



COVID-19 and California's Detained Youth: Vulnerable and Overlooked

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Abstract

The COVID-19 pandemic is an unprecedented and ongoing calamity, laying bare the vulnerabilities of California's public health and emergency response systems. Although youth confined in juvenile detention facilities are among those at highest risk of suffering from the effects of the virus, the plight of these young people has been largely invisible to the public and overlooked by the state. This article describes the unique dangers posed by the coronavirus to youth incarcerated in county-run detention facilities in California. It summarizes the policies and procedures necessary to protect the health and well-being of detained youth based on the recommendations of public health officials and youth justice stakeholders nationally. It then describes the county and state agencies whose coordinated action is essential to respond to COVID-19, the efforts of the authors and other California advocates to urge these government stakeholders to implement essential health and safety protocols, and the obstacles and challenges encountered. Those efforts met with a range of responses ranging from lack of certainty about authority to act to non-responsiveness. As a result, California failed to provide systematic guidelines for releasing youth from custody, proactively oversee conditions in detention facilities, report data in meaningful ways, or respond to concerns and complaints from youth and families. The article, finally, draws on the experiences of the past year and a half to offer recommendations for the systemic changes necessary to prepare for the next pandemic or similar public health emergency.

Introduction

The COVID-19 pandemic is an unprecedented and ongoing calamity, laying bare the vulnerabilities of California's public health and emergency response systems and imperiling the lives of the state's residents. At the time of this writing, 3,807,971 million residents have contracted the virus and 63,806 have died (California Department of Health 2021). While the virus spares no one, more vulnerable groups of people run the greatest risk of contracting the disease and of experiencing severe symptoms or death. Public health messaging has concentrated on the enhanced risk to older adults, particularly those living in nursing homes and other congregate settings (US Centers for Disease Control and Prevention (CDC) April 2021b), as well as people with underlying medical conditions (CDC March 2021). COVID-19 has also



magnified long-standing health inequities in California, disproportionately jeopardizing the lives of people of color (CDC April 2021a), essential workers (Berdahl 2020), and LGBTQ people (Hall and Heslin 2021; O’Neill 2020).

The burdens of COVID are also borne by young people. The U.S. Centers for Disease Control and Prevention (CDC) estimates that from February 2020 through March 2021, fully 141,611 young people ages 5-17 years of age were hospitalized because of COVID. For several reasons, young people confined in detention facilities are among those at highest risk. Despite their extreme vulnerability and the government’s obligation to ensure their health and safety, the plight of these young people has been made largely invisible to the public and inadequately addressed by relevant public agencies.

In this article, we describe the unique dangers posed by the coronavirus to youth incarcerated in county-run detention facilities¹ in California. We then summarize the policies and procedures necessary to protect the health and well-being of detained youth based on the recommendations of public health officials and youth justice stakeholders nationally. Next, we describe the county and state agencies whose coordinated action is essential to respond to COVID-19 as it impacts detained youth, the efforts the authors and other California advocates made to urge these government stakeholders to implement essential health and safety protocols, and the obstacles and challenges we encountered. Finally, we draw from these experiences to offer recommendations for the systemic changes necessary to prepare for the next pandemic or similar public health emergency.

Unique Vulnerability of Detained Youth

Inherently Hazardous Environment

The CDC has confirmed that people in carceral settings, including detained youth, are at a significantly higher risk of contracting COVID-19 (CDC March 2020). The physical and operational design of detention facilities requires youth to live, eat, sleep, and recreate in close proximity to one other. There is no reasonable way to limit exposure without creating other equally harmful conditions. Detention staff cannot implement social distancing without subjecting residents to prolonged seclusion, curtailing education and recreation, and depriving youth of contact with other youth, their attorneys, and their loved ones. The immediate and serious harm to youth from isolation is well-documented (American Civil Liberties Union 2013; Burrell and Song 2019). During a frightening and dangerous pandemic, depriving youth of human contact is particularly harmful (Gagnon 2020). Under any circumstances, contact with their families is essential for the health and well-being of incarcerated youth (Agudelo 2013). The risks associated with the isolation of incarcerated youth are compounded during a pandemic, when youth and families are separated, at risk of contracting a deadly virus, and experiencing high levels of anxiety and fear. Likewise, attorneys provide essential support to youth by keeping

¹ Detention facilities, also known as juvenile halls, are locked institutions designed for short term confinement (California Welfare and Institutions Code, Sec. 550) but in recent years are also used for longer term commitments.



them informed of the progress of their case, advocating for their welfare, and giving voice to their concerns (National Juvenile Defender Center 2021). When youth cannot contact their families or their attorneys, they lose important conduits for information about their safety and well-being. This is especially true during an emergency, when facilities are understaffed, conditions deteriorate, and personnel are struggling to perform the most essential tasks (Hager 2020).

The constant movement of people in and out of detention facilities also increases the risk of contagion. Probation personnel, facility staff, youth, and others enter and exit these facilities every day. Transfer of youth from one facility to another creates similar risks. Where courts continue to operate in-person proceedings, youth are transported to hearings alongside other youth and staff, further increasing their risk of exposure. Where courts are closed during emergencies, delayed hearings subject youth to longer periods of detention.

Youth detention facilities face inherent difficulties in managing a highly contagious virus. Particularly in older, crowded facilities, it is nearly impossible to implement social distancing. Like other institutions, detention facilities may experience supply chain disruptions and difficulty obtaining soap, hand sanitizer, personal protective equipment, and cleaning supplies. Even when supplies are available, detained youth do not have unregulated access to soap and water, let alone disinfectants or personal protective equipment (American Academy of Pediatrics (AAP) 2020). Medical services in detention settings even in ‘normal times’ are often inadequate to respond to common injuries and illnesses. Many institutions rely on part-time medical providers, and few, if any, have the capacity or facilities needed to medically quarantine or treat youth who contract the virus.

