

**The Bronx
Defenders**

**Redefining
public
defense**

The New York State Assembly

Standing Committee on Codes and Standing Committee on Corrections

Hearing on Alternatives to Incarceration (ATI) and Pre-Trial Services

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Testimony of Kristen Anderson, Senior Criminal Defense Social Worker

THE BRONX DEFENDERS

Chairman Lentol and Chairman Weprin, my name is Kristen Anderson and I am a Senior Criminal Defense Social Worker at The Bronx Defenders. The Bronx Defenders is a public defender non-profit that is radically transforming how low-income people in the Bronx are represented in the legal system, and, in doing so, is transforming the system itself. Our staff of over 350 includes interdisciplinary teams made up of criminal, civil, immigration, and family defense attorneys, as well as social workers, benefits specialists, legal advocates, parent advocates, investigators, and team administrators, who collaborate to provide holistic advocacy to address the causes and consequences of legal system involvement. Through this integrated team-based structure, we have pioneered a groundbreaking, nationally-recognized model of representation called holistic defense that achieves better outcomes for our clients. Each year, we defend more than 20,000 low-income Bronx residents in criminal, civil, child welfare, and immigration cases, and reach thousands more through our community intake, youth mentoring, and outreach programs. Through impact litigation, policy advocacy, and community organizing, we push for systemic reform at the local, state, and national level. We take what we learn from

the clients and communities that we serve and launch innovative initiatives designed to bring about real and lasting change.

Introduction

I first want to thank the members of the Assembly Standing Committee on Codes and the members of the Assembly Standing Committee on Corrections for taking the time to listen to this testimony today. I also want to thank you and the rest of the State Assembly for dedicating time and energy to think creatively about how to best serve New Yorkers after contact with the criminal legal system through alternatives to incarceration and pretrial services. The passing of bail reform was a monumental step forward in reducing our jail population and curbing the tide of mass incarceration. It was a bold recognition that many New Yorkers are being warehoused in our jails simply because they are too poor to afford their freedom. We are now at a critical juncture that requires us to assess available pretrial services and alternatives to incarceration with the goal of making significant improvements and expansions to meet the increased demand that bail reform will inevitably create. We must balance this new need with a firm commitment to the presumption of innocence and not to widening the net of people under state supervision.

With this increased demand for services comes a great opportunity to rethink the how and why the criminal legal system utilizes these services. Through our work representing clients as they navigate the interaction between the legal system and service providers, we have learned the ways in which this interaction functions smoothly and those areas where the communication often breaks down. We have identified ways in which the structure of mandated treatment often fails our clients and recommend structural changes including:

- ATIs and pre-trial services will yield better outcomes if determined by client needs as opposed to the nature and severity of their charge
- The looming threat of jail does not motivate people, and instead impedes their progress
- A strengths-based view of participants is critical to success

Additionally, populations that are often denied the same opportunities that other groups have to access treatment simply because of gaps in available services. New York City offers our clients a wide variety of options, especially in comparison with other, less resourced areas of the state, and yet many of our clients fall through the existing gaps. The most glaring obstacles to ATIs include:

- Individuals with the highest levels of need are often barred based on the severity of the charges against them;
- Individuals with co-occurring mental health and substance abuse needs often fall through

the cracks; and

- Language access limitations and insurance ineligibility leave immigrant New Yorkers at a constant disadvantage

Lastly, in addition to mending broken structures and bridging gaps in existing services, we believe New York has an opportunity to step back and look at the larger goals behind bail reform legislation and the resulting expansion of programming, to listen to directly impacted communities, and to put that individual or client-centered mentality to practice in the development of community-based, holistic services tailored to each individual's needs and interests. This means supporting programs and services committed to:

- Client-centered services recognizing that impacted communities and individuals know what they need;
- Program requirements that are manageable and goals are achievable
- Creative programming options for everyone, as it currently only exists for special populations; and
- Empowering and funding smaller, grassroots and community-based programs to repair and uplift their community members.

