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Cynthia Brann, Commissioner
New York City Department of Correction
75-20 Astoria Blvd.
East Elmhurst, NY 11370

Dr. Patsy Yang, Senior Vice President
Correctional Health Services
NYC Health and Hospitals
125 Worth St.
New York, NY 10013

Deanna Logan
Acting General Counsel
Mayor's Office of Criminal Justice
City Hall Park
New York, NY 10007

SENT VIA EMAIL

Re: COVID-19 in DOC Facilities and Closure of MDC and OBCC

As public defenders and advocates for people in custody, we are gravely concerned about the conditions the New York City Department of Correction (“DOC” or “the Department”) has created in the city jails. Despite historically low jail populations achieved earlier this year and efforts to release medically vulnerable people in the early months of the pandemic, the COVID-19 outbreak in New York City’s jails led to more than 2,000 infections and at least 16 deaths among incarcerated people and jail staff since March.¹ Now, as both New York City and New York State see increased COVID-19 positivity rates and the jail population is on the rise, newly obtained data shows that density in NYC jails has reached dangerous levels. Compounding the heightened risks to the health and safety of people in custody, the Department has announced closure of the Manhattan Detention Complex (“MDC”) and the Otis Bantum Correctional Center (“OBCC”) without any transparency or, apparently, any advance planning about how the Department will safely move the populations of these jails without increasing the already dangerous density in other facilities.

¹ See Correctional Health Services, Local Law 59: Report for Week of October 12, 2020 - October 18, 2020, available at <https://hhinternet.blob.core.windows.net/uploads/2020/10/report-for-the-week-of-october-12-2020-to-october-18-2020.pdf> (last visited November 5, 2020) (573 cumulative COVID-19 infections among NYC jail population since March 13, 2020); BOC Weekly COVID-19 Update, Week of October 17 to October 23, available at <https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-10-17-10-23-20.pdf> (last visited November 5, 2020) (3 cumulative COVID-related deaths among NYC jail population, 209 infections among CHS staff, and 1,446 infections among DOC staff since March 13, 2020); Jan Ransom, “Virus Raged at City Jails, Leaving 1,259 Guards Infected and 6 Dead,” *The New York Times*, May 20, 2020 (updated June 16, 2020), available at <https://www.nytimes.com/2020/05/20/nyregion/rikers-coronavirus-nyc.html> (last visited November 5, 2020) (6 COVID-related deaths among correctional officers (with the officers’ union contending 1 additional officer died from COVID-19), 5 COVID-related deaths among other jail employees, 2 COVID-related deaths among CHS staff).

These conditions call for immediate and urgent decarceration efforts. Removing people from the jails is the most effective and efficient way to protect them and to avoid another outbreak in the jails, which will inevitably spread to the broader community. We urge DOC to work with other City officials to release our clients. In the meantime, we demand that City officials cease efforts to obscure and obfuscate the reality of current jail conditions and release accurate information, current policies and procedures intended to protect people in custody and staff from a second outbreak of COVID-19 and a comprehensive plan to execute the closures of MDC and OBCC safely.

The City is failing people in the city jails—largely Black and brown, and disproportionately medically vulnerable—just as a resurgence of the virus in the jails appears increasingly inevitable. This is—or should be—a pressing concern to the entire New York City community, not just those who are incarcerated or who work in DOC facilities. The City must take steps to abate these risks immediately, and must be forthright with our clients, their loved ones, city decision-makers, and advocates about how they will do so.

The Data Shows that DOC is Creating Dangerously High Housing Area Densities

Despite DOC’s assurances to the contrary, we have obtained data demonstrating that DOC is operating housing units at population densities that makes physical distancing impossible. This is in flagrant disregard of public health guidelines intended to reduce the risk of transmission of COVID-19 and creates conditions dangerous to everyone who enters a jail facility, but particularly staff and people in custody. Dangerous population densities must be addressed through a renewed effort to decarcerate, among other measures—but there is no evidence that the City has any such plan.

Eight months into this global health emergency, we know that the ability to maintain physical distancing is a critical component of preventing the spread of COVID-19.² In jail settings, housing area density is the most important factor in determining whether one can remain physically distant from others. In DOC dormitory housing, for example, beds are often 3 feet apart. As a benchmark, the New York City Board of Correction (“BOC” or “the Board”) assesses whether DOC housing units are at or below 50% capacity because that density allows people in to sleep with a bed between them in “alternate bed spacing,” with approximately 6 feet between them at night.³

The Department represents in its online COVID-19 Plan that “[a] majority of the *dormitory* housing areas are below 50% capacity and close to half of *all* housing areas department wide are also operating at or below 50% capacity” (emphasis supplied).⁴

² See Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Social Distancing*, available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited November 6, 2020).

