

June 23, 2022

The Honorable Elizabeth A. Taylor
Bronx County Supreme Court
851 Grand Concourse
Bronx, New York 10451

Re: *Agnew et al. v. N.Y. City Dep't of Corr.*, Index No. 81341-2021E

Dear Judge Taylor:

We write to contest the Department of Correction's June 16th declaration that it has achieved substantial compliance with the Court's December 3, 2021 Order [NYSCEF Doc. No. 81 (the "December Order")]. In the Court's May 13, 2022 Order holding the Department of Correction ("DOC") in contempt, this Court advised that DOC could purge itself of contempt "by complying with the December 3, 2021 order" and providing proof of substantial compliance. [NYSCEF Doc No. 126 (the "May Order") at 6]. On June 16, 2022, DOC submitted the affidavit of Kathleen Thomson, Chief of Staff of DOC, in which DOC declared that it had achieved substantial compliance with the December Order. [Affidavit of Kathleen Thomson, NYSCEF Doc No. 129 (the "Thomson Affidavit"), ¶ 5]. Petitioners respectfully submit that the Thomson Affidavit fails to demonstrate substantial compliance because (i) it 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.

In the past five days, three more people have died in DOC custody.¹ It is critical that DOC fix its medical care access problems to ensure the safety of those in its custody. Based on the Thomson Affidavit, this Court cannot conclude that DOC has done so. Petitioners have asked DOC to provide documentation that will support the claims made in the Thomson Affidavit, along with an explanation of any changes DOC has made to its collection and categorization of missed medical appointments. DOC has agreed to provide information by Tuesday, June 28. If the Court does not agree with Petitioners that, on the face of the Thomson Affidavit, DOC has failed to achieve substantial compliance, Petitioners may then ask that the Court set a short hearing for which a DOC representative will be made available for questioning, or, in the alternative, set a briefing schedule on whether DOC has achieved substantial compliance.

DOC Admits That It Is Still Not in Substantial Compliance with the Court's Order

The Thomson Affidavit demonstrates that DOC has failed to escort people in its custody to their medical appointments since entry of the Court's May Order. DOC admits that for the period from May 17, 2022 to June 12, 2022, it "failed to produce 186 inmates due to lack of

¹ Ex 8.

escort availability.” Thomson Aff ¶ 5. In other words, in less than 30 days, DOC denied access to medical care to nearly 200 people solely due to its own administrative failure. As this Court stated in its May Order, “good faith attempts to comply with a court’s order is not a recognizable defense to a motion for contempt.” May Order at 6-7 (*citing McCain v Dinkins*, 192 AD2d 217, 219, 601 NYS2d 271, 273 [1st Dep’t 1993], *aff’d as modified*, 84 NY2d 216 [1994]). Progress towards compliance is not itself compliance. For that reason, the Court of Appeals in *McCain* sustained the lower court’s finding of contempt where the City failed to immediately place 30-100 families into emergency housing, among thousands who were successfully placed each day. *McCain v. Dinkins*, 84 NY2d 216, 223-24, 639 NE2d 1132 (1994). The situation here is nearly identical to that in *McCain*. While DOC claims to have “made considerable progress in coming into compliance with the Civil Contempt Order,” Thomson Aff ¶ 21, denying 186 class members access to medical care is, by definition, noncompliance and further contempt of this Court’s December Order.

To be sure, non-production to a medical appointment for reasons outside DOC’s control, such as a conflicting court appearance or a person’s own (legitimate) refusal, does not constitute noncompliance. But by admitting that it failed to produce nearly 200 people to their medical appointments solely due to a lack of escorts, DOC admits failure to substantially comply with this Court’s Order.

Further, the Thomson Affidavit is insufficient to show that DOC is discharging its obligations because it is unclear whether the data provided includes access to non-clinic medical appointments, such as off-island specialty appointments, dental and podiatry appointments, or mental health visits. The Affidavit also contains no information about access to emergency medical services—which the Board of Correction, in a May 9, 2022 report, found to be inadequate and a contributing factor to recent in-custody deaths.² The law that this Court ordered DOC to comply with requires DOC to provide access not just to clinic appointments, but to all medical services. [NYSCEF Doc No. 118 at 8-9 (ordering DOC to “[s]afely keep in the New York City jails each person lawfully committed to his custody . . . by not prohibiting or delaying incarcerated persons’ access to care, appropriate treatment, or medical or dental services”)]; RCNY § 3-02 (c) (1) (“Correctional personnel shall not prevent or delay or cause to prevent or delay an inmate’s access to medical or dental services.”).

