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SUPERIOR COURT
CIVIL ACTION
NO. 20-00855-D
SJC 2020-0212

STEPHEN FOSTER, et. al,
Plaintiffs,
vs.

CAROL MICI, as Commissioner of Correction, et. al,
Defendants.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS’
SECOND MOTION FOR PRELIMINARY INJUNCTION

The plaintiffs, a class consisting of all prisoners held at Department of Correction (“DOC”) facilities, filed a second motion for preliminary injunction that would require DOC to make specific efforts to further reduce the prison population in light of the COVID-19 pandemic.¹ The defendants, Carol Mici in her official capacity as Commissioner of DOC (“Commissioner Mici”), Gloriann Maroney, in her official capacity as Chair of the Massachusetts Parole Board (“Parole Board”), and Thomas Turco, in his capacity as Secretary of the Executive Office of Public Safety and Security (collectively, “Defendants”) opposed the motion. The Court heard oral argument on February 10, 2021. For the below reasons, the motion is **DENIED**. However, plaintiffs may move on an expedited basis for leave of court to amend their Complaint to assert new claims under the line-item law enacted over the Governor’s veto on December 28, 2020 (the “December 2020 line-item law”).²

¹ The Supreme Judicial Court denied certain named plaintiffs’ first motion for a preliminary injunction on June 2, 2020. See *Foster v. Commissioner of Correction*, 484 Mass. 698 (2020) (“*Foster I*”). Thereafter, this Court certified a class of all prisoners housed in DOC facilities.

² See Chapter 227 of the Acts of 2020, Section 2, line item 8900-0001, available at <https://malegislature.gov/Budget/FY2021/FinalBudget>.

Procedural History of this Motion

Plaintiffs filed the pending motion the evening of December 23, 2020. After allowing Defendants until January 22, 2021 to respond, a hearing was originally scheduled for January 27, 2021. On January 26, 2021, one day before the scheduled hearing, plaintiffs submitted a reply brief that made arguments for the first time based on the December 2020 line-item law. The Court set an expedited briefing schedule for Defendants to respond to plaintiffs' reply brief and for all parties to address additional issues raised by this Court, including the current status of the vaccination effort that had commenced at DOC facilities on January 18, 2021 and how that effort should affect the pending motion. Final submissions were made on February 9, 2021. The Court heard oral argument the next day.

Discussion

I. Legal Standard on Motion for Preliminary Injunction

"A party seeking a preliminary injunction must show that success is likely on the merits; irreparable harm will result from denial of the injunction; and the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party." *Doe v. Worcester Pub. Sch.*, 484 Mass. 598, 601 (2020) (quotation and citations omitted). "In cases in which a public entity is a party, a judge may also weigh the risk of harm to the public interest in considering whether to grant a preliminary injunction" *Id.* (citations omitted). "[T]he movant's likelihood of success is the touchstone of the preliminary injunction inquiry. [I]f the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." *Foster I*, 484 Mass. at 712, quoting *Maine Educ. Ass'n Benefits Trust v. Cioppa*, 695 F.3d 145, 152 (1st Cir. 2012) (additional citations omitted.)

II. Application of the Legal Standard

In its ruling on plaintiffs' first motion for a preliminary injunction, the Supreme Judicial Court ("S. C.") set forth in detail the standards for establishing an Eighth Amendment violation, and their particular applicability to lawsuits against prison officials. See *Foster I*, 484 Mass. at 716-724. For purposes of this motion, two of these standards are of paramount importance. First, an Eighth Amendment claim requires the proponent to establish both an objective element, i.e., that the inmates' living conditions "amount to a serious deprivation[] of basic human needs," *id.* at 717, quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), and a subjective element, i.e., "that prison officials acted or failed to act with deliberate indifference," *id.*, citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Second, the SJC has not held that art. 26 of the Massachusetts Declaration of Rights, which prohibits cruel and unusual punishment, provides greater protections with respect to conditions of confinement than does the Eighth Amendment. See *Foster I*, 484 Mass. at 716. This Court's analysis focuses primarily on DOC, the defendant that has custody of Massachusetts prisoners.

