

Testimony to the Board of Corrections

May 12, 2020

By Sarita Daftary, Senior Community Organizer, JustLeadershipUSA

Dear Members of the Board of Corrections,

I'm testifying today on behalf of JustLeadershipUSA and as a member of the Jails Action Coalition.

First, I want to thank the Board for your work, early on, in urging that all decision makers use their power to urgently release people from City jails, and for your daily reports to improve some measures of transparency during this critical time.

Today, I want to ask for the Board's attention to certain aspects of the emergency response to COVID19 that continue to be insufficient.

I want to urge the Board to use all appropriate measures including video and unannounced, in-person visits to observe, document, and report on actual compliance with DOC and CHS COVID19 response plans within the jails. We continue to hear a great discrepancy between what DOC says is being done, and what people in the jails are reporting to us and their family members. Here are a few recent examples:

- A mother reported yesterday that her son and others being held on the Boat have not been given a new mask in more than a month, and are expected to reuse the masks they have indefinitely. The soap her son has received has no antibacterial ingredients, and they frequently run out of cleaning supplies and have to use plain water.
- A mother reported that her son and others in GRVC were given only 3 masks each, about one month ago. She also reported that not even the COs consistently have masks. The other day, when they did not have any clean dishes, they were told to wash their dishes in the slop sink where they clean mops. She also reported that she has been giving her son extra commissary funds so that he can buy shampoo and use it for cleaning in his housing unit. The people in his unit have not been provided with adequate cleaning supplies.

This information about the actual conditions in the jails is crucial to maintaining an accurate picture of the current jail environment. In response to lawsuits filed by public defenders, attempting to secure emergency release of their clients, DOC has consistently argued that they are taking adequate measures to stop the spread of COVID19, mostly based on their stated policies. The Board has the ability and responsibility to document conditions, and assess if stated DOC policies are actually being implemented. It has been well-documented that this is a department that is consistently violating minimum standards for responsible treatment of people in their custody.

I also want to urge the Board to investigate the City's failure to immediately implement the guidelines outlined by DOHMH Commissioner Barbot in her March 25, 2020 Order. This order was sent to FEMA to notify them of the City's plans, consistent with the FEMA Public Assistance

eligibility criteria, to use non-congregate shelter options for a number of groups of people, including “asymptomatic individuals...in City programs such as....the Department of Corrections whose programs do not have appropriate facilities to provide them housing.” The directive from DOHMH ordered any “agency that may be responsible for providing shelter to any person in the City to locate, secure, operate, and make available non-congregate sheltering to any person needing to be isolated or quarantined to prevent the spread of COVID-19.” Given the design of jails, there is no jail facility in this City that could be considered non-congregate shelter, no matter how much excess capacity Rikers has. While the most important action is to release people from the custody of the Department of Corrections in alignment with the Board’s requests, this order would indicate that the Department should have already secured non-congregate shelter for any of the remaining people in their custody. It seems clear that the failure to do so has already cost lives - of people in custody and people who work in the jails - and continued delays in implementation will risk more lives.

Thank you,

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NEW YORK CITY EMERGENCY MANAGEMENT
165 CADMAN PLAZA EAST BROOKLYN, NEW YORK 11201

DEANNE CRISWELL COMMISSIONER

March 25, 2020

Mr. Thomas Von Essen
Regional Administrator, Region II
Federal Emergency Management Agency
26 Federal Plaza, Room 1807
New York, New York 10278

TRANSMITTED VIA EMAIL

RE: The City of New York Requests to Utilize Non-congregate Sheltering in Response to the COVID-19 Pandemic (DR-4480)

Dear Regional Administrator Von Essen,

On behalf of the City of New York (the City), I am sending this request for approval to use non-congregate sheltering as a result of the Coronavirus Disease 2019 (COVID-19) pandemic, pursuant to Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) § 403(a)(3)(B), based on the facts provided below.¹

As described below, this request meets the specific FEMA Public Assistance (PA) eligibility criteria for approval as outlined by FEMA Assistant Administrator for Recovery Keith Turi in a memo dated March 18, 2020.² The City's non-congregate sheltering program will be designed and implemented to save lives, protect public health and ensure public safety, in addition to lessening the threat of catastrophe.