With these momentous changes to our legal system comes an opportunity to rethink the purpose of the system as a whole and, more specifically, of pre-trial and ATI services. With so many more people remaining at liberty, we must ask ourselves about the best use of resources to support impacted communities in making transformative change, and truly shift our thinking away from the dated mentality of crime and punishment. Addressing the root causes of contact with the criminal legal system is the only way to effectively reduce recidivism.

The structure of mandated treatment is flawed

As a criminal defense social worker one of my primary responsibilities is advocating for and identifying alternatives to incarceration (ATI) that both meet my clients' identified needs and resolve their criminal cases favorably. As such, I have an intimate knowledge of the landscape of ATI resources in New York City and areas in which expansion and improvement is needed to best serve our clients' needs.

ATIs and pre-trial services will yield better outcomes if determined by client needs as opposed to the nature and severity of their charges

Once a person makes contact with the criminal legal system, they are from that point forward defined by system actors by their charges and the details of their case. That information determines the path of their case, strategic decisions made by prosecutors, judges, and defense

teams, and often whether they choose to plead guilty or assert their innocence in a trial. Unfortunately, however, the facts of their case continue to define them in the context of ATIs as well. The severity of the charges first and foremost determine whether they are deserving of an alternative in the eyes of the courts, prosecutors, and programs themselves, but more alarming than that, those charges often determine the course of the proposed treatment alternative or program disposition. The goals of a punitive criminal legal system are in this way in conflict with the goals of a truly client-centered treatment program which produce the best outcomes. The phrase “the punishment fits the crime” does not equate to “the treatment fits the crime” because a person’s need for treatment often has nothing to do with the facts of their legal case or the severity of their charges. As an example, in the Bronx Judicial Diversion Treatment part, felony charges equate to a mandated 12-18 months of substance abuse or mental health treatment, where misdemeanor charges equate to 9-12 months. Similarly, for a young person hoping to resolve their case with mandated vocational or educational programming, they can expect that if they are charged with a felony, especially if that felony is violent, they will be mandated to at least a year of treatment and it will likely need to be programming that requires a five-days-a-week commitment as well as drug testing, regardless of whether or not drug use had anything to do with their charges or whether they’ve identified drug use as a problem for them.

With the sweeping reforms we are seeing comes the opportunity to radically redefine the goals of our criminal legal system. If one of those goals is to keep more people at liberty and free of the confines of a jail cell, then the goals of an ATI or pre-trial services must be to serve the needs of that individual as opposed to punish them in a way that fits their alleged crime. Mental health and substance use treatment, as well as other support services such as vocational training and youth programming, are opportunities for a person to make positive change. Services that are tailored to the individual will maximize change that will keep them from coming back through the legal system. This shift in thought is critical.

The looming threat of jail does not motivate people, and instead impedes their progress

Our current system is set up such that the most common way to access services through the criminal court system is as part of a guilty plea. Our clients plead guilty to their top charge upfront, complete the required programming, and are promised the withdrawal of the high charge, replacing it with a lower charge if they are successful in programming. If not successful, however, they not only keep the more serious charge but they face a predetermined amount of jail time, usually a higher amount than they would have served if they accepted a jail plea upfront. This system is based on the ill-conceived notion that the threat of jail serves as a motivator for people to be consistent with attending treatment or programming, when evidence tells us otherwise. It is widely accepted that people respond better to positive incentives than to

the threat of punishment.¹ Pre-trial alternatives must not hold jail sanctions over people's heads in the event that they do not complete services to the satisfaction of the court, but rather the successful completion of services must be rewarded with positive consideration in the resolution of their cases. In the Bronx, our clients facing misdemeanor charges who identify substance use as a treatment need are eligible for the Overdose Avoidance and Recovery Court (OAR), where they are connected with services and permitted to participate voluntarily, without pleading guilty. Once they are no longer considered a high risk for overdose, their cases are dismissed and sealed². We need to see more options like OAR that do not involve a guilty plea or the threat of incarceration alongside participation in services, and ideally with expanded eligibility to those with more serious charges.

