

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

EDWARD BANKS, *et al.*,

Plaintiffs-Petitioners

v.

QUINCY BOOTH, in their official capacity
as Director of the District of Columbia
Department of Corrections, *et al.*,

Defendants-Respondents.

No. 1:20-cv-00849 (CKK)

**EMERGENCY MOTION TO CONVERT APRIL 6, 2020 STATUS CONFERENCE INTO
MERITS HEARING ON PLAINTIFFS’ APPLICATION FOR A TEMPORARY
RESTRAINING ORDER**

Since Plaintiffs’ filed their Application for a Temporary Restraining Order on March 30, 2020 (Docket No. 5), there have been two new developments that heighten the urgency of Plaintiffs’ Application.

First, the spread of the virus in the District of Columbia and in the Department of Corrections (“DOC”) is continuing rapidly. When Plaintiffs filed their suit, there were five positive cases in the DOC. Yesterday, Defendants represented that there were eight positive cases. By this morning, there were twelve, including at least one new positive test in an entirely new segment of the facility. *See* Docket No. 20-2 (“Jordan Decl.”), at ¶ 11. There may well be more by now. Plaintiffs — and the public health of the District of Columbia — can ill-afford to wait for the virus to continue its exponential growth through the DOC population. As Plaintiffs’ expert Dr.

Meyer explains, the “horizon of risk for rapid and severe COVID-19 in these facilities is a matter of hours not days.” Docket No. 5-2, Exhibit 1 (“Meyer Decl.”), at ¶ 37.

Second, Defendants’ policies, which have not been updated since the start of the crisis and which are at least ten years old, do not rebut most of Plaintiffs’ evidence in support of the TRO. Indeed, additional evidence from DOC staff, discussed below and attached to this motion, suggests that Defendants are not following or implementing their own policies.

In light of the escalation of the crisis at the Jail and the alarming gaps both in Defendants’ preparedness and between their policies and the realities at the D.C. Jail, Plaintiffs request that the Court convert the status conference scheduled for 9:30 a.m. on April 6, 2020, into a hearing on the merits of Plaintiffs’ application for a TRO. The Court has discretion to convert the status hearing into a merits hearing. *See* LCvR 7(f). In order to ensure that the Court has sufficient time to review the pleadings for that hearing, Plaintiffs would consent to moving the deadline for their reply brief, currently set for 5:00 pm on *Sunday*, April 5, 2020 (*see* Minute Order, April 1, 2020) to 5:00 pm on *Saturday*, April 4, 2020. Defendants have advised that they do not consent to this motion.

I. COVID-19 is Spreading Rapidly in the DOC, in the Region, and in Correctional Facilities Generally.

When Plaintiffs’ filed suit on March 30, 2020, the World Health Organization, the Centers for Disease Control and Prevention, the District of Columbia, and the DOC provided the following statistics regarding infection and death from COVID-19:

- Worldwide – 638,146 confirmed cases; 30,039 deaths
- United States – 122,653 confirmed cases; 2,112 deaths
- DMV Region – 2,934 confirmed cases; 53 deaths
- DOC – 5 confirmed resident cases.

See Compl. ¶¶ 1, 20-22. Just three days later, the picture is significantly worse:

- Worldwide – 900,306 cases (41 percent increase); 45,693 deaths (52 percent increase)¹
- United States – 213,144 cases (73 percent increase); 4,513 deaths (114 percent increase)²
- DMV Region – 4,697 cases (60 percent increase); 88 deaths (66 percent increase)³
- DOC – 12 confirmed resident cases (71 percent increase).⁴

Given the speed at which the virus is infecting people worldwide — and particularly the speed at which the virus is infecting people in DOC custody — it is no exaggeration to say that obtaining relief even one day sooner could mean the difference between life and death for those in DOC custody and DOC staff as well.

The fact that there has been some progress toward compliance with the D.C. COVID-19 Response Emergency Amendment Act of 2020 does not undermine this conclusion. It wasn't until two days after this lawsuit was filed, and two weeks after the Act was passed, that Defendants released 23 people under that emergency legislation. *See* Docket No. 18 (“3/31/20 Tr.”), at 6. More importantly, even if the entire category of prisoners eligible for release under the Act were released at this moment either through Defendants' exercise of discretion or through Superior Court review process currently underway, that group — approximately 94 individuals, including the 23 released on Wednesday — amounts to less than six percent of the population of the Jail as

¹ *See* WORLD HEALTH ORG., *Coronavirus disease (COVID-19) Pandemic* (last visited April 2, 2020, 5:30 PM), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>.

