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Secretary Robert L. Green

Maryland Department of Public Safety and Correctional Services

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Re: COVID-19 Outbreak and Constitutional Violations at Chesapeake Detention Facility

Secretary Green and Warden Wilson:

We write because there is an uncontrolled outbreak of COVID-19 at the Chesapeake Detention Facility (“CDF”) in Baltimore. To put it simply: This is a public-health and constitutional crisis that places the safety and health of residents and staff in grave danger. Because of the constant flow of staff in and out of facility, the greater Baltimore community is also in grave danger. Without immediate action to remedy this crisis, CDF will be putting the lives and safety of residents, staff, and the greater Baltimore community further at risk.

On February 1, the United States Attorney’s Office for the District of Maryland (USAO-MD) reported in a public filing that 81 residents of CDF tested positive for COVID since January 1. Later that day, the Office of the Federal Public Defender learned of approximately 50 additional positive cases. ***Currently, approximately one-third of the facility (housing approximately 400 residents) has tested positive in a single month. This is exponentially higher than the positivity rate across Maryland, which is approximately 5.6 percent.***¹

In its recent public filings, USAO-MD has reported positive cases in at least five different units at CDF, including the spread of the virus to the third, fourth, and fifth units over the weekend. Because of movement within the facility, the high number of positive residents, and other factors, there are likely far more individuals in the facility who have been infected with the virus.

¹ Coronavirus Disease 2019 (COVID-19) Outbreak, Maryland.gov, <https://coronavirus.maryland.gov/> (last accessed February 1, 2021).



We do not believe that the facility is addressing the situation based upon guidance from the Centers for Disease Control and Prevention (CDC)² or from qualified, independent correctional health experts. CDF appears to be violating the constitutional rights of its residents.³ To stop these constitutional violations, CDF must—at minimum—take the specific steps outlined below.

We have several areas of concern that must be addressed immediately. The fast spread of the virus within the facility underlines the need for immediate action.

I. The Current Conditions at CDF Represent a Violation of the Constitutional Rights of the Residents of the Facility

A. Uncontained COVID-19 Outbreak

The numbers in many ways speak for themselves: approximately one-third of the facility's residents have tested positive, and this figure is steadily increasing. USAO-MD reported positive tests of residents in two units as of January 26; USAO-MD reported on February 1 that residents tested positive in three *additional* units. USAO-MD reported that CDF was responding to the initial outbreak in the first two units by locking those units down, presumably under the belief that the

² See, e.g., Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last accessed February 2, 2021).

³ Residents of jails who have been sentenced are entitled to protections under the Eighth Amendment. See, e.g., *Brown v. Plata*, 563 U.S. 493, 510–11 (2011) (“A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”); *Helling v. McKinney*, 509 U.S. 25, 33–35 (1993) (to amount to Eighth Amendment violation, (1) prison conditions must pose “an unreasonable risk of serious damage” to a prisoner’s health, an objective test, and (2) prison officials must have acted with deliberate indifference to the risk posed, a subjective test); *Ball v. LeBlanc*, 792 F.3d 584, 594 (5th Cir. 2015) (under Eighth Amendment, need to show “substantial risk of harm”).

Residents of jails who have yet to stand trial are entitled to protections under the Fifth and Fourteenth Amendments. See, e.g., *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (pretrial detainees are entitled to protections “at least as great as the Eighth Amendment protections available to a convicted prisoner”); *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982) (pretrial detainees “entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish”); *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (“Due process requires that a pretrial detainee not be punished.”); *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) (Fifth Amendment and Eighth Amendment analysis differs in that under the former, a plaintiff can prevail in showing that the defendant “knew, or should have known, that the [challenged] condition posed an excessive risk to health or safety,” while under the latter a plaintiff must show that the defendant was deliberately indifferent to the risk posed).

Courts across the country, including the District Court for the District of Maryland, have found constitutional violations for failing to protect residents of jails and immigration detention facilities from the risks of COVID. See, e.g., *Banks v. Booth*, 459 F. Supp. 3d 143 (D.D.C. 2020) (pretrial detainees and post-conviction prisoners at D.C. jail); *Coreas v. Bounds*, 458 F. Supp. 3d 352 (D. Md. 2020) (immigration detainees at Maryland state facility); *Martinez-Brooks v. Easter*, No. 20-cv-569 (MPS) (D. Conn. May 12, 2020) (federal post-conviction prisoners at FCI Danbury). Many of these facilities’ outbreaks were far less serious than the current crisis at CDF.



virus was limited to those two units. It is now clear that that belief was mistaken, and that locking down the first two units was ineffective.