³ There is significant reason to believe that even this density poses real risks to the health and safety of people in custody. We have learned that COVID-19 can transmit via aerosolized particles; and therefore remaining 6 feet away from other people absent other precautions is highly unlikely to abrogate risk of transmission in an environment that is poorly ventilated and subjects people therein to unrelenting, 24-hour exposure to one another.

⁴ New York City Department of Correction, *COVID-19 Action Plan: Social Distancing*, available at <https://www1.nyc.gov/site/doc/media/socialdistancing.page> (last visited November 6, 2020).

These assurances are false. The Legal Aid Society received data this past week pursuant to a Freedom of Information Law (“FOIL”) request⁵ that demonstrates unsafe housing densities in most jail facilities. For example, on November 2, 2020:

- In AMKC, where most dorms hold approximately 50 people, eighteen dorms were at or above 90% density. Two were at 100%.
- In VCBC, where each dorm holds 50 people, every single dorm was at 75% density or higher. Eight of the fourteen dorms were above 90%, and four were at 98%.
- In RNDC, where each modular dorm holds between 30 and 48 people, four of the eleven dorms were above 75%. One dorm was at 97%.

Additional analysis of the data is set forth below.

Male Housing Area Density, as Measured by Population as a Percentage of Capacity, from October 19 to November 2, 2020⁶

	AMKC	GRVC	MDC	NIC	OBCC	RNDC	VCBC	Overall	Excluding MDC/OBCC
Dorm Units	85%	N/A	36%	53%	N/A	67%	87%	66%	73%
Cell Units	79%	73%	67%	54%	48%	52%	68%	63%	65%

Density Range Distribution of Male Dorm Units from October 19 to November 2, 2020⁷

Density Range of Dorm	AMKC	MDC	NIC	RNDC	VCBC	Overall
Percentage of Dorms at 75%-100% of Capacity	80% (28)	0% (0)	0% (0)	36% (4)	86% (12)	67% (44)
Percentage of Dorms at 50%-75% of Capacity	11% (4)	0% (0)	80% (4)	36% (4)	14% (2)	21% (14)
Total Percentage of Dorms at >50% of Capacity	91% (32)	0% (0)	80% (4)	27% (3)	100% (14)	88% (58)

DOC Chief of Department Hazel Jennings testified before the New York State Senate on September 22, 2020 that the Department “will continue to make sure that we do not have the housing capacity of each housing area over 50% so that we can achieve the [sic] social distancing.”⁸

⁵ Housing unit data attached.

⁶ This dorm calculation includes the “modular” units, as does BOC’s density calculation in their weekly reports. Because of the unique physical plants and purposes of West Facility, the NIC infirmary, and Bellevue Hospital Prison Ward, those units are excluded from this analysis. Rose M. Singer Center had average dorm densities of 23% and average cell-based unit densities of 25% for this date range.

⁷ GRVC and OBCC are excluded from this table because the data received pursuant to the Legal Aid FOIL request did not list any dorm units in those facilities.

⁸ Hearing before the New York State Senate Committee on Crime Victims, Crime, and Corrections, *The Impact of COVID-19 on Prisons and Jails*, September 22, 2020, available at <https://www.nysenate.gov/calendar/public-hearings/september-22-2020/joint-public-hearing-discuss-impact-covid-19-prisons-and> (last visited November 6, 2020) (relevant segment beginning at 1:46:06).

On the date of her testimony and the day prior, however, these were the actual average housing area densities in DOC facilities:

Male Housing Area Density, as Measured by Population as a Percentage of Capacity, on September 21, 2020

	AMKC	GRVC	MDC	NIC	OBCC	RNDC	VCBC	Overall
Dorm Units	71%	N/A	45%	64%	N/A	66%	75%	64%
Cell Units	69%	61%	65%	52%	60%	48%	62%	60%

Male Housing Area Density, as Measured by Population as a Percentage of Capacity, on September 22, 2020

	AMKC	GRVC	MDC	NIC	OBCC	RNDC	VCBC	Overall
Dorm Units	71%	N/A	45%	63%	N/A	67%	75%	64%
Cell Units	67%	61%	62%	52%	64%	48%	62%	60%