A. Department of Correction

1. Objective element of the Eighth Amendment claim.

Although most DOC inmates have received a first dose of the Moderna COVID-19 vaccine, *see infra* at 5, 11, conditions inside DOC facilities continue to deprive inmates of basic needs and present a significant risk of serious harm. During the week of February 4, 2021 to February 10, 2021, there were 96 active COVID-19 cases among DOC inmates, eight of whom were hospitalized, and 50 active cases among DOC correction officers and other staff.³

³ See Special Master's Weekly Report (2/11/21) in *Committee for Public Counsel Services v. Chief Justice of the Trial Court*, 484 Mass. 431 (2020) ("2/11/21 Special Master's Weekly Report"), available at <https://www.mass.gov/service-details/committee-for-public-counsel-services-v-chief-justice-of-the-trial-court-sjc-12926>.

Moreover, although prisoners are no longer in complete lockdown, measures to prevent the spread of COVID-19 continue to deprive them of pre-pandemic opportunities for recreation, work, education, and other activities. See *infra* at 5-6.

Due to the recent vaccination of inmates and staff discussed below, the Court cannot predict plaintiffs' ultimate likelihood of success on the objective element of their Eighth Amendment claim at a future trial. Further, and perhaps more to the point, plaintiffs' failure to show a likelihood of success on the subjective element of their claim (deliberate indifference by DOC officials) is dispositive of this motion. For these two reasons, the Court has not ruled in this Opinion on the objective element of plaintiffs' Eighth Amendment claim.

2. Subjective element of the Eighth Amendment claim.

In denying plaintiffs' first motion for a preliminary injunction in *Foster I*, the SJC described those measures taken by DOC in the early stages of the pandemic that demonstrated the absence of deliberate indifference:

To combat the spread of COVID-19 as far as possible, the DOC has undertaken a number of measures, set forth in the appointed judge's findings of fact, many of which are stipulated to by the parties. These measures included lockdowns of the facilities; prohibiting all outside visitors; restrictions and self-examination on entry to any facility; isolation of symptomatic inmates and those who have tested positive; requiring staff to stay home for fourteen days if they have any symptoms; mandating that staff wear masks when in contact with inmates; distribution of additional cleaning supplies to all inmates; increased cleaning of frequently touched surfaces; making alcohol-based hand sanitizer available to inmates in numerous facilities; having inmates eat in their cells or housing units rather than at tables in larger groups; and instructions, posters, and information on COVID-19 and its spread, in both Spanish and English. To reduce inmates congregating in close contact with each other, the DOC has eliminated most group programming, work release, and academic and job skills classes, as well as outdoor recreation time and access to gyms and libraries, i.e., any activities where groups of inmates would be together. Over the course of this litigation, the DOC has obtained and distributed PPE to staff and, recently, all inmates. It has required that staff in contact with inmates, and all inmates who leave their cells or dormitories, wear masks at all times. The DOC also recently has instituted some

limited amount of outdoor time for all inmates, in small groups approximately every four days, so that physical distancing can be maintained.

484 Mass. at 721-722.

The January 22, 2021 and February 4, 2021 affidavits of Commissioner Mici establish that during the more than eight months since the SJC issued its decision in *Foster I*, DOC under her leadership has continued to act conscientiously in seeking to prevent COVID-19 infections and responding to them, continuing almost all of the above-noted actions and implementing updated policies and procedures. Actions that have continued include, but are not limited to, restrictions upon entry into DOC facilities while allowing attorney visits (1/22/21 Mici Aff. ¶¶ 17-20)⁴; mask wearing (*id.* ¶ 23); frequent testing including surveillance testing (*id.* ¶¶ 23, 25, 26); informing inmates and staff as to how to prevent infection (*id.* ¶ 25); cleaning and disinfection (*id.* ¶¶ 30-36, 39-41); social distancing (*id.* ¶¶ 37-38, 45), having inmates eat and get their medication in their cells or in small groups (*id.* ¶ 45), and isolation, tracking and treatment of inmates who test positive for COVID-19 or have COVID-19 symptoms (*id.* ¶¶ 56-75). DOC has refined and upgraded these procedures during the pandemic. *See id.* ¶¶ 30-36, 39-41.

More recently, DOC has educated inmates about the benefits of vaccination, and has offered a first dose of the Moderna COVID-19 vaccine to the 94% of all DOC inmates deemed eligible by DOC to receive the vaccine at the time, 71% of whom accepted it. *See* 2/4/21 Mici Aff. ¶¶ 1-6; *see also infra* at 11.