Not only does the threat of harsh consequences create a culture of fear that is counterproductive to any type of positive change, but our clients also know that if they were to leave a program or be discharged, even if the judge decides to give them another chance, they are likely to be sent to jail for a period of weeks or months as a result. For some of our clients who truly struggle to comply with mental health or drug treatment, this means that they will often bounce back and forth from jail to treatment for months or sometimes years. Shifting one's mentality back and forth from that of a jail environment to a treatment environment without falter is nearly impossible and does not offer our clients their best chance at success. This pattern again demonstrates how crucial a shift in thought is, from that of punishment to that of growth, in seeing the desired outcomes of these services.

A strengths-based view of participants is critical to success

Another important step in expanding the state's capacity to serve people who have made contact with the criminal legal system is to shift the mentality when it comes to court-mandated treatment, or treatment as a condition of release. Shifting the way the system players (service providers, prosecutors, judges, and clinical court staff) view and think about our clients would greatly improve our ability to address the underlying factors that led to their criminal justice contact, meeting their psychosocial needs, and pursuing their legal goals. It is important to recognize that change is a process, and in that process sometimes there are setbacks.³ Service

¹ Wild, TC (2006). Social control and coercion in addiction treatment: Towards evidence-based policy and practice. *Addiction*, 101, 40-49. 10.1111/j.1360-0443.2005.01268.x.

² Marcus, C. (2019, November 4th). Three strikes but still not out: Inside the Bronx 'Opioid Court' where addicts get extra swings at recovery. Daily News. Retrieved from <https://www.nydailynews.com/new-york/ny-opioid-court-bronx-drug-overdose-20191104-ep2qoipgwbaole6ojhg2vfcoxq-story.html>

³ Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health. 2016. U.S. Department of Health and Human Services. Accessed at <https://addiction.surgeongeneral.gov/surgeon-generals-report.pdf>

providers, as well as judges and prosecutors, too often focus on the setbacks, without taking into account the overall trajectory of an individual's process. For example, we often see clients engage in treatment for nine months or more with no positive toxicologies and then experience a relapse when life stressors arise, like losing a job, and the focus immediately becomes the relapse, while all parties lose sight of the extended period of recovery. If our system of mandated treatment focused on a person's strengths and small successes within the context of their course of treatment, recognizing that relapse is often a part of recovery, our clients would feel supported, encouraged and be more likely to succeed in the long-term.

Increased funding could close significant gaps in available services

Individuals with co-occurring mental health and substance abuse needs often fall through the cracks

Many individuals experiencing co-occurring mental health and substance use disorders find the doors to treatment slammed in their faces. Existing outpatient and residential treatment programs are extremely limited in who they are able to serve successfully. Many of these programs are not at all trauma-informed and they do not offer trauma-focused therapies. They are therefore often ineffective for people with significant trauma histories that affect their engagement with treatment.

Additionally, we regularly see programs deem our clients "too mentally ill", meaning that the standard substance abuse treatment curriculum will not address their mental health symptoms, which results in an extremely small pool of people with mental health issues who can actually enroll in outpatient or residential substance use treatment. Programs often do not have the appropriately credentialed psychiatrists and clinicians on staff to treat co-occurring mental health diagnoses and tell us that our clients require a "higher level of care" that does not exist. For example, we worked with a client diagnosed with schizoaffective disorder and chronic substance use who was rejected from every residential substance abuse program despite a strong desire for treatment. Even the treatment providers that market themselves as serving people with co-occurring disorders discriminate heavily based on certain presentations of mental health symptoms. If a client has any even semi-recently disclosed suicide attempts or suicidal ideation, for example, no program will take a risk on them. The same standard applies to anyone with active hallucinations or delusions — it is extremely difficult to find a program that is able to "meet their needs" as we are often told by service providers.

Furthermore, when the needs are complex, under resourced service providers often fail to provide them with critical services, asserting that they fit under another provider's scope of work. Jail and hospital staff are often reluctant to submit a 2010E application for supportive housing - necessary to access the limited services that are specifically tailored to this group -

because the process is unnecessarily cumbersome and restrictive.⁴ We represent a client who has been rejected from all residential treatment programs because they have deemed his mental health needs to be too severe for them to handle, however discharge planning staff working with him at Rikers deem his mental health classification not severe enough to warrant completing the 2010E application. This leaves him caught in a limbo with no service providers willing to work with him and we fear that he will inevitably join the others in this category that cycle between the streets and a jail cell.