Background

On March 20, 2020, the President issued Major Disaster Declaration DR-4480 for the State of New York (State), including all five boroughs of the City. This authorizes emergency protective measures under Stafford Act § 403, including non-congregate sheltering. According to FEMA, the incident period started

¹ Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), as amended, § 403(a)(3)(B), 42 U.S.C. § 5107(b) (2019); see also *Public Assistance Program and Policy Guide*, FP 104-009-2, at 66-67 (April 2018) [hereinafter *PAPPG*] and Memorandum from Assistant Administrator for Recovery Directorate, FEMA, to Regional Administrator, FEMA Region I-X, *Non-Congregate Sheltering Delegation of Authority Public Assistance Program and Policy Guide Waiver* (Mar. 18, 2020) [hereinafter Assistant Administrator Memo].

² See generally Assistant Administrator Memo.

January 20, 2020 and is continuing.³ Previously, on March 13, 2020, the President declared a Nationwide Emergency for COVID-19 pursuant to Stafford Act § 502(b).

As a result of this Major Disaster Declaration, the City is implementing recommended measures to slow down the transmission of COVID-19, including those articulated in the President's *Coronavirus Guidelines for America*, recommendations issued by the Centers for Disease Control (CDC), and State- and City-issued orders.

On March 20, 2020, the Governor of the State of New York, Andrew M. Cuomo, signed an Executive Order – entitled “New York State On Pause” – for full 100 percent closure of non-essential businesses statewide, which took effect at 8:00pm on Sunday, March 22, 2020.⁴

On March 25, 2020, the City's Commissioner of Health, Oxiris Barbot, M.D., released an official public health order on non-congregate sheltering which is included with this request.

The City Department of Health and Mental Hygiene (DOHMH) and the Mayor have additionally advised City residents to stay home, practice social distancing, avoid public spaces and maintain distances of six feet or more, work remotely, and ordered the closure of all bars and restaurants, except for delivery and take out options.⁵

Request for Approval: Non-Congregate Sheltering

In a March 18, 2020 memorandum, FEMA's Assistant Administrator for Recovery stated that, “non-congregate sheltering may be necessary in this Public Health Emergency to save lives, to protect property and public health, and to ensure public safety....”⁶. The memorandum also delegated the authority to approve non-congregate sheltering to FEMA Regional Administrators and amended criteria for approval. Based on this memorandum, I am notifying you that the City will utilize non-congregate sheltering to ensure the health and safety of certain City populations particularly subject to the risks of COVID-19 transmission and infection.

Potential populations for which non-congregate sheltering in the City will be available include:

(1) COVID-19 Symptomatic Individuals, which could include any of the following:

- (a) healthcare workers;
- (b) individuals discharged from hospitals who do not have an appropriate home setting to convalesce and/or be isolated; and/or
- (c) individuals in City programs such as the Administration for Children's Services (ACS), the Department of Social Services (DSS), the Department for Youth and Community Development (DYCD), the Department of Health and Mental Hygiene (DOHMH), and the

³ New York Covid-19 Pandemic (DR-4480), Major Disaster Declaration on March 20, 2020, FEMA, <https://www.fema.gov/disaster/4480>.

⁴ Governor Cuomo Issues Guidance on Essential Services Under the 'New York State on PAUSE' Executive order, State of New York, Governor Andrew M. Cuomo (updated March 20, 2020), <https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order>.

⁵ Coronavirus Disease 2019 (COVID-19), NYC Department of Health (updated March 20, 2020), <https://www1.nyc.gov/site/doh/health/health-topics/coronavirus.page>.

⁴ Novel Coronavirus (COVID-19), State of New York Department of Health, (updated March 20, 2020), <https://coronavirus.health.ny.gov/home>.

⁶ Assistant Administrator Memo, at 1.

State programs sponsored by the Office of Mental Health, Office of Addiction Services and Supports (OASAS), and Office for People With Developmental Disabilities (OPWDD) who are symptomatic, do not require clinical care, and do not have access to an isolated setting.

(2) Asymptomatic Individuals, which could include any of the following:

- (a) healthcare workers;
- (b) individuals who should isolate from others and do not have access to an isolated setting; and/or
- (c) individuals in City programs such as DSS and the Department of Corrections (DOC), whose programs do not have appropriate facilities to provide them housing.

The City's need for non-congregate sheltering, pursuant to Stafford Act § 403(a)(3)(B), is eligible for FEMA funding as it meets all criteria outlined by the Assistant Administrator for Recovery⁷:

- 1) *Criterion: The non-congregate sheltering must be at the direction of and documented through an official order signed by a state, local, tribal, or territorial public health official.*

On March 25, 2020, the Commissioner of the New York City Department of Health and Mental Hygiene Oxiris Barbot, M.D. declared the existence of a public health emergency within the City of New York, for which certain orders and actions were deemed necessary to protect the health and safety of the City of New York and its residents, and for which exercising the power of the Board of Health to prevent, mitigate, control and abate the current emergency presented by COVID-19 is necessary. The order found that that there is sufficient proof to authorize a declaration of great and imminent peril to the public health.

