



Testimony of

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Before the

Committee on Criminal Justice and Committee on Hospitals

Oversight Hearing – The Department of Correction and Correctional Health Services

Management of COVID-19 in Jails

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My name is Stan Germán and I am the Executive Director of New York County Defender Services (NYCDS). We are a public defense office that represents New Yorkers in thousands of cases in Manhattan’s Criminal Court and Supreme Court every year. Thank you to Chairs Powers and Rivera for holding this hearing on the management of COVID-19 in city jails.

## **I. Introduction**

My office has over 100 employees and 70 trial attorneys. We represent thousands of people, hundreds of whom are currently incarcerated in city jails. I am deeply concerned about the welfare of our incarcerated clients and the health and safety of my staff who are required to appear in person in our courts.

In my opinion, DOC has not taken adequate steps to halt the spread of the coronavirus. It is well-established that jails are veritable petri dishes for disease that then spreads back into surrounding communities.<sup>1</sup> Research now shows that mask wearing is crucial to preventing the spread of the

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<sup>1</sup> See, e.g., Sandhya Kajeepta et al, “County Jail Incarceration Rates and County Mortality Rates in the United States, 1987-2016,” *American Journal of Public Health*, (Jan. 2020), available at

coronavirus.<sup>2</sup> Yet my staff consistently report that DOC staff are not wearing face masks, or are wearing them slung around the bottom of their chin, in shared spaces. We have seen this on multiple occasions in the holding areas at the courthouse on 100 Centre Street, during visits to clients at the Manhattan Detention Center, and in the background of daily videoconferences to our clients in city jails. At a minimum, the failure to wear face masks puts all of us at risk. Yet our incarcerated clients report to us much worse, which I outline in detail below.

I call on the City Council to hold DOC accountable when their staff fail to follow COVID-19 policies and procedures. DOC and CHS must produce written policies in line with recent CDC guidance and up-to-date research on coronavirus transmission. Furthermore, the city must continue to work with stakeholders to ensure that our jails contain as few people as possible throughout the duration of the pandemic to ensure social distancing. If the rest of the country is any indication, the next wave of COVID-19 is coming. Our city jails must be prepared. Right now, they are not.

## **II. NYCDS Coronavirus Survey**

Today, NYCDS released a new report assessing the experiences of our incarcerated clients during the COVID-19 pandemic. We are aware of no other survey in the U.S. that has sought to collect data about the experiences of incarcerated people regarding coronavirus. Our 25-question survey received 47 responses from May 12 – June 25, 2020. A copy of the survey is included with my testimony.

Our analysis revealed that our surveyed incarcerated clients perceived that hygiene procedures were lacking, that they felt unsafe, and that jail staff did not address their concerns when they raised them. The results of the survey clash with safety assurances made by the Department of Corrections over the past six months.

Some of the results include:

- 32% of respondents reported that DOC staff were not consistently wearing masks.
- Only 26% said that DOC staff were conducting cleanliness inspections multiple times per day.
- Only 22% reported they could observe social distancing guidelines when needed.
- 40% had received a new, clean mask in the past week. 60% had access to cleaning supplies when needed.
- 69% had soap readily and freely available
- 82% said they did not feel safe regarding coronavirus transmission.
  - One client, Mr. R, in response to the last question, said “I would only feel safe at home.”

Our survey by no means captures the experiences of all people incarcerated in city jails. But the responses from this small group are troubling none the less. City officials should visit Rikers and talk to people about their experiences. They should be listened to and provided what they need to

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<https://ajph.aphapublications.org/doi/10.2105/AJPH.2019.305413>.

<sup>2</sup> See, e.g., Susanna Esposito et al, “Universal use of face masks for success against COVID-19: evidence and implications for prevention policies,” *European Respiratory Journal* (June 2020), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7191114/>.

feel safe: space to social distance, cleaning products, regular testing of staff who are entering facilities from the outside, clean masks, and staff who wear masks all day every day when they are on duty. Failure to ameliorate these conditions will surely lead to a rise in cases, and death, on Rikers when cases begin to surge again in the general population.

