THE LEGAL AID SOCIETY CRIMINAL DEFENSE

New York City Council

Committee on Criminal Justice and Committee on the Justice System
Joint Hearing
May 19, 2020

Oversight: COVID-19 in City Jails and Juvenile Detention Centers

T2020-6175: A Local Law to amend the New York City charter, in relation to adding a new section creating a local conditional release commission.

T2020-6183: A Local Law to amend the administrative code of the city of New York, in relation to requiring the department of correction and correctional health services to issue reports during public health emergencies.

T2020-6184: A Local Law to amend the administrative code of the city of New York, in relation to the maximum fee allowed when transferring money to a person in the custody of the department of correction.

Testimony of The Legal Aid Society
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The Legal Aid Society thanks Chairman Powers, Chairman Lancman and the members of the Committees for holding this hearing on the COVID-19 pandemic. Today's hearing addresses the extraordinarily dangerous role that incarceration plays in spreading this deadly virus throughout our City, especially in communities of color, and the urgent measures we must take address that threat. Simply put, when it comes to COVID-19, there is no more dangerous place to be in New York than the City's jails.

Many healthcare and correctional workers have been working ceaselessly, at great personal cost, to respond to this crisis. We call on the City to support these workers with modern and proper equipment, safe working conditions and responsive leadership. But their efforts alone cannot contain the pandemic in the failed state that is our City jails. It will take the concerted action of all City stakeholders to implement the carceral and public health protections needed to slow the spread of this disease and protect incarcerated people and jail workers, and their families and communities.

To these ends, we **support** the three bills being heard today as concrete steps towards a solution. In particular, we note the importance of T2020-6183, which seeks to ensure that the public response to this crisis is rooted in facts and not conjecture. By providing for complete and accurate data to be made available the public and policy makers, this bill strengthens the foundation for all public policy decisions ahead.

In addition to passing these bills, the Council can exercise its oversight and moral authority to ensure that other City stakeholders move faster to ensure that more people are released from City jails and those who remain are treated with care. Below we provide specific recommendations for Council action.

Introduction: The Coercive Mission of Jails in a Pandemic

People held in the jails are particularly vulnerable during outbreaks of infectious disease not only because of the physical environment, which marries close proximity with poor ventilation, but also because of the profound constraints on self-help imposed by the coercive power of incarceration. The actions that public health authorities recommend we take to protect ourselves and each other – such as washing hands with soap frequently, seeking physical distance, and finding medical care if experiencing symptoms – are available to incarcerated people only with the overt assistance of their jailers. Nor do incarcerated people have any choice over who comes or goes from their living quarters, whether it is fellow incarcerated people or the rotating shifts of an extremely large workforce.

Compounding the problem in our City is the neglected and outdated physical condition of the jails themselves, the appalling recent record of violence by correctional staff, and the persistence of an "occupational ideology [that] runs counter to modern and professional correctional practice."[1] A jail system in which staff are "often hyper-confrontational and respond to incidents

[1] *Eighth Report of the Nunez Independent Monitor ("Eighth Report") in Nunez v. City of New York et. al., 11-cv-5845 (LTS) (SDNY), filed October 28, 2019,* at 4.

in a manner that is hasty, hurried, thoughtless, reckless, careless or in disregard of consequences"[2] is a particularly dangerous setting in which to confront a pandemic.

What You Don't Know Will Kill You: COVID-19 Prevalence in the City Jails and the Critical Importance of Data Transparency

It is not possible to fix a problem that you do not understand. And even this far into a pandemic, the full extent of COVID-19 infection among the incarcerated people in the City jails remains unknown. While the Board of Correction publishes data about COVID-19 prevalence among clinical and correctional *staff,* it does not similarly publish the prevalence among *incarcerated people.*[3] The public presentation thus juxtaposes two separate infection measures: the cumulative *total* number of staff afflicted with the virus, but only the *non-cumulative* number of incarcerated people similarly affected, on any given day.

As of May 14, 2020, the Board of Corrections reported that there were, at that time, 362 currently incarcerated COVID-19 patients. However, this number, by definition, does not include any of the COVID-19 patients who have been released or transferred—a significant number given the fluidity of a local jail. Therefore, it is impossible to know the true number of infections that have occurred in DOC custody or the true rate of infection. We do not know how many people are leaving the facility with the infection, nor do we know where they are going. The information DOC currently provides is only a snapshot. It dramatically understates the extent of the problem and does not allow an accurate view of the past or future course of the pandemic.

Unless and until the City reports information about the *cumulative* numbers of people in custody with confirmed COVID-19; the criteria for COVID testing; and numbers of tests administered to the incarcerated population, the data we have risks obscuring the full extent of the outbreak within DOC facilities.

Moreover, CHS and DOC have published little if any data on the likely source or timing of infections among incarcerated people. We do not know whether any of the 362 current COVID-19 patients contracted the infection within the facility or prior to arriving. For those that contracted it within the facility, we do not know their housing area, nor work assignments. The data does include the number of people in quarantine units, i.e, the units where DOC is isolating people who are confirmed and symptomatic, or asymptomatic but likely exposed. But if the census in a confirmed symptomatic unit declines from one report to the next, is this because sick people were transferred, or recovered, and how many of each? Without the above kinds of information, there is no way to discern where or how the disease is spreading the fastest.