It is now apparent that the virus has spread throughout the facility as a result of CDF's inadequate preparation for, and handling of, COVID-19. There is no indication that CDF has taken all of the steps necessary to deal with this crisis. To the contrary, it appears that this upward trajectory will continue, with the safety of residents and staff alike at risk.

According to a memorandum from Warden Wilson attached to a USAO-MD filing, the first residents who tested positive in early January were housed on “working units”: two on sanitation duty and another on kitchen duty. These individuals and those within those units who have tested positive since that time appear to have moved throughout the facility and likely infected other residents. It is not clear to us the extent to which meaningful contact tracing has been performed to determine the extent of the spread within other parts of the institution—particularly with the spread of the virus to the third, fourth, and fifth units over the weekend.

We have also heard disturbing reports indicating CDF's failure to meaningfully contact trace and to conduct necessary follow-up testing of residents who have been exposed to the virus. This reflects a deeply troubling misunderstanding of the steps necessary to comply with constitutional standards. For example, we have learned of individuals who apparently were not re-tested after being housed with others who did test positive; we have also heard of an individual who may have contracted the virus outside of C and F pods (the first two pods where the positive January tests reportedly originated), but that no one in that area of the jail was immediately tested. We have also learned of residents being transferred into the cells of individuals who tested positive without any meaningful efforts to sanitize the cells.

Although we have heard recent reports that CDF has announced that it will not be accepting new detainees temporarily, the length of that moratorium on new intakes is undefined, and we are not aware of any criteria being used to determine when new admissions can be accepted back into the facility. There is also no indication that CDF is taking the much more crucial step of seeking to meaningfully downsize its resident population or reduce the density of its resident population.

These numbers alone reflect an unconstitutional risk to the residents of CDF.

B. Inadequate Isolation and Quarantine

It appears that CDF is not taking adequate measures to quarantine and isolate residents in order to protect the entire resident and staff population. According to a February 1 public filing from USAO-MD, CDF was planning to house positive residents in the C and F pods *prior* to the spread to the third, fourth, and fifth units over the weekend—an inadequate response in itself for multiple reasons. This leaves CDF with no meaningful plan to address quarantine and isolation, as described below.



1. Plans Prior to COVID's Spread to Five Units

First, based on available information, neither C nor F pods were or are equipped to serve as isolation units. We have no information suggesting that ventilation at the facility protects against spread from within those pods to other areas of the facility. We understand that before the outbreak in C and F pods, CDF planned to house positive residents in a small, reportedly contained unit referred to as the “cadre” or at a separate facility referred to as the Health Monitoring Facility. The number of positive residents in C and F pods alone rendered both options untenable.

Second, we have learned that residents who have tested positive—although purportedly in “isolation”—continue to be moved within the institution for various reasons. This is inconsistent with correctional health guidance, poses serious risk of promoting further spread of the virus within the institution, and undermines claims that CDF is meaningfully attempting to combat COVID-19's spread.

Third, we have learned that CDF's quarantining process is insufficient. Any new admissions to a facility during the pandemic, of course, must be tested and quarantined prior to placement in the general population. We have heard a report that a new admission in “quarantine” was placed in a two-person cell with an individual who was determined through testing to be positive.

2. Plans After COVID's Spread to At Least Five Units

But even if this originally planned response (to use C and F pods as isolation units) was adequate, USAO-MD reported on February 1 that CDF has reached the limits of its capacity to meaningfully isolate positive residents in light of the virus' spread to the third, fourth, and fifth units over the weekend. As the USAO-MD reported, CDF's prior isolation plans are “not currently practical.” The USAO-MD reported that CDF has a “preference” to house positive individuals at a separate facility but that a sufficient number of beds is not available to do so. Simply put, CDF was not, and is not, ready for this crisis.

It appears that CDF did not take adequate steps in advance of this crisis to prevent such an outbreak. We have seen no reason to believe that CDF is prepared to address the outbreak now that it has overwhelmed the facility, either. The inadequate plans previously in place, as well as the current situation that has necessitated abandoning those plans, represent an unconstitutional risk to the residents of CDF.

C. Use of Solitary Confinement or its Equivalent

We are concerned that CDF's decisions in the past may now result in CDF's decision to essentially lock down the entire facility—putting every resident in the equivalent of solitary



confinement. The Constitution places very clear limits on this type of housing,⁴ and for good reason: the psychological impacts of solitary confinement or its equivalent are debilitating.