This is a glaring treatment gap given how common co-occurring mental health and substance use disorders are; compared with the general population, people addicted to drugs are roughly twice as likely to suffer from mood and anxiety disorders, with the reverse also true.⁵ For those with a serious mental illness, studies show that about 1 in 4 also have a diagnosable Substance Use Disorder.⁶ This gap in services results in the chronically mentally ill and chemically addicted population falling into a cycle of homelessness and incarceration simply because there are no services equipped to meet their level of need.

Individuals with the highest levels of need are often barred based on the severity of the charges against them

No matter how many services exist, as long as we continue to discriminate against individuals based solely on the specific charge they are facing, there will be people who are unable to benefit from treatment and supportive services. Those same people are often those with the most complicated needs. Because of gaps in eligibility criteria, they are much less likely to be able to benefit from supportive services and more likely to continue revolving through the criminal legal system. People charged with most violent felonies, especially felonies that are sexual in nature and arson, are ineligible to enroll in most programs. New York City is ripe with resources and program options, but for this population there are often few or no options at all. In the Bronx there is only one program, with a focus on restorative justice, that not only allows violent offenders to participate but actually encourages those referrals. Their focus is on addressing the true roots of violence, and operates with the understanding that even those who may have caused real harm are deserving of the opportunity to change. This restorative approach is unfortunately

⁴ Human Resources Administration. Accessing Supportive Housing. Accessed November 13th, 2019 at <https://www1.nyc.gov/site/hra/help/accessing-supportive-housing.page>

⁵ National Institute on Drug Abuse. Comorbidity: Addiction and Other Mental Illnesses. Accessed November 11th, 2019 at <https://www.drugabuse.gov/publications/research-reports/comorbidity-addiction-other-mental-illnesses/drug-addiction-mental-illness>

⁶ National Institute of Drug Abuse. Common Comorbidities with Substance Use Disorders. Accessed November 11th, 2019 at <https://www.drugabuse.gov/publications/research-reports/common-comorbidities-substance-use-disorders/part-1-connection-between-substance-use-disorders-mental-illness>

rare and while promising, the program has ,otherwise limiting eligibility criteria, including an age cap and limits on the level of mental health and cognitive needs for participation. This gap in eligibility criteria creates many missed opportunities to address real issues of violence in impacted communities, as well as missed opportunities to truly address complex and interpersonal trauma for some of the most affected individuals.

Language access limitations and insurance ineligibility leave immigrant New Yorkers at a constant disadvantage

Despite the diversity our state celebrates, New Yorkers who do not speak English are severely restricted in what programs they can access. This includes speakers of Spanish, the most widely spoken language other than English. There are very few specialized programs such as sex offender treatment, domestic violence services, and vocational and educational programming offered in Spanish. Furthermore, mental health and substance abuse treatment services are not only limited by language access, but also by insurance eligibility.

Access to mental health and substance abuse treatment remains largely predicated on access to health insurance, particularly for people who cannot afford the high out-of-pocket costs of these services in private practice settings. As such, immigrants who are ineligible for insurance through an employer or a publicly funded healthcare plan face significant financial barriers to accessing these vital health care services. Many of our clients at BxD are in the position of being ineligible for insurance and cannot afford private practice rates, leaving hospital emergency rooms (ER) or clinics that offer sliding scale fees as their means to accessing mental health or substance abuse treatment services. Since ER settings are not positioned to provide ongoing treatment and sliding fee scales do not guarantee true affordability, lack of access to health insurance remains a substantial barrier to accessing treatment. While there are some providers in the city that are funded to provide these types of treatment services at no cost, these options are few in number and often have very specific admission criteria linked to their funding streams that further limits the scope of who is able to access services there. We applaud the provision of no-cost services while noting that there are not sufficient no-cost mental health or substance abuse services available to meet the demand that we see regularly in our work.