In addition, Legal Aid has received many reports from our clients that isolation protocols have not been properly observed, such by transferring people out of quarantine units well before the

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[2] *Id.*

[3] The New York City Board of Correction publishes daily data on this figure. https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Public_Reports/Board%20of%20Correction%20Daily%20Public%20Report_5_08_2020.pdf.

CDC-recommended time, or by failure to isolate known or suspected cases in a timely manner. BOC should publish data on how long incarcerated people are spending at quarantine units to ensure that there is sufficient public oversight. While perfect knowledge about the individual contacts between all individuals is not possible, by the nature of their operations, corrections facilities are in a unique position to do contact tracing. They can learn in detail how, where and when their populations of incarcerated people and staff members are moving and interacting. The health authorities should use this valuable information and provide it to decisionmakers.

Jail populations are sicker than free populations. Because the health conditions that put people at risk for more severe illness from COVID-19 are overrepresented in the jail population, it is important for reporting also to include significant information connected to the severity of disease: number of hospitalizations, number of people placed on ventilators, number of people discharged from custody while hospitalized, and average length of stay in the hospital.

Requests:
The Council should pass T2020-6183 to help provide transparency and accountability during this and any future public health crisis that affects DOC facilities. This bill would appropriately require BOC to publish cumulative data about the total number of incarcerated people who have tested positive for COVID-19 since the beginning of the pandemic. The bill could be strengthened by adding metrics that would support better analysis of where and how the disease is spreading and what measures are effective, including (but not limited to):

- The number of people placed on ventilators, number of people discharged from custody while hospitalized, and average length of stay in the hospital;
- The length and severity of the illness for incarcerated people, and in particular what treatments or medical interventions are most needed;
- Information on the COVID-19 status of any people leaving DOC custody; and
- Information on how, when and where those people were infected, including:
    - Whether they were infected before or after entrance into the facility;
    - What housing units or work assignments they were assigned near in time to their tests; and
    - The reasons and timing of incarcerated people's admission to and transfer from quarantine.

The City Must Expand Its Testing Regime Beyond the Ineffective Symptom-Based Testing Systems in Place Now

Managing a captive population during a pandemic requires widespread if not universal testing for a disease that spreads as easily as COVID-19. Frequent, close contact with other people is unavoidable in a jail, and three correctional officer shift changes per day mean that new sources of contamination are constantly introduced. For that reason, a negative test result for an incarcerated person or a staff member cannot be considered reliable for very long; information about who has been infected must be frequently and diligently updated.

CHS and DOC currently use symptom-based systems for screening and infection management. The appearance of symptoms governs which intake facility takes a person in custody[4] and whether staff is sent home or permitted to work.[5] The BOC data reports that people are housed according to both testing and symptom statuses: "Confirmed Positives," "Symptomatic," and "Likely Exposed but Asymptomatic."[6]

But evidence about how COVID-19 is transmitted shows that protections based on *symptoms* will be ineffective to control the spread of the virus because of the prevalence of people who are contagious before they show symptoms (presymptomatic transmission) or who never show symptoms at all (asymptomatic transmission).[7] This characteristic of COVID-19 counsels an emphasis on measures not based on symptoms, like wide scale testing throughout the jail population and aggressive contact tracing.

Our understanding of CHS and DOC protocols, however, is that, as a matter of policy, testing is largely limited to two groups: new admissions and people exhibiting symptoms. Our clients report that when a person in their housing unit tests positive, the protocol from DOC is often just to remove the person and place the unit under "quarantine." Even if that protocol was implemented with fidelity—which our clients report that it is not—it is unclear to us why the entire unit is not then tested for the virus as a form of aggressive contact tracing.

The reported number of infections thus likely undercounts the true prevalence of COVID-19 cases because of the lack of comprehensive testing. If the City were to undertake widespread testing, there is reason to believe that the number of diagnosed infections would skyrocket. In the federal prison system, for example, more than 70% of inmates who have been tested have tested positive.[8] Montgomery County, Pennsylvania found after testing each of member of its incarcerated population that infection rate was 30 times greater than that reported before mass testing. A prison in North Carolina similarly found a rate almost 40 times greater. In both facilities, this spike was in large part due to the number of infected inmates who have been asymptomatic.[9] The lack of mass testing in the NYC jail system is likely to be a serious impediment to management of the crisis.

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[4] DOC Presentation at May 12 BOC Meeting, *supra*, p. 17.
[5] *Id*. at p.20.
[6] *Daily Covid-19 Update, Friday, May 15, 2020*, *supra*, p.3
[7] *See* Mandavilli, Apoorva. *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, The New York Times (March 31, 2020), https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html (quoting a warning from CDC director Dr. Robert Redfield that as many as 25% of people infected with COVID-19 may not show symptoms); Presymptomatic Transmission of SARS-CoV-2 — Singapore, January 23–March 16, 2020. *MMWR. Morbidity and Mortality Weekly Reports,* https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6914-H.pdf (study indicating that "[t]he potential for presymptomatic transmission underscores the importance of social distancing, including the avoidance of congregate settings, to reduce COVID-19 spread").
[8] Michael Balsamo, Over 70% of tested inmates in federal prisons have COVID-19, AP News (Apr. 29, 2020), https://apnews.com/fb43e3ebc447355a4f71e3563dbdca4f.
[9] *United States v. Pabon*, No. CR 17-165-1, 2020 WL 2112265, at *4 (E.D. Pa. May 4, 2020).