CDF should not be in the situation where it must impose the equivalent of solitary confinement on large proportions of residents, and it appears that CDF has no plan to avoid implementing such a lockdown.

This is, again, yet another constitutional violation within CDF.

D. Inadequate Ventilation and Cleaning Systems throughout Facility

Our concerns about ventilation are not limited to the isolation and quarantine areas of CDF. To the contrary, CDF does not appear to have an adequate ventilation system in place throughout the facility, and we have also learned that CDF's cleaning procedures are inadequate to keep residents and staff safe.

These inadequate ventilation and cleaning systems and procedures pose an unconstitutional risk to the residents of CDF.

E. No Provisions of Vaccines for Eligible Residents

While Maryland has started vaccination of individuals in three ranked priority groups, it does not appear that DPSCS has commenced vaccinations of residents in its facilities or plans to do so.

The Office of the Federal Public Defender has identified 22 of its clients who qualify as high-risk and are currently eligible for a vaccine under Maryland's priority groups for vaccination.

These individuals, and any other residents in these priority groups at the facility not represented by the Office of the Federal Public Defender, should be immediately vaccinated in accordance with CDC guidelines.

F. Inadequate Testing and Screening for Symptoms of Both Residents and Staff

1. Residents

Though USAO-MD reported on February 1 that the resident population was tested in its entirety over the weekend (excluding individuals who had tested positive in the past 90 days), there is no indication that CDF is undertaking widespread and adequate monitoring of *symptoms*. Given

⁴ See, e.g., *Porter v. Clarke*, 923 F.3d 348, 354 (4th Cir. 2019) (Eighth Amendment violation where death-row inmates were under a 23- to 24-hour per day lockdown policy, even when they were visited by case counselors daily and mental health professionals once per week).



the extent of the outbreak within the facility, CDF medical staff must conduct daily symptom checks of *all* inmates, including temperature checks and pulse oximeter readings. CDF can only begin to address this crisis when it determines how many residents within the facility have been infected; where they are housed (particularly when they tested positive and when they were potentially spreading the virus); and the extent to which any positive residents came into contact with other residents and staff. Indeed, CDF has a limited medical staff. There is no indication that the limited medical staff within the facility is sufficient to perform the necessary monitoring of symptoms and provision of needed care throughout the facility during this crisis.

Indeed, the contrary appears true: that the jail is not taking steps to meaningfully assess the scope of the outbreak and how to address it—including assessment and management of residents' symptoms. USAO-MD reported on January 26 that only three positive cases displayed or reported COVID-19 symptoms, and that only three positive residents have been transported to the hospital or infirmary. This report was based on conversations with jail staff. This assertion blinks reality—that *only* three people have displayed or reported symptoms, and that those were *the same three people* who were taken to the hospital.

Meanwhile, we have heard accounts regarding positive individuals (who did *not* go to the hospital) with symptoms such as exhaustion, stuffy nose, cough, headaches, loss of smell and taste, and body soreness. We have also heard that another positive resident (again, not hospitalized) was too fatigued to attend a legal visit on January 26 and reported he had not had an appetite for several days. CDF is either unwilling or unable to meaningfully assess and treat residents with symptoms—or is not reporting accurate information.

The lack of accurate information from CDF—or the failure to collect accurate information from its residents and staff—speaks to the need to additional intervention. Indeed, the lack of accurate monitoring of residents is a constitutional red flag.

2. Staff

Similarly, CDF can only begin to address this crisis when it determines how many staff within the facility have been infected, where those staff members worked, and the extent to which those staff members came into contact with other staff members and residents. Given that the virus has been confirmed in at least five separate units, staff members (and medical staff members) are likely to be a vector of transmission across the facility.

USAO-MD reported that as of January 25, 20 staff members tested positive since the start of the year. This is yet another troubling reflection of the spread of this virus in the absence of meaningful intervention on the part of CDF. These numbers also reflect the consequences of CDF's failure to prepare for this situation, with staff members bringing the virus out of CDF and into the community.



G. Inadequate Care for Those Who Have Been Infected

We have reason to believe that COVID-19 patients receive inadequate medical care while in isolation. As noted above, CDF's claim to USAO-MD that only three positive residents are symptomatic strains credulity, particularly in light of the reports that we have heard (described *supra*, § I.F.1.). We also have heard a report that one resident with significant risk factors was transferred to a nearby facility, which—although ostensibly equipped to provide *some* level of medical care—had neither arranged for the resident to see a doctor nor checked the resident's oxygen levels (as of the time of reporting).