DOC has also modified to some extent the onerous conditions caused by restrictions on movement and social activity resulting from measures to prevent the spread of COVID-19. These modifications are significant because, as the SJC noted in *Foster I*, while the pandemic

⁴ “1/22/21 Mici Aff.” and “2/4/21 Mici Aff.” refer to the January 22, 2021 and February 4, 2021 affidavits of Commissioner Mici. “Plt. Br.” refers to plaintiffs’ brief in support of the pending motion. “DOC Opp. Br.” and “Parole Bd. Opp. Br.” refer respectively to the opposition briefs of defendants DOC and the Parole Board.

continues, the lockdown conditions instituted by DOC to prevent a serious risk of harm themselves risk becoming Eighth Amendment violations. 484 Mass. at 731. DOC ended the full lockdown, and has provided for outdoor time (1/22/21 Mici Aff. ¶¶ 45, 53), new opportunities to earn good time credit (*id.* ¶¶ 47, 51), the resumption of some industrial programs (*id.* ¶ 50), and expanded video access for inmates and their families and friends (*id.* ¶¶ 18-19).⁵

Commissioner Mici has taken personal responsibility for fighting the spread of and responding to COVID-19 infections inside DOC's facilities, as opposed to delegating leadership duties to her subordinates. *See, e.g.*, 1/22/21 Mici Aff. ¶¶ 15, 19, 22-23. In assessing whether DOC has acted with deliberate indifference to prison conditions during the pandemic, the Court places significant weight on Commissioner Mici's personal involvement.

In response to DOC's above-noted evidence of its actions to reduce the spread of COVID-19 inside its facilities and respond to infections, plaintiffs make two overarching arguments. First, plaintiffs argue that despite DOC's best intentions it has frequently failed to implement its policies and protocols, and has not prevented thousands of inmate COVID-19 infections and at least 19 inmate deaths. *See* Plt. Br. at 12-18; FTR recording of 2/10/21 hearing.⁶ Second, plaintiffs argue that DOC has demonstrated deliberate indifference by refusing to employ numerous lawful means to reduce the inmate population, including furloughs, home

⁵ DOC cites a decrease in the number of inmate self-harm incidents and suicide attempts during the first nine months of the pandemic, measured against the same time period in 2019-2020, *see* 1/22/21 Mici Aff. ¶ 55, however plaintiffs cite credible evidence of lapses in DOC physical and mental health treatment, both before and during the pandemic, *see* Plt. Br. at 19-23, and supporting affidavits. The Court further notes that, in evaluating any decrease in adverse inmate events, one must consider the significant overall decrease in inmate population that has occurred during the pandemic. *See* 2/11/21 Special Master's Weekly Report.

⁶ This Court agrees with plaintiffs that good intentions alone are not sufficient, i.e., that prison officials must implement tangible measures to address unsafe conditions and significant risks of serious harm. *See Farmer v. Brennan*, 511 U.S. 825, 829, 847 (1994); *Foster I*, 484 Mass. at 719-720.

confinement, medical and general parole, and maximizing the use of good time credit. *See id.* at 12-18. The Court rejects both arguments.

Alleged lapses in DOC's actions and their consequences.

To support their first argument, i.e., that DOC's efforts have failed, plaintiffs rely on extensive exhibits including, but not limited to, two expert affidavits, Plt. Br., Exhibits at 3-44, an affidavit of the Deputy General Counsel of CPCS's Public Defender Division, *id.* at 46-52, and 38 prisoner affidavits, *id.* at 55-180. Plaintiffs' exhibits combine individual incidents and overall statistics. Evidence of individual incidents supported by prisoner affidavits includes inmates being housed in dorms with nonfunctional sinks, showers and urinals, inmates with COVID-19 symptoms being housed in the general prison population, lapses in mask wearing, and delays in the provision of medical care, including mental health treatment. *See* Plt. Br. at 18-23, and supporting affidavits. Plaintiffs also cite the consequences of DOC's measures to combat the coronavirus, including reduced education, job training and rehabilitation programs, reduced access to recreation, religious services and libraries, and fewer visits by attorneys and family and friends. *See id.* at 23-26, and supporting affidavits. Further, it is undisputed that, even with the roughly 17% reduction in DOC inmate population that has occurred during the pandemic, inmates cannot keep a six-foot distance from each other at all times. As just one example, roughly half of all inmates do not sleep in single cells. *See* 1/22/21 Mici Aff. ¶83.