Population-based Risks

The COVID-19 pandemic has demonstrated the devastating consequences of health inequities, which place specific marginalized populations at higher risk of contracting the virus and experiencing severe illness or death (Chotiner 2020). Discrimination, lack of access to quality healthcare, overrepresentation among essential workers, homelessness or crowded housing, lack of access to education, poverty, and underlying medical conditions – the social determinants of health – contribute to COVID-related health disparities by people of color (CDC April 2021a) and LGBTQ people (Hall and Heslin 2021).

These same populations are overrepresented among detained youth in California. Youth of color are significantly overrepresented at every stage of the delinquency process, including detention. Compared to white youth, Black youth are 9 times more likely to be detained, Native American youth are 4 times more likely to be detained, and Latino youth are twice as likely to be detained (Sickmund 2019). In a survey of California’s county-run facilities, 19.1% of youth identified as lesbian, gay, bisexual, queer, transgender, or gender nonconforming (LGBQ/GNCT), which is 2 to 3 times their numbers in the general population (Irvine 2017). The rate of overrepresentation is highest among detained girls, over half of whom identify as LGB/GNCT (Irvine 2017). Over



90% of LGBTQ/GNCT youth are of color, illustrating the cumulative probability of detention at the intersection of race and sexual orientation, gender identity, and gender expression (SOGIE).

While children and youth infected by COVID-19 are less likely to develop severe illness compared with adults, children of all ages who contract the virus may develop respiratory failure, myocarditis, shock, acute renal failure, coagulopathy, and multi-organ system failure (CDC 2020). Further, youth in the juvenile justice system have higher rates of underlying health conditions, such as asthma, that increase the risk of serious illness from the virus (Fair and Just Prosecution 2020). These youth are also more likely to have disabilities, behavioral health conditions, and a history of trauma – all of which compound their vulnerability (AAP 2011). Once infected, youth can spread the virus to other youth and staff, as well as members of their families and communities when they are released from detention.

Essential Health and Safety Protocols

Shortly after the emergence of COVID-19, public health and justice stakeholders across the country acknowledged the deadly and catastrophic impact of the virus in carceral settings, including youth justice facilities. The recommendations that emerged from medical, legal, human rights, and law enforcement professionals, as well as youth and family advocates, were consistent and urgent. We summarize those recommendations here.

Population Reduction

The single most effective means of controlling contagion in detention facilities is to significantly reduce the number of young people confined in the institution (AAP 2020; Youth Correctional Leaders for Justice 2020; The Sentencing Project 2020; McBride 2020; Council of Juvenile Justice Administrators 2020; Fore 2020). Institutions can reduce their population by limiting or curtailing new admissions and expediting release of as many youth as possible. Examples of policies reducing new admissions include increasing funding and utilization of community-based diversion programs (Youth Correctional Leaders for Justice 2020), citing and releasing youth on their own recognizance (McBride 2020), and limiting new admissions to youth who present a “substantial and immediate safety risk to others.” (Governor Whitmer 2020). Examples of release policies include prioritizing youth with pre-existing medical conditions (Youth Correctional Leaders for Justice 2020), youth charged with misdemeanors or probation violations (McBride 2020), and post-adjudication youth with scheduled release dates in the next 6 months (McBride 2020). Application of such policies can quickly result in dramatic reduction of the institutional population. The Annie E. Casey Foundation surveyed the jurisdictions that participate in its Juvenile Detention Alternatives Initiative (JDAI) and found that the population counts in JDAI detention facilities employing these policies dropped by 24 percent in one month (Annie E. Casey Foundation 2020).



Data and Transparency

Oversight of conditions and operations in juvenile facilities requires the collection, analysis, and public reporting of data, including regular reports on population count and demographic characteristics of the youth in the facility. Without these data, it is impossible to identify or respond to harmful conditions or disparities among subpopulations of youth. Without transparency, what happens inside the facility is invisible to the public, agency leadership, policymakers, courts, advocates, and families.

During a public health emergency, institutional capacity to collect and report data is even more critical. In its guidance on responding to the needs of youth in the justice system during the coronavirus pandemic, the American Academy of Pediatrics recommended that juvenile justice agencies “develop and publish COVID-19 response plans and ensure data regarding suspected and confirmed cases are publicly available, stratified by demographic characteristics (e.g., race/ethnicity, sex, sexual orientation/gender identity), so that we are able to identify persons most at risk” (AAP 2020). To generate these data, facilities must conduct frequent and universal testing of youth and staff, track the number of positive and negative tests, and submit weekly reports to the appropriate state agency for publication (The Sentencing Project 2020). The reports should also include the number of youth diverted or released from detention due to the health emergency. Disaggregating the data by race, gender, and SOGIE allows the agency and the public to discern and address health inequities.

As part of the duty to provide transparency, government agencies must also provide a means for youth in confinement and their families to ask questions, submit complaints, and receive up-to-date information. During a public health emergency, confined youth and their families experience understandable fear and anxiety about one another’s health and well-being. This is particularly true when in-person visits have been suspended. In its guidance on COVID-19 and children deprived of their liberty, UNICEF recommended that agencies “instruct [...] facility staff to increase and provide regular updates (including by phone or computer) to families about the location, health and well-being of the child and to children about their families.” If the youth justice agency has an existing ombudsperson’s office, it should be empowered to receive, investigate, and respond promptly to questions and grievances. If no such entity exists, the appropriate agency should assign the task to existing staff.

