

CONSENT ORDER ON PARTIAL SETTLEMENT AGREEMENT

Named Plaintiffs (alternatively, “Plaintiffs”), by and on their own behalf and on behalf of a class of similarly situated persons (the “Settlement Class”), filed a complaint against Dean Williams, in his official capacity as the Executive Director of the Colorado Department of Corrections (referred to herein as “CDOC”).

This matter is before the Court on a Joint Motion for Preliminary Approval of the Consent Decree and Settlement Class.

This Class Action Consent Order on Partial Settlement Agreement (“Consent Order”) is made this ___ day of _____ 20___, and agreed to by the Named Plaintiffs, by and on behalf of a class of similarly situated persons as defined in Paragraph II, below, executed between Named Plaintiffs and CDOC in connection with the Release and Settlement Agreement, executed by the parties on _____.

RECITALS

Whereas, on May 28, 2020, Plaintiffs filed this putative class action under the Colorado Constitution on behalf of themselves and all other proposed class members confined in the Colorado Department of Corrections, alleging violations of rights under Article II, Section 20 of the Colorado Constitution;

Whereas, on May 28, 2020, Plaintiffs filed a Motion for Preliminary Injunction seeking immediate relief from alleged unconstitutional and otherwise illegal conditions of confinement;

Whereas the parties have engaged in good-faith negotiations;

Whereas CDOC contends that it has worked diligently with medical experts and public health officials throughout this pandemic to best protect employees and inmates, while also balancing public safety needs; and

Whereas, in negotiating the Consent Decree and Settlement Agreement, CDOC welcomed the opportunity to share information with Plaintiffs to show the operational changes and diligent work taken to mitigate the spread of this virus, which include: adoption of a pandemic response plan consistent with CDC guidance, adoption of COVID-19 policies and procedures, which CDOC will continue to follow as written or updated, enhanced screening and testing for COVID-19, increased hygiene and sanitation, limitation of inmate and employee movements and increased separation of inmates; and

Whereas, CDOC contends that many of the provisions of this Consent Decree were already implemented by CDOC and include: conducting a large scale prevalence testing program; providing all inmates and staff with masks and replacing those masks as needed; increasing the already robust cleaning protocols and providing additional cleaning supplies to the inmate population; engaging in extensive medical records review to assess vulnerable populations and prioritize their access to single cells; conducting audits of facilities to ensure compliance with COVID-19 prevention policy and protocols and creating a parole pilot program to increase efficiencies; and

Whereas, Plaintiffs contend that the response to the pandemic in Colorado prisons has violated the Colorado Constitution and that many of the provisions herein had not been implemented or have only been partially or sporadically implemented, and/or only implemented since the litigation was filed;

Whereas, CDOC and Plaintiffs have reached a Settlement Agreement on the issues presently before the Court as between them¹, as set forth below; and

Whereas, on careful review and consideration of the proposed Consent Decree and Settlement Agreement, the Court finds the provisions to be fair, adequate, and reasonable resolution of the issues addressed therein, and finds them to be sufficient to protect the legal interests of the Settlement Class; and

Whereas, the following Order is based on a negotiated settlement between CDOC and the Settlement Class and is not to be construed as an admission of liability of any party;

IT IS ORDERED, this ____ day of _____, 2020, that the following Settlement Agreement and Consent Decree is approved and effective as of this date.

This Order will remain in full force and effect until the earliest of the following occur: (1) the parties mutually agree and stipulate to the termination of the Order; (2) the Court terminates it after a showing of good cause by a preponderance of the evidence at an evidentiary hearing by either party; or (3) the WHO or CDC declare that Colorado, the United States or globally is in the post-pandemic phase for COVID-19. If the Colorado Governor rescinds the March 11, 2020 Executive Order D 2020 003 Declaring a Disaster Emergency Due to the Presence of Coronavirus Disease 2019 and subsequent orders extending the same or

¹ While the claims against CDOC are resolved through this Consent Decree and separate Release and Settlement Agreement, Plaintiffs' claims against Defendant Governor Polis, who is not a party to this Agreement, continue based on the amended complaint that Plaintiffs are also filing on November 13, 2020.

the order expires on its terms, there shall be a presumption that this Order will terminate absent a showing of good cause for its continuation by either party.