Further, Commissioner Barbot ordered the Administration for Children's Services, the Department of Corrections, the Department of Social Service, the Department of Youth and Community Development, and any other agency that may be responsible for providing shelter to any person in the City to locate, secure, operate, and make available non-congregate sheltering to any person needing to be isolated or quarantined in order to prevent the spread of COVID-19. The provision of non-congregate shelters required by the Order shall be limited to that which is reasonable and necessary to adequately protect the public from the threat presented by the COVID-19 pandemic, as determined by the Commissioner of Emergency Management.

Such shelters may be located in hotels, convention centers and other non-traditional shelter facilities as deemed appropriate by the Commissioner of Emergency Management in consultation with myself and the Commissioners of Fire, Police, Social Services, and Buildings. Such shelters shall be under the control of the Commissioner of Social Services.

- 2) *Criterion: Any approval is limited to that which is reasonable and necessary to address the public health needs of the event and should not extend beyond the duration of the Public Health Emergency.*

⁷ *Id.* at 1-2.

According to FEMA, the COVID-19 incident period started January 20, 2020 and is continuing.⁸ Further, the COVID-19 Public Health Emergency began January 27, 2020 as determined by HHS.⁹ Therefore, the City is implementing non-congregate sheltering to address the public health incident that began more than two months ago. However, the City understands that it should not extend beyond the Public Health Emergency. As of the date of this request, the City understands that the period is ongoing.

- 3) *Criterion: Applicants must follow FEMA's Procurement Under Grants Conducted Under Exigent or Emergency Circumstances guidance and include a termination for convenience clause in their contracts.*

The City has reviewed FEMA guidance on procurements under emergency and exigent circumstances.¹⁰ In this guidance, FEMA establishes that local governments, like the City, "may proceed with new and existing noncompetitively procured contracts in order to protect property and public health and safety, or to lessen or avert the threats created by emergency situations..."¹¹ In line with this guidance, the City will follow all applicable local and state procurement requirements as it moves forward with non-congregate sheltering and include a termination for convenience clause in relevant contracts.

- 4) *Criterion: Prior to approval, the applicant must provide an analysis of the implementation options that were considered and a justification for the option selected.*

The City has reviewed the available options to shelter the public during the COVID-19 pandemic and has determined non-congregate sheltering is the most suitable option to save lives, protect public health, and ensure public safety. This assessment was made by examining the effectiveness, feasibility, capacity and cost of all potential options.

The City's current congregate sheltering plans were not designed for pandemic conditions where a highly communicable disease can be spread by respiratory droplets. Current data suggests that, on average, each person with COVID-19 could infect at least two other healthy people. The City's shelters must be a safe environment that reduces the spread of COVID-19, which is not possible in the current congregate sheltering facilities. Further, the existing congregate sheltering system is compounded by the density and uniqueness of the City's building stock, resulting in shelters that cannot comply with health directives for social distancing and isolation.

The Mayor, DOHMH and the City's Emergency Management Department (NYCEM) have assessed the available congregate and non-congregate sheltering options and have determined that non-congregate sheltering provides the most effective means to protect the public, reduce transmission rates, and provide a safe and secure sheltering system. Specifically, this will include the provisions of hotels and motels for non-congregate sheltering, in addition to the potential use of dormitories, armories, and rental units, as appropriate and available.

⁸ New York Covid-19 Pandemic (DR-4480), Major Disaster Declaration on March 20, 2020, FEMA, <https://www.fema.gov/disaster/4480>

⁹ Memorandum from Acting Associate Administrator, Office of Response and Recovery, and Assistant Administrator, Grants Programs Directorate, FEMA, to All States, Territories, Tribal Governments, Local Governments, and All Other Non-Federal Entities Receiving FEMA Financial Assistance, at 2 (Mar. 17, 2020) [hereinafter Emergency Procurement Memo].

¹⁰ *Id.*; see also FEMA Fact Sheet, *Procurements Under Grants Conducted Under Exigent or Emergency Circumstances* (Mar. 16, 2020).

¹¹ Emergency Procurement Memo, at 2.