Requests:

- The Council should inquire with CHS and DOC about the operations relating to scale of testing, and contact tracing.
- Bill T2020-6183 appropriately requires BOC to publish data on the daily number of positive, negative, and pending tests. The bill could be strengthened by mandating that the reports are broken down by facility and housing area and census of that area on the day of the test, and mandating testing for all people in the facility, as often as changes in circumstances require.

The Ongoing, Urgent Need to Release Medically Vulnerable People from the City Jails

Notwithstanding the steps the Department of Correction ("DOC") has taken to attempt to address the COVID-19 pandemic, which we discuss in more detail below, the virus continues to spread in the City's jails and the situation remains a crisis. On March 20, 2020, there was only one confirmed case of a resident with a positive COVID-19 diagnosis.[10] Just one day later, on March 21, 2020, the New York City Board of Correction ("BOC") reported that at least 21 people in the jails had tested positive for the virus, along with twelve DOC employees and five Correctional Health Services ("CHS") employees.[11] The percentage of incarcerated people testing positive has ranged between 9% and 10% of the total jail population since April 17, giving the jails a rate of infection between four and eight times higher than the rest of New York City.[12] Cumulatively, 1,529 DOC and CHS staff have contracted the virus.[13] Already, there have been at least three tragic deaths of incarcerated people due to the spread of the virus in the City's jails and dozens of corrections officers and jail staff have died.

Certain populations – those over the age of 50 and those with specific underlying medical conditions – are particularly vulnerable to serious illness and death from COVID-19. The highest risk populations face a fatality rate as high as 15 percent. The mortality rate for people of any age with cardiovascular disease, diabetes, hypertension, chronic respiratory disease, chronic liver or kidney disease (including hepatitis and dialysis patients) and compromised immune systems (such as from cancer, HIV or auto-immune disease) are significantly elevated. Preliminary research from China suggests that people aged 50-59 face a mortality rate nearly three time higher than people under the age of 40; people aged 60-69 have a mortality rate 18 times higher; the rate is 40 times higher for people aged 70-79 years old. Even if a COVID-19 infection is not

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[10] Chelsia Rose Marcius, *Rikers Island inmate has contracted coronavirus: officials*, N.Y. DAILY NEWS (Mar. 18, 2020), https://www.nydailynews.com/coronavirus/ny-coronavirus-rikers-island-inmate-tests-positive-20200318-gf3r7q4cefaxzlqmwrmuevzz3y-story.html.

[11] Jacqueline Sherman, Interim Chair of NYC Board of Correction, letter, Mar. 21, 2020, *available at* https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letter-from-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf (last visited Mar. 22, 2020).

[12] https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/BOC%20Board%20Update%20-%20COVID-19_5.11.2020.pdf (last visited May 18, 2020).

[13] https://www1.nyc.gov/site/boc/covid-19.page (last visited May 18, 2020).

fatal, it can often require highly specialized care for people over the age of 50 and result in longstanding medical complications, including permanent loss of respiratory capacity, damage other vital organs including the heart, kidneys and liver, and neurological damage.[14]

For this reason, correctional public health experts – including leading doctors from New York's own correctional health system – and the Board of Correction have pressed for the release from custody of vulnerable people. On March 17, 2020, the BOC called on New York City to "immediately remove from jail all people at higher risk from COVID-19 infection" including "[p]eople who are over 50; [and] [p]eople who have underlying health conditions, including lung disease, heart disease, diabetes, cancer, or a weakened immune system" and to "drastically reduce the number of people in jail right now and limit new admissions to exceptional circumstances."[15] On March 21, 2020, BOC issued a second advisory, urging judges and prosecutors to act quickly to release more people, and concluding that, based on having "closely monitored Rikers Island and the borough jails for over sixty years" that "*DOC's and CHS's best efforts will not be enough to prevent viral transmission in the jails."*[16]

The failure to aggressively decarcerate the City's jails is a human rights failure, showing inhumane disregard for the lives of people we place in cages. It is also a public health failure. A recent epidemiological study commissioned by the ACLU and carried out by researchers from three major universities indicates that — even if communities across the United States continue practicing social distancing and following public health guidance — we will still experience much higher death rates if no substantial action is taken to reduce jail populations, because jails acts as vectors for disease spread into surrounding communities, many of which – as in New York – are already experiencing disproportionate rates of illness from COVID-19.[17]

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[14] *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 28, 2020), at 12, https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf; *Age, Sex, Existing Conditions of COVID-19 Cases and Deaths* Chart, https://www.worldometers.info/coronavirus/coronavirus-age-sex-demographics/; 'Wei-jie Guan et al., *Comorbidity and its impact on 1,590 patients with COVID-19 in China: A Nationwide Analysis*, medRxiv (Feb. 27, 2020), at 5, https://www.medrxiv.org/content/10.1101/2020.02.25.20027664v1.full.pdf; Fei Zhou et al., *Clinical course and risk factors for mortality of adult inpatients with COVID-19 in Wuhan, China: a retrospective cohort study*, Lancet (March 11, 2020), tb. 1, https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext; *Characteristics of an Outbreak of 2019 Novel Coronavirus Diseases (COVID-19) — China, 2020* , China CDC Weekly , 2020, 2(8): 113-122 , *at* http://weekly.chinacdc.cn/en/article/id/e53946e2-c6c4-41e9-9a9b-fea8db1a8f51.

