



April 22, 2020

Secretary Brian Blalock
Children Youth and Families Department
P.O. Drawer 5160
Santa Fe, NM 87502-5160

Dear Secretary Blalock,

On April 6, 2020, the Governor's office released Executive Order 2020-21 to reduce the population of adult inmates held in jail and prison facilities throughout New Mexico. This action was taken specifically in response to the COVID-19 crisis, and in recognition of the fact that inmates and community members working in detention facilities are especially vulnerable to contracting the disease and communicating it to others because, in detention facilities, there is little possibility of social distancing, facilities are less clean, and there are generally more underlying health issues among inmates. If there was an outbreak in a detention facility, it could have devastating effects on those inside, and any community's health care system. The Governor's Executive Order was an important step in reducing the risk of adult incarcerated people and detention facility workers becoming ill, and also balancing public safety. However, those of us involved in juvenile justice are concerned because no such action has been taken or proposed for incarcerated juveniles.

COVID and JUVENILE DETENTION FACTS

The importance of finding avenues of release for juveniles both pre- and post-adjudication must not be understated. As of April 8th, The Sentencing Project was aware of forty-three youth and fifty-five staff across more than twenty states who have tested positive for COVID-19. Given the lack of testing throughout the country, this likely means that many more youth and facility staff have COVID-19. Additionally, ten percent of Louisiana's juvenile detention population was known to be positive for Coronavirus as of April 16. Louisiana's youth incarceration numbers are comparable to those of New Mexico's.

Youth in detention and correctional facilities are at an increased risk of harm from COVID-19.

Young people involved in the justice system have higher rates of physical conditions such as asthma and hypertension than the general youth population, as well as higher rates of past trauma and behavioral health challenges. This means that they are at greater risk of serious outcomes if they contract COVID-19, as well as of psychological harm from the stress

of possible exposure, and the separation from support networks during this time. Dr. Homer Venters, a physician and epidemiologist who oversaw efforts to contain the outbreak of the H1N1 virus at New York's Rikers Island jail has disputed the myth that COVID-19 is not a danger to youth, saying, "We have seen that this is not the case. We know that this population is made up of youth that have disproportionately higher health problems that put them at higher risk. We cannot proceed on the basis of this misconception. They can and they will get sick if we don't do anything."

In addition to the risk incarcerated youth generally face is the well known disproportionate impact of race in the juvenile justice system, and the disproportionate impact of COVID-19 in minority communities. One purpose of the Delinquency Act is "to reduce overrepresentation of minority children and families in the juvenile justice, family services and abuse and neglect systems through early intervention, linkages to community support services and the elimination of discrimination." The intersection of the pandemic and juvenile incarceration is one place societal inequities is on full display.

The structures and conditions in detention and correctional facilities make it difficult to avoid or reduce transmission of COVID-19, and to adequately care for youth who do contract the virus.

The US Centers for Disease Control and Prevention (CDC) has issued specific guidance on the management of COVID-19 in correctional and detention facilities, recognizing that containing the virus in these environments "presents unique challenges." US Centers for Disease Control and Prevention. ((2020) Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities.) Among these, incarcerated youth (and adults) sleep, eat, and otherwise spend time in large groups, and their ability to wash hands and otherwise protect themselves from disease may be limited (Ibid.). Facilities may also not have the medical staff and equipment to meet the needs of symptomatic youth, let alone the ability to provide adequate medical care in isolation.

NEW MEXICO RESPONSE

Thus far, attorneys and advocates in the child welfare community have been able to obtain official information for one youth detention facility, Bernalillo County Youth Services Center (BCYSC), through an IPRA request submitted April 13, 2020. This information is not public, except through IPRA. On March 3, 2020 BCYSC outlined its Pandemic Policy. This facility, like the seven other juvenile detention facilities in New Mexico, is licensed by CYFD, and could be considered a case study for what juvenile detention centers plan to do around the state. However, without other information, it is unclear if this policy is the norm across facilities.

There are several concerning aspects of this policy. First, this policy was issued March 3, 2020. In the IPRA request submitted April 13, 2020, one document requested was

“copies of any documents indicating the number of children in detention at the Youth Services Center who have undergone laboratory and/or imaging testing to determine whether they have been infected with SARS-CoV-2/COVID-19.” The County’s response was there are no responsive documents. This indicates that no children in BCYSC have been tested for COVID-19. This is confirmed by anecdotal reports. The CDC has indicated that at least 25% of people infected by the virus are asymptomatic and show no symptoms. This means the only way to know if residents of the facility and staff have the virus and are spreading it--the only way to keep people safe--is to test everyone. This is not being done.