Protection of Youth in Custody

The American Academy of Pediatrics made the following recommendations for youth who remain in custody:

- In accordance with guidelines from UNICEF and the World Health Organization, ensure that the human rights of confined youth are fully respected and fulfilled.
- Ensure appropriate access to physical, reproductive, and mental health care to youth in custody.
- Ensure that facilities follow CDC guidance on management of COVID-19 in correctional and detention facilities.



- Provide adequate sanitation supplies for facilities and personal protective equipment for health care providers, staff, and youth.
- Provide youth with written and verbal communication about COVID-19, including information about everyday preventive behaviors within the confines of detention facilities.
- Ensure that youth have the same access to distance learning materials as nonconfined youth.
- Ensure access to developmentally appropriate programming.
- Allow youth to have frequent contact with family and/or individual supports with regular access to free phone calls or video chats.
- Limit the use of isolation, particularly cells designated for administrative isolation and solitary confinement. If youth must be held in isolation for medical purposes, ensure access to personal belongings, education materials, reading materials, and other programming materials. Youth held in isolation should have regular, free access to contact family or designated support individuals by phone or video chats.
- Ensure timely access to legal counsel and court hearings (AAP 2020).

California Youth Justice System Structure and Relevant Agencies

The following is a summary of the structure and statutory provisions governing the California agencies most relevant to the response to COVID-19 by the youth justice system. It is followed by a discussion of how those agencies responded, or failed to respond, beginning in March 2020.

County Government

Juvenile courts, which are part of each county's Superior Court system, have jurisdiction over youth involved in California's youth justice system. Youth who are incarcerated pending resolution of their case are held in county juvenile halls, with each county either operating its own juvenile hall or contracting for space in another county (California Welfare and Institutions Code, Sec. 850). Juvenile halls are locked facilities administered by county probation agencies. Many are jail-like, featuring locked rooms with tiny windows, institutional furniture (often bolted to the floor), barbed wire fences, and limited program and visiting areas. Youth have little freedom of movement, and the facilities operate much like jails, relying on hardware and control measures (PJDC and Youth Law Center 2020).

While they are primarily designed as facilities for youth in pre-adjudication (pre-trial) status, approximately 32% of youth in juvenile halls in 2020 were in post-disposition status (Board of State and Community Corrections 2020c). Counties may also operate juvenile ranches or camps for post-disposition youth (California Welfare and Institutions Code Sec. 880 1999), which may also be secure.² In 2019, the most recent year for which we have statewide data, fully 17,555

² Until now, the state has operated the Division of Juvenile Justice facilities as a post-disposition placement, but as of July 1, 2021, the state will begin the process of closing the system, with a full closure date on June 30, 2023.



youth were detained in county secure facilities (California Department of Justice Table 14 2020). Although many of those youth were held in pre-adjudication status, 5,355 were committed to county juvenile facilities as a case disposition (California Department of Justice Table 20 2020).

County probation departments and juvenile court judges each have the authority to detain youth. Typically, probation detains youth at the beginning of the case (California Welfare and Institutions Code Sec. 628 2018), and the court releases them at various points in the court process (California Welfare and Institutions Code Secs. 635, 636, 637, 702, 709, subd. (g)(1), 727 2015). The probation department also has discretion to release youth in connection with specific court orders; when the objectives of the court order have been met; or pursuant to emergency powers.³ The California Emergency Services Act provides that in an emergency endangering the lives of persons in a county correctional institution: "...[T]he person in charge of the institution may remove the inmates from the institution. He shall, if possible, remove them to a safe and convenient place and there confine them as long as may be necessary to avoid the danger, or, if that is not possible, may release them" (California Emergency Services Act of 1970, Sec. 8658).

County Boards of Supervisors, established under Government Code section 25000, also have authority over conditions and practices in youth facilities by virtue of appointing the chief probation officer (Government Code 27770), and overseeing the chief probation officer in the execution of his or her duties with respect to county juvenile facilities (Government Code 27771). In recent years, some Boards of Supervisors have promulgated policies on important youth justice matters including youth justice reform and reduced reliance on juvenile facilities (Cosgrove 2020). Through a workgroup convened by the California State Association of Counties in 2019, several county supervisors, executives, and probation chiefs developed a tool kit to aid local decision-makers in reassessing underutilized juvenile halls while continuing to address the needs of a smaller youth justice system (CSAC 2019).

State Government

Executive Branch

The Governor's Office heads the executive branch (Cal. Const., Art. V) of state government, and the Governor has emergency powers through the California Emergency Services Act. Pursuant to Government Code section 8527, the Governor has complete authority over all state agencies, the right to exercise police powers, and the ability to issue and enforce orders "as he deems necessary." This includes the authority to "make, amend, and rescind orders and regulations necessary to carry out the provisions of this chapter" (California Emergency Services Act of 1970, Sec. 8657, subd (a)). The Act includes "epidemics" in covered emergencies (California Emergency Services Act of 1970, Sec. 8558 subd. (b)).

³ Discretion to release may be given to probation by the court, for example, in connection with commitments or orders for detention under Welfare and Institutions Code section 730. Emergency release powers are set forth in Government Code section 8658.



There is also a Governor's Office Department of Emergency Services within Governor Newsom's office (California Governor's Office of Emergency Services 2021). Although the name suggests that it could have some relationship to the current discussion, the agency's strategic plan does not mention public health emergencies as within its purview (California Governor's Office of Emergency Services 2014). Its website provides guidance on preparedness for earthquakes, tsunamis, and volcanic eruptions, but not COVID-19 (California's Governor's Office of Emergency Services 2021).

