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***By Electronic Transmission***

The Honorable Tani Cantil-Sakauye  
Chief Justice of California  
Judicial Council of California  
455 Golden Gate Avenue  
San Francisco, CA 94102-3688 (Attention Martin Hoshino)

**Re: Follow Up Request for Covid-19 Guidance in Delinquency Cases: Proposed Model Protocol**

Dear Chief Justice Cantil-Sakauye:

On April 4<sup>th</sup> and 22<sup>nd</sup> we wrote requesting that you take steps to protect California children by exercising the enhanced authority of the judicial branch granted by gubernatorial [Executive Order N-38-20](#), dated March 27, 2020. Since our last letter, more information has come to light, and the likelihood of increased transmission of Covid-19 to youth in juvenile facilities compels us to write once again. We ask that you create a rule requiring county Superior Court presiding judges to implement a systematic process for review and possible release of currently detained youth. We have enclosed a suggested model protocol.

Unlike many states, California does not have a state agency tasked with affirmative oversight of county probation departments or detention facilities.<sup>1</sup> In California, those entities operate independently, with no orchestrated guidance from the state. California's plan to protect youth in custody during the Covid-19 crisis is haphazard, with no centralized principles or focus. While some juvenile courts have developed a multi-agency process to address intake and release decisions, others have not. As a result, decisions on which children are detained and which are released vary from county to county, creating a geographic patchwork of justice across the state. For example, the likelihood that a California youth accused of a misdemeanor will face detention and increased exposure to serious illness depends on the county where he or she resides. We believe these circumstances necessitate extraordinary action on your part—there is no one else who can take the steps needed to ensure an equal application of justice across the state.

On May 6, 2020, the [American Academy of Pediatrics released a policy statement and guidance](#) urging juvenile justice agencies to implement plans to release youth who can be safely cared for in their

home communities, reduce new admissions to juvenile detention facilities, and increase the use of diversion strategies. The Academy additionally recommends that data regarding suspected and confirmed juvenile detention cases be made publicly available, stratified by demographic characteristics in order to identify youth most at risk.

In California, however, it now appears clear that the Attorney General's April 14, 2020 Information Bulletin, [Covid-19 and Statutory Authority Under Government Code Section 8658](#), is not resulting in changed probation department practices. Furthermore, although on April 20, 2020 the Board of State and Community Corrections (BSCC) began to publish [information on daily population and bookings](#) in juvenile facilities, it continues to refuse to provide the critically important data about the spread of the virus. Meanwhile, nearly every day there are reports of increasing numbers of youth infected in other states' facilities. Unlike California, some of those states provide the type of transparency the American Academy of Pediatrics concluded is a necessary element of protecting children.

While limited in scope, the daily population numbers the BSCC does provide show an initial drop of about 30% across the state in county-run facilities. However, since that initial data run on April 11, the population reached a plateau—even while the risk of infection increases for people who are incarcerated. Similarly, counties initially succeeded in decreasing new admissions by almost 40%. Since then, new admissions have increased slightly.

We are concerned that the misperception of children not being harmed by Covid-19 is slowing plans to uniformly protect them and the staff who care for them. Though emerging research does indicate that children may be less susceptible to severe illness from the virus than older individuals, this research is limited, and much of it has focused on younger children. To our knowledge, no research has focused on youth in custody. At this time, there is no clear evidence that older teens and transition-age youth—the largest population in halls and camps—are at significantly less risk of infection than adults.<sup>ii</sup> There are also highly concerning indications that younger Black and Latino individuals experience higher rates of Covid-19 related death than their white counterparts.<sup>iii</sup> In addition, there are alarming signs that multisystem inflammatory syndrome, a disease that can trigger serious heart problems, is potentially associated with Covid-19. More than 100 such cases involving children have emerged in six countries, and in New York, Washington, D.C., Pennsylvania, and California.<sup>iv</sup> Beyond the risks for children, the dangers of Covid-19 to institutional staff are abundantly clear from such deaths in California and around the country. There is also a risk to families and communities. Youth who are in local facilities are generally there for short periods; they will be released. New studies provide compelling evidence that children transmit the virus, so youth who contract it in halls and camps and then return home will put their families and communities at risk.<sup>v</sup>

Large-scale studies, which may be able to provide more conclusive answers about the effect of Covid-19 on children, are just beginning.<sup>vi</sup> The nature of this quickly evolving pandemic means swift decisions must be made about how to protect children and youth with only emerging facts. For many youth in lock-ups, the risk outweighs whatever societal benefit of detention may be claimed. Every youth deserves careful review of their circumstances.