A second concern is the lack of Personal Protective Equipment available for both staff and residents of juvenile detention facilities, and to whom it will be provided. In the April 13 IPRA files, emails provided a PPE count from April 15, 2020 at BCYSC. The workers responsible for PPE indicated that in one area they were completely out of cleaning wipes, in another area they were “down to the last two containers of Clorox Wipes,” and wanted to submit orders for surgical masks and face shields.

Perhaps more concerning than the amount of PPE is the distribution. In the BCYSC Policy, only staff working with residents are expected to get equipment. No provision is made for the residents, unless 1. The PPE is medically recommended for a resident (Policy, E-1) or 2. A resident is suspected of having an infection, in which case they will be directed to put on a surgical mask, put in a single room, vitals checked, and then staff will determine whether isolation or transport to UNMH is appropriate. The staff treating the child will receive an N95 mask, isolation gown, gloves, and eyeshield. (Policy, C-2).

A third concern is the social isolation occurring in the facility. The Policy requires that all in person visits and interaction with professionals cease, no physical contact occurs, food service is made to be served to children in their cells or units and that the food be able to be served cold. (Policy B-1) Anecdotally, advocates have learned that juveniles expressing fear of the disease--not showing symptoms--have been placed in isolation.

All members of our society must sacrifice comfort and personal connection to prevent the spread of this disease. However, for children already incarcerated and cut off from home, these measures risk children’s mental health as much as protect their physical well-being.

Finally, children are still being admitted to the facility. A population list from April 20, 2020 shows eighteen new juveniles have arrived at D homes across the state since March 1, 2020, which is near the time New Mexico cases began to appear. The Policy states: any child admitted to the facility will be “screened ... in the outdoor sally port area before proceeding with the admission process inside the physical structure of the facility. They will only be tested at UNMH if they show symptoms. (Policy, C-2). This practice is similar to what is being done in adult facilities, and is highlighted as an especially concerning practice in the ACLU’s April 14 Emergency Petition for Writ of Mandamus and/or Habeas Relief, filed on behalf of adult prisoners. Advocates also have reports of children arriving in long-term commitment facilities. Although no cases have been

reported in juvenile facilities, with this many new residents arriving, it is only a matter of time.

CYFD'S ROLE AND ABILITY TO RELEASE

The Children, Youth, and Family Department has a unique duty in that it must create programming and rehabilitation so that delinquent youth may safely reintegrate into their families and communities, while also ensuring public safety. During this time of major safety concerns, CYFD's internal calculation should weigh on the side of getting children out of detention. The prospect of releasing youth before their original sentence allows might be a change in policy and attitude, but the Department must react strongly to ensure that the specific threats of the pandemic are not lost to the theoretical threats of the dangers posed by delinquent children.

Advocates have identified several mechanisms CYFD may use to reduce the detention facility populations. Advocates are working with other stakeholders to identify judicial and defense attorney lead avenues.

PREVENT NEW CHILDREN FROM ENTERING FACILITIES

Before delinquency proceedings are initiated against a child, CYFD JPOs have significant authority to divert or recommend the child avoid adjudication, therefore preventing any chance of incarceration. Reduction of incarcerated youth is a stated CYFD goal in non-Pandemic times; now, with the extra health risk in facilities, reducing contact with juveniles in court, by JPOs, and in facilities must be the lens by which all determinations are viewed.

Under CYFD's Juvenile probation and Parole Powers enumerated in NMSA 32A-2-5 (B), CYFD officers may (1) Choose not to begin a proceeding pursuant to a provision of the Delinquency Act; (3) make predisposition studies and assessments and submit reports and recommendations to the court; (4) supervise and assist a child placed on probation or supervised release or under supervision by court order or by the department; and (6) informally dispose of up to three misdemeanor charges brought against a child within two years. These are extensive powers which suggest emphasis on diversion of juveniles from involvement in the juvenile justice system generally, and avoid incarceration. Under these same powers, JPOs may decide whether or not a child will be incarcerated for a violation of conditions of release or probation.

During this time of possible exposure to illness, CYFD should direct JPOs to have a policy of in-home confinement for probation violations, or other consequences which do not involve incarceration. This would bring New Mexico in line with states such as Michigan, which has ordered no incarceration for violations unless court ordered.

Preventing new children from entering detention facilities is a front line defense against possible outbreak in the residence. Although facilities might have screening and cleaning protocols, cycling new residents into the facility increases risk for everyone. It is not clear whether the screening process can truly identify asymptomatic carriers or those incubating the disease.