I. DEFINITIONS:

- A. Phase III Operations: Any correctional facility that has a staff member or inmate test positive will immediately be reviewed by prison operations, clinical services and human resources to establish if Phase III operations are warranted. Phase III operations mean that inmates in quarantined and isolated areas will remain in their cells while on Phase III outside of opportunities to shower. During this time, the ability to use phones and video visitation may be limited given the use of shared equipment and could potentially be a spread location. Outdoor recreation, phone and video visitation will be made available in quarantined units to the extent possible once medical experts believe it is safe to do so and, depending on the extent of the outbreak, in the individual facilities and on staffing allowances. The inmates will have access to their normal personal property during Phase III operations and will be able to send and receive mail. Facilities will be continuously reviewed and monitored to assess if moving back to Phase II protocol is warranted. Phase III may look different at each facility based on the scope of the infection, physical plant and operational needs.
- B. Isolation/Quarantine: Isolation and quarantine means separation of inmates because they: (i) have a positive COVID-19 test; (ii) have symptoms of COVID-19; (iii) are getting ill and think they might have COVID-19, or (iv) separates inmates and restricts their movement if they may have been exposed to COVID-19 to see if they become sick and prevent exposing others.
- C. Post-Pandemic Phase: refers to a WHO declaration of the post-pandemic phase of COVID-19 and will be defined consistent with the WHO's declaration and definition.

II. CLASS CERTIFICATION

- A. By separate Order, the Settlement Class has been certified pursuant to C.R.C.P. 23(b)(2) and is defined as the following:

All current and future persons incarcerated by CDOC who might be at moderate to high risk of serious illness or death from COVID-19 because they:

- 1. are age sixty (60) years or older; or

2. have one or more of the underlying medical conditions recognized by the CDC or WHO as causing a person to be at moderate to high risk of death or serious illness from COVID-19, which as of the date of this order include the following:
 - i. Obesity - BMI 30 kg/m² or higher; cancer; chronic kidney disease; Immunocompromised state due to solid organ transplant; chronic lung disease; chronic obstructive pulmonary disease (COPD); emphysema; chronic bronchitis; Diabetes - Type I or II; Cardiovascular disease - including Heart Failure, Coronary Artery Disease, Cardiomyopathies, Pulmonary Hypertension; Sickle Cell Disease; or
 - ii. Asthma (moderate to severe); Cerebrovascular Disease; Cystic fibrosis; Hypertension; Immunocompromised state from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids or other immune weakening medicines; Neurologic conditions such as dementia; Liver disease; Thalassemia; Idiopathic pulmonary fibrosis or other chronic conditions associated with impaired lung function; or
3. are pregnant.

III. SUBSTANTIVE PROVISIONS

A. Independent Expert Consultation

1. The parties hereto shall mutually agree to an Independent Expert Consultant (“IEC”) to advise on policies, practices and precautions necessary to protect the Class;
2. The IEC shall provide guidance on the following topics:
 - i. The definition of medically vulnerable to COVID-19;
 - ii. The triaging and ranking of medically vulnerable inmates so as to create a priority list for single celling and other conditions of confinement;
 - iii. COVID-19 treatment protocols for inmates who test positive for COVID-19 or who are presumed to be positive for COVID-19; and,
 - iv. Testing protocols for COVID-19, including the definition of “symptomatic.”

