

April 20, 2020

Valerie Boykin
Director, Virginia Department of Juvenile Justice
600 East Main Street
Richmond, VA, 23219
Via email to valerie.boykin@djj.virginia.gov

Dear Director Boykin:

We write to share our grave concern that the Department of Juvenile Justice (DJJ) is violating the legal rights of young people incarcerated at the Bon Air Juvenile Correctional Center during the COVID-19 pandemic. As set forth in more detail below, we believe DJJ is failing to protect youth in its care and is exposing them to risk of serious illness and even death. We have previously warned DJJ about the extreme risk posed by the COVID-19 pandemic to incarcerated youth. Despite overwhelming and early evidence that correctional settings are uniquely vulnerable to the coronavirus, DJJ failed to take proactive steps to prevent its spread at Bon Air, and the facility is now experiencing an outbreak. Moreover, DJJ has consistently failed throughout this crisis to keep the public informed and updated about the health and safety of youth in its care. The recent revelation that 25 young people in Bon Air have tested positive for the coronavirus is a public health crisis of enormous magnitude. We fear this highly contagious virus poses a significant health and safety threat to the entire population of incarcerated youth in Bon Air, the staff who work in Bon Air, and the surrounding community.

We understand that DJJ is now taking emergency measures to attempt to mitigate the outbreak at Bon Air, but we are concerned that these measures may violate our clients' legal rights and will do little to stem the tide of a crisis that has already overtaken the facility. We would greatly prefer to resolve these matters without turning to the courts, and this letter, along with our letter of March 26, constitutes our good faith effort to work constructively with you on these issues. However, if we do not hear back from you by April 27 with a detailed description of the steps DJJ is taking to remedy these serious deficiencies, we may have to take legal action.

1. The COVID-19 Outbreak at Bon Air Poses A Dire Threat to Incarcerated Youth, Staff, and the Greater Community

As public health officials nationwide have warned, COVID-19 spreads quickly and easily from person to person and can even be transmitted by asymptomatic individuals. Despite initial myths, children and young adults are indeed vulnerable to the deadly disease, and some have died. Due to their very nature as congregate settings, correctional facilities are extremely vulnerable to outbreaks of COVID-19. Public health officials warned more than a month ago that “the epicenter of the pandemic will be jails and prisons.”¹ Just last week, infectious disease physicians

¹ Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. Times (Mar. 16, 2020), <https://nyti.ms/3aycWX4>.

at the University of Virginia called Virginia’s prisons and jails “landlocked cruise ships,” warning that the spread of coronavirus in these facilities threatens not only prisoners but also facility staff, who may transmit the virus from their workplace to their family and friends at home.²

Bon Air is experiencing an outbreak of COVID-19. At least 25 youth have tested positive for the virus, including our clients currently incarcerated at the facility. DJJ is obligated under the Eighth Amendment to protect youth at Bon Air from conditions that present an unreasonable risk of injury and death, *see Helling v. McKinney*, 509 U.S. 25, 33-34 (1993). We are deeply concerned about dangerous conditions and a lack of adequate medical care at Bon Air. For example:

- Our clients report they have not been provided with adequate personal protective equipment to lower their chances of contracting COVID-19. Residents did not have access to masks until recently, and still do not have access to gloves or other protection. The masks are washable, but sometimes residents go many days without being able to wash the masks.
- At least one client who has tested positive for COVID-19 has never been examined by a doctor.
- Another client who exhibited COVID symptoms 2-3 weeks ago reported to his mother that he has never been tested and his complaints of illness were overlooked. He since has been quarantined after his own recovery due to exposure to a resident who tested positive, a step likely unnecessary had his diagnosis been confirmed previously.
- Numerous residents reported not being advised about COVID-19 even after diagnosis.
- Reportedly, the way residents learn they have tested positive for COVID-19 is by notification that they are being moved to the medical unit. Numerous residents report not having a conversation with medical staff about the implications of such a diagnosis.
- Family members of incarcerated youth report that DJJ is not communicating with them when residents test positive.
- Youth report fear and confusion about their diagnoses and about the spread of COVID-19 and inadequate measures to contain it.
- Our clients report they have not received counseling services in the past 2-3 weeks.
- Clients report that Bon Air is operating on a skeleton staff.