A policy allowing CYFD JPOs to only incarcerate children under the most egregious of circumstances would prevent new carriers from coming into facilities. In these times, the risk of sickness greatly outweighs the need for detention for relatively minor violations.

CYFD HAS THE SOLE AUTHORITY TO RELEASE JUVENILE OFFENDERS WHO HAVE BEEN COMMITTED

The Delinquency Act makes clear that the Department has exclusive jurisdiction to release an adjudicated delinquent child during the time of the child's commitment. The factors the Department shall consider are public safety, the extent to which the child has been rehabilitated, the adequacy and suitability of the proposed release plan and the needs and best interests of the child, including the child's need for behavioral health or medical services that are not available in facilities for adjudicated delinquent children. At this time, the health and safety of the children must be paramount--and they cannot be guaranteed in detention facilities. There is simply no way to properly social distance, not enough PPE or cleaning supplies, and too many people coming in and out of the facility to prevent exposure. JPOs can work with the children to expedite release plans. All release requests, as proposed in 32A-2-23.1 (C) should be presumed reasonable. Further, CYFD could write a letter to judges presiding over juvenile cases indicating CYFD's intention to release children, and why it is necessary during the pandemic. Although juvenile justice advocates are also communicating with judges to adopt this mindset, such direction from CYFD would be incredibly helpful.

BE PROACTIVE AND TRANSPARENT ABOUT CHILDREN WHO REMAIN INCARCERATED

As CYFD begins to implement procedures to release children, or determines some children must remain detained, CYFD must take steps to ensure children and staff are safe in the facilities. CYFD could take steps both inside and outside facilities to promote safety and peace of mind. Suggestions include:

- CYFD should make known its policies and procedures on its website for screening, testing, PPE distribution, notification of parents/guardians if a child becomes ill, and mental health care. Individual caseworkers have given pieces of information to parents and advocates, but it is obvious there is no Department-wide policy and no official release of information.
- All children and staff should be given surgical masks. In Camino Nuevo, children have been given homemade masks made by the mother of a guard.
- Mask procedures should be standardized across facilities and enforced. Advocates have been told that children and guards might have masks, but no one wears them consistently.
- Social distancing should be demonstrated and enforced. Per reports of residents, families, and professionals, no social distancing is occurring in the facilities.
- Residents should be provided daily, factually correct information regarding the pandemic. Currently they receive updates from guards and family members, and advocates are concerned by both the lack and inaccuracy of information residents seem to have.

- Communication with children's support systems should be increased and encouraged. Family visits have been cancelled and telephone calls are reduced or inconsistent. It is understandable that in person visits can no longer happen. However, phone calls and video technology should be increased for both the mental health of residents and families. All residents--no matter their level--should have multiple phone calls a week. During this time when everyone wishes to be close to loved ones, the fact of incarceration should not deprive children of this basic comfort.
- If there is a cost associated with the phone calls, CYFD could allocate a fund to allow for more than two phone calls a week for all residents. Additionally, visual technology which is already utilized for attorney and professional visits, could be used for family visits as well.
- Children should be allowed to write and receive letters from as many people as possible. Families report having extreme difficulty getting people such teachers, relatives, social workers, and clergy approved to write to incarcerated juveniles. This seems an over precaution as the letters sent and received are screened. At this time, letter writing is a basic lifeline out of necessary isolation.

Finally, CYFD should continuously review cases and find avenues for release. As this pandemic continues, the reasons for keeping children incarcerated might become fewer and fewer. Advocates are hopeful that with the combined expertise of the Department, judges, lawyers, and others, all detained children can be released to families or less risky facilities. We offer our ears and voices to accomplish this.

During this unprecedented time, let New Mexico take unprecedented measures to ensure the safety of incarcerated youth, the community who dedicates their lives to these children every day, and the families of both. Juvenile justice advocates look to CYFD's mission statement as guidance:

CYFD believes in the strengths and resiliency of families who are our partners and for whom we advocate to enhance their safety and well-being. We respectfully serve and support children and families and supervise youth in a responsive community based system of care that is client-centered, family focused, and culturally competent.

Like all members of society, the families, workers, and children involved in the juvenile justice system deserve to be physically safe from this pandemic and the mental angst it causes. The values of client-centered, family focused, and culturally competent cannot be upheld if a child is not physically safe.

The group of advocates concerned about New Mexico incarcerated youth is made up of civil rights attorneys, public defenders, parents of incarcerated youth, social workers, and community members. We look forward to working with CYFD as soon as possible to assist in any way we can to address this issue.

Sincerely,

/s/ Bette Fleishman

Bette Fleishman

Executive Director

Pegasus Legal Services for Children