3. CDOC will pay the cost of the IEC to complete the tasks described in Paragraph (III)(A)(2) up to one hundred thousand dollars (\$100,000). Any costs for IEC to perform tasks agreed to under this Consent Decree above that amount (\$100,000), shall be divided equally between CDOC and counsel for the Settlement Class. To the extent counsel for the Settlement Class (“Settlement Class Counsel”), seeks additional guidance or information from the IEC not required pursuant to this Consent Order, including the IEC’s attendance at any audit, Settlement Class Counsel shall bear the IEC’s costs and fees solely.
4. Any information provided by the IEC to one party must be shared to all parties regardless of who requested or paid for the IEC’s time associated with the information. Counsel to the parties agree that they will not communicate *ex parte* with the IEC, unless the opposing party’s counsel gives prior written consent to an *ex parte* communication with the IEC.
5. The IEC shall be selected by mutual agreement by the parties and their counsel by December 11, 2020, unless a later date is mutually agreed to by the parties.
6. CDOC will provide Settlement Class Counsel a copy of all policies and protocols adopted or revised based on the guidance from the IEC.

B. Provisions Related to the Identification of Medically Vulnerable Inmates

1. CDOC shall continue to timely identify Medically Vulnerable Inmates and will update its list of Medically Vulnerable Inmates with input taken in good faith from the IEC pursuant to Paragraph (III)(A)(2).
2. CDOC will continue to identify groups by risk level with input taken in good faith from the IEC pursuant to Paragraph (III)(A)(2).
3. Medically Vulnerable Inmates shall be prioritized by their risk level to be offered single cells within their unit or facility.

4. Nothing in this Consent Decree will require CDOC to move an inmate from one facility to another because of available single cells, given the wide acceptance of the fact that the movement of prisoners to new units or facilities increases the risk of COVID-19 transmission.
5. Classification of high risk or medically vulnerable does not guarantee an inmate any specific treatment but will be used as a basis to prioritize limited resources such as single cells, with the understanding that in some cases, due to availability of cells, medically vulnerable inmates may be celled together.
6. Settlement Class Counsel shall be provided with an updated list of medically vulnerable inmates by facility as classified by their risk classification level after guidance by the IEC. To the extent the list changes, an updated list with the same information shall be given to Settlement Class Counsel quarterly. CDOC will also provide Settlement Class Counsel a list of single-cell occupancy percentage based on high-risk classification quarterly. Both the lists detailing medically vulnerable inmates and single-cell occupancy percentage will be marked CONFIDENTIAL and treated as such under the Protective Order.

C. Provisions Related to Personal Hygiene, Personal Protective Equipment, Cleaning, and Disinfecting

1. CDOC shall provide inmates two free bars of soap on a weekly basis.
2. Common areas and recreational equipment will be sanitized pursuant to established schedules and according to operational phase.
3. All inmates shall have reasonable access to the following cleaning agents and materials to clean their cells and sleeping areas, in addition to the scheduling cleaning times, by checking out a cleaning caddie during open pod time, which contains:
 - i. Virex or a similar CDC-approved disinfectant;
 - ii. Stride or a similar general-purpose cleaner; and
 - iii. Clean rags.

4. CDOC shall provide inmates with two free masks at all times and the ability to launder those masks through the laundry service or have access to materials, referenced in paragraph (III)(C)(3) above, to clean the masks. If a mask wears out, becomes damaged, or is lost, the person shall have the ability to obtain a replacement mask such that they have two masks at all times.
5. CDOC will require staff to use masks consistent with current CDOC guidance on mask use embodied in Dr. Randolph Maul's (Chief Medical Officer of CDOC) October 2020 memorandum, as updated or embodied in CDOC policy.

D. Provisions Related to Testing for COVID-19

1. All symptomatic inmates and staff shall be tested for COVID-19;
 - i. The definition of symptomatic shall be defined in consultation with the IEC. Symptoms that are self-reported shall not be disregarded because they are solely self-reported or subjective rather than objectively measurable.
2. All inmates or staff who are exposed to confirmed or presumptive positives shall be tested.
3. Once there is a positive within a given correctional facility, prevalence testing shall be conducted.
4. All inmates that test positive will be advised of such result in as timely a manner as possible, with consideration made for any staffing fluctuations. Inmates that are not advised of a positive result should assume they are negative but may submit a kite to clinical services for a specific response.

