

**The Bronx
Defenders**

**Redefining
public
defense**

**New York City Council
Committee on Criminal Justice and Committee on the Justice System
Re: COVID-19 in City Jails and Juvenile Detention Facilities
May 19th, 2020**

Written Testimony of The Bronx Defenders

By Tahanee Dunn, Robyn Goldberg, Martha Grieco, Deborah Lolai & Julia Solomons

Good afternoon Chair Powers, Chair Lancman, and committee members. My name is Tahanee Dunn and I am a criminal defense and prisoners' rights attorney with The Bronx Defenders. The Bronx Defenders ("BxD") has provided innovative, holistic, and client-centered criminal defense for adults and youth, family defense, immigration representation, civil legal services, social work support, and other advocacy to indigent people in the Bronx for more than 20 years. Our staff of close to 400 represents approximately 22,000 people every year and reaches thousands more through community outreach. The primary goal of our model is to provide high-quality legal representation; address the underlying issues that drive people into the various legal systems; and mitigate the devastating impact of that system involvement, such as deportation, eviction, loss of employment and public benefits, or family separation and dissolution. Our team-based structure is designed to provide seamless access to multiple advocates and services to meet our clients' legal and related needs.

Thank you for your attention to these critical matters and for the opportunity to testify before you today. This testimony will address the response to COVID-19 in both the city jails (Section I) and juvenile detention facilities (Section II).

I. COVID-19 IN THE CITY JAILS

A. Introduction

The onset of COVID-19 has dramatically worsened conditions in our city jails, exposed persistent violations of the minimum standards, illuminated a complete lack of transparency and accountability, revealed negligible communication efforts between DOC, their staff and the

people in their custody, a disregard for proper training on the use of PPE and implementation of CDC recommended safeguards, and inspired urgency in defense efforts to secure our clients' release from custody. As a member of BxD's Prisoners' Rights team, I receive referrals from other advocates in my office on behalf of their incarcerated clients who are experiencing below standard care, ineffective or non-existent due process in disciplinary procedures, or are facing other sometimes life-threatening collateral consequences of being in custody. My colleagues and I then follow up with these clients and try to rectify the situation, advocating with relevant parties within the Department of Correction ("DOC"), Correctional Health Services ("CHS"), and the Board of Correction ("BOC"). The stories we hear from our clients have always been very troubling, but since the onset of COVID-19, the reports we hear are nothing short of horrifying.

Conditions in the city's jail facilities are unacceptable, and our clients are afraid for their lives. In the course of hundreds of conversations with our clients, we have heard repeated accounts of the following:

- **Failure to provide adequate protection and supplies for people in jail.** We continue to hear reports of how the movement practices within the Department pose increased risks of exposure to the virus, and the provision of Personal Protective Equipment ("PPE") is limited at best. 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.
- **Lack of due process for punitive segregation.** A once skeletal due process structure appears to have ceased to exist, with every single one of our clients who has been placed in punitive segregation reporting that it happened without a hearing. They are denied the opportunity to participate in the disciplinary process, and their rights to due process are being compromised in ways that are unacceptable no matter what the circumstances may be. To make matters worse, our clients have reported that when they inquire into these due process violations and attempt to assert their rights, they are told by correctional officers that the disciplinary process has been suspended due to COVID-19. To our knowledge, no such suspension was granted by any governing board, body or agency.

- **Insufficient access to healthcare.** The reports regarding reduced access to healthcare are equally concerning. 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.”¹ 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. 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.
- **Delays in healthcare services.** 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. Clients repeatedly tell us they cannot get access to a clinician through this system.
- **Additional risk presented to transgender and gender non-conforming (TGNC) individuals.** TGNC people in custody often experience frequent movement between housing areas and facilities, and are at particular risk because it is common for them 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 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 city jail conditions themselves are unacceptable, but that is not the only problem. The responses from DOC, as well as the collateral consequences for our clients, are extremely concerning. We ask the City Council to provide oversight and take action to achieve the following goals:

- Make more detailed public data regarding the state of healthcare and COVID-19 testing in city jails available.
- Increase scrutiny of DOC policies and practices and do not rely solely on self-reported self-serving reports in order to remove barriers to decarceration.

¹ 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.

- Improve access to counsel for our clients in custody

We need the City's help in providing true oversight over DOC in order to improve our ability to access our clients and to be able to successfully advocate for their release, in a time when incarceration or release could be a life or death distinction.

