



TESTIMONY OF:

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BROOKLYN DEFENDER SERVICES

Presented Before

The New York City Council Committees on Criminal Justice & Committee on Hospitals

**Oversight Hearing of The Department of Correction and Correctional Health Services
Management of COVID-19 in Jails**

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Brooklyn Defender Services (BDS) provides comprehensive public defense services to nearly 30,000 people each year, thousands of whom are detained or incarcerated in the City jail system either while fighting their cases or upon conviction of a misdemeanor and a sentence of a year or less. We thank the Committees on Hospitals and Criminal Justice and Chair Rivera and Chair Powers for calling this necessary hearing.

Six months after COVID-19 was declared a pandemic by the World Health Organization,¹ the number of global deaths is approaching one million, with nearly 31 million individuals infected.² Prisons and jails around the country have been petri dishes for the virus, as it spreads through units and buildings, infecting incarcerated people and staff alike, while the known methods for containing the spread of the virus—such as mask-wearing, social distancing, and systematic cleaning—are difficult if not impossible to implement in these settings.

In May of this year, the City Council Committee on Criminal Justice and Committee on Justice System held a joint hearing on the COVID-19 response in our City jails. Directly impacted people, advocates and defender offices in NYC said the same thing: Department of Correction (DOC) and Correctional Health Services (CHS) had failed to be transparent. That opaqueness

¹ World Health Org., *WHO Director-General's opening remarks at the media briefing on COVID-19* (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

² Center for Systems Science and Engineering, Johns Hopkins University, COVID-18 Dashboard, <https://coronavirus.jhu.edu/map.html> (last updated September 24, 2020 at 10:23 am).

created mistrust, lack of accountability, and failed to adequately address the public health crisis at hand. DOC and CHS had not provided, and still have not provided, a comprehensive response plan, and they failed to share vital information with people in custody and the community. Four months later we find ourselves in a nearly identical position, with little progress. Our office and the offices of other defender legal providers have made countless attempts requesting information with little or no response. As just one example, on Friday, September 11, the NYC defender offices wrote to the DOC, CHS and the BOC requesting information on COVID-19 protocols. As of today, the NYC defender offices have not received a response.

City agencies are asking the press, the oversight agencies, and the public to believe one narrative, but that narrative is far divorced from the experiences of those directly impacted. These agencies' narratives largely describe how things *should* be, not how they actually are. They reflect policies and official guidance—despite those policies not being shared. The other narrative, the one we hear each day that is lived by directly impacted people, is the experience of people who see firsthand how those spoken policies are failing. For six months we have seen a City reluctant to enforce the version of the narrative shared by the City agencies – one that is, at best, aspirational – there's no transparency around basic safety protocols, compliance measures, accountability structure for staff who don't comply.

With the looming threat of a second wave, no written policies on COVID-19 safety measures from DOC and CHS, numerous reports of staff non-compliance with PPE, the public is left with no assurances Department of Correction and Correctional Health Services are equipped to handle this ongoing crisis.

COVID-19 is Still a Threat

There is no question that NYC has made tremendous progress maintaining control of the virus. Nonetheless, cases are cyclical, and we know the virus is still spreading in New York³ and around the country. As that happens, increased infections in NYC jails are nearly inevitable as experts assure us a second wave is ahead.⁴ We know COVID-19 will enter NYC jails one of two ways: staff and jail admissions. As we prepare for a potential second wave, we can almost guarantee that when and if it does hit NYC, the jails will become the epicenter once again.

Over the course of six months, people in custody have been sharing their direct experience with continued confusion about testing practices, housing determinations and access to services and family. The experience of one person represented by BDS from the time of their arrest through numerous transfers instead DOC housing units demonstrates the high risk of exposure and how the virus does and will continue to spread, without specific policies and practices designed to counteract the danger:

³ <https://rt.live/> (showing an infection rate above 1.0 for New York, demonstrating that each infected person is infecting more than one additional person)

⁴ <https://www.nbcnewyork.com/news/coronavirus/six-nyc-neighborhoods-see-spike-in-covid-19-cases-as-fears-of-second-wave-mount/2631102/>.