Public health officials and state leaders have recommended social distancing to control the spread of COVID-19; indeed, Governor Northam has issued a “stay at home” order for Virginians until at least well into June. But correctional medicine and public health experts warn that social distancing is nearly impossible in correctional facilities:

² Scott Heysell, MD, MPH and Rebecca Dillingham, MD, MPH, *Correctional Facilities are Virginia’s Landlocked Cruise Ships*, Virginia Mercury, (April 13, 2020), <https://www.virginiamercury.com/2020/04/13/correctional-facilities-are-virginias-landlocked-cruise-ships/>.

In jails and detention centers, people live in close quarters and cannot achieve the “social distancing” needed to effectively prevent the spread of COVID-19. Toilets, sinks, and showers are shared, without disinfection between use. . . In most congregate settings it is impossible for those detained to maintain a six-foot distance from others or to avoid groups. (Declaration of Robert B. Greifinger, MD, *Ortuño v. Jennings*, N.D. Cal. 2020, attached).

Social distancing presents serious challenges for everyone in every part of our society, but nowhere more than in penal institutions, where living conditions are unusually sparse, prisoners necessarily live in unescapably close quarters, and have unavoidable contact with one another. Juvenile institutions are no exception to this general institutional rule. (Declaration of Craig W. Haney, Ph.D., *In re C.Z.*, Pa. 2020, attached).

2. Excessive Room Confinement Violates Youth’s Constitutional Rights

With social distancing nearly impossible in correctional settings, we are concerned that DJJ is now using excessive room confinement as an attempt to stop the spread of COVID-19 at Bon Air. For example:

- Our clients report they are kept in their rooms for at least 23 hours per day.
- Although they are supposed to receive one hour per day outside their rooms, this is not always honored.
- Even when their free hour is made available, residents are sometimes forced to choose between using it for essential activities, like taking a shower, instead of exercise and recreation.
- Bon Air has not made any communications equipment available to residents in their rooms. As a result, residents’ only opportunity to communicate with their families is during their one hour outside of their rooms each day. And, because youth are being moved from unit to unit as Bon Air attempts to quarantine them, the available phone may not be programmed to permit calls to the necessary numbers—effectively cutting residents off from any family contact whatsoever.
- At least one client reports that he was not permitted to bring papers or schoolwork with him when was moved to a quarantine unit. As a result, he has been isolated in his room for 23+ hours per day without any means of mental or physical exercise, diversion, or entertainment for weeks.
- At least one client reports that he has not had any access to outdoor recreation since being moved to the quarantine ward.

Solitary confinement is ineffective to mitigate the risk of COVID-19 to the youth at Bon Air, and it poses an additional danger to their physical and mental health. A “chorus of courts have recognized the unique harms that are inflicted on juveniles when they are placed in solitary confinement.” *J.H. v. Williamson County*, 951 F.3d 709, 718 (6th Cir. 2020). Indeed, in the federal justice system, the prolonged solitary confinement of a juvenile is prohibited by statute.

18 U.S.C. § 5043(b)(1). And while solitary confinement is not per se unconstitutional, a child’s due process rights are violated when the confinement is excessive in light of its duration and the child’s age and mental condition. See, e.g., *J.H.*, 951 F.3d at 719 (holding that twenty-one days of solitary confinement imposed on a fourteen-year-old with mental health issues was unlawful).

The widespread solitary confinement of Bon Air residents as a makeshift solution to the Department’s failure to initially contain COVID-19 is not an acceptable response. While isolation may prevent *some* transmission at this point, this virus is extremely contagious, contact is likely unavoidable, and the outbreak at Bon Air indicates the virus is already widespread. Mitigation of the spread of the virus must be done in a way that avoids solitary confinement of youth. Otherwise, DJJ is subjecting youth to serious psychological risks in addition to the health risks posed by COVID-19.

The youth at Bon Air have the right to treatment and rehabilitation, and depriving them of therapeutic programming, education, exercise, sunlight, and social interactions—in conditions known to cause long-term psychological harm—falls far short of this standard. See *Youngberg*, 457 U.S. at 321–22; *Nelson v. Heyne*, 491 F.2d 352, 360 (7th Cir. 1974) (youth have a right to “rehabilitative treatment”; because the State has assumed the role of the parent such treatment must be “what proper parental care would provide”); see also *C.P.X. v. Garcia*, No. 4:17-cv-00417, Trial Order (S.D. Iowa Mar. 30, 2020) (holding that juvenile facility’s failure to provide appropriate mental health care violates youth’s substantive due process rights under the Fourteenth Amendment).

