SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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Matter of JOSEPH AGNEW, ANTHONY GANG, TYRONE GREENE and KAMER REID

On behalf of themselves and all others similarly situated,

Petitioners,

For a judgment under Article 78 of the Civil Practice Law and Rules

-against-

NEW YORK CITY DEPARTMENT OF CORRECTION,

Respondent.

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AFFIDAVIT OF RABIAH GAYNOR RE: NEW YORK CITY DEPARTMENT OF CORRECTION COMPLIANCE AFFIDAVIT

Index No.: 813431/2021E
(Taylor, J.)

STATE OF NEW YORK)
:SS:
COUNTY OF QUEENS)

RABIAH GAYNOR, being duly sworn, deposes and says as follows:

1. I am the Executive Director of the Health Affairs Division of the New York City Department of Correction ("DOC" or "the Department").

2. I have been employed by DOC for approximately six years as the Executive Director of Health Affairs. I also previously worked for the Department as a New York City Correction Officer for less than one year in 1997.

3. The Health Affairs Division is the primary liaison between Correctional Health Services ("CHS") and the Department. Health Affairs works to ensure detainees have access to all healthcare services. In ensuring access to care, our division works closely with the facilities to address day-to-day operational issues as they relate to the delivery of healthcare. In my role, among other things, I manage this process as well as track DOC's clinic production progress. The

Health Affairs Division also investigates death in custody cases, oversees suicide prevention, mental health first aid, and crisis intervention training. In addition, Health Affairs is also responsible for overseeing the reasonable accommodations requested by incarcerated individuals pursuant to the Americans with Disabilities Act.

4. I have reviewed the prior affidavit submitted by the Chief of Staff ("COS"), Kathleen Thomson, dated June 16, 2022 (ECF Doc. No. 129) ("Thomson Aff."), discussing the Department's efforts to resolve the issue of lack of escort officers, which was undermining our obligation to provide detainees with timely access to sick call, as required by this Court's order of December 3, 2021 (ECF Doc. No. 82) (the "Mandamus Order"), and subsequent contempt order of May 17, 2022 (ECF Doc. No. 126) (the "Contempt Order"). Based on the steps taken, as described in COS Thomson's prior affidavit, the Department believes that it has achieved substantial compliance with the subject orders.

5. Specifically, in the period May 17, 2022 to June 12, 2022, the Department was obligated to provide escorts for 42,177 clinic appointments--or in some facilities, to provide passes for unescorted travel to the clinics--and was unable to provide escorts on 186 occasions, approximately 0.4% of the total scheduled appointments. *See* Thomson Aff. I at ¶ 5.[1]

6. I have reviewed the letter submitted to the Court by Plaintiffs' counsel, dated June 23, 2022 (ECF. Doc. No. 130) ("Pl. Resp."), and wish to address their contentions, and provide additional context for the Department's own contention that it is now in substantial compliance.

[1] As discussed further below, due to a typographical error in the COS's prior affidavit, these 186 missed *appointments* were misstated as a non-production of 186 *"inmates."*

7. As a threshold matter, I wish to address Plaintiff's initial contention that recent deaths in custody are attributable to lack of clinic access. *See* Pl. Resp. at p. 1. I am aware that this assertion has been made throughout the course of this lawsuit, and the Department continues to assert that it is unfair to suggest--in the absence of a thorough investigation of those deaths by the proper authorities--that there is a causal connection between a death in custody and a missed clinic appointment.

8. Moreover, while the official cause of death is still pending in recent cases, many of the apparent causes of death in Department custody over the last few years have no clear connection to missed clinic appointments. The Department has acknowledged the importance of timely clinic visits and acknowledged certain deficiencies through the course of this litigation; it is unclear why Plaintiffs repeatedly cite these terribly tragic incidents, which we believe are unfair and inflammatory.

