



May 8, 2020

Jennifer Jones Austin, Chair
Margaret Egan, Executive Director
Members of the Board of Correction
New York City Board of Correction
1 Centre Street, Rm. 2213
New York, NY 10007
Via email

Re: NYC Jail Conditions During the COVID-19 Pandemic

Dear Chair Jones Austin, Executive Director Egan, and Members of the Board,

We hope this letter finds you and your families healthy and safe. We write today as representatives of public defender offices across New York City, united in our grave concern for the people being held in our city jails during the current public health crisis. As advocates, we rely on the Board of Correction (“the Board” or “BOC”) to act in its capacity as an oversight body; to actively monitor the conditions of the jails; to inform the public of any deviations from the Minimum Standards it finds; and to work with the Department of Correction (“the Department” or “DOC”), Correctional Health Services (“CHS”), and stakeholders to ensure that the Minimum Standards are upheld. These responsibilities are even more critical during this public health crisis, especially because the Board has unique access to information about conditions within DOC facilities. In this moment, our clients’ health and well-being depend heavily on whether courts, prosecutors, and other government actors have *accurate* information not just about DOC and CHS policies, but whether those policies are being implemented effectively, if at all. While we very much appreciate the efforts that the Board has made to keep the public abreast of its findings relating to the prevalence of COVID-19 in DOC facilities, and understand that we are all working against unprecedented challenges, we believe that more can be done.

As many of us expressed in submissions to the Board, we were dismayed to hear that the Board had both received variance requests from CHS without posting them and intended to vote on

those requests before receiving public input. Although the Board ultimately allowed public comments before voting it was only after several organizations and individuals objected. We write now to impress upon you the importance of continuing to involve advocates and the general public in your process, because decisions about how to respond to the COVID-19 pandemic *must be informed by those who are directly impacted by those decisions*. We hope that going forward, the Board will contribute to our collective efforts to protect New York from this pandemic by making the process and information more transparent.

The rate of infection in DOC facilities is alarming for both people in custody and staff.[1] We have now seen the deaths of at least three people in custody and eleven DOC staff members. We know that at least 1,692 people in custody and staff have been infected as of May 3, and we know that the actual total is even higher than the reported numbers because DOC and CHS have failed to report the cumulative number of incarcerated people who have tested positive. We know these numbers in large part because of the Board's work in collecting the information and publishing it. But our clients continue to call us in overwhelming numbers—expressing a fear that pervades the jails and conveying troubling reports about the risks of exposure to the virus and the inaccessibility of necessary medical and mental health care. We now ask for your help in obtaining a more complete and nuanced picture of the crisis in New York City jails. To that end, we ask that the Board:

1. Monitor the creation and implementation of DOC and CHS policies responding to the COVID-19 crisis to ensure that incarcerated persons are provided with adequate and appropriate medical and mental health care.

Over the past eight weeks, we have grown increasingly alarmed about the ways in which DOC policies and practices fail to protect our clients from COVID-19. We have also seen drastic changes to the way CHS responds to people with medical, mental health and substance use needs, including those unrelated to the current crisis. We understand that DOC and CHS need not always seek a variance where they do not believe their policy requires a departure from the Minimum Standards, but we believe that the recent changes in services place our clients' lives at risk. We therefore believe it is imperative that the Board review recent changes in DOC and CHS policies and procedures—including changes to sick call and psychiatric assessments—and issue a report on whether they have placed those in custody at increased risk of illness and death.

A. Accessibility of Medical and Mental Health Treatment

In March, CHS announced that medical care would be accessible through “sick call triage”, whereby people in custody could “directly call CHS nurses about their concerns.”[2] This has not worked in practice. Our clients report that phone lines are not answered, there is no way to

leave a message, and for those able to report concerns, little or no follow up with medical staff occurs. This is a particular problem at AMKC, where we have heard that the clinic remains completely unstaffed and people at that facility rely entirely on the phone system to get any help at all. Our clients report that mental health treatment is likewise plagued by these issues, as clients must utilize the telehealth system unless they are housed in a Mental Observation or PACE unit where staff are onsite. Clients repeatedly tell us they *cannot get access to a clinician* through this system.

Further, we know from the variance requests approved on April 14, 2020 that those individuals with mental illnesses who once would have been reassessed psychiatrically every two weeks will now only have that opportunity every eight weeks. Despite the fact that the current pandemic has created widespread fear and anxiety among incarcerated persons, especially the large numbers of those with chronic illness and mental health conditions, it now takes days, sometimes weeks, of efforts by our clients and their advocates before they are able to talk to someone from mental health. In some particularly concerning circumstances, we have heard from clients who are *actively suicidal* (and thus have been identified by CHS as taking priority) being denied care for days. Moreover, clients are reporting that medication distribution has been intermittent or interrupted in several facilities, meaning that they are not able to comply with their assigned medication program and thus face even heightened risk. We ask that the Board seek information about the efficacy of the new telehealth system and report those findings to the public.