This data is consistent with reports from our incarcerated clients in recent months. It should alarm all of us. A nationwide CDC study from August made clear that prevalence of COVID-19 in jail dorms is three times higher than cell-based housing.⁹ These risks are compounded by the documented¹⁰ and protracted¹¹ refusals of DOC staff to wear masks properly. Equally alarming is the absence of sufficient testing for staff and people in custody—including a lack of mandatory, regular staff testing that constitutes a potentially significant blind spot for reintroducing the virus to the jails—despite evidence that such testing is a critical component of virus control.¹²¹³

⁹ Hagan LM, Williams SP, Spaulding AC, et al. *Mass Testing for SARS-CoV-2 in 16 Prisons and Jails – Six Jurisdictions, United States, April-May 2020*, MMWR Morb Mortal Wkly Rep 2020; 69:1139-1143, available at <https://www.cdc.gov/mmwr/volumes/69/wr/mm6933a3.htm>.

¹⁰ See The Legal Aid Society, Letter to New York City Mayor’s Office of Criminal Justice and New York City Department of Correction, September 4, 2020 (attached); Comments of Board of Correction Member Dr. Robert Cohen, NYC Board of Correction Public Meeting, September 14, 2020, available at <https://www.youtube.com/watch?v=izTMQoJ9wps> (last visited November 6, 2020) (at approximately 2:23-2:35); Monitoring COVID-19 Responses in New York City Jails, April 5-April 16, Board of Correction, May 11, 2020, available 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 November 6, 2020).

¹¹ After advocates and BOC members and staff raised concerns about DOC staff mask compliance in September, the Department issued a new directive that mandated face coverings only when the staff member is within 6 feet of another person. As of the writing of this letter, we continue to receive regular reports from attorneys meeting with clients via videoconference and in-person jail visits that they observe a pattern of DOC staff members wearing masks improperly or not at all.

¹² See Hagan, *supra*.

¹³ 2020 Health Alert #38: *COVID-19 Diagnostic Testing and Screening Recommendations for People Who Live or Work in New York City*, New York City Department of Health and Mental Hygiene, available at <https://www1.nyc.gov/assets/doh/downloads/pdf/han/alert/2020/covid-19-diagnostic-testing-10142020.pdf> (last visited November 6, 2020). In relevant part, DOHMH advised: (1) that all individuals living within NYC areas [including, of course, DOC and CHS staff] with increased COVID-19 activity be tested *immediately, even if they have no symptoms and no known exposures*, and (2) routine diagnostic testing *at least monthly* for people working and living in congregate settings, noting that New York State requirements mandate weekly testing for staff of nursing homes and adult care facilities (emphasis added). The only regular testing mechanism for people in DOC custody occurs in new admissions, but there is no routine testing protocol for the majority of the city jail population,

The Department has offered only vague public assurances about how much space there is in the jails, which have been consistently disputed by the incarcerated people we serve. Though DOC Chief of Staff Brenda Cooke asserted during the October BOC Public Meeting that the Department had “nearly 100 units that will remain open that are presently closed” for imminent transfers from MDC and OBCC, she did not answer the question posed by Board Member and former DOC Chief of Department James Perrino: “If there are hundreds of beds, why aren’t we using them now to keep density lower?”¹⁴ Given the density data now public via Legal Aid’s FOIL request, that question is more urgent than ever.

Representations by DOC and Correctional Health Services (“CHS”) about the low reported prevalence of COVID-19 in the jails do not justify the alarmingly high dormitory density levels. The Department has consistently stated that there have been no intra-jail transmissions of COVID-19 since May 19, 2020, and all positive cases within the jail population have been new admissions through the intake units at MDC and AMKC.¹⁵ That claim is no longer accurate. The most recent BOC reporting indicates that a housing unit in OBCC was moved into quarantine status after an exposure during the week of October 17, 2020, indicating a COVID-19 diagnosis unrelated to new admission testing.¹⁶ Our clients who have been incarcerated for months are reporting rising anxiety and fear as they and those around them receive positive test results or enter quarantine for suspected COVID-19 symptoms. During the late spring and early summer, the city jails benefited both from the falling prevalence of COVID-19 in the broader New York City community and from a historically low jail population. As the City faces new outbreaks, and the jail population increases—both the overall population and the population of medically vulnerable people¹⁷—it is clear that we must prepare for a likely resurgence of the virus. These housing area densities and the conditions they create present serious risks to public health.