Although the Court has not made paragraph-by-paragraph credibility findings with regard to the inmate affidavits, the evidentiary record is clear enough for the Court to include that DOC has not achieved 100% compliance with its policies and procedures. The Court fully understands the consequences of any lapses in preventing the spread of a virus that has killed at

least 19 prison inmates and over 15,000 Massachusetts residents.⁷ However, these lapses reflect sporadic mistakes and sporadic lack of sufficient attention to detail, which is far below the standard of deliberate indifference necessary to establish a constitutional violation. *See Estelle*, 429 U.S. at 105-106 (negligence not sufficient to establish constitutional violation).

Statistical evidence

With regard to the statistical evidence of DOC inmate infections and deaths, the parties emphasize the statistics that support their respective arguments. In broad terms, the statistical evidence reveals that the spread and control of COVID-19 inside DOC's facilities has closely paralleled the spread and control of COVID-19 throughout the Commonwealth.⁸ In Spring 2020, COVID-19 cases spiked both throughout Massachusetts and inside DOC facilities. During the summer and early fall months, when COVID-19 infections and deaths declined throughout Massachusetts, COVID-19 infections almost disappeared from DOC facilities. Indeed, between June 1, 2020 and September 23, 2020, a period of almost four months, there were never more than three new inmate infections or three new staff infections in any week. There were also no inmate deaths due to COVID-19 between June 29, 2020, when this information was first reported, and December 2, 2020, a period of more than five months.

The second spike in COVID-19 infections and deaths in DOC facilities during the remainder of 2020 and early 2021 parallels a similar increase throughout Massachusetts and the United States. New COVID-19 infections inside DOC facilities and throughout the Commonwealth peaked in December 2020 and January 2021.

⁷ See 2/11/21 Special Master's Weekly Report; *COVID-19 Response Reporting*, available at <https://www.mass.gov/info-details/covid-19-response-reporting> (accessed Feb. 16, 2021).

⁸ Compare 2/11/21 Special Master's Weekly Report with *COVID-19 Response Reporting*, *supra* at 8, n. 7.

The Executive Branch has prioritized the vaccination of prison and jail inmates. As of February 2, 2021, 94% of all members of the plaintiff class had been offered a first dose of the vaccine, and 71% of all class members who had been offered the vaccine had taken it. *See supra* at 5; *infra* at 11.

In sum, any shortcomings in the actions of DOC officials to combat the COVID-19 pandemic, and any adverse consequences of those actions or inactions, do not establish deliberate indifference by DOC.

DOC's decision not to use certain programs for inmate reduction.

Plaintiffs' second argument in their claim of deliberate indifference by DOC hinges on DOC's decision not to use certain programs to combat the spread of COVID-19 inside prisons by releasing inmates or speeding their release through certain programs. It is essentially undisputed that DOC has interpreted the applicable statutes and regulations as putting numerous limits on its ability to use home confinement, good-time credit and medical parole as methods of reducing the inmate population, and that DOC does not consider furloughs to be good policy. See 1/22/21 Mici Aff. ¶¶ 84-103. The flaw with plaintiffs' second argument is that they wrongly equate DOC's decision not to use certain *programs* with deliberate indifference to inmate *conditions* inside DOC's facilities. Deliberate indifference is the reckless disregard of "a substantial risk of harm," *Foster I*, 484 Mass. at 719, not the non-use of certain programs. The Eighth Amendment does not obligate prison officials to take all possible action available to address harms inside prisons. On the contrary, "[w]here the risk of harm is substantial, but prison officials have undertaken significant steps to try to reduce the harm and protect inmates, courts have concluded that there was no Eighth Amendment liability." *Foster*, 484 Mass. at 720 (footnote and additional citations omitted). DOC stands on firm ground in this regard, because its decisions

hinge on its interpretation of statutes and regulations. See, e.g., 1/22/21 Mici Aff. ¶¶ 85-87; 89-103.

In sum, DOC's decision not to use furloughs, home confinement, medical and general parole or the maximum lawful use of good time credit as methods of inmate reduction does not establish deliberate indifference on its part.