3. DJJ Must Not Impede Access to Counsel During the Pandemic

As your agency is aware from previous correspondence with our office (see enclosed May 1, 2014 Letter to Director Block Re: DJJ Residents’ Right of Access to Counsel), incarcerated youth have an affirmative right to assistance of counsel to bring court claims challenging their original sentences or the conditions of their confinement.³ Access to counsel necessarily includes the right to confidential communication with an attorney.⁴ In the present situation, enabling the

³ See *Lewis v. Casey*, 518 U.S. 343, 355 (1996) (holding the Constitution guarantees inmates access to “tools to . . . attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement”); *John L. v. Adams*, 969 F.2d 228, 234, 237 (6th Cir. 1992) (holding that, for juveniles, “the remedy for a constitutional deficiency in access . . . requires access to counsel”); see also *Germany v. Vance*, 868 F.2d 9, 16 (1st Cir.1989) (holding juveniles have a right of access to the courts, and noting “custodians of a minor may well have a greater obligation . . . than do the custodians of an adult inmate, because of the minor’s greater reliance on the correctional system for care and protection”).

⁴ Federal courts have long recognized the foundational nature of the attorney-client privilege and its centrality to the right to counsel. See, e.g., *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078 at 1090 (9th Cir. 2007) (“The attorney-client privilege is the oldest and arguably most fundamental of the common law privileges recognized under Federal Rule of Evidence 501. See *United States v. Zolin*, 491 U.S. 554, 562, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989). The assurance of confidentiality promotes open attorney-client communications, which are “central to the legal system and the adversary process.” *United States v. Hodge & Zweig*, 548 F.2d 1347, 1355 (9th Cir.1977); see also *Zolin*, 491 U.S. at 562, 109 S.Ct. 2619. The attorney-client privilege protects fundamental liberty interests by allowing individuals to seek the legal advice they need “to guide them through [the] thickets” of complex laws. *United States v. Chen*, 99 F.3d 1495, 1499 (9th Cir.1996).”)

exercise of this right requires providing adequate space for incarcerated youth to hold confidential legal telephone calls with their attorneys in a manner that protects the attorney-client privilege.⁵

Due to COVID-19 precautions, in-person attorney visits are likely unwise for the attorney and for youth given the outbreak at Bon Air; however, attorney contact is especially important during this crisis. Despite initial promising efforts to address access to counsel, we have since found DJJ's administration of attorney contact to be ad hoc, unsafe, and unacceptable. For example:

- On or around April 2, a scheduled legal call with a client took place in a counselor's office with the counselor present.
- On April 3, a call with a different resident had to be discontinued because the counselor was not willing to leave the room during the call.
- On April 7, a DJJ staff member told a representative from our office that our representative would not be able to communicate directly with her youth client until the end of the "lockdown."
- From April 13 until April 16, we were unable to communicate with any clients being housed in "medical." When contact was finally established with one client, it occurred only because a DJJ counselor walked over to the medical unit with his own cell phone and held it up against the young person's cell door.
- In at least one case, a COVID-19 positive client has faced a flat denial of access to the courts. This young man's sentence review hearing was scheduled for April 17. Despite the court's willingness to conduct a remote hearing via videoconference, the staff at Bon Air asserted that they could not facilitate a remote hearing for a resident in isolation on the medical unit. While this resident's case resolved favorably without his participation in a hearing, the inability of Bon Air to facilitate hearings of youth on the medical unit violates established civil rights law and will pose many problems in the coming weeks.

On April 17, we received a schedule from a DJJ attorney for attorney telephone calls, providing two hours in the morning and two hours in the afternoon on most weekdays for youth to speak with counsel. However, given the ongoing difficulty in reaching clients and conducting confidential calls up to this point, we continue to have concerns about access to counsel at Bon Air. First, the schedule does not appear to be posted publicly and was simply emailed to the undersigned. Second, it relies on communication with a resident's counselor to set up a telephone call. From our understanding, Bon Air is operating with a skeleton staff, and numerous residents have been moved to different units based on exposure or diagnosis, so the point of contact is not always readily identifiable. Third, based on our prior experiences, counselors have not been

⁵ See *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) ("Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid"); see generally *McClendon v. City of Albuquerque*, 272 F. Supp. 2d 1250, 1258-59 (D.N.M. 2003) (enjoining restrictions imposed by detention center that limited class counsel's access to clients to investigate their reports of unconstitutional conditions of confinement).

uniformly trained to facilitate confidential attorney-client telephone calls, or else they do not have the ability to facilitate such calls due to conflicting policies that require proximate supervision of the residents.