The City Must Safeguard the Health of Incarcerated People During the Closure of MDC and OBCC

On October 9, 2020, the City announced that it intends to close OBCC and MDC this year.¹⁸ But the City must be transparent about how it will protect our clients during this transition, which will involve the movement of hundreds of people in custody¹⁹ and over a thousand staff during a

who are primarily tested after developing symptoms consistent with COVID-19. It is now well-settled, however, that the prevalence of asymptomatic and presymptomatic transmission render symptoms-based testing schemes inadequate to identify the scope of COVID-19 infection.

¹⁴ October 13, 2020 BOC Public Meeting, available at <https://www1.nyc.gov/site/boc/meetings/oct-13-2020.page> (last visited November 6, 2020) (relevant segment beginning at 32:22).

¹⁵ *Id.* beginning at 34:38.

¹⁶ BOC Weekly COVID-19 Update, Week of October 17 to October 23, *supra*.

¹⁷ Discussed in more detail below.

¹⁸ Marcius, Chelsia Rose, *NYC to close two city jails by November: ‘The Tombs’ in Lower Manhattan and a jail on Rikers Island*, New York Daily News, October 9, 2020, available at <https://www.nydailynews.com/new-york/ny-correction-department-closes-the-tombs-20201009-q2bdw4scrzh2rfzfuyynsqmiaa-story.html> (last visited November 6, 2020).

¹⁹ According to the Legal Aid FOIL, as of November 2, 2020, there were still 520 people still detained in MDC and 470 people still detained in OBCC.

pandemic.²⁰ The lack of clarity in the City’s minimal and insufficient public pronouncements regarding the closures raises several critical questions:

1. By what dates will the City close each facility?
2. The density in the city jails is already unacceptable, even more so when considering the City employees who staff the units and the people in custody who perform work details. How, specifically, will the City achieve a safe density for dorm and cell-based housing as it closes the jails, given that current density levels are above what experts and public health officials have recommended?
3. How has the City ensured safe physical distancing when transporting individuals from the closed facilities to their new ones? How many people will be transported in each bus? What opportunities will those in custody have to practice hand hygiene? How will the buses be sanitized? What quality assurance process have you put in place to ensure that cleaning and sanitation protocols are implemented?
4. What is the plan for initial housing of people previously in MDC or OBCC upon their arrival to other DOC facilities? Will you cohort them together and follow quarantine protocols and/or offer additional COVID-19 testing?
5. Given that MDC was operating as one of two intake facilities for male admissions, how specifically will you ensure that you have adequate capacity to perform new admissions testing and quarantine protocols responsibly upon its closure? How many intake units do you now have operational, where are they, and what is their capacity? What other intake units do you intend to add, and when will they be operational?
6. We heard frequent complaints from our clients in the spring of difficulties accessing medical and mental health care. What specific efforts are you making to ensure that the operational facilities have enough staffing and technical infrastructure to support the increased populations from MDC and OBCC?
7. What facility, if any, will now house the Enhanced Supervision Housing units, and when will that be operational? What other special populations will need to be re-housed? What construction needs to take place for any re-housing to occur?

These questions are essential to the health and safety of our clients, but on the eve of the facility closures we have yet to hear adequate, or, in some instances, *any* answers from the City. For many of these questions, the answer is clear: The only way the City can responsibly operate DOC facilities is to engage in immediate, significant, and sustained decarceration. The urgency of the density data above requires the City to coordinate efforts among stakeholders, including court actors and law enforcement, and to present a unified action plan as a response to this latest crisis in the jails.

The City Must Decarcerate, Be Transparent About Planning and Limitations, and Ameliorate Unsafe Conditions in the City Jails

The connection between population level and COVID-19 transmission risk is significant. In the most recent BOC Public Meeting, BOC Executive Director Margaret Egan noted that “the jail population remains a critical factor in mitigating the impact of COVID-19 on the jails, and an

²⁰ See Marcius, *NYC to close two city jails*, *supra*.

increasing population is dangerous.”²¹ This conclusion has been echoed by countless law enforcement and public health experts around the country. The National Academies of Sciences, Engineering, and Medicine recently released a report submitted by an interdisciplinary panel of experts assembled to develop guidance for combating the spread of COVID-19 in custodial settings and their broader communities.²² After “consider[ing] both public safety and public health” and “review[ing] large bodies of research on recidivism and the incapacitation effects of incarceration on crime,” they concluded that correctional facilities must include decarceration in their COVID -19 response plans if they are to “reduce risks of exposure to and transmission of the disease within correctional facilities” and “[improve]the safety of incarcerated and detained people and correctional staff.”²³