- 5) *Criterion: The funding for non-congregate sheltering to meet the needs of the Public Health Emergency cannot be duplicated by another federal agency, including the U.S. Department of Health and Human Services or Centers for Disease Control and Prevention.*

The City understands that it cannot receive duplicate funding for non-congregate sheltering activities from both FEMA and HHS. Further, FEMA acknowledged in its March 19, 2020 guidance on eligible emergency protective measures, which includes non-congregate sheltering, that there may be an overlap between activities eligible for FEMA and HHS/CDC funding. Therefore, “final reimbursement determinations will be coordinated by HHS and FEMA.”¹² The City stands ready to assist FEMA and HHS/CDC in separating eligible non-congregate sheltering activities and costs to prevent duplicate funding.

- 6) *Criterion: Applicable Environmental and Historic Preservation laws, regulation and executive orders apply and must be adhered to as a condition of assistance.*

The City will comply with all environmental and historic preservation laws, regulation and executive orders as applicable to its non-congregate sheltering program. However, the City understands that on March 22, 2020, the FEMA Assistant Administrator, Keith Turi, issued specific, amended guidance for PA program simplification for COVID-19.¹³ That guidance includes a simplified approach to EHP compliance in which FEMA will develop program-wide compliance for activities with no potential EHP impact – which the City believes should include non-congregate sheltering.

The City appreciates FEMA acknowledging that certain elements of PA policy and process must be amended or waived to address the unprecedented COVID-19 Public Health Emergency, particularly for non-congregate sheltering. The City agrees that the PA program is not necessarily designed for a national public health emergency of this scale. **The City has already utilized non-congregate sheltering to protect lives in the immediate response upon the first confirmed case of COVID-19 within the City. As such, we request this approval be retroactive to March 10, 2020.** This is consistent with FEMA PA policy that states “FEMA considers the urgency with which the Applicant proceeds with work when evaluating eligibility. The Applicant should not delay in following its normal policies and procedures when taking actions to address threats to life, public health and safety, and improved property.”¹⁴ In the coming days and weeks, the City will further develop its non-congregate sheltering program and implementation. As the City meets the immediate need for emergency sheltering to stem the spread and impact of COVID-19.

To ensure the City’s non-congregate sheltering program meets FEMA’s requirements, we ask that you clarify non-congregate sheltering eligibility requirements outlined in the Assistant Administrator Memo that amend the requirements in the *Public Assistance Program and Policy Guide (PAPPG)*. We specifically request additional guidance on the below items:

¹² FEMA Fact Sheet, *Coronavirus (COVID-19) Pandemic: Eligible Emergency Protective Measures*, at 1 (Mar. 19, 2020).

¹³ Memorandum from Assistant Administrator, Recovery Directorate, FEMA, to Regional Administrator, FEMA Region I-X, *Public Assistance Application Simplification for COVID-19* (Mar. 22, 2020).

¹⁴ *PAPPG*, at 43.

- While the City will develop rigorous internal controls to manage its non-congregate sheltering program, it also must first and foremost consider public health, safety and the risk of incorporating potentially personally identifiable information (PII) in its database. Therefore, not all shelteree information outlined in the *PAPPG* appear to be applicable, feasible or prudent in responding to this immediate COVID-19 public health emergency. This appears to be the reason for the Assistant Administrator's specialized, amended March 18, 2020 guidance on non-congregate sheltering.
- For example, the City understands that Individual Assistance (IA) is authorized under DR-4480, but does not believe it must be tracked for emergency sheltering purposes as a condition of assistance. The City will, however, track shelteree information it believes is sufficient to demonstrate FEMA PA eligibility, including, but not limited to, the age and number of shelterees, disability or functional needs status of shelterees, services (e.g., meals, laundry, etc.) provided to shelterees, and other information. Due to the emergency and need to act expeditiously to ensure the City stops and reduces the spread of COVID-19, the City will continue to build out controls but not delay in the provision of sheltering.