The Board of State and Community Corrections (BSCC) is an independent agency in the executive branch, whose Chair and Board Members are appointed by the Governor. BSCC provides "statewide leadership, coordination, and technical assistance to promote effective state and local efforts and partnerships in California's adult and juvenile criminal justice system" (California Penal Code Sec. 6024, subd. (b) 2011). It inspects county facilities, develops minimum standards for conditions and practices in facilities, runs training programs for correctional staff, and oversees numerous grant programs. The BSCC inspections of county facilities take place only once every two years (California Welfare and Institutions Code Sec. 209 2020), and the agency has no process for receiving or considering individual complaints about conditions from youth, family, or others.

The BSCC *Minimum Standards for Juvenile Facilities* include provisions for emergency suspension of standards (Emergency Suspension of Standards or Requirements 2014) and require facility administrators to have policies and procedures on emergencies (Emergency Procedures 2019) and communicable diseases (Management of Communicable Diseases 2019), but do not say what should be in the policies, and clearly do not encompass the breadth of issues that need to be addressed during a pandemic.

Judicial Branch

The courts are one of the three branches of government under our state constitution (Cal. Const., Art. VI). The Judicial Council of California is the policymaking body of the California courts, presided over by the Chief Justice of the California Supreme Court as Chairperson (Judicial Council of California 2021). Government Code section 68115 gives the Chairperson specified emergency powers. On March 27, 2020, Governor Newsom issued Executive Order N-38-20, giving the Chairperson even greater powers, suspending any limits of Section 68115 "that would otherwise prevent the Chairperson from authorizing, by emergency order or statewide rule, any court to take any action she deems necessary to maintain the safe and orderly operation of that court."

Legislative Branch

The third branch of state government is the California Legislature (Cal. Const., Art. IV), and it can enact measures to address emergency situations. Legislators have flexed their muscles in this regard, filing litigation to limit the Governor's use of the California Emergency Services Act to



amend, alter, or change existing statutory law or adopt new statutory law or legislative policy (*Newsom v. Superior Court of Sutter County*).⁴

The Obstacles to Effective COVID-19 Intervention in County Juvenile Facilities

We turn now to a description of our attempts to bring attention to the plight of incarcerated young people and how the relevant county and state agencies engaged or did not engage to protect such a vulnerable population during the COVID-19 pandemic. The observations and conclusions in this section are based on the documented vulnerability of incarcerated youth during the pandemic, the national guidance issued by justice stakeholders and public health officials, the concerns raised by families and defenders about the experiences of youth in some county institutions, and our interactions with officials in agencies whose missions included the protection of youth incarcerated in county facilities. Nothing in the article is intended to suggest that state and local agency responses were uniformly inadequate or that there were no bright spots during COVID. While our analysis would surely have benefitted from more complete data and greater opportunities to interact with officials in the relevant agencies, what follows reflects our experience in 2020 California.

As a preliminary matter, California has long suffered from the absence of a dedicated youth justice agency to oversee the county systems, and this surely contributed to the fragmented response we observed. In early 2020, it was difficult to know who had a legal duty to act, or even who had the authority to do so. Existing emergency statutes and regulations did not explicitly cover the situation. Linkages between relevant agencies did not appear to exist. Officials in some agencies seemed confused about whether they could take proactive steps to ensure COVID protections for youth in youth justice facilities.

The state's activity on COVID-19 began as information about the virus surfaced in January 2020. The Governor pronounced a state of emergency on March 4, 2020.

Initial Investigation and Defender Driven Advocacy

Shortly after the Governor's announcement, we and other advocates began to hear from youth and families that juvenile facilities were not taking basic public health precautions to protect youth currently held in their custody. Within two weeks of the initial announcement of the mid-April lockdowns in California, the first media reports of Covid-19 spreading within juvenile detention facilities began to surface, along with reports of youth being forced to quarantine in juvenile detention centers (Queally 2020). Juvenile defenders spoke of repeated, consistent reports of youth in custody not receiving guidance on how to safely socially distance or manage their communal eating and showering schedules, and lacking consistent access to soap and water or hand sanitizer throughout a given day (O'Neil 2020). Staff members spoke of youth being

⁴ The Court of Appeals for the Third Appellate District upheld the Governor's exercise of emergency powers; a petition for review in the California Supreme Court has been filed.



increasingly worried and afraid, and of their own anxiety in trying to keep youth safe. One staff member said that they were “*very freaked out*” about the situation. A mother spoke of the negative impact on her son’s existing anxiety and depression, and the “worthless” handouts being given to youth in lieu of educational services (Fremon 2020). We read news articles about deteriorated conditions in county facilities, including suspension of family visits, parents’ uncertainty of being able to communicate with their children, and concerns from families that they would be charged for telephone calls despite the current state of emergency (Loudenbeck 2020; Miller 2020).

The Pacific Juvenile Defender Center quickly mobilized upon hearing these reports. It issued a statement on COVID and system involved youth, with a call to specific agencies to act promptly to protect the youth (Pacific Juvenile Defender Center 2020b). We reached out to members to learn more about what juvenile defenders were seeing and hearing. Our written survey of participants at an April 2020 conference received 38 responses from 22 counties. In addition, a small group interviewed the head juvenile defenders in 15 counties to ask about court process and institutional conditions issues. We also participated in an April 2020 webinar designed to equip grassroots family support organizations with the tools to advocate on behalf of youth in custody on COVID-19 issues. The webinar was attended by representatives from more than a dozen organizations, several of whom were concerned about specific youth with underlying health conditions. We learned of additional issues and problem situations in individual messages on the Pacific Juvenile Defender Center listserv and private messages. During April 2020, we also met with advocates from public defender offices and advocacy organizations about systemic litigation, and heard the results of their research on conditions.

