

**The Bronx
Defenders**

**Redefining
public
defense**

**New York State Senate
Public Hearing: Impact of COVID-19 on Prisons and Jails**

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**Written Testimony of The Bronx Defenders
By Martha Grieco, Julia Solomons, and Tahanee Dunn**

Good afternoon Chairs Sepulveda and Rivera, my name is Martha Grieco and I am a prisoners' rights attorney with The Bronx Defenders ("BxD").¹ Thank you for your attention to these critical matters and for the opportunity to testify before you today.

A. Introduction

The impact of COVID-19 has dramatically worsened conditions in New York City jails, exposing persistent violations of the Board of Correction's minimum standards and a complete lack of transparency and accountability; revealing negligible communication efforts between the Department of Correction ("DOC"), their staff and the people in their custody, as well as a disregard for proper training on the use of PPE and implementation of CDC recommended safeguards; and inspiring a sense of urgency among defenders to secure our clients' release from custody. Conditions in the City's jail facilities are unacceptable and our clients are afraid for their lives. Through our clients' experiences, we highlight for you today the following concerns:

¹ The Bronx Defenders is a public defender non-profit that is radically transforming how low-income people in the Bronx are represented in the legal system, and, in doing so, is transforming the system itself. Our staff of over 350 includes interdisciplinary teams made up of criminal, civil, immigration, and family defense attorneys, as well as social workers, benefits specialists, legal advocates, parent advocates, investigators, and team administrators, who collaborate to provide holistic advocacy to address the causes and consequences of legal system involvement. Through this integrated team-based structure, we have pioneered a groundbreaking, nationally-recognized model of representation called *holistic defense* that achieves better outcomes for our clients. Each year, we defend more than 20,000 low-income Bronx residents in criminal, civil, child welfare, and immigration cases, and reach thousands more through our community intake, youth mentoring, and outreach programs. Through impact litigation, policy advocacy, and community organizing, we push for systemic reform at the local, state, and national level. We take what we learn from the clients and communities that we serve and launch innovative initiatives designed to bring about real and lasting change.

- DOC and Correctional Health Services (“CHS”) do not have the resources to follow adequate safety protocols with regard to COVID-19 while also maintaining humane conditions and responsive healthcare practices;
- Lack of transparency regarding policies and procedures creates barriers to decarceration; and
- Limitations in access to counsel are ongoing and must be addressed

Before the pandemic, our city jails were already isolated from the public eye. Over the past six months it has become dangerously so, and as we navigate ongoing COVID-19 precautions, increased visibility and oversight is critical for our clients in custody.

B. DOC and CHS do not have the resources to follow adequate safety protocols with regard to COVID-19 while also maintaining humane environmental conditions and responsive healthcare practices.

We pay particular attention to the health and wellness of our clients held pre-trial in the city jails. In particular, we focus on the need of countless BxD clients for meaningful access to mental health services and necessary changes in environmental factors that put their lives at risk. Environmental factors such as extreme heat, unclean water from pipes, and physical isolation throughout this crisis have created inhumane crisis conditions. Coupled with the extreme risk posed by COVID-19 inherent in a congregate jail setting, these conditions reveal a disregard for the human lives inside those facilities. These conditions not only affect our clients’ physical health but also their emotional and mental health, which can be life-threatening.

Throughout the COVID-19 crisis, we have seen our clients struggle to access necessary mental health support, a struggle that has become significantly worse due to the drain on Correctional Health resources. In many cases, clients who express ongoing suicidal ideations receive no attention despite regular advocacy by our staff on their behalf. Given the barriers to stability that our clients struggling with mental health concerns already face prior to incarceration, being held in such an inhumane environment only makes more difficult the task of overcoming those barriers upon release. Release rates for our clients with mental health concerns, however, have been consistently lower than those without them, which we believe can be attributed to the lack of clinical support and discharge planning they have received throughout the past six months.²

² NYC Open Data (September, 2020). Retrieved from https://vera-institute.shinyapps.io/nyc_jail_population/