E. Provisions Related to the Conditions of Inmates who Have Tested Positive for COVID-19, Are under Quarantine for Suspected Infection of the Virus, or who Are Housed in a Facility on Phase III Restrictions, as defined by CDOC's pandemic response plan

1. Cells or housing used for medical isolation and quarantine will meet American Correctional Association ("ACA") standards for

habitability according to its cell type and are not intended to be punitive.

2. It is the policy of CDOC not to mingle people who have tested positive for COVID-19 until they are no longer considered contagious, with people who have not tested positive, whenever possible.
3. Inmates in isolation or quarantine because of contracting or exposure to COVID-19 shall have access to personal items and property, whenever possible.
4. When a facility is on Phase III lockdown, CDOC will – after completing testing necessary to isolate the COVID-19 positive inmates, contact tracing and dividing inmates into cohort groups – provide inmates reasonable access to: outdoor recreation, communal spaces, facilities, phones, showers, and legal materials, to the extent possible.
 - i. It shall be the goal of CDOC to provide inmates that are housed in a facility that is on Phase III restrictions, but that are not COVID-19 positive or contagious, access to facilities described in Paragraph (III)(E)(4) within five (5) weeks of Phase III restrictions being first implemented, except where a facility is experiencing a significant staffing shortage;
 - ii. The parties expressly recognize that CDOC's inability to provide inmates the access to facilities described in Paragraph (III)(E)(4) within five (5) weeks after first implementing Phase III restrictions is not by itself evidence of bad faith conduct by CDOC, if CDOC is experiencing a significant staffing shortage and is working in good faith to remedy that staffing shortage.

F. Provisions Related to Medical Treatment of COVID-19 Positive Inmates

1. CDOC shall develop, with input from the IEC, a COVID-19 specific treatment protocol instructing medical staff on the appropriate protocols for the diagnosis, treatment, and monitoring of COVID-19 current positive inmates.

2. Providers, which include Physicians, Physician Assistants, and Nurse Practitioners, shall exercise their independent medical judgment to treat individual inmates for COVID-19.
3. Medical co-pays shall be waived for inmates for COVID-19 testing and treatment, and for evaluation of potential COVID-19 symptoms, even if the person turns out not to have COVID-19 after testing. All inmates shall be advised regarding this waiver of co-pays.

G. Provisions Related to Complaints and Grievances Under this Agreement

1. At each CDOC facility, a point person shall be appointed to receive and respond to certain COVID-19 related problems. This person shall be empowered to address complaints related to the following areas:
 - i. Access to masks;
 - ii. Access to soap;
 - iii. Access to cleaning materials;
 - iv. Access to recreation or facilities during Phase III restrictions are implemented pursuant to Paragraph (III)(E) above.
2. Any inmate who wants to know if they are considered medically vulnerable or their classification level of medically vulnerable may employ the grievance procedure enumerated in AR 850-04.
 - i. The inmate may submit a Step 1 grievance which shall be identified as a clinical grievance. They shall receive a response identifying whether they are considered medically vulnerable, and if so, what risk level they are considered. With this response, the inmates shall also receive a form definition of medically vulnerable and high-risk classification.
 - ii. For a Step 2 grievance, if the inmate contests or disputes their classification (or failure to be classified) as medically vulnerable and/or they dispute their high-risk classification, they may submit a Step 2 grievance for additional review. To the extent possible, CDOC will provide a grievance response tailored to the inmate's specific medical records. CDOC's ability to provide a tailored grievance response will be dependent on the

substance of the grievance, volume of pending grievances, CDOC staffing capacity and demands on CDOC clinical staff based on COVID-19 issues.