B. Make more detailed public data regarding the state of healthcare and COVID-19 testing in city jails available.

Given the conditions being reported by our clients, it is critical that DOC make comprehensive data about the current conditions in the city's jails publicly available. We very much appreciate and recognize the value of BOC's daily report regarding COVID-19 in the jails, as well as their recently published monitoring report regarding the implementation of new policies responsive to COVID-19². However, we believe even broader data gathering and information sharing is necessary both to serve the greater public interest and to improve our ability to advocate for our clients. **We strongly support the legislation proposed by Councilmember Powers, Int. 6183, requiring public reporting by DOC and CHS during a public health emergency.** We ask that the City Council require DOC to publish answers to the following questions with regard to COVID-19 testing:

1. How many people have been tested overall?
2. Who is administering the tests?
3. What are the conditions under which tests are administered?
4. What types and brands of tests are being administered?
5. What lab or medical entity is analyzing the tests?
6. What is the cumulative number of people in custody who have tested positive?
7. What is the positive test rate compared to that number in the community?
8. How many people in custody are being tested vs. testing of staff?
9. 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?
10. Are there discharge and or medical clearance procedures in place? If so, what are they?
11. What is the number of DOC staff (i.e. not just CHS staff) who are out sick or under observation?

² New York City Board of Correction Monitoring COVID-19 Responses in City Jails, April 5-16, 2020. Retrieved from https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/COVID%20Housing%20Public%20Report%204.5-4.16%20DRAFT%205.11.20_FINAL_1.pdf

12. Was CHS involved in creating and facilitating COVID-19 response DOC housing areas, such as quarantine versus non-quarantine areas? If so, what is the housing placement criteria and who oversees this process to ensure the health and safety of those detained in those areas and the staff assigned to work in those housing areas?

Additionally, we ask that the City Council require Correctional Health to publish answers to the following questions regarding access to both physical and mental healthcare:

1. How has the implementation of telehealth services within the jails impacted the ability of people in custody to access services?
2. How does this impact vary between mental healthcare and physical healthcare?
3. What is the CHS staff capacity to answer the telehealth phone lines?
4. What percentage of calls are answered?
5. What is the system for addressing missed calls? How are voicemails responded to?
6. Do the correctional officers have control over when and who accesses the telehealth phone lines?

At a time when direct access to the city jail facilities is extremely limited, family members, advocates, and concerned community members are reliant on this type of public reporting to understand what is happening inside and what people in custody are experiencing. Additionally, advocates require clear, indisputable data in order to effectively argue for our clients' release, and the self-reporting currently offered by these agencies is insufficient.

C. Increase scrutiny of policies and practices and do not rely solely on self-reported self-serving reports in order to remove barriers to decarceration.

1. *Conditions in NYC jails as reported by our clients and the Board of Correction do not match public messaging from DOC*

The public statements of DOC are often in conflict with our clients' reports about their realities. For example, each month, BOC holds a public meeting. During that meeting, DOC and CHS speak about current policy and frequently request some variation from the Board's minimum standards, or what the Board considers to be "basic elements necessary to ensure the safe and humane housing of inmates."³ In defense of these requests, the agencies give an abbreviated update on the state of the conditions related to the policy, for example mental healthcare, and the predicted effect of changing the proposed policy, relying on data they do not make available to

³Retrieved from <https://www1.nyc.gov/site/boc/jail-regulations/minimum-standards.page>

the public. Rarely does either agency share a negative consequence for people in custody. Since the onset of COVID-19, the conflict between the public reports and our clients' reports is the starkest it has ever been, and with the most significant consequences. Now, more than ever before, the reports from our clients are desperate and scared for their lives.

On April 1, the Board began publishing daily COVID-19 reports updating the numbers of staff and people in custody who have tested positive and the fluctuating total numbers and demographics of people in custody. Due, in part, to mounting public pressure and calls for more concrete reporting on the implementation of DOC's reported policies, on May 11 the Board published its first observational report since the onset of the COVID-19 crisis.⁴ In this report, BOC reports their observations between April 5 and April 16, quantifying the anecdotal information we have heard from our clients. Regarding sanitation, the Board reports that out of 45 instances of phone use, it was only cleaned three times, and in all three of these instances, it was a person in custody who wiped down the phone with a cloth. Cleaning supplies were not observed anywhere nearby. Out of 249 observations of people in custody across housing areas, only 17% of all visible people were correctly wearing masks.