B. Parole Board

The Parole Board has a far more limited role than DOC has in addressing the effects of COVID-19 in the Commonwealth's prisons and jails because the Parole Board does not have custody of prison and jail inmates. Cf. *Pope v. Massachusetts Parole Board*, No. 20-P-1389 (Mass. App. Ct. Feb. 8, 2021) (Rule 1:28 opinion) (in rejecting plaintiff's Eighth Amendment claim, "the [Superior Court] judge rightly observed that, to the extent the plaintiff's current conditions of confinement form the basis for his demand for release, he should have named his custodian or the Department of Correction -- and not the board, who is not responsible for those conditions -- as the defendant in his civil action.") However, the SJC in *Foster v. Commissioner of Correction, et. al*, 484 Mass. 1059 (2020) (*Foster II*) ruled that plaintiffs' claim against the Parole Board survived a motion to dismiss. 484 Mass. at 1062-1063. Therefore, the Court must consider whether the Parole Board has shown deliberate indifference to conditions inside DOC's facilities.

Like DOC, the Parole Board argues that the applicable statutes and regulations limit the use of certain programs (here, parole) as a means of reducing the inmate population to combat COVID-19. See Parole Bd. Opp. Br at 4-11. Within its perceived legal limits, the Parole Board has made numerous adjustments in its operations during the pandemic, including but not limited to remote parole hearings, expediting certain types of hearings, and expanding living

arrangements for prospective parolees through contractual arrangements. *See id.* at 8, 12-14. The Parole Board also considers the impact of COVID-19 in individual parole decisions. *See* FTR recording of hearing on 2/10/21. These actions are sufficient to withstand a finding of deliberate indifference on the part of the Parole Board.

C. Vaccinations

As of February 2, 2021, 94% of all DOC inmates had been offered a first dose of the Moderna COVID-19 vaccine, and 71% of those who had been offered the vaccine accepted it. *See supra* at 5. The remaining 6% of all inmates were not eligible to receive the vaccine, because they were currently infected with COVID-19, within 10 days of a positive test result, symptomatic, allergic to vaccine ingredients, pregnant or nursing, or had tested positive and received plasma within 90 days. *See* 2/4/21 Mici Aff. ¶ 6. Hopefully, vaccination of inmates and staff will lead to dramatically improved conditions inside Massachusetts prisons and jails, but this remains to be seen.⁹

D. The December 2020 Line-item Law

On December 28, 2020, over Governor Baker's veto, the Legislature enacted a line-item law that imposed requirements on DOC during the COVID-19 pandemic. During oral argument on the pending motion, plaintiffs and DOC expressed dramatically different views of the law's import. *See* FTR recording of hearing on 2/10/21. This Court has accepted DOC's argument that statutes which have been in effect throughout the pandemic have limited its ability to use certain

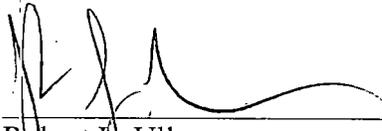
⁹ In contrast to inmate vaccination rates, vaccination rates of DOC correction officers and other staff are currently shrouded in secrecy. DOC reports that only 49% of its employees who were offered the vaccine at DOC facilities accepted it there, but it does not know how many employees who refused the vaccine have accepted it at some other location. *See* FTR record of 2/10/21 hearing; Betancourt, *DOC accused of "deliberate indifference" to prisoners*, Commonwealth (February 10, 2021). DOC cites privacy concerns for its inability to ascertain overall vaccination rates of correction officers and staff. *Id.*

programs to decrease the inmate population. Plaintiffs should have an opportunity establish that the December 2020 line-item law changes this legal landscape and gives them a private cause of action. Therefore, plaintiffs may move on an expedited basis for leave of court to amend their Complaint to assert new claims under the law, as set forth below in the Conclusion and Order.

Conclusion and Order

Plaintiffs' Emergency Motion for Preliminary Injunction (Docket # 83) is **DENIED**. Plaintiffs may move on an expedited basis for leave of court to amend their Complaint to assert new claims under the line-item law enacted over Governor's Baker's veto on December 28, 2020. Upon the filing of any such motion, Defendants shall have eight court days to respond, and thereafter plaintiffs shall have four court days to file a reply of no more than 10 pages.

Dated: February 17, 2021



Robert L. Ullmann
Justice of the Superior Court