B. Substance Use Treatment

Equally concerning is the reduced commitment to provide consistent substance abuse treatment. It is our understanding that there is no longer any option to participate in substance abuse counseling, as all groups have stopped meeting. We further understand that the critical service of medication-assisted treatment (“MAT”) administered through the KEEP program is functioning at a reduced capacity, which has resulted in inconsistent access to MAT for anyone who was not already receiving methadone or buprenorphine in the community. Even more distressingly, CHS does not admit that detox services have been interrupted: indeed, we learned of the interruptions only after a client of The Bronx Defenders was denied detox support for several days while being held in intake. Though we were recently told that new admissions who did not enter custody on MAT may once again participate in KEEP, the inconsistent administration of this lifesaving treatment, and the fact that there was no notification when the treatment was suspended, indicates that the Board must be proactive in seeking information about the provision of substance abuse treatment during this pandemic.

C. Personal Protective Equipment (PPE) and Sanitation

We continue to hear reports that many of our clients do not have access to masks, despite DOC's claims that they have distributed 200,000 N95 masks. Those who have a mask report that they wear the same dirty mask for weeks at a time because they are not provided new masks, thus rendering them ineffective against infection. We hear the same about gloves. Individuals who perform sanitation services in the housing units report that they must use the same pair of gloves for weeks. Our clients also report that staff are not consistently wearing masks. Finally, despite reassurances from DOC, we continue to hear reports of shortages of soap and cleaning supplies. Clients also tell us that facilities—including common areas posing particular risk of transmission, like dayroom benches and phones—are not being sanitized regularly, and certainly not consistent with guidance from the Centers for Disease Control and Prevention regarding Correctional and Detention Facilities.[3] Although there is no Minimum Standard for the provision of PPE in the jails, existing standards on access to hygiene items and health care as well as sanitary surroundings provide sufficient basis for the Board to investigate and report on these issues.

D. Population Density

Our clients consistently report that they are unable to practice adequate social distancing in both dorm and single cell units. It is our understanding that most dormitories in DOC have a capacity between 30 and 60 people, although 50 is the most common maximum capacity. Beds in these units are in one room, and are spaced less than six feet apart. People housed in dorms must share sinks, toilets, showers, phones, tables and dayroom benches. And even people in single-cell units must leave the cell to use shared showers, go to the clinic, use a shared phone, or perform a job assignment. Meals are prepared and delivered from other parts of the jail by incarcerated people who live in other housing areas. The cell units typically have narrow hallways, forcing people to walk within 6 feet of other occupied cells whenever they leave their cell. Though we understand that the Department has made an effort to reduce the population in some dorm units, there is a public health basis to believe that social distancing, even at significantly reduced capacity, is virtually impossible due to the physical realities of the shared spaces in the dorms and the difficulty of adequately sanitizing a space inhabited by a constantly rotating population of incarcerated people and staff.

We believe the Board should obtain information about housing density in each housing area to assess the results of DOC's asserted efforts to reduce the population in dorm units, and issue a report on whether the current housing utilization is safe to prevent transmission of COVID-19.

E. Movement

While individuals in New York City, and much of the world, are being advised to shelter in place and limit their movement amongst other people, we continue to hear reports of how the movement practices within the Department pose increased risks of exposure to the virus. These include:

- People in DOC custody are moved around constantly in response to developments within a housing area.
- Clients who have confirmed or suspected cases of COVID-19 report being moved to two or three different housing areas by correctional officers.
- Correction officers move between and among quarantined housing areas while not wearing proper protective gear, potentially spreading the virus.
- Transgender and gender non-conforming (TGNC) individuals, who often experience frequent movement between housing areas and facilities, are at particular risk because it is common for TGNC individuals to be initially housed incorrectly and subsequently moved to another facility more aligned with their gender identity. Additionally, when TGNC people need to be removed from the unit they are housed in, DOC will move them to an entirely new facility, not aligned with their gender identity, instead of moving them to a different housing in the facility they are in. This is problematic because every transfer involves a stop at “intake,” and exposure to even more staff and incarcerated persons.

The Board should request DOC procedures concerning the movement of individuals during this crisis, evaluate whether they can be improved to minimize movement and the transmission of the virus, and report those findings to the public.

F. Disciplinary Hearings

More than ever before, our clients report being placed in punitive segregation without notification that they had received a ticket. They are denied the opportunity to participate in a hearing, and their rights to due process are being compromised in ways that are unacceptable no matter what the circumstances may be. The Board should audit alleged refusals to attend disciplinary hearings, speak with people in custody who complain of due process violations, and report those findings to the public.

2. Request and publicly report additional information about the conditions in the New York City jails since the COVID-19 outbreak.