DOC’s Progress Appears Largely Due to Unexplained Changes in Its Metrics

The Thomson Affidavit claims DOC has achieved substantial compliance with the December Order, but the data it provides to back up its apparent progress seems incongruous for two key reasons: (i) DOC now reports the number of people who have missed medical appointments, rather than the number of missed medical appointments themselves; and (ii) DOC has not explained the significant shift in the “Other” category, suggesting a change in methodology is impacting the data reporting.

²² See Ex 9 (Board of Corrections February & March 2022 Deaths in DOC Custody: Report and Recommendations at 7 (“DOC and CHS do not seem to have an acceptably functioning system for providing emergency care to persons in life-threatening situations.”)).

First, in the Thomson Affidavit, DOC measures its non-productions by counting the number of *people* in its custody who missed appointments, not the number of *appointments* actually missed. Thomson Aff ¶ 5. Stated differently, the Affidavit does *not* reflect when a single person, such as a class member with a chronic illness who requires frequent care, misses multiple appointments due to a lack of escort. This contrasts with DOC’s previous reporting metric, used in its statutorily required monthly reports and earlier in this litigation, which is the number of missed appointments, rather than people who were not produced.

If DOC only counts people who miss appointments to report its progress, the data will fail to capture the total instances of non-production, which could be much higher than 186 during the May 17 to June 12 period. For example, if each of those 186 people had 10 appointments scheduled during the May 1 to June 12 period, but missed each appointment due to DOC’s failure to provide an escort, then the non-production rate for this period would be in line with the rates in December 2021 and January 2022, the period for which this Court held DOC in contempt. In fact, many people in custody with chronic care needs have daily appointments scheduled with Correctional Health Services. If those 186 people missed multiple appointments during this period, that would further suggest that the people who are not being produced to their appointments are among the sickest people in DOC custody. There can be no comfort in DOC’s purported progress if the 186 people who were not produced to medical appointments are repeatedly being denied care or are among those who most critically need care.

Second, since March 2022, there has been a significant and unexplained increase in the “Other” category for non-productions, indicating a potential shift in data reporting rather than an actual decrease in the number of people who missed medical appointments due to lack of escorts. In its mandatory reports, DOC publicly reports certain non-productions, including non-productions due to no escort, in the category “Other,” which “includes but is not limited to instances where an incarcerated individual chooses to instead attend a work assignment, law library, school, religious services, or commissary, when an escort is not available, or when movement is limited due to a lockdown, search, or alarm.”³ Through this litigation, DOC has provided Petitioners the “no escort” non-production numbers disaggregated from the total “Other” category. These disaggregated numbers consistently showed that non-productions due to no escort made up approximately 60% to 85% of “Other” non-productions from December 2021 through February 2022.⁴ Indeed, Chief Ada Pressley testified at the hearing on this contempt motion that “the main driver of the Other category numbers have been no escort.” Ex 3 at 69:25-70:4.

Starting in March 2022, the DOC data showed the number of non-productions categorized

³ See, e.g., [NYSCEF Doc No. 99 (Publicly available December 2021 non-productions)].

⁴ In December 2021, DOC publicly reported 1,231 “Other” non-productions, while it reported to Petitioners that 1,061 of those non-productions were due to lack of escort (86%). [NYSCEF Doc No. 91 at 9 (December 2021 non-productions reported to Petitioners)]; [NYSCEF Doc No. 99 (Publicly available December 2021 non-productions)]. Likewise, in January 2022, DOC publicly reported 998 “Other” non-productions, while it reported to Petitioners that 848 of those non-productions were due to lack of escort (85%). [NYSCEF Doc No. 114 (January 2022 non-productions reported to Petitioners)]; Ex 4 (Publicly available January 2022 non-productions); see also Ex 5 (indicating that 812 “no escort” non-productions in February 2022 make up 60% of all “Other” non-productions).