² *See* CTRS. DISEASE CONTROL & PREVENTION, *Cases in U.S.* (last visited April 2, 2020, 5:30 PM), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

³ *See* Joe Heim & Dana Hedgpeth, *Live Updates: Jobless Claims Skyrocket in the D.C. Area; Mayor Tells Hospitals City Needs 3,600 More Beds for Surge*, Wash. Post (April 2, 2020, 4:50 PM), <https://www.washingtonpost.com/dc-md-va/2020/04/02/coronavirus-dc-maryland-virginia-live-updates/>.

⁴ Docket No. 20-2 (“Jordan Decl.”), at ¶ 11.

of March 27, 2020.⁵ That would leave over 1,500 individuals, including many with conditions that put them at particular risk in the facility, subject to the conditions described in frightening detail in Plaintiffs' TRO motion papers.

It is truly urgent that DOC be required to implement meaningful change, including both improvements in conditions and releases guided by the appointment of a public health expert to assist the Court in determining how many and which class members to order released, consistent with public health and safety, so as to ensure that the number of prisoners remaining at the CDF and CTF can be housed consistently with CDC guidance on best practices to prevent the spread of COVID-19, including the requirement that prisoners be able to maintain six feet of space between them. As Plaintiffs' expert Dr. Meyer explains, the "horizon of risk for rapid and severe COVID-19 in these facilities is a matter of hours not days." Docket No. 5-2, Exhibit 1 ("Meyer Decl."), at ¶ 37. The escalating numbers of diagnosed cases alone warrant expediting the proceedings so that Plaintiffs may be heard on their relief as soon as possible and before it is too late.

II. Defendants' Policies Fail To Rebut Plaintiffs' Evidence and New Evidence Suggests They Are Not Even Being Implemented.

In response to the Court's request for "all relevant written procedures and practices concerning COVID-19," Defendants docketed the following:

- Unity Health Care's — DOC's medical contractor — "Coronavirus Protocol" for the Department of Corrections Health Center (Docket No. 19-3);
- A flowchart showing DOC's COVID-19 screening protocol (Docket No. 19-4);
- An e-mail from Shreya Khuntia, Epidemiologist at the District of Columbia Department of Health to "Beth" (Docket No. 19-5); and
- Unity Health Care's 2008 "Medical Plan for Pandemic Influenza," most recently revised on October 1, 2018 (Docket No. 19-6).

⁵ Keith L. Alexander et al., *As Inmates in D.C., Maryland and Virginia Test Positive for the Coronavirus, Jail Officials Scramble to Reduce the Risk*, WASH. POST (April 1, 2020) (reporting that there are around 1,600 residents in DOC custody).

Defendants also provided, under seal, a document they referred to as “DOC’s Pandemic Flu Plan (2009, currently being revised).” *See* Docket Nos. 19, at 2 n.1 & 22-2. Defendants also provided two policies related to good-time credits. *See* Docket Nos. 19-1 & 19-2.

A review of these documents, in combination with evidence suggesting they are not being implemented, raises grave concerns that also merit expediting the proceeding. Unity Health Care — the medical services contractor for DOC — has developed a “Coronavirus Protocol” covering the DOC Health Center. *See* Docket No. 19-3, at 4 (discussing cleaning and disinfection “in healthcare facilities”). However, according to Defendants’ submission, the only written policy or procedure guiding efforts to mitigate the spread of COVID-19 in the rest of DOC operations (that is, housing units and the rest of the facilities not operated by Unity Health Care) is a 2009 “Pandemic Flu Plan,” Docket No. 22-2, which is “currently being revised,” Docket No. 19, at 2.⁶ As an initial matter, it is shocking that, over three weeks after the Mayor declared a public health emergency, DOC has not yet updated its policies to require the social distancing and other precautionary measures that the CDC and others have insisted on.

Another problem revealed by Defendants’ submissions is that DOC has tested only 22 residents, Jordan Decl. ¶ 11, even though 65 residents interacted with the Deputy Marshal who tested positive (and that, according to DOC staff, *six* of those 65 residents subsequently tested positive themselves, *see* Docket No. 23-11, at ¶ 48). Defendants’ response does not indicate when those tests were conducted or the unit or facility of the residents that were tested.