While being incarcerated in a juvenile facility is traumatic and stress-inducing even in ‘normal’ times, the reports we received indicated that COVID made it much worse. Defenders and advocates told us their clients were experiencing added stress and loneliness in juvenile hall. In one county, a defender reported that the sounds of young people crying in their cells at night reverberated through the juvenile hall. Particularly at the beginning of the lockdown, youth in some facilities were essentially being locked in their room without programming for much of the day. They received “packets” of schoolwork. They seldom went outdoors. Religious services and recreational activities were drastically curtailed. Youth spoke to their defenders of not having access to hand sanitizers and making masks out of paper towels. Families contacted defenders, desperately worried about their children with asthma, diabetes, and other chronic health conditions.

Families expressed frustration and fear that they could not get information about what was happening to their children. We heard reports of officials saying that some youth would be “better off” in custody than being released to the community. While we do not know how widely this view was shared, it reflects a disturbing perception that the families of system-involved youth are unable to properly care for them. In ‘normal’ times this unfounded, racialized perception is used to justify incarceration; to the extent it surfaced during the pandemic it may have resulted in enormously greater consequences for youth of color and their families.



Again, we do not mean to suggest that conditions in every facility were horrible, but the information we received suggested widespread problems. The lack of transparency in the management of juvenile facilities across the state made it impossible to accurately assess the scope of the problem. Our primary sources of information about conditions and the prevalence of COVID-19 in juvenile facilities were news articles about individual facilities and anecdotal reports from our contacts with defenders and advocates. We had no way to know what measures facilities were taking to mitigate the impact of COVID. Public health guidelines governing juvenile institutions were available early on, but it did not appear that they were being utilized in any systematic way in California.

Our initial efforts focused on individual case advocacy. We quickly drafted sample motions and offered a zoom training on advocating for the release of individual youth. We wrote a protocol for courts to rely upon in releasing youth and distributed it to probation agencies and the courts (Pacific Juvenile Defender Center 2020a). Anecdotal information from defenders suggests that individual motions resulted in release in a small number of cases, but that individual litigation was cumbersome, slow, and dependent on having an attorney with the willingness and capacity to vigorously litigate on behalf of their clients. Also, because youth in some counties are represented by appointed counsel with limited resources, or financial disincentives to pursue anything perceived as “extra,” many youth who would have benefitted from such efforts did not receive them.

The Center for Juvenile Law and Policy at Loyola Law School and the Independent Juvenile Defender Program in Los Angeles filed litigation challenging the conditions under which youth were being held, but it was ultimately unsuccessful (*All Youth Detained in Juvenile Halls & Camps in Los Angeles County v. Superior Court of Los Angeles County* 2020). While we remained committed to using the courts to the fullest extent possible, we realized that effective intervention required the engagement of state agencies to proactively assure a systematic process for limiting admissions and expediting releases from custody, oversight of conditions in juvenile facilities, data on testing and incidence of infection, and a process for investigating and responding to complaints about the treatment of incarcerated youth.

Board of State and Community Corrections (BSCC)

BSCC Guidance to the Counties

We reached out to BSCC in late March 2020 asking agency leaders to issue COVID guidance to facilities, and to call for counties to develop guidelines consistent with CDC and expert guidance on reducing institutional population numbers. Their response was that counties had the authority to control population and conditions, and that, in any event, they could not act without direction from the Governor. They told us they were willing to act if asked.

Accordingly, we contacted the Governor’s office and drafted a proposed Executive Order directing BSCC to act. Although the Governor did not issue a formal Executive Order, his office did intervene. Within two days of our request to the Governor, BSCC issued guidance that



closely matched the language we had submitted on COVID protections. With respect to our request that there be guidelines for release, however, BSCC made only a vague statement to “encourage local Probation Chiefs and juvenile facility managers to collaborate with local public health officials and contracted healthcare providers to update healthcare policies and procedures” to address COVID-19 (Penner March 2020). This advice was destined to have little effect, because there was neither a structural mechanism for communication between county public health agencies and juvenile justice facilities nor authority granted to public health agencies to order compliance with public health directives.⁵

With respect to release decisions, we offered BSCC the guidelines from public health and correctional experts stating that the most important thing institutions can do is to reduce facility population during a pandemic (AAP 2020, Youth Correctional Leaders for Justice 2020, The Sentencing Project 2020, McBride 2020, Council of Juvenile Justice Administrators 2020, Fore 2020). We encouraged BSCC to call for counties to engage in a structured process to limit admissions and facilitate release of youth from custody. But even with pressure from the Governor’s office, the agency never went beyond the most general suggestions that counties should consider releasing youth from custody.

Despite the agency’s reticence to proactively exercise leadership, subsequent events made it clear that stronger BSCC involvement would have prompted further county-level action. Beginning in April, BSCC began requiring counties to report data on juvenile facility populations and the number of youth released for COVID-related reasons (Penner April 2020). Within a month-and-a-half of the reporting requirements going into effect (from Feb. 29 to April 11, 2020), the total population in California facilities dropped 30% (Board of State and Community Corrections 2020e). Once that initial attention dissipated, however, there was no further pressure to act from BSCC. Facility population plateaued, and it has remained almost the same for the past year (Board of State and Community Corrections 2020e).

If the BSCC’s reticence to proactively guide the counties is a reflection a lack of clarity in the agency’s authority, this is a prime area for future legislative action. In emergencies, the oversight agency should be clearly empowered to provide guidance, require counties to act in the best interests of youth, staff, and the community, and to document the results of these efforts.