Mr. B is arrested on 8/1/2020 by two police officers who were not wearing PPE.^{5 6 7} Mr. B is taken to Brooklyn Criminal Court (“Central Booking”) where he is held in a large cage with 10-15 other men and where it is impossible to socially distance from one another. Mr. B is held in Central Booking for several hours until he is called in front of a judge and bail is set. A while later, Mr. B is led to a DOC bus with 10 other men and forced to sit directly next to another person where the two are handcuffed together. Mr. B has not been tested recently and does not know if he is positive for COVID-19 or if the man he’s now handcuffed to might be. Mr. B is already overwhelmed with the stresses that follows anyone entering a jail, but that stress is now exacerbated by the lingering threat of COVID and knowing he has been in close proximity to many others.

Upon arriving at the Manhattan Detention Complex, Mr. B exits the bus and is left in an intake holding cell, again with 10-15 other men. These are not the same men he was with in Central Booking and not all are from the same bus he came in on. His potential exposure to COVID-19 has now increased. One day after arrest, 8/2/2020, Mr. B is moved from the intake holding area to the New Admission Housing unit. In this unit are men who did not enter the jail on the same day as Mr. B, but days before. Within 4 days on 8/6/2020, Mr. B is tested for COVID-19 in his unit, and verbally informed by CHS staff that he will receive his results in 10 days and he will not be moved until his results are confirmed.

Mr. A is also incarcerated and entered the same new admission housing unit a few days prior to Mr. B. Mr. A was tested on 8/1/2020, the day before Mr. B arrived in the new admission housing unit and was verbally told he will not be moved until his results are confirmed. Mr. A did not receive verbal or written documentation of his COVID-19 test results but was moved to a new housing unit in a new facility 10 days after getting tested for COVID-19. (his attorney received his test results before Mr. A, and Mr. A later learned those test results were negative).

Mr. A is anxious because he does not know the answers to his test results, and now men in his new housing unit are asking him questions if he’s positive or if he has proof of his test results. He doesn’t, and now the tensions in the unit have risen. Mr. A has signed up for sick call and requested his test results only to be told by CHS, “we’ll look into it.” He can only assume he’s not positive because he’s not witnessing anyone in the unit sick, but he does not know for sure.

Meanwhile, Mr. B is still in the new admission housing unit waiting for his results. They come back on the tenth day, and Mr. B is positive for COVID-19. He is moved to the contagious disease unit at West Facility.

Mr. A and Mr. B spent a total of 9 days together in the New Admission Housing unit. Both were allowed out of their cells during the day, used the telephones, used the same showers

⁵ <https://www.nytimes.com/2020/06/11/nyregion/nypd-face-masks-nyc-protests.html>

⁶ <https://www.rollingstone.com/culture/culture-news/nypd-masks-bella-hadid-1041003/>

⁷ <https://gothamist.com/news/called-out-not-wearing-mask-nypd-officer-calls-teen-male-version-karen>

and even interacted. The unit had a bucket of dirty water next to the telephones, and understandably so, no one was using it to clean the shared telephones. The showers were being cleaned every other day, but not after every use.

The above is one account, but it represents many stories our office has heard and continues to hear. Infected people—many who may not know they are infected, and may even have tested negative—can spread the disease not only by direct contact (such as congregating with fellow incarcerated people in a jail or having direct contact between an incarcerated person and a corrections officer) but also through indirect contact (such as touching a surface in a communal bathroom or eating space, or sharing breathing space in an enclosed dormitory lacking access to outside air circulation.⁸

After Mr. B was found to have tested positive, what remains unclear is how Mr. A is notified and if and when the people in Mr. A's new housing unit are also notified and retested.

We do not know how and if Mr. A was informed of his exposure to a positive case while in New Admission Housing. We do not know if Mr. A is allowed to retest following his known exposure—we hear conflicting reports from people in the jails and based on what CHS and DOC represent—and we do not know if the people in his new unit are also informed and or allowed to retest. What action steps are being taken to make sure people, including those detained and staff, are made aware of potential exposure and have the right to retest for COVID-19?

Mr. A may also have exposed others like Mr. C who was handcuffed to Mr. A on the bus as he was transferred from New Admission Housing, Mr. D who was intaked with Mr. A and was moved to different facility, and all the other individuals who those people have encountered. Similarly, Mr. B was in close proximity with others at the start of his contact with the criminal legal system – his arrest by two NYPD officers, who were not wearing masks; the Brooklyn criminal court holding areas; handcuffed to another person on the DOC bus and then again in a holding area in the DOC facility intake. How far back will authorities go to notify those Mr. B was in close proximity? These are all questions that neither DOC nor CHS have answered, but necessary information to assess the safety of our jails.