Defendants’ submissions look even worse when juxtaposed with declarations from DOC’s own staff members showing that Defendants’ policies were not widely disseminated and have not

⁶ Neither Defendants’ flowchart (Docket No. 19-4) nor Defendants’ email to Beth (Docket No. 19-5) purport to offer staff guidance on how to mitigate the spread of COVID-19 in the DOC.

been implemented. First, it appears that DOC’s “Pandemic Flu Plan” is not even the most recent version of DOC’s own policy. Doreen Deterville, a staff member who has worked at the DOC since February 2017, and who currently works in CTF, “searched through DOC’s policies to identify any plan regarding pandemics” earlier this week and found a plan that seems to be an updated version of the policy that Defendants’ filed under seal. *See* Exh. A (“Deterville Decl.”), ¶ 7 & Attach. A.⁷ The main difference between the two versions — itself troubling — is that the more recent policy deletes an entire section that had been present in the 2009 policy regarding staff training in preparation for the pandemic. *Compare* Docket No. 22-2, *with* Deterville Decl., Attach. A.

And apparently, no such training has occurred. It does not seem as if DOC leadership was even *aware* of this policy until March 27, 2020, when Ms. Deterville emailed DOC’s Director of Programs & Case Management, Camile Williams, to inform her of the policy. Deterville Decl. ¶ 8. Ms. Williams responded: “Good stuff! I just glanced over the entire thing. Thanks for sharing.” *Id.* Deterville’s “understanding of her message was that she had not seen this policy until [she] sent it to [her].” *Id.* Indeed, it is difficult to understand Ms. Williams’s reaction in any other way; if that document was one with which Ms. Williams had been familiar prior to Ms. Deterville’s email, one would have expected her to say that rather than responding that she had “glanced” at it and expressing her appreciation.

Further, DOC did not inform its staff about the policy. According to Ms. Deterville, she has “never seen,” until now, the policies and procedures that Defendants claim to be implementing, and “DOC never sent an all-staff email with those plans, or anything similarly comprehensive,”

⁷ It is puzzling why Defendants’ own search of what was presumably the same set of policies did not turn up the updated policy.

even though “DOC’s standard procedure is to disseminate the relevant policies to all staff affected by it.” Deterville Decl. ¶¶ 5-6.

That may be the reason why the policies do not actually seem to be implemented. For instance, while the policies call for certain staff to don personal protective equipment, Defendant Booth informed staff that “using personal protective equipment (PPE) could increase [staff] risk of contracting the virus.” *Id.* ¶ 10. Those policies also call for high-touch surfaces to be disinfected, but Ms. Deterville points out that the “biometric scanning device” that literally “all staff must place their hands on” is “not wiped between uses.” *Id.* ¶ 16. To make matters worse, Ms. Deterville recounts that on March 27, no hand sanitizer was available for staff at the entrance of CTF; the next day, CTF had refilled the hand sanitizer bottle with a formula containing “1% benzalkonium chloride,” *id.* ¶ 16, which the CDC does not recommend and actively cautions that it “has less reliable activity against coronavirus than either of the alcohol[]” based sanitizers.⁸

Lennette Nesbitt, a DOC case manager at the CTF since 2017, corroborates these concerns and notes systemic deviations from the stated policies and the actual practices in the facilities. DOC relies on residents to clean the facilities themselves, but residents receive no training and almost always lack protective equipment when they clean. *See* Exhibit B (“Nesbitt Decl.”), at ¶¶ 7-9. Social distancing is not occurring. *Id.* ¶ 15. The Jail does not have enough cleaning solution. *Id.* ¶ 11. Key common touch-points remain unsanitized: Ms. Nesbitt reports that “[d]uring the week of March 23, multiple inmate came to my office to make legal calls. After they left, I did not have any cleaning solution capable of killing covid-19 that I could use to wipe down surfaces. As

⁸ *See* CTRS. DISEASE CONTROL & PREVENTION, *Frequently Asked Questions about Hand Hygiene for Healthcare Personnel Responding to COVID-2019*, <https://www.cdc.gov/coronavirus/2019-ncov/infection-control/hcp-hand-hygiene-faq.html> (last accessed April 2, 2020).

a result, any virus particles any inmate left on my phone remained there, where each successive inmate's face could come into contact with it.” *Id.* ¶ 13. As a result of all the risks she faces in light of DOC's lack of precautionary measures, Ms. Nesbitt reports that “[t]he nature of our facility, the lack of protective gear, my inability to obtain adequate cleaning supplies all left me afraid to come to work—so much so that I would have to sit in my car for thirty minutes every day so I could calm myself down before entering the building. *Id.* ¶ 3.