### **III. Defender Request to DOC and CHS for Transparent Policies and Protocols**

Two weeks ago, New York City public defender offices, including New York County Defender Services, sent a letter to the Department of Correction Commissioner and head of Correctional Health Services.<sup>3</sup> We asked DOC and CHS to clarify how they have revised or supplemented their COVID-19 policies and procedures implemented at the outset of the pandemic to account for changing facts and scientific information acquired over the past six months. We also asked the Board of Correction to clarify how they intend to monitor the agencies' implementation of these policies going forward.

Since the beginning of the pandemic, it has been extremely difficult to ascertain what DOC and CHS' coronavirus policies are. The DOC COVID-19 Action Plan website is vague, to say the least.<sup>4</sup> To date, the lack of clear information from DOC and CHS, including policies and procedures for testing people in custody and staff, and how incarcerated individuals will be able to quarantined and housed safely as facilities close and the population grows, has given us grave concerns that there have not been adequate preparations for a second wave of cases.

The Department, CHS, and the Board need only to look to the Centers for Disease Control for guidance. In July 2020, the CDC issued *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*.<sup>5</sup> DOC, CHS, and BOC should strive to ensure that any and all NYC COVID jail policies comply with the CDC guidance.

NYC public defender offices have sought information on existing DOC and CHS policies over the course of the pandemic through FOIL, public calls for transparency, and direct requests to the agencies. The responses we have received have been insufficient to ensure the health and safety of our clients and our staff. For example, NYCDS submitted a FOIL request to DOC on August 13, 2020 asking for protocols for attorney visits during the pandemic, "including health screening required for entry, social distancing measures for visits, and other precautions that are being taken." This information is critical for an Executive Director like myself to have before deciding whether NYCDS staff should be allowed or encouraged to visit their clients in person in city jails.

On September 11, four hours after NYCDS sent the letter to DOC demanding they release their written policies and procedures, we received what can only be described as a non-responsive answer to our FOIL. We were informed: "As a preliminary matter, please note that your request for answers to a list of questions in not a request pursuant to FOIL...the Department is not required

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<sup>3</sup> Joint NYC Defender Letter Re: DOC and CHS COVID-19 Pandemic Procedures, Sept. 11, 2020, available at <https://nycds.org/wp-content/uploads/2020/09/Joint-Defender-BOC-letter-Sept-2020.pdf>.

<sup>4</sup> NYC Dept. of Correction, DOC Covid-19 Action Plan, available at <https://www1.nyc.gov/site/doc/media/coronavirusap.page> (last visited 9/20/20).

<sup>5</sup> Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

to create a new record in order to respond to a FOIL request. The Department will respond to your remaining requests for records by October 15, 2020.”

DOC’s response to our FOIL is, sadly, what we expected. Either they do not have policies and procedures in place that they intend to ensure that attorney visitors can be safe from coronavirus, or they do have them, but they will not share them. Whatever the case may be, how can a defender office like NYCDS balance our constitutionally-mandated duty to provide effective assistance of counsel to our clients without exposing our staff to a potentially-life threatening disease? Right now, we simply do not have sufficient information or confidence in DOC staff’s compliance with previous COVID-19 measures, such as mask wearing, to ensure our staff’s safety. Our clients, then, will be the ones to suffer.

Video conferences, as currently enacted, are an inadequate substitute for in-person attorney visits. They are loud, not private, there are technical difficulties, there are insufficient time slots to meet the needs of defense teams, sometimes our clients arrive late or not at all because guards will not bring them to their vid-con in a timely manner, our clients are transported without masks, or by guards who are not wearing them properly. For the past six months, we have done our best to make do. But we are now six months into this pandemic, with no vaccine or end in sight. DOC must do better. DOC must create reliable, available, and private vid-con capabilities, as well as ensure safe, clean spaces for in-person visitation.

In short, the status quo is untenable. The public, defenders, and incarcerated people and their families have the right to know what DOC is doing to keep people in their custody safe. There is no evidence that DOC and CHS have promulgated policies covering all of the necessary aspects of risk prevention and reduction, that there is robust enforcement of the policies that are in place, or that policies have been re-evaluated and revised to comport with new and emerging information about disease transmission and prevention.