We regularly refer uninsured clients to a select number of programs that offer low or no cost services. Unfortunately since these settings are few and far between, these referrals often involve sending clients to treatment locations far from where they work and live. This puts people in the position of having to navigate long travel distances in order to access necessary care. Many of our clients have difficulties navigating the stress of long trips via public transportation due to their trauma symptoms — the very symptoms for which they are seeking treatment — and/or are unable to afford the costs of transportation to attend the services.

The reasons delineated above speak to some of the barriers facing clients who seek outpatient mental health and substance abuse treatment. The obstacles are even greater for clients who seek inpatient or residential treatment services as their necessary and desired level of care. While state-funded Addictions Treatment Centers are an available resource for 28-day inpatient rehabilitation regardless of insurance status, their capacity for admissions is limited — especially for people who require treatment services in Spanish — and there are no affordable options for long term residential treatment for the uninsured as HRA benefits eligibility in addition to insurance coverage are requisite for admission to residential treatment.

Investment in creative, community-based, client-centered programming is key to successful outcomes

With bail reform comes the danger that the system will find alternative methods to impose punishment by overburdening people with arbitrary and unrealistic requirements that set people up to fail. We have an incredible opportunity to invest in programming that truly meets the needs and interests of impacted communities. We must focus on addressing those needs rather than shifting surveillance and supervision from the jail to community setting.

We need creative programming options for everyone, but it currently only exists for special populations

Currently, certain groups, most notably young people, are able to take advantage of a plethora of therapeutic, educational, and vocational services tailored to special populations that are without a doubt serving many people with unique needs in NYC. For example, our clients between the ages of 16 and 24 have options such as internship opportunities where they can intern at a restaurant and glean cooking skills which then serve as an entryway into the culinary field. They can hone their artistic skills, learn how to record music to be able to visualize a career in the performing arts, learn boat building skills with a youth development organization, or even join a wrestling team. Additionally, young people are able to access two different in-home therapy providers as part of an ATI, Esperanza and Families Rising, with whom we have seen great results. We also see specialized therapeutic services offered to our clients who identify as survivors of domestic violence, with STEPS to End Family Violence doing individual therapy with our clients while they are incarcerated and transitioning with them back into the community upon release..

Unfortunately, however, the creativity and diversity in the vocational opportunities provided to our youth and other special populations is very limited in eligibility and leaves the vast majority of our clients without options tailored to address their needs. Generally, once someone turns 25,

the options are significantly more limited. Therapeutic programming becomes much harder to access, though our adult clients report equally if not more intensive trauma histories. When they exist, vocational programs are often limited to HSE classes and construction skills, sending the message that once you've reached 25, it is no longer possible for you to excel and find employment that matches your interest. This same type of one-size-fits-all approach to adult education and vocational training fails to recognize that adults who are justice-impacted have an expansive variety of goals. Unemployment or underemployment is a common factor identified by our clients, regardless of age, in creating instability in their lives and driving their involvement in the criminal legal system. This is an area ripe for innovation and entrepreneurship. We must think expansively about how to create innovative programs to train adults in areas of growing markets such as the tech industry and green jobs initiatives. Some youth providers who currently offer creative programming to young people are beginning to extend their age eligibility requirements, recognizing that their services can benefit a broader population. We hope this trend continues, and urge the Assembly to consider dedicating resources to expanding creative programming- therapeutic, educational, vocational, and beyond- to reach a larger percentage of justice-impacted New Yorkers.

Impacted communities and individuals know what they need

To achieve transformative change, any and all services must be personally tailored to meet the needs and goals of the individual. Too often our clients experience a one size fits all approach to treatment and services. This happens in the context of determining the appropriate ATI, for example when a certain charge is met with a specific program without regard for the particularities of that person's experience and circumstances. Someone charged with a drug related offense may automatically be funneled into drug treatment when in fact the root cause of that criminal contact may be unemployment. The system's response is often to decide what people need, rather than listening to those directly impacted. .