The experiences of DOC staff and Plaintiffs documented in the TRO papers and the attached declarations are buttressed and expanded on by the proposed *amicus* brief of the Fraternal Order of Police for the District of Columbia Department of Corrections Labor Committee (FOP/DOC) — the union representing DOC staff — which attaches a joint declaration of five DOC Correctional Officers who serve as union officials. *See* Docket Nos. 23-2 & 23-11 (proposed *amicus* brief and Exhibit I). The brief and declaration thoroughly rebut Defendants' claims about the safety of their facilities and the nature of their practices. The five Correctional Officers document in detail, based on personal experience, that, for instance, they lack protective equipment, screening protocols are not observed, sanitizing and food-preparation protocols have not been communicated or executed, cleaning instructions to residents are not communicated to all residents, and cleaning supplies are not available for residents. Docket No. 23-11, at 12-16. Based upon their personal experiences working inside of DOC facilities for years, DOC staff state: “Very few changes to the daily operations have been implemented in preparation for and in response to COVID-19.” *Id.* at 11.

Just as important as what Defendants' submissions say is what they do not say. Plaintiffs make the following specific and detailed allegations about current conditions in the jail that Defendants' policies and declarations make no mention of:

- Plaintiffs and proposed class members are not being required to practice social distancing, and in fact are being actively encouraged to do so by attending programs in large groups. One Plaintiff describes sitting in “group” sessions of up to 30 residents for hours a day, passing pens and papers between them. *See* Docket No. 6-2, Exhibit 5 at ¶¶ 3, 7. Another Plaintiff describes residents of his housing unit sharing a large cooler of juice, using their hands to dip cups into the cooler to get juice. *See* Docket No. 6-2, Exhibit 6 at ¶ 6.
- Plaintiffs and proposed class members are not being required to practice social distancing, and in fact are being actively encouraged to do so by attending programs in large groups.
- Defendants are still using Windex as an all-purpose cleaning solution, *see* Docket No. 5-2, Exhibit 3 at ¶ 6(a); Exhibit 16 at ¶ 4(f), despite the fact that Windex “could actually be harmful” in preventing the spread of COVID-19, according to Dr. Meyer, *see* Meyer Decl. ¶ 28(a)(ii).
- Medical facilities are horribly under-equipped to provide care during an outbreak, as Dr. Meyer puts it: “The 2019 D.C. Auditor report suggests there is a single medical isolation space in CTF with negative pressure capacity To say this is unacceptable is an understatement.”
- Plaintiffs and proposed class members wait days after requesting to see medical staff, as one Plaintiff recounts: “[I]t takes days before you get a visit with anyone from the medical unit.” Docket No. 5-2, Exhibit 7, at ¶ 4.
- In Defendants’ own words, the “current HVAC system has significant design problems that inhibit proper airflow,” Meyer Decl., ¶ 28(c), a condition that is echoed repeatedly by Plaintiff Banks, who is housed next to a quarantine unit and describes the ventilation between his unit and the quarantine unit as “very poor,” and that the units are “not sealed off,” Docket No. 5-2, Exhibit 6, at ¶ 3.

In sum, there is a yawning gap between what DOC claims its policies are and what actually happens inside DOC facilities. Whether because of this gap, or because the policies themselves are ineffective, the results are clear: COVID-19 is rapidly spreading in Defendants’ facilities.

Plaintiffs therefore request that the Court exercise its discretion to convert the hearing for Monday, April 6, 2020, into a merits hearing for argument on Plaintiffs’ Application for Temporary Restraining Order and, if the Court feels it necessary to adjust the briefing schedule as a result, to advance the deadline of Plaintiffs’ reply brief by 24 hours.

DATED: April 3, 2020
Washington, D.C.

Respectfully submitted,

/s/ Steven Marcus

Steven Marcus (D.C. Bar # 1630882)
Jonathan Anderson (D.C. Bar # 475306)
Jenna Cobb (D.C. Bar # 979506)
Public Defender Service for the District of Columbia
633 Indiana Avenue N.W.
Washington, D.C. 20004
Tel. 202-824-2524
Fax 202-824-2525
smarcus@pdsdc.org

/s/ Scott Michelman

Scott Michelman (D.C. Bar # 1006945)
Arthur B. Spitzer (D.C. Bar # 235960)
Michael Perloff (D.C. Bar # 1601047)
American Civil Liberties Union Foundation
of the District of Columbia
915 15th Street NW, Second Floor
Washington, D.C. 20005
Tel. 202-457-0800
smichelman@acludc.org