[15] Press Release, N.Y.C. Bd. of Corr., New York City Board of Correction Calls for City to Begin Releasing People from Jail as Part of Public Health Response to COVID-19 (Mar. 17, 2020), https://www1.nyc.gov/assets/boc/downloads/pdf/News/2020.03.17%20-%20Board%20of%20Correction%20Statement%20re%20Release.pdf .

[16] Jacqueline Sherman, Interim Chair of NYC Board of Correction, letter, Mar. 21, 2020, *available at* https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letter-from-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf (last visited Mar. 22, 2020).

[17] https://www.aclu.org/report/flattening-curve-why-reducing-jail-populations-key-beating-covid-19

Nonetheless, today many hundreds of elderly and medically vulnerable people remain incarcerated in the City's jails where they face the risk of life-threatening exposure to COVID-19. The population of the City's jails has dropped significantly, a development that represents meaningful progress and should be celebrated. But – as correctional medical professionals have warned for months – it is simply not enough. The Council should not mistake progress for a solution.

While many stakeholders in the criminal justice system have worked hard to release some people, other parts of the system have opposed releases that are necessary to protect medically vulnerable people and reduce the public health threat. For example, prosecutors' offices – especially the District Attorney's Office of New York – have aggressively opposed releasing even very ill people from Rikers Island, manipulating DOC's lack of data transparency to suggest that COVID-19 is not a serious threat and making the spurious claim that jail is a safer place for medically vulnerable people than returning to their own communities. Unfortunately, judges across the city hearing emergency motions for the release of medically vulnerable people have often agreed with this claim, and many hundreds of people Legal Aid has identified as having serious medical conditions leaving them extremely vulnerable to death or long-term disability from contracting COVID-19 have been denied release.

Even those people who are legally freed from DOC custody don't get out when they should. This is because DOC's byzantine, bureaucratic, and often callous policies delay both court-ordered release and release on bail.

Speaking to unacceptable delays in bail release, Speaker Johnson said in 2019, "no presumptively innocent New Yorker should spend a single minute in jail unnecessarily, but they are because of our system's inadequacies."[18] This is even more true during the pandemic. Yet even after courts order our clients released on writs of habeas corpus, DOC frequently holds our clients for not just additional minutes, but hours or even days after these writs are granted.

The Council has already legislated to combat the delay in release with the passage in 2017 of Local Laws 123, 124 and 125.[19] These laws require, among other things, that bail payments be made widely-accessible for communities through bail payment windows, bail facilitators, and online bail payment options.[20] The purpose of these laws was to prevent DOC from holding presumptively innocent people in jail for any amount of "extra" time.[21]

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[18] Rocco Parascandola and Thomas Tracy, "Posting bail in New York is too hard — and Correction Department ignores 2017 law meant to make it easier, City Council report says," New York Daily News, Mr. 31, 2019, available at https://www.nydailynews.com/new-york/nyc-crime/ny-council-report-blasts-department-correction-bail-system-20190331-6m6724usq5dr5pts6n3va2yvem-story.html

[19] New York City Council Local Law 123.

[20] *See* Local L. 123, sec. 1(c); Local L. 125.

[21] *See* The Council of the City of New York, Oversight and Investigations Unit, Report: An Investigation Into the Difficulties with Posting Bail in New York City (March 2019), *available at*: http://council.nyc.gov/wp-content/uploads/2019/04/FINAL-DOC-Report-3-30-19-1.49PM.pdf [Council Bail Report].

Unfortunately, according to a Council report issued in July 2019, DOC largely does not comply with these laws--leaving people who pay bail in jail for many hours, if not days, beyond the three-hour limit.[22] In fact, DOC "routinely fails to release people who post bail within a three-hour window mandated by city law," according to data collected by the Council and defenders.[23] DOC's prolonged detention of people who should be freed, these reports found, was due to inaccessible cash payment locations,[24] lack of functionality of online bail payment,[25] and DOC's administrative "paperwork" delays.[26]

The administrative delays reported in 2019 paint a particularly maddening portrait of DOC's byzantine process for release. The Council report details the long and "unnecessarily complicated" journey that individual pieces of paper must make from courthouse, to facility, to housing unit.[27] It also described instances of advocates being forced to "rely on intervention by personal contacts at DOC, MOCJ, and UCS to prevent their clients from unnecessarily spending the weekend in custody." These findings led the Council to direct DOC to "modernize its communication systems" and "upgrade" its administrative process for release.[28] It also directed DOC to provide regular reporting and audits.[29]

Yet little has changed. What in ordinary times is a frustrating and distressing injustice becomes, during the pandemic, a public health crisis not just for our clients and their families, but for the entire city. To paraphrase Speaker Johnson, no New Yorker should spend a single minute in jail unnecessarily during the COVID-19 pandemic, but they are because of our system's inadequacies.

During the past three months, we have tracked data on release times for people who were granted release specifically because of the COVID-19 risk. This group includes people whom the Mayor's office agreed to release on work release, whom the City DAs' office agreed to re-sentence, and people granted habeas corpus relief because they are so medically vulnerable that their continued detention violates the constitution. These delays, we have found, are mostly due to DOC procedures that show disorganization, inflexibility, and deliberate indifference to our client's lives.