In the face of the mounting empirical evidence, public health guidance, and lessons learned by New York City officials during the spring that lower populations in custodial settings save lives—the population in DOC continues to rise every week. Since a historically low census on April 29, 2020, the population has increased by 805 people, or 21%.²⁴ CHS Vice President Dr. Patricia Yang says the number of vulnerable people in custody is also rising,²⁵ an observation reflected in the 35.4% increase of people aged 50 or older since April 29.²⁶

The increase in overall and vulnerable populations, the rising housing density, the myriad flaws in implementation of COVID-19 policies, and warnings from public health officials about a likely winter resurgence of the virus should compel every New York City decision-maker to work urgently toward decarcerating the jails. City Hall must make clear what steps it is taking to identify more people serving city sentences who can be released pursuant to New York Correction Law, Article 6-A, §§ 150-160, as DOC did for a limited population in the spring. The Mayor must use his platform to persuade the New York State Department of Corrections and Community Supervision to release the nearly 200 people currently in City custody on technical parole violations,²⁷ and advocate for the city’s district attorneys to agree to alternatives to incarceration at arraignment and thereafter. CHS must continue to identify people in custody who are at risk of serious illness should they contract COVID-19, and be transparent in public fora about the serious risks that the city jail environment poses to both incarcerated people and staff. Knowing that the representations made by CHS and DOC with regard to risk level within the jails has a significant impact on judges’ decisions to grant release applications, the City must put pressure on DOC and CHS to make swift, accurate representations of risk in any public

²¹ October 13, 2020 BOC Public Meeting, *supra*, beginning at 16:05.

²² National Academies of Sciences, Engineering, and Medicine, *Decarcerating Correctional Facilities during COVID-19: Advancing Health, Equity, and Safety* (October 19, 2020), Washington, DC: The National Academies Press, available at doi: <https://doi.org/10.17226/25945> (last visited November 6, 2020).

²³ *Id.* at S-2.

²⁴ Figures derived from: BOC Daily COVID-19 Update, April 30, 2020, available at https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Public_Reports/Board%20of%20Correction%20Daily%20Public%20Report_4_30_2020.pdf (last visited November 2, 2020), BOC Weekly COVID-19 Update, Week of October 24 to October 30, available at <https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-10-24-10-30-20.pdf> (last visited November 6, 2020).

²⁵ October 13, 2020 BOC Public Meeting, *supra*, beginning at 57:15.

²⁶ Figures derived from: BOC Daily COVID-19 Update, April 30, 2020, *supra.*, BOC Weekly COVID-19 Update, Week of October 17 to October 23, *supra.*

²⁷ BOC Weekly COVID-19 Update, Week of October 17 to October 23, *supra.*

statements or affidavits presented to the courts. This effort also requires the City to work with judges and New York City District Attorney's offices to encourage granting releases when possible, and to make connections between the safety of those incarcerated and the safety of the general public.

Of equal importance, City Hall and DOC must answer the questions raised above about the closure of MDC and OBCC, to ensure the safety of our clients during the pandemic and beyond as the effort to close Rikers Island continues. To the extent the City does not have a plan to address those issues, it must make one immediately and be transparent with us and the public about that plan. Our clients and their loved ones deserve the dignity of knowing how the City confining them plans to protect their health in a time of great national anxiety.

DOC cannot transform old, close-quarter, poorly-ventilated buildings into modern facilities. But DOC can, and must, make decisions about staffing assignments, housing assignments for people in custody, when to open closed units, and how to enforce COVID-19 policies, keeping in mind the impact on people working and incarcerated in its facilities. **Just as critically, DOC, CHS, and the City leadership that oversees those agencies can be transparent about the limitations of the physical plant and operational realities.** Decision-makers rely on the representations of City agencies to make critical decisions—judges determine our clients' liberty before trial, elected officials make decisions about where to allocate resources, and the community and Board of Correction provide accountability where accountability is needed. None of those integral functions are possible when the City keeps the truth about conditions within and plans for the city jails hidden behind the walls of Rikers Island.

We look forward to your response.

Signed,

The Legal Aid Society
Brooklyn Defender Services
Bronx Defenders
New York County Defender Services
Neighborhood Defender Service of Harlem

cc: Jennifer Jones Austin, Chair of the New York City Board of Correction
Council Member Keith Powers, Chair of the City Council Criminal Justice Committee