We note that, in addition to being cut off from confidential communications with legal counsel, at least one incarcerated youth at Bon Air has been denied access to his legal papers. This client, whose sentence review hearing is coming up in May, was forced to leave his legal papers behind—including his in-progress letter to the judge deciding his case—when he was moved to a different quarantine unit. Staff have denied his repeated requests for the papers to be collected and provided to him, and he has now been without the tools to prepare for his upcoming hearing for almost two weeks. Although DJJ has stated publicly that it is facilitating the release or transfer of the youth incarcerated at Bon Air, we question how this process can succeed if youth do not have access to their legal papers.

Bon Air is an established correctional facility and should be equipped to handle lockdown situations while still ensuring residents' access to counsel. Our office is aware that the Department of Corrections has—at least in some facilities—implemented simple measures to ensure prisoners' access to confidential attorney calls.

Officials have advised that with social distancing impossible in correctional settings and with other measures—including solitary confinement—imposing additional serious harm to prisoners, particularly to youth, **the best way to mitigate the spread of COVID-19 at prisons and to reduce the risk to surrounding communities is to reduce the prison population.** On March 19, our office sent a letter to Governor Northam to warn of the danger of COVID-19 in correctional settings, asking DJJ to examine all release processes and mechanisms under your control and begin to employ them liberally and expeditiously. On March 26, we followed up with a letter to your office with further requested actions to reduce the population at Bon Air and the total population of youth in DJJ custody. Given the outbreak at Bon Air, reports of inadequate care, and reports of excessive room confinement, it is urgent that DJJ take action to prevent serious harm to the youth in its care.

Accordingly, we ask that DJJ immediately:

- A. Ensure that residents at Bon Air have access to comprehensive medical care, including examination by a doctor if positive for COVID-19;
- B. Ensure that medical information is being communicated to residents' families as appropriate, and that any resident age 18 or older is able to designate a medical contact who shall receive timely information about their care at the resident's direction;
- C. Ensure that all residents have access to appropriate personal protective equipment;
- D. Release any youth who does not pose an immediate and identifiable safety threat;
- E. Reduce the number of youth entering Bon Air or other DJJ facilities (i.e. Community Placement Program commitments);

- F. Confirm that the Department has a pandemic operations policy and make that policy public;
- G. Cease to use excessive room confinement as a means of quarantine;
- H. Ensure that residents have access to counseling during this crisis;
- I. Ensure that residents have access to means of communication with their families;
- J. Ensure that all residents are receiving educational services and enrichment activities;
- K. Ensure that all residents have access to at least one hour per day of outdoor activity;
- L. Ensure that all residents have consistent, unimpeded access to showers and other hygiene implements as needed;
- M. Develop and implement a plan ensuring that attorney telephone calls can take place in a timely manner and in a confidential, safe setting on a non-monitored phone line, allowing sufficient length of call for the adequate provision of legal counsel to youth;
- N. Develop and implement a reliable method of coordinating legal telephone calls, including a designated point-person who can remove barriers or resolve issues with attorney calls as they arise;
- O. Ensure that all Bon Air residents have access to their legal papers;
- P. Ensure that Bon Air residents with upcoming court hearings have access to remote videoconferencing methods to appear; and
- Q. Ensure that the foregoing demands are extended to all other youth in DJJ custody, including those in the Community Placement Program, group homes, or other residential facilities.

We remain ready to work with you to quickly resolve these issues and look forward to your speedy response to this letter.

Sincerely,



Rachael Deane
Legal Director, JustChildren Program, Legal Aid Justice Center
rachael@justice4all.org



Shannon Ellis
Attorney, Legal Aid Justice Center
shannon@justice4all.org



Amy Walters
Attorney, Legal Aid Justice Center
amyw@justice4all.org

Attachments: Greifinger Declaration
Haney Declaration
May 1, 2014 Letter to Director Block