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[22] *Id.*

[23] David Brand, *NYC jails violate the law by holding people hours after posting bail, report finds*, Queens Daily Eagle (May 10, 2019), *available at* https://queenseagle.com/all/bail-fail-hours-after-posting-bail-report-nyc. *See also* The Bronx Freedom Fund and Decarceration Project, Implementation of New York City Council's Local Law 123 2019 Mid-Year Report (May 2019), *available at* https://www.legalaidnyc.org/wp-content/uploads/2019/07/BFF_LAS_Release_Time_Report_Jan-June_2019.pdf [Defenders Bail Report].

[24] *See* Council Bail Report, pp. 7, 27.

[25] *S*ee Council Bail Report, pp. 8, 35.

[26] See Council Bail Report, pp. 37-40.

[27] See Council Bail Report, pp. 37-38.

[28] *See* Council Bail Report, p. 49.

[29] *See* Council Bail Report, p. 49.

Several of our clients were held for prolonged periods due to DOC's rigid adherence to unannounced paperwork requirements. Here are two examples:

> In one instance, our medically vulnerable client was serving a short misdemeanor sentence on Rikers Island. The Bronx District Attorney's Office agreed to his re-sentencing to an amount of time that would secure his immediate release. But his release was delayed by *five days* because, according to DOC, his paperwork did not contain the words "revoked" next to his original sentence. Corrections officers we spoke with agreed that the intent of the paperwork sent from the court was that this man should be released, but said that he could not be freed until the court put these specific words on the paper. No one contacted anyone at Legal Aid to alert them of the issue once our client's paperwork came in; instead, this man was simply left to be imprisoned until his attorneys, on their own, discovered the issue and followed up.
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> Another client was granted a writ of habeas corpus because, according to the judge, he was "high risk" of death if he remained at Rikers. But despite the Court's clear language that this man should be released immediately, DOC would not let him go, claiming the order is invalid because it did not contain sufficiently precise language. Again, DOC did nothing to contact the court, prosecutor or this client's attorney.

DOC's procedures for receiving release orders also continue to be overly complex and frustrating. At least two of our clients were detained for more than 48 hours because, even though the judge e-mailed orders directing their immediate release, DOC would not accept them because they were not properly signed and sent from the clerk of court. Again, DOC did not so much as reply to the judge's e-mailed orders, instead leaving it to counsel to navigate a maze of phone calls and emails with DOC officials to figure out what was keeping our clients in jail. And oftentimes we don't even know why our clients' release under these circumstances are delayed, just that it frequently takes several calls and emails just to figure out where our client's paperwork is and why it hasn't timely reached the appropriate facility.

This is not to say that bail problems also aren't persistent during the pandemic--they surely are. One client was held in for almost a week, despite paying bail, because the "bail pay" option on the DOC website was not working. Just like the Council observed in 2019, it took correspondence with MOCJ and DOC general counsel to finally get this woman released. Another client's release was delayed more than a day due to problems with the online bail payment system. When our office asked DOC the reason for the delay, we were told that the employee who enters the "code" for online bail was not in; apparently, the absence of a single employee caused our presumptively innocent client to be held not just minutes, but hours, after he was supposed to be released. And, with courts largely closed and social distancing orders in place, access to in-person bail payment is even more difficult for our clients than ever before. This makes it even more important that DOC immediately fix its broken online bail payment process.

Requests:

- The Council should join BOC and correctional medical professionals in calling for the release from City jails of *all* people over the age of 50 or with CDC-identified medical vulnerabilities.

- The Council should exercise greater oversight of prosecutors' policy objections to the release of medically vulnerable people from City jails, hold them accountable for spurious and inhumane claims that Rikers is safe, and call on them to facilitate the release of more medically vulnerable people.

- The Council should expand Local Laws 123, 124 and 125 to include not just bail, but also all release orders, so that medically vulnerable New Yorkers do not sit in jail any longer than needed.

- The Council should audit release times for all people who paid bail, were released on work release, or on court order from the beginning on the City's pandemic response through the present.

- The Council should direct DOC immediately to increase staffing for processing release orders, including having a person permanently on staff to manage release delays, including online bail payment and resolving any questions about court-ordered release.

The Reality of Life in the Jails Precludes Social Distancing and Effective Sanitation

The only known ways to protect oneself from COVID-19 are keeping physical distance from others and frequently cleaning hands and anything they touch. Both the physical design of the City jails, and the nature of their operations which put people in intimate contact with each other, simply do not allow for the necessary degree of physical distance from other people nor sufficient cleaning of shared space. We describe some of the most significant areas for COVID-19 transmission here, but note that these risks exist throughout the facilities given the enormous amount of necessary movement -- for meal distribution, cleaning, staff assignment – that heightens risks of cross-contamination.

Facility Intake Areas:

Every DOC facility has a high-traffic intake area (also called a "receiving room") which holds incarcerated people before their entry to or exit from the facility, or as a way station while they are moving within the jails. Intakes vary, but principally consist of large open "pens" – communal rooms containing only a bench and open toilet and sink, with some also having smaller rooms or cells. While they were designed for short-term use, in practice DOC holds people in these intake areas for hours on end, and often many *days.*

The DOC intake pens are not fit for communal human habitation during this pandemic. There is no way to sanitize the benches and toilets, nor, in many of them, to afford adequate distance between people.