This pattern is unfortunately also fueled by the types of programming that currently exist. Most traditional ATI models offer only intensive, daily programming applying the same curriculum widely to an incredibly diverse and varied group of participants. The programming objectives seem to satisfy the needs of the criminal legal system- group therapy curriculums such as "rethinking behavior" and "anger management"- and ignore the unique backgrounds, circumstances, or goals of our clients. Our clients find ways to succeed in these programs, but what we truly need to see programs that offer flexibility to meet participants' needs. The few programs we work with that ask our clients upfront what their goals are and what support they need to accomplish those goals are the programs that truly client-centered- they exist to meet client needs. These are the same programs that adjust their requirements to be manageable based on each individual's responsibilities and schedules, and often will meet our clients wherever is

most convenient for them- at their home, at McDonalds, or even in the park. Unfortunately, these programs also only work with specialized groups such as youth and women, and even then they are few and far between. We implore the Assembly to consider funding more programs that operate this way in order to truly center impacted people in creating opportunities for transformative growth and change.

Success is more likely when program requirements are manageable and goals are achievable

Our clients are often juggling many responsibilities- trying to care for children, maintain financial stability, often while navigating complicated benefits and medical systems- and we must take direction from them to avoid imposing barriers to their success. Rigid requirements of treatment programs often leave clients facing the impossible choice of maintaining work or complying with their mandate. Too often clients become inundated with programming to a point that it becomes not only unmanageable for them but also ineffective in its intended purpose. We see this play out especially in treatment court when our clients relapse and thus their mandate is extended, sometimes requiring them to return to a more intensive stage of treatment that they already completed even when it is not clinically appropriate.

The structure of this type of intensive programming often does not match our clients' needs. In contrast, the programs that base their structure around our client's identified goals and take into account the many other time commitments that participants are managing offer those participants the best possible chance to succeed. We see pushback against flexible program requirements, claims that compliance is "too easy" which truly begs the question that we hope to emphasize today- why are these services being implemented in connection with the criminal legal system and what are our goals in utilizing them?

If the answer is positive change for individuals and communities, and as a result less people in our city jails and state prisons, then at the root of everything is the crucial nature of client-centered programming. We must trust our clients determine what they need, and also what is possible for them at this juncture in their lives.

Smaller, grassroots settings lead to stronger relationships and stronger communities

In our work at Bronx Defenders, we recognize that program models vary greatly, as does the client population that utilizes those models. Many of our clients have been very successful working with larger scale programs that serve people from all over the city and sometimes even the state, who are open to participants of all ages, genders, and backgrounds. These programs are

an incredible resource and we support their continued funding.

We also see, however, that many of our clients benefit from a different program model, one that often receives less funding and less interest from stakeholders because it casts a smaller net and as a result, is not necessarily able to serve as large a number of people. These programs are generally community-based, with the goal of supporting and enriching the communities that make up their participant base, understanding that those communities have very specific needs. The South Bronx is a great example of a community that has risen to support its own, determining that gang violence and a large population of at-risk youth are issues that must be addressed. As a result, many small programs have been created with the goals of supporting young people and providing opportunities for their development, such as SoBro and Bronx Connect. We see similar development in Brownsville and East New York, with programming designed to uplift the talent, creativity, and entrepreneurship of a neighborhood with a limited media portrayal as violent and impoverished. Not only does the smaller model allow for more tailored services based on community need, but it also fosters relationship building and mentorship for participants, strengthening community connection.

We encourage the Assembly to consider investing in small, community based programs with the understanding that every community is different and the faith that the community knows what its members need to succeed.

Conclusion

We are in a critical moment to expand and improve upon existing ATIs and pre-trial services to ensure that they meet the needs of individuals with criminal legal system involvement. Addressing the flaws in the structure of mandated treatment and programming, the current gaps in existing services, and implementing changes that truly center the needs of impacted groups are crucial next steps to realizing the goals of bail reform legislation. These changes represent a radical paradigm shift away from punishment and incapacitation and towards transformation and rehabilitation.