Many of our clients' stories reflect the dangers of neglectful correctional healthcare. Our clients who suffer from asthma have been denied access to their inhalers. In August, while checking in with one of our clients via video conference, he explained that it was extremely hot in his cell. As a result of this heat, he experienced difficulty falling and staying asleep at night, woke up with nosebleeds, expressed feeling dizzy and having terrible headaches. When our client complained about the heat, he reports that he was only given lotion by the staff, which consequently only caused him to sweat more. As recently as this month, while checking in with a different client via video conference, he explained that he had some rashes appearing on his skin and the doctor informed him that it could be the water. Our client expressed that the water from the pipe is often blackish, or yellow with a bad odor. This is the same water that he showers in; disgusting and contaminated water that is causing damage not only to his skin, but also his self-worth.

Too often, the criminal legal system only deems someone worthy of rehabilitation after they have pleaded guilty and had participation in treatment imposed by a court. The procedural posture of a case, however, has no bearing whatsoever on our clients' health and wellness needs. All of our clients deserve compassion, respect, and the right to live in conditions that support their healing. Moreover, providing reliable mental health care throughout a pandemic, livable housing areas, and clean water, are vital to any human being's ability to be healthy and rehabilitate. Incarceration isolates our clients from regular life activities and socialization and creates barriers to developing healthy coping mechanisms. This increases depression, anxiety, and suicidal ideation among our clients. They are forced to be hyper-focused on keeping themselves alive while incarcerated, leaving them with little energy left to fight for their freedom.

C. Lack of transparency regarding policies and procedures creates barriers to decarceration.

The public statements of DOC are often in conflict with our clients' reports about the realities of their detention. For example, each month the Board of Correction ("BOC") holds a public meeting, during which DOC and CHS present information about current "policy" and frequently request some variation from the Board's minimum standards, what the Board considers to be "basic elements necessary to ensure the safe and humane housing of inmates."³ In defense of these requests, DOC and CHS give an abbreviated update on the state of the conditions related to the policy--for example, mental healthcare--and the predicted effect of changing the proposed policy, all while relying on data they do not make available to the public. Rarely does either agency share a negative consequence for people in custody.

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

Since the onset of COVID-19, the contradictions between the public reports and our clients' reports are the starkest they have ever been, and with the most significant consequences. Most recently, as the number of new COVID-19 cases has remained low, our attorneys and advocates have been able to meet with clients in DOC custody both in court and at some of the facilities, and have observed firsthand some of the ways in which the policies cited by DOC and CHS do not match the practices. Defense attorneys and advocates attempting to visit their clients in person at the jail facilities report seeing many officers without masks entirely, or wearing them below their chin while interacting with the public and people in custody. Margaret Egan, Executive Director of the Board of Correction, echoed these concerns at the most recent Board meeting, but received very little reassurance from DOC that these issues would be corrected promptly. Our clients have been reporting this mismanagement of COVID-19 safety protocols since the onset of the pandemic, but DOC has never publicly acknowledged any struggle to properly implement protocols to keep our clients safe.

D. Limitations in access to counsel are ongoing and must be addressed.

1. We continue to need expanded video capability.

Access to counsel has been significantly limited since the onset of the crisis, greatly inhibiting defenders' abilities to advocate for our clients' release. Though some in-person counsel visits have resumed, the safety protocols to protect clients and defender staff remain unclear and the risks involved remain significant. As a result, videoconferences continue to be the only reliable and safe way for attorneys and advocates to proactively communicate with our clients in custody. They are also the only means to conduct virtual court appearances and competency exams to determine whether people can aid in their own defense. In the last couple of months, with so many court appearances and proceedings being conducted by video in both Criminal and Supreme Court, there are even fewer slots on the videoconferencing calendars available for counsel visits. Additionally, we have seen DOC struggle to produce our clients by video for court appearances, sometimes requiring the case to be adjourned and creating unnecessary delays in due process. As long as courts are operating remotely for the safety of all parties involved,, it is critical that the City take the necessary measures to ensure that our clients are able to be present for their court appearances. We believe this only makes more critical the expanded availability of videoconference time slots, both to adequately accommodate the increased scope of their use and to ensure meaningful access to counsel.