Requests:

- We ask the Council to obtain from CHS its infection management plan for each jail's intake area, including identification of which, if any, of the intake pens can safely hold more than one person, and what specific protocols incarcerated workers should use in cleaning the areas.

- We further ask the Council to monitor via the Department's video surveillance system whether the CHS protocols have been implemented.

Housing Areas

DOC housing areas were never intended to afford privacy or individual living quarters. Most people in custody are housed in dormitories with shared bathrooms; others sleep in individual small cells, with a toilet and sink, but by day share showers, dayrooms, chairs and phones. They rely on other incarcerated people and DOC staff for their meals, laundry, personal hygiene items, and sanitation. Their living areas are notoriously poorly ventilated.

Despite the reductions in population and huge excess of space in the jails, DOC housing areas remain too densely populated to provide minimal infection control. Only a dramatic reduction in the number of people living in each room, and a sanitation program the Department has never before implemented, could even begin to make these areas safe for habitation.

As a threshold matter, there is little information available to assess the density of housing areas within DOC facilities. The first public information, from a BOC report issued May 11, 2020, showed that of the 20 units observed in April, nearly half were "above 50% capacity."[30] We implore the City to provide the data behind this aggregate number: a dorm operating at 75% of capacity presents very different public health risks than a dorm operating at 15% of capacity.

The Department provided some additional housing density information in a May 12, 2020 BOC public meeting, citing housing densities ranging from 36% to 49% of capacity.[31] But these averages provide little meaningful information about the health risks to people in custody. DOC provided no data about the occupancy rates in single-cell housing, which pose significant transmission risks to people in custody due to operational realities, discussed further below. Nor do these average occupancy percentages or ranges give the information needed to assess risk in *this* pandemic, which is measured by aerosolized viral particles and feet, if not inches—averages cannot provide information adequate to assess the threat.

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[30] The New York City Board of Correction, *Monitoring COVID-19 Responses in New York City Jails, April 5 – April 16, 2020* (May 11, 2020), at 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 (last visited May 15, 2020).

[31] NYC Department of Correction, *DOC Presentation re: COVID-19 Preparedness and Response*, given at May 12, 2020 Public Meeting of the New York City Board of Correction, https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2020/May/May%202020%20COVID-19%20Preparedness%20and%20Response_5.12.20.pdf, p.7 (last visited May 15, 2020).

The Council must query of our public health experts whether the common measures of "social distancing" recommended for contact among strangers in the public provide the proper infection disease control for communal living. We all know, for example, to remain 6 feet away from one another to avoid contracting the virus through aerosolized viral particles and droplets expelled when we cough, sneeze, or speak. But as we learn more about COVID-19 transmission—especially indoors with subpar ventilation conditions[32]—it becomes increasingly clear that protocols in the community do not provide enough protection in the 24-hour environment of a custodial setting. The space and protective measures that keep us safe in a passing encounter in a grocery store are not the same space and preventative measures necessary to keep us safe when we must sleep, shower, brush our teeth, defecate, wash our hands, sit on benches, use phones, and breathe together.

In any event, reports from our clients and monitoring from BOC raise questions about whether the Department is capable of following its own minimal protocols. For example, the Department asserted in the May 12 BOC meeting that telephones are cleaned every 30 minutes.[33] Our clients, however, have reported to us for weeks that phones are not being cleaned regularly and that they are forced to hold them with socks if they want to risk using them to access legal counsel, medical care through the new CHS telehealth system, or loved ones. When Board staff conducted monitoring of phone access and cleaning, they confirmed that holding phones with socks and other fabric was a "frequent" practice, and that of the 45 phone usages they observed, the phone was only cleaned 3 times prior to use.[34] The Board also reported troubling findings about social distancing. In an audit of 20 housing areas, Board staff observed social distancing failures in 50% of units observed.[35]

Requests:

- The Council should obtain data on the census and capacity of all housing areas holding individuals.
- The Council should seek input from CHS and health authorities on the safe number of people who can live together in each housing unit in the City jails, and mandate compliance with these limits.
- The Council should ensure that the sanitation workforce—incarcerated people responsible for cleaning the jails--has full protective equipment.
- The Council should obtain information on cross-contamination in the jails introduced by meal delivery and sanitation workers moving from housing area to housing area.

Medical Isolation Units

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[32] Quia, Hua, et.al. *Indoor transmission of SARS-CoV-2* (April 7, 2020), Department of Mechanical Engineering and School of Public Health, The University of Hong Kong, https://www.medrxiv.org/content/10.1101/2020.04.04.20053058v1.full.pdf (last visited May 15, 2020). *Note: this study has not yet completed the peer review process, but due to the dynamic and rapid pace of the novel coronavirus, we felt it important to bring to the attention of the Council.*

[33] DOC Presentation at May 12 BOC Meeting, *supra*, p. 2.

[34] BOC COVID-19 Monitoring Report, May 11, p. 9.

[35] *Id*. at p. 6.

