care facilities, and ordered that the state provide the same prioritization to those incarcerated in state facilities.⁵

¹ See *Letter Demand for COVID-19 Vaccines for Individuals Held in DCR Custody*, WV CRIMINAL LEGAL REFORM COALITION (Mar. 25, 2021), <https://wvprisonreform.org/blog/letter-demand-for-covid-19-vaccines-for-individuals-held-in-dcr-custody/>; see also Emily Allen, *W.Va. Leaders Address Correctional Staff Reluctance, Prisoner Access To COVID-19 Vaccine*, West Virginia Public Broadcasting, W. VA. PUBLIC BROADCASTING (Jan. 11, 2021), <https://www.wvpublic.org/2021-01-11/w-va-leaders-address-correctional-staff-reluctance-prisoner-access-to-covid-19-vaccine>.

² *COVID-19's Impact on People in Prison*, EQUAL JUSTICE INITIATIVE, <https://eji.org/news/covid-19s-impact-on-people-in-prison> (last visited Mar. 23, 2021).

³ *COVID-19 UPDATE: Gov. Justice makes vaccinations available to all West Virginians age 16 and older*, OFFICE OF GOV. JIM JUSTICE (Mar. 22, 2021), <https://governor.wv.gov/News/press-releases/2021/Pages/COVID-19-UPDATE-Gov.-Justice-makes-vaccinations-available-to-all-West-Virginians-age-16-and-older.aspx>.

⁴ *Maney v. Brown*, No. 6:20-cv-00570-SB, 2021 U.S. Dist. LEXIS 19665 (D. Or. Feb. 2, 2021) (“Our constitutional rights are not suspended during a crisis. On the contrary, during difficult times we must remain the most vigilant to protect the constitutional rights of the powerless. Even when faced with limited resources, the state must fulfill its duty of protecting those in its custody. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (“It is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself.”)).

⁵ *Id.* at *46.

Here, those incarcerated in West Virginia have an even stronger claim given that vaccines are now available to any West Virginia resident who is 16 years of age or older. Those who are incarcerated in our state and regional facilities are no less West Virginians than those who are not incarcerated.

The problem is further compounded by the fact that, while those that work in correctional facilities have been offered the vaccine, a substantial percentage of those workers have elected not to take the vaccine.⁶ When an employee brings COVID into a facility, those who they come in direct contact with, including the incarcerated, are at risk of contracting the virus.

We request, immediately, the following assurances:

- All incarcerated individuals must be declared immediately eligible for prioritized vaccination, without regard to their age or medical condition.
- The state must immediately allocate an adequate supply of vaccines to DOCR facilities so that all incarcerated people in DOCR custody who are willing to be vaccinated are administered the vaccine on a highest-priority basis, and in any event **no later than April 5, 2021**.
- The state must provide suitable documentation, access to information, and cooperation to the undersigned so that we may verify that such measures are being carried out.
- The state must provide information to the public of the timeline during which incarcerated individuals can expect to have access to vaccines.

Due to the urgency of this situation, we request your immediate attention to this matter and insist on a meaningful response, in writing, **by no later than Wednesday, March 31, at 5 p.m.**

We remain hopeful that progress in this area remains possible. However, we are prepared to file litigation imminently should a resolution not be forthcoming.

Sincerely,



Rachel Kincaid
Staff Attorney, Mountain State Justice



Loree Stark
Legal Director, ACLU-WV

⁶ Allen, *supra* note 1.

cc: Commissioner Betsy Jividen, betsy.jividen@wv.gov
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