If you have any questions, please contact Senior Assistant Director Christopher Blanco at the Mayor's Office of Management and Budget at BlancoC@omb.nyc.gov

Sincerely,



Deanne Criswell
Commissioner
NYC Emergency Management

cc: Claude Hyacinthe, Recovery Director, FEMA Region II
Jason Wind, Response Director, FEMA Region II
Anne Bink, Deputy Commissioner for Disaster Recovery Programs, NYS Division of Homeland Security & Emergency Services
Andrew Martin, Public Assistance Chief, NYS Division of Homeland Security & Emergency Services
Christopher Blanco, Senior Assistant Director, NYC Office of Management and Budget
Oxiris Barbot, MD, Commissioner, NYC Department of Health and Mental Hygiene

**ORDER OF THE COMMISSIONER OF HEALTH AND
MENTAL HYGIENE OF THE CITY OF NEW YORK
FOR THE PROVISION OF NON-CONGREGATE SHELTERS**

WHEREAS, on January 30, 2020 the World Health Organization designated the novel coronavirus disease 2019 (“COVID-19”) outbreak as a Public Health Emergency of International Concern and on March 11, 2020 characterized the outbreak as a pandemic; and

WHEREAS, on January 31, 2020 the United States Secretary of Health and Human Services announced a nationwide public health emergency to respond to COVID-19; and

WHEREAS, on March 7, 2020 New York State Governor Andrew Cuomo issued Executive Order No. 202, declaring a State disaster emergency for the entire State of New York to address the threat that COVID-19 poses to the health and welfare of New York residents and visitors; and

WHEREAS, on March 12, 2020, Mayor Bill de Blasio issued Emergency Executive Order No. 98 declaring a state of emergency in the City to address the threat posed by COVID-19 to the health and welfare of City residents; and such Emergency Executive Order directed all agency heads, including the Department of Health and Mental Hygiene (the “Department”), to take all appropriate and necessary steps to preserve public safety and to render all required and available assistance to protect the security, well-being and health of the residents of the City; and

WHEREAS, I find the continuing widespread transmission of COVID-19 internationally and locally to be a threat to public health in the City of New York; and

WHEREAS, pursuant to Section 556 of the New York City Charter (the “Charter”) and Section 3.01 of the Health Code, the Department is authorized to supervise the control of communicable diseases and conditions hazardous to life and health and take such actions as may be necessary to assure the maintenance of the protection of public health; and

WHEREAS, Section 17-104 of the Administrative Code of the City of New York directs the Department to adopt prompt and effective measures to prevent the communication between parts of the City infected with an infectious disease such as COVID-19; and

WHEREAS, pursuant to Section 3.01 of the Health Code, I am authorized to declare a public health emergency and issue orders and take actions that I deem necessary for the health and safety of the City and its residents when urgent public health action is necessary to protect the public health against an existing threat; and

WHEREAS, non-congregate sheltering is necessary to save lives, to protect property and public health, and to ensure public safety, as well as to lessen or avert the threat of a catastrophe; and

WHEREAS, there is an urgent health need for non-congregate shelters for individuals who may need to be isolated or quarantined for seven days after the onset of symptoms and up to 14 days, in order to protect the health and safety of all City residents; and

WHEREAS, sheltering such individuals in congregate settings will further the spread of this disease, endangering populations that are particularly susceptible to COVID-19 infection,

including people over 60 years of age and people with certain underlying health conditions, and a system of non-congregate shelters will save lives, protect public health, and promote public safety;

NOW, THEREFORE,

1. I, Oxiris Barbot, M.D., Commissioner of the New York City Department of Health and Mental Hygiene, hereby declare the existence of a public health emergency within the City of New York, for which certain orders and actions are necessary to protect the health and safety of the City of New York and its residents, and for which exercising the power of the Board of Health to prevent, mitigate, control and abate the current emergency presented by COVID-19 is necessary. I find there to be sufficient proof to authorize a declaration of great and imminent peril to the public health.
2. I hereby order the Administration for Children's Services, the Department of Corrections, the Department of Social Service, the Department of Youth and Community Development, and any other agency that may be responsible for providing shelter to any person in the City to locate, secure, operate, and make available non-congregate sheltering to any person needing to be isolated or quarantined in order to prevent the spread of COVID-19. The provision of non-congregate shelters required by this Order shall be limited to that which is reasonable and necessary to adequately protect the public from the threat presented by the COVID-19 pandemic, as determined by the Commissioner of Emergency Management.

Such shelters may be located in hotels, convention centers and other non-traditional shelter facilities as deemed appropriate by the Commissioner of Emergency Management in consultation with myself and the Commissioners of Fire, Police, Social Services, and Buildings. Such shelters shall be under the control of the Commissioner of Social Services.

3. This Order shall be effective immediately and remain in effect until the end of the public health emergency or such earlier time as I may indicate, subject to the authority of the Board of Health to continue or rescind, alter, or modify this Order pursuant to section 3.01(d) of the New York City Health Code.

Dated: 3/25/20



Oxiris Barbot, M.D.
Commissioner of Health