Suspension of Standards and Need for Public Complaint Process

BSCC’s passivity in relation to county-level COVID response was also on display in relation to the suspension of Title 15 state regulations for juvenile facilities. In March 2020, the agency announced that it would survey the counties about what regulations were being suspended because of the pandemic and would review those reports every two weeks (Penner March 2020). The suspensions are posted on the BSCC website, and they encompass critically important issues

⁵ The advice simply restated the general statement in Title 15 Cal. Code of Regs., § 1410, that the facility health officer shall update policies and procedures on communicable disease “as necessary to reflect communicable disease priorities identified by the local health officer and currently recommended public health interventions.”



including education, visitation, religious services, recreation, and exercise (Board of State and Community Corrections 2020d).

Unfortunately, BSCC appears to have simply accepted the county's reports without verifying accuracy or completeness, and with no assessment of the impact of suspensions on the health and welfare of incarcerated youth. While some counties have provided detailed information about which services have been eliminated and what was being done to mitigate the absence of those services, others offered only vague intentions to bridge any such gaps. Further, there is no indication that BSCC has followed up with counties except to extend the period of suspension. Moreover, the posted reports do not provide any information about whether counties are providing the COVID protections for youth and staff set forth in the BSCC guidance.

Again, our initial investigation indicated a clear need for families, defenders, and others to have information about what was happening in county facilities, as well as the need for a process by which to lodge complaints about inadequate protective measures, and concerns about youth with underlying health conditions. Families and youth reported not being able to connect with local authorities on these issues, and we strongly urged BSCC to provide a complaint process through which such concerns could be recognized and addressed or communicated to the right people. BSCC declined to act on our request.

Data on Populations Reduction, Testing and Positive Tests

Beginning in July 2020, after months of advocate requests for COVID data, BSCC began to ask county juvenile facilities for data on testing and positive tests for youth and staff (Penner July 2020). Although we were hopeful that this would provide valuable information, the data were not particularly useful because, instead of presenting actual numbers of tests and positive results, for numbers less than 11, the form only recorded a vague "<11" for each category. Thus, in a facility housing 6 youth, it would be impossible to know whether all of them tested positive or only one. Similarly, using <11 as the unit of measure makes it impossible to track changes week to week in a particular facility. Some counties failed to report data for significant periods in 2020 (Board of State and Community Corrections 2020b).

Aside from the poor design of the data reporting elements, the COVID data failed to include categories of information that seemed important to fully understand the impact of the virus on incarcerated youth. For example, although there has been enormous interest in the disparate impact of COVID on communities of color, the BSCC data fails to disaggregate the data by race/ethnicity to indicate who was in detention, who was released, who was tested, and who tested positive.

The California Judicial Council

Over the course of 2020, we and other advocates repeatedly attempted to engage with the Judicial Council about COVID-19 issues in delinquency cases. During April and May 2020, we wrote four separate letters to the Chief Justice to bring attention to delinquency issues in the



context of the emergency rulemaking process (Burrell 2020a, b, c, d). We requested the Council to require county juvenile courts to develop a systematic process for limiting admissions and expediting releases from custody. To that end, we submitted the proposed model protocol we had developed (PJDC 2020). We also called for earlier appointment of counsel and shorter time frames for initial hearings in delinquency cases, which seemed important since youth could not take advantage of the emergency adult rules eliminating bail. With respect to other court issues, the Judicial Council issued successive emergency rules to address COVID-19. Some, such as a temporary elimination of bail for a broad swath of criminal cases, were far reaching. That provision was repealed after a few months but had a major impact on adult jail populations while it was in effect.

In relation to delinquency cases, however, the Judicial Council took almost no action.⁶ Its modest attempt to rein in the timeline for hearings simply admonished courts to follow the existing law. It did not call for courts to review their detention population for possible release or to shorten the time frame for hearings. With respect to detained youth, the comments to the rules stated only that, “Juvenile courts are able to use their broad discretion under current law to release detained juveniles to protect the health of those juveniles and the health and safety of the others in detention during the current state of emergency related to the COVID-19 pandemic” (Judicial Council of California 2020). Although the Judicial Council normally welcomes and invites comments for proposed court rules, we received no response to our requests for input.

We recognize that the Judicial Council was overwhelmed with managing emergencies in an enormous range of cases, including adult criminal cases, eviction, and mortgage foreclosure proceedings, restraining orders and child abuse cases. Delinquency proceedings appear to have been overlooked in what was a chaotic and difficult time. As we look to the future, it will be important for the Council to adopt policies and guidelines assuring that there are systematic processes in place to protect against incarceration in conditions that threaten the health and well-being of detained youth.

County Institutional Officials

Because we were having difficulty in gaining traction with state agencies, we encouraged advocates within the state’s counties to impress upon their probation departments the need to have a systematic process for reducing institutional populations by limiting admissions and expediting releases. The responses we received were that probation officials either did not think they had the authority to release, or that they felt uncomfortable taking that initiative.

On April 14, 2020, the California Attorney General released an Information Bulletin highlighting the emergency release authority of county institutional officials pursuant to Government Code section 8658 (California Department of Justice 2020c). Unfortunately, the feedback we received from several public defenders after this announcement was that county probation officials still did not think this applied to them.

⁶ We do not address COVID-19 rules on issues other than those pertaining to detained youth in this Commentary.



The Governor's Office

Of all the relevant public agencies, the Governor's office was the most responsive to our requests for COVID interventions in juvenile facilities. Twice, the Governor's staff intervened to pressure recalcitrant agency officials to act. But those actions were more in the nature of helping advocates who knew who to ask than responses that were based on a set of emergency process rules. Further, while we were grateful for the responses we received, we were concerned that the Governor was inundated with such requests, and that a more direct path was needed in the relevant agencies.