as “Other” rose dramatically two to threefold,⁵ and the number of non-productions in the “Other” category excluding “no escort” increased significantly by several thousands.⁶ This trend continued in the DOC data for May 2022 and June 2022. Thus, in May and June, as the “no escort” numbers purportedly decreased, the non-productions categorized as “Other” for reasons excluding “no escorts” stayed at these elevated levels, suggesting a shift in the reporting rather than a remediation of the medical access problem. To put it frankly, it is confounding that, after years of being deprived access to medical care, people in custody started skipping medical appointments by the thousands in order “to instead attend a work assignment, law library, school, religious services, or commissary.”⁷ To obtain comfort that the “no escort” numbers have in fact gone down and that there are not new, additional categories of non-production attributable to DOC’s administrative failures contained within the “Other” category, it is imperative that DOC provide information to explain these discrepancies, specifically what factors are driving the sudden, recent increase in the non-productions categorized as “Other,” particularly the dramatic increase for the numbers excluding “no escort.” Petitioners hope that DOC’s production of data explaining these discrepancies will show whether DOC is making real progress and coming closer to satisfying its burden of proving substantial compliance.

Thus far, DOC has not explained how DOC is now collecting and categorizing its data. The unexplained changes make it impossible to credit DOC’s assertion that it has made “substantial strides,” Thomson Aff ¶ 5, without a fulsome understanding of the methodology for collecting and reporting data and any recent changes. This is particularly true as counsel for Petitioners continue to receive regular complaints from people in custody that they are not produced to their medical appointments. As a result, to understand the reasons for the dramatic changes in DOC’s metrics, Petitioners have asked DOC to provide: a breakdown of the “Other” categories; information about how DOC is collecting and categorizing the various types of non-production data; and any changes that DOC has made since December 2021 to how it collects and categorizes non-production data. In addition to the opacity of the “Other” data, Petitioners remain concerned about the startlingly high number of “Production Refusals” DOC reports, for example, 6,339 in May, 6,609 in April, and 7,148 in March.⁸ It strains credulity that, given the well documented difficulties people in custody experience trying to access health care, they would refuse appointments at such a high rate.

Petitioners may also need to review the raw data underlying DOC’s assertion of substantial compliance. Without this critical information, Petitioners and this Court cannot determine whether DOC is in fact making progress towards compliance.

⁵ DOC reported 1,231 “Other” non-productions (including no escort) for December 2021, 998 for January 2022, and 1,371 in February 2022. *See* [NYSCEF Doc No. 99 at 2]; Exs 4, 5. But DOC reported 4,270 “Other” non-productions (including no escort) for March 2022, 3,778 for April 2022, and 2,864 for May 2022. Exs 6, 7, 1.

⁶ For example, in February 2022, DOC reported 559 instances of non-productions in the “Other” category excluding “no escort,” which jumped to 3,069 in March 2022 and 2,313 in April 2022. Exs 5, 6, 7.

⁷ No escorts comprised only 28% of all “Other” non-productions for March 2022, only 38% of “Other” non-productions for April 2022, only 26% of “Other” non-productions for May 2022, and only half a percent for June 1-15, 2022. Exs 6, 7, 1, 2.

⁸ Exs 1, 7, 6.

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Because DOC, by its own admission, continues to fail to escort hundreds of people in its custody to medical appointments, this Court should impose contempt fines. If this Court is not ready to impose fines, then we ask that this Court defer its decision on whether DOC has purged itself of contempt for 30 days to allow Petitioners and this Court the opportunity to review the information necessary to assess DOC's purported progress and set a short hearing where a DOC representative will be made available for questioning, or, in the alternative, set a briefing schedule on whether DOC has made progress towards substantial compliance.

Respectfully submitted,

MILBANK LLP

By: /s/ Katherine Kelly Fell

Katherine Kelly Fell

THE LEGAL AID SOCIETY

By: /s/ Veronica Vela

Veronica Vela

BROOKLYN DEFENDER SERVICES

By: /s/ Lucas Marquez

Lucas Marquez