Much of the infrastructure that DOC developed for addressing contagious disease arose during the drug-resistant tuberculosis crisis of the 1980s. Then, pursuant to a court order obtained by our office in response to the City's failure to provide adequate care, DOC constructed 140 respiratory isolation beds in the "sprungs"—temporary housing areas—in a Contagious Disease Unit of West Facility. These included very specific ventilation and construction systems to provide the necessary care. With the waning of the TB response and declining DOC population, these facilities were put to different uses, including *de facto* protective custody or *de facto* punitive segregation in violation of BOC standards.[36]

At the start of the COVID-19 pandemic, the City stated the Contagious Disease Unit had a capacity of 70 beds.[37]We do not know how many beds were occupied before the pandemic, but in any event, this capacity was reached quickly. We understand that Correctional Health Services and DOC then created new isolation areas inside the recently-shuttered Eric M. Taylor Center, the former jail for serving misdemeanor sentences. We not know the total capacity of any of these units, nor their functional characteristics; their current occupancy; and whether they provide clinicians with the setting needed for disease management.

Request: We ask that the Council ascertain:

- The number of respiratory isolation beds fully operational and occupied and unoccupied in DOC today.
- The capacity of CHS and DOC respectively, to staff a contagious disease unit with appropriately trained staff.
- The number at which CDU admissions would exceed current staffing capabilities, and the plan for care at that point.

The Expertise of Correctional Health Services is Underutilized Because the Systems to Connect Clinicians and Patients are Broken

Our clients in the City jails are terrified, anxious and angry, and desperately want their doctor's advice on what they can do to stay safe. Hundreds of clients have called us since the pandemic began and reported that the medical systems the City touts—telehealth, phones, posters—do not work in practice to connect incarcerated people and clinical staff. Collectively, they describe an overwhelmed system, and a sick call protocol that is not working.

There are many indicators of the increased stress on the system of medical care in the NYC jails. Individuals with chronic medical conditions and substance abuse needs unrelated to COVID-19 find those needs are neglected. In a well-intentioned effort to reduce movement within and among the jails, visits to specialists, physical therapy, dental care, and medication are diminished or stopped. For example, one individual held at OBCC who survived pancreatic cancer reported to us that he was informed that elevated antibodies in a blood test indicated that he should be

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[36] *See* Board of Correction, Notice of Violation of Minimum Standards at West Facility, September 29, 2016, available at https://www.politico.com/states/f/?id=00000157-8837-d9e5-a35f-e8bf11870000.

[37] See https://rikers.cityofnewyork.us/wp-content/uploads/Justice-Implementation-Task-Force-Materials-2018-03-16.pdf.

seen by an oncologist. An appointment was made for March 23rd but it was canceled. He has left repeated messages on the sick call line but receives no response. He lately started experiencing symptoms associated with COVID-19, including body aches and loss of smell and taste, but as of April 30 he still had not been seen by a medical staff person.

Most critically, the need for mental health care during this difficult time continues to increase. While the jail population has reduced, the percentage of individuals in DOC custody receiving mental health care has risen to over 50%.[38] CHS is seeking to change its protocols for regular psychiatric checkups with much of this population from every two weeks to every eight weeks.[39] While measures to delivery services more efficiently are laudable, when the patient population is reporting great difficulty accessing care, reductions in doctor-initiated patient contacts during a crisis exacerbate fear and tension.

While CHS asserts that individuals who need and want care will receive it, our clients report that failures in a new sick call system belie those claims. This spring, DOC and CHS unveiled a new sick call system, a telephone number that incarcerated people are instructed to call if they need access to care and a separate number for mental health services. This " telephonic sick call triage" is open during specified hours and is supposed to allow patients direct access to CHS nursing staff for consultation and to make appointments. If the caller does not reach a nurse they are told to leave a message. And, they are told, "in case of an emergency, please contact DOC."

From what our clients report, these are not reliable avenues to obtaining care. Since telephone triage system began, we have received several reports each day from incarcerated people who say that no one picks up the line, and it hangs up on them without the opportunity to leave a message. For those who can leave a message, we have heard that it is rare to receive follow-up to those messages. During the week of May 4th through May 8th, we heard from individuals in OBCC, AMKC, GRVC and West Facility that the sick call line does not work. The cause of these problems is unclear; it might be staffing, it might be technical, it could be a failure to communicate between CHS and DOC, or a combination of issues. But the end result is that individuals are not receiving the medical attention that they need.

And even when the phone system operates properly, there is complete perversity in requiring people to contact their clinicians during this pandemic exclusively by *shared* handsets, in areas with phones fewer than 6 feet apart, with little or no cleaning between callers. We are surprised that public health experts would counsel their patients to touch such a device during a pandemic without the opportunity to disinfect it completely.

Request: We ask that the Council ascertain from CHS and/or DOC

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[38] Board of Correction Daily Covid-19 Update for Sunday, May 17, 2020, available at: https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Public_Reports/Board-of-Correction-Daily-Public-Report-5-17-2020.pdf, at 2.

[39] Correctional Health Services' request for renewed variances to Mental Health Minimum Standards, dated May 4, 2020, available at: https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2020/May/CHS%20Variance%20Renewal%2020200504.pdf

- Data on the calls being made, by facility, to the triage telephonic sick call line, including the number of completed calls (where the caller speaks to a medical professional), the number of messages left on voicemail and the number of calls that were dropped.
- Whether individuals who speak to nursing staff and request clinic appointments are subsequently seen in the clinic.
- The capacity for DOC to escort individuals requiring medical care who have made appointments through the telephonic line and whether, independent of this capacity, staff is escorting individuals to scheduled appointments.
- Whether, based on the call data and available nursing staff, CHS has the capacity to staff the telephonic sick call line, and whether the staffing and the hours of the telephonic line can be expanded.
- Whether there are technological means to address the problem of dropped calls and unavailable voicemail.
- A plan for medical and mental health staff to conduct rounds in units that do not have dedicated in unit medical staff, to follow-up on medical and mental health issues raised through the telephonic sick line.
- Auditing and documentation that Virex solution and other cleaning supplies are stocked in all housing areas, including near shared telephones.