Governor Newsom issued a series of Executive Orders in relation to state operated correctional facilities, including the Division of Juvenile Justice, but not the county juvenile facilities that are the subject of this commentary. Unfortunately, what was good for state facilities sometimes created additional problems for counties. When Governor Newsom acted on our request for an Executive Order to stop transfer between local and state youth justice facilities to reduce the chances of COVID transmission⁷ (California Executive Order N-36-20), the result was that many youth awaiting transfer to the Division of Juvenile Justice spent a much longer period detained in county juvenile facilities.

Recommendations

Our experiences advocating on behalf of detained youth revealed enormous gaps in our state's emergency response systems for this extremely vulnerable population. It was unclear who had authority to act, and where to go if there were problems needing to be addressed. Even the agencies that appeared to have authority were not set up to respond to specific requests. In some instances, there were general statements in law of the need to cooperate in emergency situations, but no mechanism to ensure that it happened. Our statutes, regulations, and agency guidance did not adequately address many issues that predictably arose during the pandemic.

After other emergencies, California has mobilized to be better prepared for the next such disaster. Our current Office of Emergency Services has grown piecemeal from its origins as the State War Council in 1943, adding new objectives and guidances as we underwent sequential concerns over terrorism and a series of natural disasters (California Governor's Office of Emergency Services). Because we now know that this pandemic is likely to be followed by others, we should act now to put the right processes in place for the 'next time.' We offer the following recommendations for legislative and policy changes with that in mind.

Changes in State Youth Justice Structure

⁷ Governor Newsom issued Executive Order N-36-20 on March 24, 2020, suspending intake at Division of Juvenile Justice and state adult correctional facilities for 30 days



The pandemic unfolded as California stood poised to reorganize its youth justice system. In May 2020, the Governor announced an intention to close the Division of Juvenile Justice, the state operated juvenile facilities system, and to shift responsibility for all institutional care to the counties. Months later, a budget trailer bill, S.B. 823, laid out the intentions, timeline, and funding plans for this realignment (California Legislature 2020). As part of the shift, the legislation also created a new state agency, the Office of Youth and Community Restoration (“OYCR”) within the Department of Health and Human Services (California Welfare and Institutions Code, Sec. 2200 subd. (a) 2020) “to promote trauma responsive, culturally informed services for youth involved in the juvenile justice system that support the youths’ successful transition into adulthood and help them become responsible, thriving, and engaged members of their communities” (California Welfare and Institutions Code, Sec. 2200 subd. (b) 2020). The agency has been given authority to oversee county grant plans (California Welfare and Institutions Code, Sec. 1995, subds. (e)-(g) 2020); develop a plan for improved data systems; identify policy recommendations for improved outcomes; disseminate information on best practices; and provide technical assistance to the counties (California Welfare and Institutions Code, Sec. 2200 subd. (c) 2020). The legislation also provides for an ombudsman with the authority to investigate and resolve complaints about “harmful conditions or practices, violations of laws and regulations governing facilities, and circumstances presenting an emergency situation” (California Welfare and Institutions Code, Sec. 2200 subd. (d) 2020).

As we consider how better to respond to the next pandemic, we recommend that OYCR exercise leadership in developing and implementing appropriate health protections, oversight of county facilities during the emergency, a mechanism for youth and families to receive needed information and to register complaints, and a system for receiving and publishing facility-specific data. We have woven the new agency into the recommendations in the next section.

Emergency Powers

The lack of statutory clarity regarding the authority of state and county actors during the pandemic hampered efforts to protect detained youth. To correct this confusion, the Legislature should amend the California Emergency Services Act (“Act”) to give the Governor explicit authority to order county officials to expeditiously evacuate or significantly de-populate county juvenile institutions when a public health emergency threatens the health and safety of confined youth. In addition, the legislation should clarify the separate and independent authority of county probation officials, boards of supervisors, and the juvenile court to depopulate juvenile institutions during a public health emergency by curtailing or limiting new admissions and releasing appropriate youth from custody. Finally, the legislation should require the Office of Emergency Services to amend the State Emergency Plan to address planning, preparation, and mitigation efforts for future public health emergencies, including strategies for protecting the health and safety of youth confined in juvenile justice institutions.

The Legislature should also clarify the oversight role of the Board of State and Community Corrections (“BSCC”) during a public health emergency. As noted, the Title 15 regulations promulgated by BSCC permit facility administrators to temporarily suspend regulations “directly affected” by an emergency (Emergency Suspension of Standards or Requirements 2014). The



regulations require approval of the BSCC if the suspension last longer than 15 days (Emergency Suspension of Standards or Requirements 2014). However, neither statutes nor regulations provide clear criteria for determining whether a decision to suspend regulations is appropriate, how to assess the impact of the suspension on detained youth, or the measures necessary to mitigate the negative impacts of the suspension. Nor does existing law clarify the authority of the BSCC to monitor suspension of regulations or intervene if county officials inappropriately suspend regulations or fail to employ mitigation strategies. It is impossible to know how young people are faring in an unmonitored and locked down institution.

Further, the existing Title 15 regulations are inadequate and ineffectual with respect to what measures are required during a public health emergency. Section 1327 requires the facility to have a policy for emergencies but provides no guidance on the issues the policy should address and doesn't expressly apply to public health emergencies (Emergency Procedures 2019). Section 1410 requires the health care provider in each institution to develop written policies to address the "identification, treatment, control, and follow-up management of communicable diseases" (Management of Communicable Diseases 2019). Again, the provision clearly does not encompass the policies and procedures necessary to manage a pandemic, nor does it refer to any specific public health guidelines.