Contact Tracing

BDS acknowledges that contact tracing is key to slowing and preventing the spread of COVID-19 to our friends, loved ones and community. Our community includes, and has always included, the City jails, yet jails and the people NY chooses to incarcerate are often left out of the discussion. We are failing to recognize the significance jails have on a community during a pandemic. Due to the transient and consistent movement that a jail represents, people will be exposed to a virus, and the potential for spread to and from the community is astronomical. We have witnessed this throughout the pandemic – rather than before and now amid a pending second wave. City and state officials are failing to prioritize the safety guidelines for all NYC jails and prisons, and this is having a direct impact in how data is being collected, testing is practiced and how information is shared across all NYC and NY state.

⁸ Centers for Disease Control and Prevention, How COVID-19 Spreads, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

Nonetheless, the City’s decisions thus far with regards to Test & Trace risk exposing New Yorkers’ most intimate details—their daily whereabouts, friends and family, private health information—to criminal, family, and immigration enforcement authorities, as well as other private actors.

Further, beyond just the privacy implications, other crucial details of the effort to deploy contact tracing in the City’s jails remain unknown and problematic. CHS claims they are in partnership with DOC in contact tracing efforts, but what those specific efforts mean in practice has yet to be explained or shared. When our office asked CHS for clarification about contact tracing efforts, we are simply told “it’s complicated.” There is no question that the systems before us are “complicated,” but using that as an excuse to refuse to share those specifics with the public during a pandemic is absurd at best and dangerous at worse.

To CHS’ credit, they have provided written responses to some questions, but those responses lacked any specificity and failed to answer the question posed. Instead, responses are in general, overarching themes that give little assurance and faith the agency has the capacity to fulfil their responsibilities. And most importantly, we are still left with many unknowns, including how information is stored or used and what privacy protections are in place.

Our office will be testifying and submitting testimony for the joint Committee on Health and Committee on Hospitals oversight hearing on NYC’s COVID-19 Testing and Contact Tracing Program, Part II scheduled for Wednesday, September 30, 2020. We will provide substantive information outlining our concerns and I encourage both Committee on Hospitals and Committee on Criminal Justice to review.

Access to Tests

Since early in the pandemic, the jails have touted broad testing efforts: namely, CHS claims to provide COVID-19 screenings at “every contact point of the criminal justice process.” This purported blanket access is simply contrary to what people in the jails experience in practice. Specifically, CHS claims to test “pre-arraignment, admission, clinical encounters, and discharge.” It is unclear from CHS’s own statements if testing is supposedly available to all, or only if the person is symptomatic and/or if aware of exposure to a positive case. The majority of people in custody that we speak to were only tested at time of admission, and requests for a second test to confirm results or the ability to retest later in their incarceration is ignored or denied without reason.

This inadequate practice exacerbates other risks when people are frequently moved from one unit to another, or from one facility to another by the Department. When our office asked CHS for clarification about testing upon transfer to a new facility, the response was “it isn’t practical” because transfers happen often and are not health driven. If we assume a person in custody is negative because they tested negative weeks ago, what is to prevent them from contracting the virus by staff who come and go daily? What prevents that now-positive person from spreading the virus to countless others, who were similarly tested weeks ago?

CHS has stated they have learned a lot in how they respond over the course of this pandemic. We urge the Council to require they share those findings, including what is working and what

knowledge has been gained. We are all experiencing this pandemic together, we are all learning and we are all adjusting our practices in how we move in our roles, and withholding information that is vital to public health puts us all at risk.

Deaths due to COVID-19 Complications Post-Release

Throughout the pandemic, media outlets have detailed the stories of people who contracted the disease and subsequently died. Noticeably absent from this group is the lives of people who contracted the disease while in custody and died after being released. COVID-19 has rampaged New York City’s jails. Over 2,000 incarcerated people and jail staff were infected, and at least three incarcerated people and at least thirteen staff members have died. These statistics do not include individuals who may have succumbed to the virus after being released or whose death may not have originally been attributed to COVID.⁹

The public has demanded this information time and again, and yet the Department and CHS have made little to no effort to gather or share this information. The City Council has an opportunity to understand, and accurately portray the true impact COVID-19 had and continues to have on City jails.