Health Education is Desperately Needed in the Housing Areas

From every facility, we routinely hear from people whose questions about their personal health and safety go unanswered, or wrongly answered, by correctional or health staff. People do not understand why they are or are not tested; why they are housed in certain areas; whether symptomatic individuals will cause infection in the unit as a whole; and what they can do, or where they can go, if their living quarters are unclean. Moreover, they ponder these risks cut off from contact with their parents, children or loved ones, and worry constantly about family members they are not allowed to see or whose funerals they could not attend. While the response to the pandemic is necessarily dynamic, and represents new terrain for many of the correctional staff, the lack of community healthcare information in the jails is causing fear, confusion and distrust that will linger long after the virus is resolved.

It is abundantly clear that people in the jails desperately want and need patient education from credible messengers about the true facts of the pandemic, and what measures they can and should take to mitigate risk. Posters about hand-washing or admonitions from correction officers are no substitutes for community healthcare workers who can bring medical education to the patient population.

Request:

- The Council should fund and require community healthworker presence and education in the housing areas of the jails.

New Admissions to the City Jails Threaten Progress Made so Far Contain COVID-19

The reduction in the City jail population represents a significant positive step. The Council and other actors must watch closely for indications that the population will rise again, putting stress on all of the systems within the facilities and increasing the health and safety risks to people in custody and staff. This is happening already. From late March to mid-April, the number of new admissions to DOC per week ranged from 113 to 138.[40] Beginning in late April, however, that number began to rise and nearly double, with 241 new admissions in the week of May 3.

Week	New Admissions to DOC
March 22 – March 28	138
March 29 – April 4	122
April 5 – April 11	121
April 12 – April 18	113
April 19 – April 25	138
April 26 – May 2	209
May 3 – May 9	241
May 10 – May 16	234

There are many potential reasons that the number of new admissions to Department facilities is increasing, but one of those reasons is policing.

COVID-19 has disrupted nearly every aspect of everyday life in New York City. People, government and businesses have drastically modified their practices to limit physical contact, refrain from everyday activities, and prioritize actions that prevent community spread. The glaring exception to this rule is the NYPD. Police Commissioner Dermot Shea has steadfastly refused to adjust policing practices in light of the pandemic, despite a decrease in crime and a rapid increase of confirmed COVID-19 cases among police officers. Legal Aid continues to see clients accused of low-level crimes going through the system on a regular basis, and every day we see new admissions to the City jails for pre-trial detention. Over one-third of all custodial arrests continue to be for petty misdemeanors and non-violent felonies.

On April 8, Legal Aid sent a letter to Mayor DeBlasio and Commissioner Shea calling for Public health experts echoed the calls to refrain from aggressive policing in order avoid exacerbating the COVID pandemic, calling for limitations on police interactions for low-level or "quality of life" offenses and reductions in custodial arrests, including by increasing the use of verbal warnings, non-criminal citations, and appearance tickets for all low-level offenses and refraining from the criminalization of the failure to social distance. Public health experts echoed the calls to refrain from aggressive policing in order avoid exacerbating the COVID pandemic.[41] Instead of

[40] Data taken from daily reporting from the Board of Correction at https://www1.nyc.gov/site/boc/covid-19.page (last visited May 15, 2020).

[41] Medical Workers Letter re: Public Health Concerns on NYPD Spread of COVID19 Virus, April 23, 2020, available at https://www.changethenypd.org/sites/default/files/covid_policing_medical_letter_to_mayor_nypd_4-23-2020.pdf; Dr. D.L. Marshall and Abdullah Shihipar, *We Can't Police Our Way Out of a Pandemic,* NYT Opinion (April 7, 2020) https://www.nytimes.com/2020/04/27/opinion/coronavirus-police.html

responding to these calls for appropriately restrained policing, the Mayor and the NYPD used the pandemic and its requirement of social distancing as a platform for more aggressive policing, resulting in a spate of scandals in recent weeks with the release of videos showing violent police encounters and data demonstrating extreme racial disproportionality in enforcement.

The City Council should formally condemn these actions and join the calls for limitations on low-level police interactions, including but not limited to interactions stemming from the enforcement of social distancing rules. More generally, it should recognize that the NYPD's aggressive pandemic policing is a natural result of the City's weak system of police accountability and a lack of transparency surrounding the actions of the police department. The City Council should:

Requests:

- The Council should monitor changes in the jail population, and engage stakeholders through public hearings and otherwise to ensure that new admissions are reduced and reductions in the jail population are made permanent.

- The Council should pass a budget that puts community safety, not criminalization, first, by funding critical social services and decreasing the NYPD budget.

- The Council should pass the resolution in support of repealing Police Secrecy Law 50-a (Resolution 750).

Conclusion

We thank the Council for turning its attention to this critical public health topic. We look forward to working together to respond to this crisis, protect each other, and make New York a safer and fairer city.