#### **IV. An Urgent Need for Improved Testing Protocols**

As we noted above, it is not clear what DOC and CHS testing protocols are. The policy for employee testing appears to be located on the DOC COVID-19 Action Plan website, which states:

*All DOC personnel, both uniformed and non-uniformed, will be provided access to COVID-19 testing at Northwell Health Urgent Care sites. Testing will be provided specifically to staff who are symptomatic and have been exposed to someone with COVID-19 and are exhibiting symptoms of this disease. Staff can register for an appointment by calling Northwell Health Urgent Care First Responder call center or walk in to any Northwell Health Urgent Care center.<sup>6</sup>*

It appears from this policy that corrections staff are not required to undergo regular testing—despite research, promoted publicly by CHS’s own Chief Medical Officer, showing that workers in high-risk settings must be tested at least twice per week for that testing to actually assist in

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<sup>6</sup> *Id.*

curbing the spread of infection.<sup>7</sup> NYC jails, which were among the most infected workplaces in America during the first outbreak here, surely qualify as a high-risk setting.<sup>8</sup> Yet according to their own written policy, DOC personnel are merely “provided access” to testing—and even this testing “access” is limited to staff who are showing symptoms. This policy flies in the face of both the aforementioned research on testing high-risk workers as well as studies showing that many infected persons are highly contagious before the onset of symptoms.<sup>9</sup> Rather than mandating frequent testing to protect incarcerated people, DOC staff, and our communities, DOC left its own rank and file in a position where they had to sue the city just to achieve this meager “access” to testing when they start feeling sick..

Testing for the NYC jail population has similarly focused on symptoms—if they’re being tested at all. During the first outbreak in NYC jails, the scope of testing for incarcerated people remained limited even as testing in NYC at large expanded drastically.<sup>10</sup> In May 19 City Council testimony, CHS Senior Vice President Patsy Yang declared that all newly incarcerated people were being “universally” tested.<sup>11</sup> Yet according to data obtained by NYCDS from a CHS FOIL request in July, this was never true.<sup>12</sup> During the period from April 27 (when the jails began tracking new admissions testing) through June 2, only about one-third of the approximately 1,200 new jail admissions were tested upon intake.

We have been told that people are asked to consent to a COVID-19 test at intake, and if they do not, they are placed in quarantine for fourteen days. It feels unlikely to us that two out of three people refuse a nasal swab test and instead request two weeks of quarantine, but we have no way of knowing. The simple fact is that a huge proportion of people entering NYC’s jail population are not being tested. DOC’s ability to appropriately quarantine all those who have “refused” to be tested is of course dependent on the amount of space available to do so. That space may be available now, while community transmission in our jails is (apparently) low, but what happens when another outbreak hits? The walls at Rikers Island have not moved, and the impossibility of controlling the spread of infections in our jails has not changed. The only possible answer is that we must keep NYC’s jail population as minimal as possible.

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<sup>7</sup> See <https://twitter.com/NathanLo3579/status/1258141974940364801> (retweeted by CHS CMO Ross MacDonald on May 6, 2020).

<sup>8</sup> Deanna Paul & Ben Chapman, “Rikers Island Jail Guards Are Dying in One of the Worst Coronavirus Outbreaks,” *Wall Street Journal*, April 22, 2020, available at <https://www.wsj.com/articles/rikers-island-jail-guards-are-dying-in-one-of-the-worst-coronavirus-outbreaks-11587547801>.

<sup>9</sup> See, e.g., Harvard Health Publishing, “If you’ve been exposed to the coronavirus,” March 2020, available at <https://www.health.harvard.edu/diseases-and-conditions/if-youve-been-exposed-to-the-coronavirus> (last updated September 11, 2020); Tina Hesman Saey, “COVID-19 may be most contagious one to two days before symptoms appear,” *Science News*, April 15, 2020, available at <https://www.sciencenews.org/article/coronavirus-covid-19-infection-contagious-days-before-symptoms-appear>; National Foundation for Infectious Diseases, “Frequently Asked Questions About Novel Coronavirus (COVID-19),” available at <https://www.nfid.org/infectious-diseases/frequently-asked-questions-about-novel-coronavirus-2019-ncov/>.

<sup>10</sup> Brad Maurer, Seth J. Prins & Sandhya Kajepta, “There must be mass releases from NYC jails immediately – it’s the only way to protect public health,” *The Appeal*, July 9, 2020, available at <https://theappeal.org/there-must-be-mass-releases-from-nyc-jails-immediately-its-the-only-way-to-protect-public-health/>.