2. Confidentiality protections and technological troubleshooting

Not only is accessing our clients via videoconference exceedingly difficult, but when we do make contact with our clients via Skype, there are additional issues that prevent productive conversations. Most concerning is that it is often possible to hear the conversation happening between another person in custody and their attorney in a neighboring booth. We assume that our conversations are similarly audible to others nearby. This presents significant challenges to attorney-client privilege, and limits our ability to speak freely with our clients about the details of their case or possible plea negotiations. This was not previously the case with videoconferences.

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

3. *The City Council must push the Board of Correction to include Access to Counsel in its proposed restrictive housing rule.*

Advocates are eagerly awaiting BOC's proposed changes to their minimum standards regarding restrictive housing, anticipating an end to solitary confinement in New York City and a significant shift in how DOC must address violence in our jails. We are very concerned, however, that implementation of the Board's restrictive housing rule, due to be released in October, will not be successful without access to counsel in the disciplinary process. Since the onset of the pandemic, a once-skeletal due process structure has ceased to exist, with every single one of our clients who has been placed in punitive segregation reporting that it happened without a hearing. Our clients are denied the opportunity to participate in the disciplinary process, and their rights to due process are being compromised in ways that are unacceptable no matter the circumstances. To make matters worse, our clients have reported that when they inquire into these due process violations and attempt to assert their rights, they are told by correctional officers that the disciplinary process has been suspended due to COVID-19. To our knowledge, no such suspension was granted by any governing board, body or agency. Without access to their advocates, our clients basic due process rights are denied regularly.

We regularly see the Board of Correction create rules and standards that do not trickle down to the rank-and-file officers. Just as regularly, we hear DOC leadership make expansive claims

about their picture-perfect policies and procedures that directly contradict the reality in the jails portrayed by our clients. We need the involvement of an outside party, someone who is a step removed from the jail environment, but who understands the rules and rights of both parties and is invested in the ultimate well-being of the person in custody. DOC must notify an incarcerated person's advocate and offer the opportunity for them to be present at any fact finding involving an offense that could lead to status changes of any kind, to speak with their advocate before waiving any fact finding rights, and to share information about the incident with the advocate so that the advocate can support their client through the process.

Both the DOC Commissioner and the Board of Correction have spoken frequently about moving away from punitive approaches in our jails and towards rehabilitation. Approaches to violence that are truly restorative always involve a support person for the people on both sides of the conflict, as this increases accountability and investment in the process and in long-term change. Correctional staff are not our clients' support people, nor are they experts in due process. Yet due process is fundamental to a disciplinary system that seeks to be fair and not arbitrary, impactful and not cruel. As we move into the unknown and unexplored means to address violence in our jails, regardless of what form that takes, meaningfully involving the person in custody and their advocates will be critical to creating real change.

E. Conclusion

We urge the Senate, first and foremost, to think creatively about how to reduce barriers to decarceration. Defense organizations continue to advocate for the release of our clients. Transparency on the part of the agencies who manage and staff those facilities is critical to our ability to be able to secure releases for our clients. While finding ways to release as many people as possible should always be the priority, for those who remain incarcerated it is critical that conditions be improved wherever possible. Everyone in custody deserves to live in humane conditions, have access to the medical and mental health care that they need, as well as thorough, confidential access to their defense team. This crisis has placed significant limitations on the City and State's ability to keep people safe in custody, but as long as anyone remains in our city jails and state prisons, it is the Legislature's responsibility to do everything possible to protect and address the needs of those individuals. These clients and so many others could have been released before pandemic ravaged our jails. They could have avoided so much fear, pain, and anguish. This pandemic is not over. It has ceased to ravage our state for right now, but a second wave is predicted this fall. The Senate must act *now* to prevent the pain and suffering of so many more people inside our city jails. They must learn from the mistakes made these past six months, and take real, tangible steps to protect New Yorkers in custody before more lives are lost or permanently damaged by this deadly disease.

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