2. Judges and District Attorneys are relying on DOC affidavits when making release decisions despite conflicting reports from clients

As the Council is likely aware, since COVID-19 hit NYC in early March, defender organizations across the boroughs have been advocating for our clients' release with even greater urgency. This has taken the form of negotiations with District Attorneys outside of court, emergency bail applications and writ arguments in front of judges on behalf of individual clients, and mass writ arguments on behalf of multiple clients at one time. We have focused heavily in our writ litigation on our most medically at risk clients and have argued that DOC has acted with "deliberate indifference" to individuals' serious, unmet medical needs. With each writ argument, DOC submits an affirmation stating their CDC-compliant policies. Advocates submit affirmations as well, detailing the reports they have heard from their clients who are incarcerated. The difference between the reported policy and what our clients experience in reality is striking. It is for this reason that accurate, detailed public reporting by DOC and CHS is so critical. If proposed legislation Int. 6183 had been in effect at the beginning of this crisis, defense organizations may have seen more success in securing the releases of our clients.

⁴ New York City Board of Correction Monitoring COVID-19 Responses in City Jails, April 5-16, 2020. Retrieved from https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/COVID%20Housing%20Public%20Report%204.5-4.16%20DRAFT%205.11.20_FINAL_1.pdf

Despite submitting countering affirmations sharing the reports of so many of our clients in custody, judges across the city generally accept DOC's assertion of facts and subsequently deny our petitions for release. After BOC released its report last week, we are hopeful that some of the gaps between policy and implementation validated by the report will convince judges to issue different decisions moving forward, but unfortunately we need more reliable data in order to truly see a difference in how many of our clients are released.

D. Improved access to counsel for our clients in custody

1. Expanded video conference availability

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, 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 competency exams to determine whether people can aid in their own defense. Now, with grand jury proceedings conducted by video, there are even fewer slots available for attorney conferences. . It is our understanding that EMTC remains without skype videoconferencing capability at all. In the facilities where videoconferences are available, they are significantly backlogged, requiring requests for video conferences to be made several weeks in advance. Given the fluidity of this health crisis, and therefore the importance of collecting data as situations occur, the lack of access to our clients has severely impeded our ability to advocate on their behalf and meaningfully engage in decarceration efforts.

Currently, video conferences are only available from 9am-5pm for defense organizations that rely on the Office of Court Administration ("OCA") to connect, more limited than traditional counsel visit hours from 8am-8pm, and they are only available on weekdays when counsel visit hours previously extended to weekends as well. 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 City Council inquire into efforts to increase and systematize video conferencing capabilities and advocate for expanded capabilities where needed.

2. Improved confidentiality protections and technological troubleshooting

Not only is accessing our clients via videoconference exceedingly difficult, but when we do make contact with our client via Skype, there are additional issues that prevent productive conversations with our clients. Most concerning is that it is often possible to hear the conversation happening between another person in custody and their attorney in a neighboring

booth. We assume that our conversations are similarly audible to others nearby. This presents significant challenges to attorney-client privilege, and limits our ability to speak freely with our clients about the details of their case or possible plea negotiations. This was not previously the case with videoconferences.

Beyond the urgent issue of confidentiality, there are often issues with sound on either side, either no sound at all or loud background noise in the facility making it difficult to hear one another. Our clients are rarely in the booth at the start time of the video conference, cutting significantly into the 30 minute time slot. This problem was common pre-COVID but was less pressing because it was not the only way we could speak to our clients. Thirty-minute video conferences were useful for relatively quick conversations, but are inadequate for serious conversations, social history interviews, reviewing discovery or discussing a possible plea. These conditions are not suitable for those types of conversations, impairing our clients' right to have access to their defense team in a way that could have devastating effects on the outcomes of their cases.

3. Additional mailing supplies be made available to people in custody and the consistent forwarding of legal mail upon facility transfer

It is our understanding, based on public statements by DOC, that people in custody were provided with a round of free stamps and pre-stamped envelopes at the beginning of the COVID-19 crisis. We applaud DOC for this compassionate measure and request that it be repeated. We have not seen an uptick in letters from our clients despite the difficulties of communication and suspect that our clients used their first round of mailing supplies to contact family members. This must be an ongoing offering; in fact, we request that mailing supplies be continuously available upon request to anyone for as much as they need during this crisis as long as in-person visits are suspended.