H. Provisions Related to Providing Continuous COVID-19 Data

1. CDOC shall continue to provide to Settlement Class Counsel the following information weekly through CDOC's publicly available COVID-19 dashboard:
 - i. Number of tests conducted in aggregate and by facility;
 - ii. Number of positives tests among prisoners in aggregate and by facility;
 - iii. Number of active COVID-19 cases among inmates in aggregate and by facility; and
 - iv. Number of staff who are currently on leave, positive or active due to possible exposure or symptoms of COVID-19 in aggregate;
 - v. Number of deaths of inmates who demonstrated symptoms or tested positive for COVID-19. Note, only the appropriate Coroner's Office can determine the official cause of death; and
 - vi. Current facility operational status.
2. Nothing herein shall alter the rights of the Settlement Class to obtain information through CORA, discovery, subpoena or other lawful process.

I. Monitoring and Continuing jurisdiction

1. If Settlement Class Counsel creates a 1-800 number for members of the Settlement Class to contact them, CDOC agrees to permit inmate access to this number, at no charge, and that this number will not be recorded.
 - i. In the event that telephone access is restricted due to operational phase, CDOC shall continue to provide inmates access to telephones to make attorney phone calls, report PREA incidents and contact the established 1-800 number identified in Paragraph (III)(I)(1). Plaintiffs' counsel expressly agrees that such communications will be limited to the terms of and enforcement of this Consent Decree and terminate any

other inquiries, including any potential individual claim related to COVID-19, and direct the inmate to utilize the usual attorney-client communication channels;

- ii. The 1-800 number will be terminated upon expiration of this Consent Decree;
 - iii. Settlement Class Counsel will pay for the creation, maintenance and all other costs associated with this 1-800 number.
2. Settlement Class Counsel shall have the ability to attend quarterly audits and report to all parties his or her observations from the site visits.
- i. During these visits, Settlement Class Counsel may speak to inmates regarding COVID-19 conditions and issues related to this Consent Decree, so long as it does not unduly delay the audit;
 - ii. Settlement Class Counsel agrees communications with any inmates shall be designed to monitor the ongoing implementation of the Consent Decree and shall not relate to an individual's claims related to COVID-19 or another issues;
 - iii. CDOC representatives will have the right to terminate a conversation and/or move the audit forward, if Settlement Class Counsel's communication with an inmate is unduly delaying the audit;
 - iv. Settlement Class Counsel agree that they will not interview CDOC employees and communications with CDOC employees will be limited to as necessary to coordinate and complete the audit;
 - v. CDOC will provide their audit reports to Settlement Class Counsel, which will be marked CONFIDENTIAL and treated as such under the Protective Order; and
 - vi. If Settlement Class Counsel desires to have the IEC attend an audit or review any audit reports, Settlement Class Counsel will solely pay for the IEC's fees and costs associated with attending an audit or reviewing an audit report.

J. Provisions Related to Parole and Additional Case Managers

1. The Division of Adult Parole will create a parole pilot program, which involves the following:
 - i. The Division of Adult Parole will refocus duties of Pre-Release Specialists (FTE 21) and Facility Community Parole Officers (FTE 20). The Unit's refocus shall include:
 - a) The completion of a release plan for each person that identifies all stabilizing factors prior to release. This will include partnerships with community providers;
 - b) Active management and reduction of the Tabled List, by facility;
 - c) Actively communicating with the parole board about the feasibility of some table requirements, and rapid staffing of anyone who does not have a place to go upon release; and
 - d) Identification of substance use needs post release and facilitate more active referrals.
2. CDOC will advise the parole board where an inmate's eligibility for parole is delayed through no fault of his or her own because of inability to complete programming or classes due to COVID-19. CDOC will also evaluate whether the inmate can complete the programming or class in an alternative manner and, if appropriate and in CDOC's discretion, will include a letter in the parole packet asking that the program or class be allowed to be completed in an alternative manner while on parole.
3. The parties understand that the decision whether to grant parole rests solely within the discretion of the parole board.

K. Provisions regarding education

1. Settlement Class Counsel and counsel for CDOC shall collaborate on a notice to all inmates and staff regarding this agreement and the protocols and procedures of CDOC.
2. Inmates will be provided written guidance, in English and Spanish, on how to protect themselves from COVID-19, reduce

COVID-19 transmission, including to wash hands, wear masks, social distance where possible, and to report symptoms.