9. As to Plaintiffs' specific response to COS Thomson's affidavit, in their letter, Plaintiffs contend as follows with respect to the Department's provision of access to care in the period following the Court's Contempt Order:

> (i) [DOC] admits that DOC failed to provide access to medical care to nearly 200 people in less than 30 days; and (ii) DOC's "progress" appears largely due to two unexplained changes in their metrics, rather than due to people actually being produced to their medical appointments. Petitioners and this Court cannot verify DOC's purported progress in producing more people to their clinic appointments until DOC provides a breakdown of the non-production category from December 2021 to present, and an explanation of how its data collection practices have changed.

See Pl. Resp. at p. 1.

10. First, in citing "nearly 200" missed appointments, Plaintiffs should acknowledge that those lack of escorts (186) occurred in the context of *42,177 clinic appointments,*

representing 0.4% of scheduled appointments. I understand that the final determination will be made by this Court, but in the Department's view, this constitutes substantial compliance. While we understand the gravity of any missed appointment, we do not believe it a reasonable position to assert that every appointment must be made to constitute substantial compliance with the subject orders.

11. In this regard, as noted in the above footnote, the Department acknowledges a typographical error in COS Thomson's prior affidavit, when she made reference to "186 inmates" not being produced. *See* Thomson Aff. I, ¶ 5. COS Thomson's reference to "inmates" rather than "appointments" did not represent a change of metrics as Plaintiffs believed. Rather, it was intended instead to refer to 186 "appointments" not being made due to lack of escort officers. I advise the Court and counsel that in fact, the Department tracks '*appointments* made' and '*appointments* missed', precisely to avoid this ambiguity in its metrics.[2]

12. As to Plaintiffs' expressed concerns about the metrics generally, the Department fully agrees that a further explanation of the metrics is appropriate and has produced additional data to Plaintiffs to allow further discussions. In addition, we will work with Plaintiffs' counsel to answer questions, address concerns, and provide additional information as needed, so that the Court has a full and complete record before it.

13. But to put this issue in proper perspective, the prior metrics, and the categories that we have traditionally reported on in the mandated monthly reports, were originally borne out of a prior Local Law that required this particular mode of reporting.

[2] I have been advised by counsel that prior to the June 24th appearance before the Court, the Department's counsel informed Plaintiffs' counsel of this error via e-mail, and so the contention was not advanced at the appearance.

14. For example, the title of the reports, "Medical Non-Production," is something of a misnomer, and actually refers to *all scheduled clinical encounters* (*i.e.*, appointments), not just those at the medical clinics. Specifically, this metric also encompasses mental health, dental, and podiatry appointments, as well as appointments at medical clinics--whether on-island or at an off-island Health + Hospitals facility. Therefore, the suggestion in Plaintiffs' response letter that DOC is being intentionally vague (at pp. 1-2) is incorrect, and we trust this clarifies the matter.

15. As part of ongoing reevaluation of our productivity and in speaking with clinic captains and other staff, my Division recognized the need for additional metrics to better understand and track medical access.

16. DOC can only meet its obligation to provide clinic access when it has an opportunity to do so. For example, if an individual on an appointment list is in court or has been discharged from custody, we would not record that as a 'failure to produce.' By contrast, if we escort someone to a clinic, and he or she does not wish to wait or gets tired of waiting and asks to be returned, DOC would consider that a successful production, even though the individual was not seen by clinical staff.

17. While I would not expect the above examples to be controversial, there are other instances of non-production that the Department believes should also not be classified as a 'failure to produce.' As alluded to in Plaintiffs' letter, these instances were previously encompassed by the 'Other' category in our monthly report--*i.e.,* a list of the other legitimate reasons for non-production--and Plaintiffs now suggest that DOC may have "shift[ed]" its reporting, rather than remediating the problem, in a purported attempted to evade the Contempt Order. *See* Pl. Resp. at p. 4. We strongly disagree with this suggestion, and I discuss below the sound reasons for the changes we made.