To correct these deficiencies, the state should amend state law to clarify that BSCC has the duty and authority to oversee conditions in juvenile facilities during a public health emergency, including approving and monitoring any suspension of regulations and ordering facilities to correct any harmful conditions caused by the suspension. The legislation should also direct BSCC, with the coordination and concurrence of OYCR and the California Department of Public Health, to revise the existing regulations to:

- Clarify the circumstances under which regulations may be suspended and require facilities to notify BSCC of any suspension of regulations for any period, the rationale for the suspension, and the specific measures taken to mitigate the negative impacts of the suspension.
- Require facilities to work with county public health departments to create policies consistent with prevailing public health standards governing the management of public health emergencies in carceral settings
- Require facilities to work with juvenile courts and probation officials to implement county protocols for reducing the facility population and ensuring due process protections during a public health emergency
- Create a mechanism for facilities to seek guidance from county public health departments during public health emergencies about emerging or unforeseen issues related to the public health emergency

County Protocols for Public Health Emergencies

At the onset of the pandemic, counties had no process for reducing the population in juvenile facilities to protect the health and safety of youth and staff. Requests to adopt protocols were hindered by disputes over which, if any, county actors possessed the authority to make admission



and release decisions. Many youth had little or no access to counsel or the courts, subjecting them to confinement in inherently dangerous environments without recourse or due process. To prepare for the next pandemic, the state should enact legislation requiring each county board of supervisors to adopt a written protocol for responding to public health emergencies. The legislation should require the juvenile court, defense attorneys, prosecutors, and probation agencies in each county to work together to develop the protocol. At a minimum, the protocol should include:

- The process and criteria for evaluating all youth who are arrested and booked to determine if they can be diverted from secure confinement
- The county's alternatives to detention and the process for utilizing them
- The process and criteria for releasing youth in custody who are especially vulnerable to the risks posed by the public health emergency and/or who pose minimal risk to public safety
- The process for the juvenile court to quickly resolve cases in which a youth's eligibility for admission or release is disputed
- The circumstances under which juvenile courts may conduct remote hearings in delinquency matters
- The specific policies and procedures by which the probation agency and the court will ensure that youth under juvenile court jurisdiction, including those in detention, have meaningful access to counsel and due process protections, such as earlier appointment of counsel, shortened timelines for initial hearings, and unrestricted electronic or telephonic meetings with defense attorneys
- The services available to support the safe and healthy re-entry of released youth from custody

The legislation should also require the Judicial Council to set statewide minimum standards in the California Rules of Court for delinquency court protocols during public health emergencies, and an expedited process for requesting guidance from the Judicial Council for issues related to delinquency matters that are not addressed in the Rules of Court.

Data and Transparency

Lack of publicly available, detailed data about the youth served in the state's juvenile justice system is a longstanding failing (California State Auditor 2012, 2020).⁸ The consequences of this lack of transparency were much more serious during the pandemic, making it impossible to understand the impact of the virus on confined youth and institutional staff. To correct this systemic deficiency, the state should enact legislation requiring county probation agencies to submit weekly demographic data to OYCR, which should be posted on OYCR's website. The data should include the number of youth currently served by probation, including youth confined in each county institution (juvenile halls, ranches, and camps), youth on probation, and youth receiving other probation services. The data should be disaggregated by race/ethnicity, sexual

⁸ Twice the State Auditor has concluded that youth justice data collection is so inadequate that it is impossible to meaningfully evaluate whether the vast sums of funding the state has given to the counties were spent on the intended programs or whether the programs were successful.



orientation, gender identity and gender expression, sex assigned at birth, zip code, and charges, where relevant. The data should be accessible to the public and reported separately by county.

Legislation should also specify additional data that probation agencies are required to collect and provide to OYCR during public health emergencies. These weekly data should include: the number of youth booked, the number of youth detained, the number of youth diverted or released for public health reasons, the number of youth and staff tested or otherwise screened for the specific virus or disease, and the number of youth and staff who have currently been diagnosed with the virus or disease. The legislation should also require county probation agencies to report, and OYCR to publish, any regulations suspended during the public health emergency and the specific actions taken to mitigate any negative impacts on the health and well-being of youth and staff.

While collection and reporting of these data would create more transparency, it is also necessary during a public health emergency to provide a mechanism for confined youth and their families to obtain information and submit complaints about harmful policies and procedures in the institutions. To address this need, the state should enact legislation requiring the OYCR ombudsman to manage a hotline or other expedited mechanism to receive, investigate and resolve questions and complaints from confined youth and their families whenever Title 15 regulations are suspended during a public health emergency.

Conclusion

Youth who were detained in county juvenile facilities during the COVID-19 pandemic will feel the repercussions for years to come. This period has been difficult for all young people, and it has been especially so for youth in custody -- who were deprived of even the limited programs, services, and access to support normally available in juvenile facilities. The recommendations herein are practical and achievable. We urge stakeholders to move forward in implementing them before the state experiences another public health emergency.

While this article has focused primarily on the immediate public health needs of detained youth, our experience during the pandemic suggests additional areas for exploration. Even with the imperfect measures taken, for example, it appears that detention population was reduced without having a negative impact on crime by juveniles. Going forward, this should have important policy implications for the use of secure confinement in California. Further, the widespread use of virtual court hearings had a severe impact on timeliness of hearings and due process protections for youth, but at the same time, there may be elements of the emergency procedures that should be retained. As this article is being written, we know that the Judicial Council is already beginning to discuss these issues, and we hope that the recommendations herein will be folded into an action agenda.



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