IV. Enforcement and Modifications

A. The parties agree and consent to the jurisdiction of this Court over any proceedings seeking to enforce or modify the terms of this Consent Decree.

B. Informal Dispute Resolution:

1. If a Plaintiff or CDOC believes that a dispute exists relating to the performance or interpretation of this Consent Decree, he/she/it shall notify the other party in writing, describing the dispute and clearly identifying that they are invoking the dispute resolution process.
2. The other party shall respond in writing to such notice within fourteen (14) business days of receipt of the notice.
3. Within fourteen (14) business days of receipt of the response described in the previous Subparagraph, counsel for both parties shall meet and confer by telephone or in person and attempt to resolve the issue informally.
4. In the event that Plaintiffs are notified of an issue posing an immediate serious risk to health that requires resolution in a shorter time-frame in order to protect the health of Plaintiffs or class members, the Defendants shall still be given written notification and the parties will engage in good-faith efforts to resolve the matter prior to Plaintiffs seeking court intervention.
5. Only if the parties are unable to resolve the dispute through the informal process described in this Paragraph (IV)(B) may the dispute be submitted for judicial resolution.

C. Resolution by the Court:

1. If, after completing the Informal Dispute Resolution process described in Paragraph (IV)(B), either party believes that the other has breached this Consent Decree, that party may submit the dispute for resolution by Judge Kandace Gerdes or, if Judge Gerdes is unavailable, to another judge in the District Court for the City and County of Denver.

2. In the event that the Court finds that a party has not complied with a material provision of this Order, the Court shall have the power to order specific performance of the provision and/or any other relief the Court deems necessary to ensure compliance.
3. In the event that the Court finds that a party's position is without merit, vexatious or frivolous, then the opposing party shall be entitled to their or its attorneys' fees and costs in bringing or defending the dispute.

D. Changes to CDOC policy and procedures:

1. The parties further recognize that CDOC maintains its discretion to implement any and all policy and procedures in responding to emergency situations related to the COVID-19 pandemic taking into consideration legitimate penological interests, constitutional requirements, and its overarching goals and objectives in preventing the spread of COVID-19. CDOC will act in good faith when exercising its discretion related to this Consent Decree. Nothing in this Consent Decree limits CDOC's discretion to respond as it deems necessary. In such situations, CDOC will give Settlement Class Counsel notice of the change as soon as practicable, but within fourteen (14) days of any material alteration to any policy enumerated pursuant to Paragraph (III)(A)(2), the provisions of this Consent Decree, or written policies and procedures for managing COVID-19. The Settlement Class Counsel retains the ability to challenge use of such discretion if the Settlement Class Counsel has reason to believe that CDOC has not exercised its discretion in good faith.
2. Given the evolving understanding of COVID-19, the changing access to resources and treatments, and the appropriate responses to it, CDOC will continue to take and incorporate input and updated guidance from the CDC, the WHO and the CDPHE, in good faith.

E. Other Changes to the Consent Decree: In addition to CDOC's ability to make changes in its discretion outlined in Paragraph (D) above, the parties may mutually agree to changes to this Consent Decree at any time. If the parties are able to agree on a necessary change to these protocols, they shall present any such changes to the Court for approval by joint motion.

V. **Confidentiality**

- A. Any information disclosed, shared or obtained by any party in connection with this Consent Decree and marked CONFIDENTIAL or Private Medical Information is subject to the Stipulated Protective Order dated June 12, 2020.

- B. Settlement Class Counsel expressly represent that communications with inmates via the 1-800 number and/or communications with inmates during audits referenced in Paragraph (III)(I) will be limited to the terms of and enforcement of this Consent Decree and terminate any other inquiries, including any inquiries regarding any potential individual claim related to COVID-19, and direct the inmate to utilize the usual attorney-client communication channels.

So ordered this ____ day of _____, 2020

The Honorable Kandace C. Gerdes