<sup>11</sup> Testimony of Patsy Yang to the New York City Council Committees on Justice System and Criminal Justice, May 19, 2020, available at <https://hhinternetauto.blob.core.windows.net/uploads/2020/05/new-york-city-council-hearing-committee-on-criminal-justice-jointly-with-the-committee-on-the-justice-system.pdf>.

<sup>12</sup> NYC Health + Hospitals FOIL Data, July 2, 2020, available at <https://nycds.org/wp-content/uploads/2020/07/FOIL-Data.pdf>.

The combination of limited testing—even during periods of high incidence and prevalence—for incarcerated people and staff, DOC’s failure to implement basic infection-control measures like staff consistently and correctly wearing masks, and the steady and significant increase in the jail population over the past several weeks is a recipe for another public health disaster. Our most respected public health officials have sounded the alarm that this coming fall and winter will bring much more infection and death.<sup>13</sup> NYC jails’ first outbreak led to more than 2,000 infections with potentially severe long-term effects, as well as at least 16 tragic deaths among those incarcerated and working in our jails. Given DOC’s apparent failure to learn from this history, I fear we are doomed to repeat it. We must reduce the jail population as much as we possibly can.

DOC’s COVID approach stands in stark contrast to the testing protocols put in place in New York’s nursing homes. At one-point Governor Cuomo mandated twice-weekly testing for nursing home workers, which was in keeping with the then-emerging studies of high-risk workers mentioned previously. News reports also indicate that a massive effort was undertaken to test every single one of New York’s 90,000 nursing home residents.

Nursing homes and jails obviously are not perfectly analogous. But both are congregate settings whose populations are especially vulnerable to COVID-19. And the heavy churn of admissions to and releases from local jails have a significant effect on spreading infections and deaths in the broader community.<sup>14</sup> Yet our policy approaches to testing in these two congregate settings with high-risk populations have been starkly different, in terms of both those working and those living in these settings.

Even city schools have adopted a more robust testing protocol. According to the UFT, “[u]pon commencement of in-person learning, the NYC DOE will implement the Random Sample Survey of COVID-19 testing of adults and students present in DOC schools.”<sup>15</sup> The testing policy is written, extensive and available to the public through a simple Google search.

Why are our jails not required to provide similar information to the public? This is the kind of information that all New Yorkers who interact with people who go in and out of our city jails, including public defenders, need to know. But as is so often the case with the Department of Correction, all we have are vague policies, lax compliance, a lack of accountability, and non-responsiveness to FOIL requests. In light of this, bold assurances from officials that that they can keep us all safe fall far short. Again: the only solution is to reduce the jail population as much as we possibly can.

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<sup>13</sup> Connor Perrett, “A top disease expert is warning of ‘another 12 to 14 months of a really hard road ahead of us’ and says the US has no national plan to stop it,” *Business Insider*, Sept. 13, 2020, available at <https://www.businessinsider.com/covid-19-fall-osterholm-really-hard-road-ahead-192020-9>.

<sup>14</sup> American Civil Liberties Union, *COVID-19 Model Finds Nearly 100,000 More Deaths Than Current Estimates Due to Failures to Reduce Jails*, Aug. 1, 2020, available at [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_covid19-jail-report\\_2020-8\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_covid19-jail-report_2020-8_1.pdf).

<sup>15</sup> NYC Department of Education and UFT, *School Testing Policy Agreement*, available at <https://www.uft.org/sites/default/files/attachments/coronavirus-school-testing-policy.pdf>.

## **VI. Conclusion**

Our city jails need robust COVID-19 policies and procedures, yes, but the most effective solution is staring us all in the face. The city must not act as if the work to reduce our jail population is finished. We must release as many people as possible from our jails in advance of an inevitable uptick in COVID-19 cases.

The risk of coronavirus infection in New York City is currently low. Now is the time to get our house in order and ensure that we are ready for the next wave. I call on City Council to work with defenders and other stakeholders to require DOC and CHS to produce written policies and procedures related to COVID-19 that comply with CDC guidance, ensure accountability when policies are not followed, and continue to work with stakeholders to keep as many people as possible out of the jails in the first place.

If you have any questions about my testimony, please contact me at [sgerman@nycds.org](mailto:sgerman@nycds.org).