In addition to our request for ongoing mailing supplies, we request that DOC implement a mail forwarding process for all mail, but specifically legal mail. It is frequently reported to us by our clients that they have not received mail from our office. This seems to be due in part to the increase in facility transfers on Rikers Island and NYC jails. While advocates understand the need to move people in custody around to keep them and others safe and healthy, placement in a new facility should not hinder one's ability to receive their legal mail. Legal mail almost always contains sensitive and confidential information relating to a person's ongoing case, thus the importance of having a mail forwarding system in place is essential. Furthermore, advocates send their clients documents that require signature and a notary stamp. These documents are essential to our ability to file motions and make record requests. Therefore, it is crucial that DOC not only implement a mail forwarding system, but that they also provide access to a notary in each housing facility, especially restrictive housing units and the punitive segregation unit.

II. COVID-19 IN JUVENILE DETENTION FACILITIES

A. Introduction

The Bronx Defenders Adolescent Defense Project (ADP) was launched in 2012 to provide specialized representation to some of BxD's most vulnerable clients: 14 through 17 year-olds whose cases originate in adult criminal court. Our youngest clients always face unique obstacles. Even in the best of times, incarceration causes children long-term physical and mental harm that lasts well into adulthood.⁵ Moreover, economists have shown that incarcerating youth reduces their future earning potential and their ability to remain in the workforce.⁶ This is far from the best of times. New York City is the epicenter of the COVID-19 pandemic, and it has caused dramatic changes to everyone's lives. This massive disruption has only exacerbated the challenges faced by incarcerated youth, who are isolated from their families and support networks.

Social distancing within the juvenile facilities is impossible: children conduct most of their lives within 6 feet of the other residents on their hall, eating, showering, and spending most of the day together. Staff travel into and out of the building on a daily basis, possibly bringing the disease with them. Youth continue to be arrested and incarcerated at these facilities, another possible vector of contagion. In an attempt to mitigate the spread of coronavirus, the children incarcerated at these facilities have been isolated from any in-person contact with their community: family visits and attorney visits have been prohibited since March; teachers no longer teach classes in the buildings; and all in-person recreational, educational, and mentor programs have been stopped.

We recognize and appreciate that the Administration for Children's Services (ACS) has made efforts to lessen the effects of this isolation, and we hope to work with ACS as it continues in these endeavors. We urge the City Council to work with ACS, the Mayor, and all other necessary agencies to address the following issues:

- Provide greater transparency and open communication for parents and advocates of incarcerated youth.
- Guarantee greater access to education and services.

The effects of the global pandemic will be felt for decades to come. It is critical that the City address these issues quickly so that our youth are not left behind.

⁵ Elizabeth S. Barnert et al., *Child incarceration and long-term adult health outcomes: a longitudinal study*, 14(1) INT'L J. OF PRISONER HEALTH 26 (2018).

⁶ BARRY HOLMAN & JASON ZEIDENBERG, JUSTICE POLICY INSTITUTE, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES (2006).

B. Provide greater transparency and open communication for parents and advocates of incarcerated youth.

Unlike adult facilities, Horizon and Crossroads are not overseen by BOC. As a result, BOC's daily reports do not include information from these facilities. We urge City Council to work with ACS to ensure regular public data reporting on at least a biweekly basis to inform parents and attorneys about ACS's COVID-19 response. We ask ACS to follow the example set by New Jersey's Juvenile Justice Commission (JJC). On its website, JJC provides an accounting of how many staff and residents have tested positive at each facility and the total numbers of residents tested for COVID-19, as well as a list of new or altered procedures regarding social distancing, family to resident communication, education, and programming.⁷ It is imperative that ACS provide updates not only about the disease itself, but also about all of the other changes occurring due to the pandemic. This communication should include:

- Current and cumulative number of youth tested and confirmed cases;
- Current testing criteria for youth and staff, including frequency of testing, how ACS determines who is tested, and numbers of tests administered;
- Information about social distancing practices; and
- Updates on how education, programming, health care, mental health, and recreation are provided to residents.

Parents and advocates require this information to know how best to fight for incarcerated youth.

In addition to making information public, ACS must also allow for more robust communication between parents and incarcerated youth. Kids need their families. When tragedy strikes, most people want to go home and hug their families. Incarcerated children are no different. Their relationships remind them of who and what is waiting for them upon release. In this uncertain time, youth need more contact with their families than ever. A lack of family involvement creates emotional and mental health challenges for not only the incarcerated youth, but for the entire family.⁸ And multiple studies have shown that a lack of family contact increases the likelihood of future recidivism.⁹ Currently, youth receive a number of 10 minutes telephone calls per week based on their behavior level. Families are also able to arrange Skype visits when there is availability. Only children on the very highest behavior level, however, receive enough access to contact their families every day. While this public health crisis continues and in-person visits are suspended, youth need daily access to telephone or Skype visits to communicate with families, regardless of behavior level. In addition to the telephone calls earned by good behavior, ACS should provide every child an opportunity to call or Skype a parent or other family member every day, seven days a week.