Decarceration is Paramount Yet Incarceration Rates Are Increasing

As both public defenders and jail-based health care experts made clear in the early stages of the COVID-19 pandemic, releasing people from jail is paramount to protecting their health and the health of the broader public, and remains so. Social distancing and proper hygiene are uniquely challenging if not impossible in jails, as well as in prisons, immigration detention facilities, and other secure facilities. Indeed, jail and prison administrators across the country who conducted widespread testing, including here in New York City, found extremely widespread COVID-19 infection rates among incarcerated people. Conversely, New York State DOCCS has not conducted sufficient testing. This is alarming. Incarcerated people’s lives matter, and because outbreaks behind bars threaten all of us, as many people, particularly staff, regularly enter and exit the facilities. An outbreak in a jail or prison will not be contained by prison and jail walls.

In response to the public health mandate, New York City initially moved toward decarceration, likely saving lives. Unfortunately, too many were left behind. Months later, this trend is now reversing. Defenders were able to get many of the people we serve released through writs of habeas corpus, Mayor de Blasio’s administration assisted with the release of many New Yorkers in jail on “city sentences” for misdemeanor convictions, and the state agreed to the release of many people detained for alleged technical parole violations. At the same time, people continue to be detained on such alleged violations. Moreover, since rollbacks to the State’s new bail

⁹ ^[1] Brad Maurer, et al., *There must be mass releases from NYC’s jails immediately—it’s the only way to protect public health*, The Appeal (July 9, 2020), <https://theappeal.org/there-must-be-mass-releases-from-nyc-jails-immediately-its-the-only-way-to-protect-public-health/>; NYC Board of Correction, Weekly COVID-19 Update Week of August 22-August 28, 2020, https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/boc_weekly_report_8_22_8_28_2020_updated_final.pdf.

reform laws took effect in the beginning of July, which expanded judges' ability to set money bail in cases involving only allegations of nonviolent offenses, the daily jail population has increased by hundreds of people. This increase likely corresponds to a significantly larger number of New Yorkers admitted to local jails and exposed to these unsafe conditions before being released into some of the communities hardest hit by COVID and the scourge of racism.

Importantly, nothing in the current bail statute should result in any increase in pre-trial detention, as money bail, if and when it is imposed, is intended to serve as a gateway—not a barrier—to liberty. Excessive bail is unconstitutional and now there is an explicit requirement in the law that judges concern a person's ability to pay, as well as other crucial protections. Yet prosecutors continue to seek and judges continue to set unaffordable bail, including in cases that should not be eligible for money under the law. In particular, defenders are challenging the abuse of CPL 510.10 (4)(t), which permits bail to be set in cases where a person is released pending trial on any A misdemeanor or felony charge involving alleged harm to an identifiable person or property and is arrested on a subsequent charge meeting the same criteria if the prosecutor can show reasonable cause. For example, people are being jailed pre-trial on cases involving only minor theft allegations, even after the property in question is recovered undamaged.

All stakeholders should be working together to quickly resume decarceration in New York City before further spread of the virus or the predicted second wave of COVID-19 hits.

Conclusion:

We acknowledge the challenging, yet critical, responsibility the Department and CHS are tasked with, especially considering it is impossible to sanitize and socially distance in a jail that has both a transient and increasing population. However, the barriers jail imposes should not excuse City agencies charged with the care and custody of people from communicating those responsibilities and how they plan to enforce their policies. Jail is inherently violent, and the walls surrounding keep people—and the virus—in, just as much as they keep people out. People in custody have families and loved ones that receive bits of information that are pieced together to try and build an understanding, but what is still unknown creates fear and anxiety for the safety of their loved ones. This City has an obligation to report accurate information about how its' agencies are operating and their plans to ensure people in DOC custody are healthy and safe.

The testimony I've shared today is based on the experiences of people incarcerated in NYC jails, however it is also vital the Council hears directly from people inside who wish to share their own lived experience. We urge City Council to promote opportunities for people in custody to share what they are witnessing at these hearings, at Board of Correction hearings, and at other public forums through video testimony and comment. Transparency is essential, and we can begin to hold those accountable when we start listening to those directly impacted. We are living in a virtual world where we have both the means and capabilities to make that happen now more than ever.

If you have any questions, please don't hesitate to contact me at kdeavila@bds.org. Thank you.

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