18. The main change in our metrics is the creation of the new categories of 'Maximum Safe Capacity,' 'Medical Priority,' and 'Mental Health Priority.' These categories were developed recently to help staff better explain the reasons why clinic appointments are not made, and whether or not there was a fair opportunity for the Department to effectuate the appointment. In the Department's view, it should not be cited for a 'non-production' if there is a physical obstacle or safety concern that prevents production--similar to the 'other' category examples discussed above--*at a time when sufficient escort officers are available.*

20. Maximum Safe Capacity reflects the availability of safe space to wait for the scheduled appointment, when escort officers are available to bring individuals to the clinic. As the Court may be aware from prior proceedings in this case, and as I previously testified, often there is inadequate space to safely hold more than a designated number of individuals while taking into consideration security concerns such as high security classification individuals, or persons in custody from separate housing units that cannot "mix." We have had sufficient staff to escort individuals to the clinics--as indicated in COS Thomson's prior affidavit--but unless there is a steady flow of individuals in and out of the treatment areas, we have no choice but to return them to the housing area or not bring them down. The revision of available codes to include this designation has allowed facilities to better explain the totality of challenges to production.

21. In the facility where the problem was most acute, the Robert N. Davoren Center (RNDC), we experienced 918 instances of non-production (about 14% of scheduled appointments) from May 17, 2022 through June 15, 2022 due to lack of safe capacity--even though the facility had sufficient staff to escort individuals to their appointments. Engaging in the futile practice of producing inmates to the clinic area, only to immediately return them to their housing area, may frustrate an individual, thereby risking a security incident, or cause a future refusal to attend an

appointment. Accordingly, once RNDC staff is notified by radio transmission or the phones in the clinic that there is no space, they hold the individuals in the housing areas until space opens up, and then produce them for appointments.

22. In our view, issues of physical space and related security considerations should not be deemed a 'failure to produce,' as DOC had ample escort staff, which was the focus of the Contempt Order.

23. The new "Priority" categories encompass medical and mental health emergencies that preempt planned clinic production. Any emergency, whether related to physical or mental health, is prioritized, and that person will be escorted to a clinic regardless of who is at the clinic at that time. Although emergency runs are not directly reflected in the prior metrics because emergency care by its very definition is provided outside the context of a scheduled appointment, such emergencies are in fact addressed. The new metrics of Medical Priority and Mental Health Priority reflect instances where a scheduled appointment is preempted by others' need for emergency treatment.

24. In addition to emergency situations, the Mental Health Priority metric also encompasses instances where individuals require a discharge plan appointment—which typically occurs when an individual requiring mental health related discharge planning and services (pursuant to the *Brad H* class action) suddenly makes bail. If an individual in custody becomes eligible for release, DOC prioritizes their visit to ensure that a discharge plan can be prepared in conjunction with their timely release.

25. To remediate the issue of lack of physical space and related security considerations in the clinic, RNDC will begin utilizing the New Admissions area within the Intake area for extra clinic space. The use of this area will be dependent on the availability of staff to

monitor and escort individuals to and from the New Admission area on a day-to-day basis. Specifically, two pens have been designated for individuals to wait for their clinic appointments when there is no safe space to wait in the main clinic pens. These pens shall not be utilized for any purpose other than providing additional holding space for clinic production patient overflow.

26. Additionally, as an update to COS Thomson's affidavit, CHS has developed a revised approach to scheduling groups of patients by service and blocks of time within a tour. This will spread production of incarcerated individuals over the course of a tour, to permit the Department to focus its production efforts on specific services at specific times and limit clinic production waiting times. This plan rolled-out on Tuesday, July 5, 2022 at the Anna M. Kross Center (AMKC); CHS is expected to develop a similar plan to be implemented at RNDC in the near future.

Rabiah Gaynor

Sworn to before me
this 5 day of July, 2022

NOTARY PUBLIC

JONATHAN CHET MING LI
Notary Public, State of New York
No. 02LI6284919
Qualified in Queens County
Commission Expires August 17, 2025