B. Guarantee greater access to education and services.

⁷ <https://www.nj.gov/oag/jjc/covid19-facilities.html>

⁸ DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* (2004).

⁹ Joseph P. Ryan & Huilan Yang, *Family Contact and Recidivism: A Longitudinal Study of Adjudicated Delinquents in Residential Care*, 29(1) SOC. WORK RES. 31 (2005).

We also urge the City Council to collaborate with the Department of Education and ACS to bring live-streamed school classes into the juvenile facilities. Remote schooling presents a particular challenge in a juvenile detention facility. While we commend the efforts to create a hotline where incarcerated youth can contact teachers for help on assignments, it is not enough. Currently, there are no teachers actually teaching classes to any student at Horizon or Crossroads Juvenile Centers. Residents' education consists solely of worksheets and computerized packets. Despite studies which show that the average student learns better and learns more when receiving instruction from trained professionals than from self-study.¹⁰ We cannot place the onus on children to teach themselves from worksheets or packets and only afford them access to a professional's expertise as a last resort.

Teachers are even more important to students with disabilities, who are over-represented in the juvenile legal system.¹¹ In the community, NYC teachers and occupational therapists are providing services online to the city's special education students. Through video chats and telephone calls, teachers are attempting to recreate necessary classes and therapy.¹² Even with these structures, students are falling behind. Special needs youth in juvenile facilities do not even have these supports. The City Council should ensure that incarcerated special needs youth receive access to the same services as their counterparts in the community.

Moreover, multiple studies have demonstrated that detention and incarceration harm the overall well-being of youth and the communities they live in over the long term. It is essential to provide rehabilitation, education, and productive recreational opportunities to youth during their time in custody. ACS had already begun to bring some programming back into the facility. Outside agencies, such as Center for Community Alternatives, have provided pre-recorded videos that are available to certain residents on a tablet (though access to tablets is dependent on behavior level). Writing competitions and questionnaires based on the videos are also available. Just as in the educational setting, however, children lack interaction with program leaders and mentors. At present, service providers are unable to stream live, digital sessions. The relationships built between children and mentors have been completely disrupted. Children should receive access to all programming, particularly interactive programming, regardless of behavior level.

We are particularly concerned about the opportunities available to residents over the upcoming summer. Programs work to keep our clients from future contact with the criminal legal system, to prepare children for successful community living, and to keep them engaged. In addition to the programs available to youth year-round, two summer-specific programs have always made a

¹⁰ See John Leddo et al., *The effectiveness of self-directed learning vs. teacher-led learning on gifted and talented vs. non-gifted and talented students*, 2(6) INT. J. OF ADVANCED EDU. RES. 18 (2017).

¹¹ Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (July 2000), available at <https://www.ncjrs.gov/pdffiles1/ojdp/179359.pdf>.

¹² Eliza Shapiro and Elizabeth A. Harris, *This is Schooling Now for 200,000 N.Y.C. Children in Special Education*, N.Y. TIMES, April 16, 2020, <https://www.nytimes.com/2020/04/16/nyregion/special-education-coronavirus-nyc.html>

huge impact: Freedom School and the Summer Youth Employment Program. This summer, neither of these programs will run unless immediate changes are made. We ask the City Council to ensure that the necessary funding and staffing are secured to continue these programs.

III. CONCLUSION

While we believe the establishment of a conditional release commission, as proposed by Councilmember Powers as part of Int. 6175, is a positive step, we fear that it will not reduce the current jail population as significantly as is necessary at this juncture. We encourage the City Council to consider involving the advocacy community as well as those directly impacted by incarceration as part of the commission, and urge the Council to think creatively about other ways to reduce barriers to decarceration. Defense organizations continue to advocate for the release of our clients, both from city jails and juvenile detention centers, and transparency on the part of the agencies who manage and staff those facilities is critical to our ability to be able to secure releases for our clients. While finding ways to release as many people as possible, for those who remain incarcerated it is critical that conditions be improved wherever possible. Young people need access to education. Everyone in custody needs thorough, confidential access to their defense team. This crisis has placed significant limitations on the City's ability to keep people safe in custody but as long as anyone remains in the city jails and juvenile detention facilities, it is the City's responsibility to do everything possible to protect and address the needs of those individuals.

Thank you for your time and attention to these important matters.