We very much appreciate and recognize the value of the Board's daily report regarding COVID-19 in the jails. We especially appreciate that additional categories of information have been added to these reports since you began issuing them. However, we believe even broader data gathering and information sharing by the Board is fundamentally necessary to both serve a great public interest while also improving our ability to advocate for our clients. We ask that the Board obtain and publish the following data:

- How many people have been tested overall?
- Who is administering the tests?
- What are the conditions under which tests are administered?
- What types and brands of tests are being administered?
- What lab or medical entity is analyzing the tests?
- What is the cumulative number of people in custody who have tested positive?
- What is the positive test rate compared to that number in the community?
- How many people in custody are being tested vs. testing of staff?
- What is the specific criteria used to determine who (both staff and incarcerated persons) is tested? Are asymptomatic people being tested? If not, why not? We are told that there is no shortage of tests and medical experts note that transmission is highly prevalent among both asymptomatic and pre-symptomatic people.
- What is the number of DOC staff (i.e. not just CHS staff) who are out sick or under observation?

Additionally, we are aware that the Board has begun investigating conditions inside the jails in real time via surveillance technology. We ask the Board to use this information to monitor closely the Department's adherence to its own policies,[6] including many of the concerns mentioned herein. This is crucial to maintaining the integrity of government, because so many of our clients are reporting a starkly different experience in the jails than the one DOC and CHS officials describe. The Board has a particular window on the jails, and should report on whether the reality depicted is consistent with representations made by DOC and CHS in court proceedings and in public statements. The Board is particularly situated to provide this vital perspective.

3. Support us in release efforts by providing defenders with data and analysis and assisting in efforts to improve access to counsel.

In March of this year, the Board released a [statement](#) calling on DOC and CHS to work with defenders, prosecutors, and judges to release vulnerable groups of pre-trial detainees as well as

city-sentenced individuals and people held on technical parole violations. Since that time, however, DOC has acted in direct conflict with the Board's directive, submitting affirmations of policy and procedures in court. Despite defense counsel's submission of affirmations detailing our clients' reports of conditions that directly contradict the policies detailed by DOC, the large majority of judges across the city accept DOC's representation as fact. As such, DOC's representations have significantly undermined release efforts that the Board itself previously encouraged. If the Board is to truly aid in efforts to allow currently incarcerated people to self-quarantine away from jail, it must help us by providing current and detailed information about the *actual* conditions in the jails that we can use to create an accurate factual record for decision-makers.

For instance, DOC has submitted affidavits in response to writs filed by NYC public defender offices alleging that social distancing is possible in the jails; that DOC and CHS are effectively managing exposure risk via isolation decisions; that sanitation practices are sufficient to impede the spread of the COVID-19 virus; and that soap, PPE, and cleaning supplies are universally accessible. These assertions, which are largely recitations of policy rather than audits of implementation, are in direct conflict with reports from people in custody. Even under the current limitations to its access, the Board is uniquely situated to provide an accurate and unbiased report on jail conditions and the administration of policies.

4. Work with DOC on improving and expanding videoconferencing capability in response to restrictions on in-person visits.

Finally, while we are asking that the Board act on its unique access to information from DOC and CHS, it is no less critical that we are able to communicate with our clients directly and that they are able to share their experiences with us, their advocates. Access to counsel has been significantly limited since the onset of the crisis, greatly inhibiting defenders' abilities to advocate for our clients' release. Without in-person visits available, videoconferences are the only way for attorneys and advocates to proactively communicate with our clients in custody. They are also the only means to conduct virtual court appearances and 730 exams. It is our understanding that West Facility and EMTC remain without skype videoconferencing capability at all. And in the facilities where videoconferences are available, they are significantly backlogged, requiring requests for video conferences to be made several weeks in advance. Currently, video conferences are only available from 9 am- 5pm, more limited than traditional counsel visit hours from 8 am- 8pm. This creates significant barriers to our ability to advocate for our clients' release and to negotiate more favorable resolutions to their cases. We ask that the

Board inquire into efforts to increase and systematize video conferencing capabilities, report their findings, and advocate for expanded capabilities where needed.

Conclusion

Now is a critical moment for the Board to take full advantage of its capacities. Information as it relates to conditions and services in the jails has never been harder to access, and at a time when those conditions are matters of life and death, our clients have never been more isolated from their advocates. The Board has the opportunity to act in its oversight function as an essential public service to protect vulnerable populations during this pandemic, and to report accurate facts about our City jails' response to COVID-19. We ask that you use your power to increase transparency and provide even more accountability, because it will save lives.

Thank you very much,

The Bronx Defenders

The Legal Aid Society

Brooklyn Defender Services

New York County Defender Services

Neighborhood Defender Services

[1] The Legal Aid Society, *COVID-19 Infection Tracking in NYC Jails*, <https://legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/> (last visited May 1, 2020).

[2] Correctional Health Services Update, presented at NYC Board of Correction Meeting, March 10, 2020 https://www1.nyc.gov/assets/boc/downloads/pdf/chs_boc_presentation_final.pdf at 5.

[3] Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*,

<https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctio-nal-detention.html#CleaningSpaces> (last visited May 1, 2020).

[4] See attached affirmation of Dr. Jonathan Giftos, M.D., dated April 14, 2020, pp. 5-6.

[5] Giftos Aff., p. 6.

[6] New York City Department of Correction, *COVID-19 Preparation and Action Plan*, <https://www1.nyc.gov/site/doc/media/coronavirus-news.page> (last visited May 1, 2020).