This inadequate care for positive residents, and the likelihood of inadequate care for residents who will undoubtedly test positive, represents an unconstitutional risk to all residents of CDF.

H. The Absence of Input from an Independent Correctional Health Expert

That CDF reports that it is consulting with medical professionals from its contract medical provider and the Maryland Department of Health about potential approaches does not suffice to meet the challenges of the moment. There is no reason to take comfort in these reported consultations. Among other problems, there is no indication that these individuals are performing the in-depth review of the facility's response that is necessary at this time. The virus is quickly spreading in the facility, and CDF does not appear to be collecting and reporting the type of accurate, complete information that different players in this system require.

Given the problems identified above, an independent correctional health expert must be permitted to visit the facility, interview staff and inmates, review records, and provide necessary guidance. We are prepared to propose potential candidates for this purpose.

To meaningfully confront the challenge of the moment, an independent expert needs access to resident, staff, records, and information—all of which is necessary to pull CDF out of this crisis of its own making.

II. Immediate Action is Required to Contain the Outbreak and Save Lives

Based on information currently available to us, the following actions are necessary to address this crisis and to remedy the constitutional violations at CDF:

1. Identify and protect high-risk residents:

- a. Prioritize both positive and negative individuals in this population for placement outside of CDF.
- b. Place in separate housing with appropriate ventilation.
- c. Provide regular testing and screenings for symptoms and document the same.



- 2. Provide medically appropriate care to those who are positive:**
 - a. Provide twice-daily pulse oximeter readings, temperature, and symptom check. Document all observations in residents' medical records.
 - b. Provide protocols for determining when symptomatic residents should be transported to hospital setting.

- 3. Identify and isolate positive residents and quarantine residents with potential exposure:**
 - a. Screen all residents for symptoms daily.
 - b. Test all residents periodically.
 - c. Require a confirmed negative test prior to release from quarantine or isolation.
 - d. Assure quarantine and isolation settings consistent with guidance from the CDC and an independent correctional health expert.
 - e. Assure that any new resident arrivals are tested and quarantined in single cells.

- 4. Prevent spread:**
 - a. End movement of positive or suspected-positive residents throughout facility.
 - b. Implement proper ventilation throughout facility, including in attorney visitation rooms.
 - c. Implement proper cleaning procedures and protocols, including adequate provision of necessary cleaning supplies to residents.
 - d. Implement proper Personal Protective Equipment procedures, including providing masks to any resident who currently lacks one, replacing them regularly, and requiring staff to consistently wear PPE.

- 5. Vaccinate residents:**
 - a. Vaccinate all residents, with primary focus on residents in high-risk categories and particularly those in qualified Maryland phases.

- 6. Provide access to counsel and to necessary legal documents:**
 - a. Provide video legal visit station or other video-based connections with all residents, (including on quarantine and isolation) on the individual housing units. (The Federal Defender Office has available tablets and mounts.)
 - b. Provide Federal Public Defender Office and CJA panel with a contact on medical staff who can update counsel on residents' condition.

- 7. Increase transparency:**
 - a. Provide access to independent correctional health expert, proposed by Lawyers' Committee with consent of CDF.
 - b. Immediately notify by e-mail Federal Defender or other designated person of all positive test results. Immediately notify residents' designated points of contact of all positive test results.



- c. Immediately notify by e-mail Federal Defender if residents are moved from CDF for medical reasons.
- d. Immediately notify by e-mail Federal Defender and the District Court of any change in procedures related to COVID-19.

8. Reduce resident population and resident density:

- a. Decrease CDF resident population and resident density through any legal means, without imposing solitary confinement or its equivalent.
- b. Continue pause on new admissions to CDF until positivity rate declines to Maryland state rate.

CONCLUSION

We hope that some of these steps are already being undertaken. We consider this to be a life-threatening matter. The positivity rate within CDF is rising exponentially, and we expect that as more inmates are tested the known positive rate will only increase more. There is every reason to believe that residents deaths are a real likelihood absent immediate action.

We therefore ask that you respond to this letter by close of business on Thursday, February 4, with the steps DPSCS and CDF are taking to implement the measures recommended here.

Sincerely,

/s/ John Fowler

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