There are counties that appear to be employing systematic review. San Bernardino, for example, used a sequential process in which youth in custody were reviewed in three phases, resulting in release of 48 youth in less than three weeks, and limited admissions to youth involved in serious, violent or sexual offenses, or where the youth present a danger to self or others.<sup>vii</sup> In San Diego County, the Superior Court entered an order authorizing the Probation Department to release detained youth early and requiring the department to “develop and adhere to a pre-release protocol on the early release of juvenile detainees.”<sup>viii</sup> But information about most counties is scant, and it is likely that some counties have no

process while others have a process that worked initially but does not have the necessary elements for ongoing application.<sup>ix</sup>

We appreciate the adoption of California Rules of Court [Emergency Rule 7, effective April 6, 2020](#), but more information has emerged over the last month, and we believe additional action is needed to effectively protect the health of all children who are now in detention under conditions that increase their risk of contracting Covid-19.

Accordingly, we ask you to create a rule requiring county Superior Court presiding judges to implement a systematic process for review and possible release of both incoming and currently detained youth during the state of emergency. To assist you in promulgating such a rule, we have developed the attached Model Protocol, which is based on public health guidance and examples from jurisdictions in California and around the country. It provides suggested standards for admission to detention, evaluation of youth currently detained, and safeguards for re-entry, and envisions strong roles for the court, probation, prosecution, and defense.

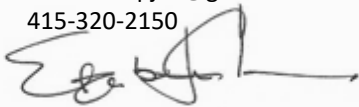
This protocol is a simple process to fairly and safely reduce the population in secure juvenile facilities to protect youth and staff during the Covid-19 pandemic. It provides a uniform framework to ensure consistency in the application of justice across the state but leaves the exact implementation to the discretion of counties. It is intended to be in force for the duration of the state of emergency in California.

Thank you for your consideration. We know you and your staff are working non-stop on the court systems' emergency response and we appreciate the difficult nature of these circumstances.

Sincerely yours,



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Encls.

## **Model Covid-19 Population Reduction Protocol for Secure Juvenile Facilities**

This model protocol provides a simple process to fairly and safely reduce the population in secure juvenile facilities to protect youth and staff during the Covid-19 pandemic. The protocol leaves to the discretion of counties its exact implementation, while providing a uniform framework that ensures consistency in the application of justice across the state. It would supersede existing law as authorized by Executive Order N-38-20 and is intended to be in force for the duration of the state of emergency in California.<sup>x</sup>

### **New Admissions to Detention**

1. The county probation department shall immediately notify the district attorney and the public defender (or other defense counsel) when a youth is transported to detention.
2. In determining whether to detain a youth, the probation department shall presume the following youth to be inadmissible, unless a probation officer determines and documents how the youth presents a substantial and immediate safety risk to others:<sup>xi</sup>
  - a) Youth at heightened risk of serious illness from the virus because of a pre-existing health condition or pregnancy;
  - b) Youth arrested for a probation violation and no new crime is alleged;
  - c) Youth arrested on a warrant and no new crime is alleged;
  - d) Youth arrested for any misdemeanor offense; or
  - e) Youth arrested for any felony offense in which no one is injured.
3. If a youth is detained, the juvenile court shall hold a detention hearing within 48 hours of arrest, excluding weekends and holidays, and shall detain the youth only if the court determines the youth presents a substantial and immediate safety risk to others.<sup>xii</sup>

### **Review of Existing Population in Custody**

1. The juvenile court shall immediately convene a meeting with the probation department, defense counsel, and the district attorney to conduct a review of every youth in county detention.
  - a) If the parties agree release is appropriate, the court shall issue an order for the youth to be released.
  - b) If the parties disagree about release, the court shall promptly hold a hearing to determine whether the youth presents a substantial and immediate safety risk to others. This standard shall not be met solely because the youth does not have an alternative placement.
  - c) The following currently detained youth shall be presumptively eligible for release:
    - (i) Youth at heightened risk of serious illness from the virus because of a pre-existing health condition or pregnancy;
    - (ii) Youth detained for a probation violation and no new crime is alleged;
    - (iii) Youth detained on a warrant and no new crime is alleged;
    - (iv) Youth detained or committed for misdemeanor offenses;

- (v) Youth detained or committed for any felony offense in which no one was injured;
  - (vi) Youth undergoing competency proceedings;
  - (vii) Youth awaiting placement or pending re-placement; or
  - (viii) Youth with dispositions to juvenile halls or camps:
    - who cannot complete programming requirements because services are not being provided during the emergency and/or
    - whose release date is within 90 days of the hearing.
2. The party objecting to release bears the burden of overcoming the presumption by clear and convincing evidence.
  3. The court shall issue an order approving or denying release.

### **Re-entry Services**

1. The court shall order release of the youth to family, relatives, or other responsible adults, giving preference to the least restrictive appropriate placement.
2. If these options are not available, probation shall make reasonable efforts to identify the least restrictive appropriate placement and support services.
3. Probation shall make reasonable efforts to identify community-based organizations that are able to offer services to youth.
4. Discharge planning should ensure that youth will have continued access to health care and other essential services.

## Endnotes

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<sup>i</sup> The Board of State and Community Corrections (BSCC) has informed us that it will only do what the Governor's office tells it to do during the pandemic, and in any event, it is limited in its ability to enforce conditions-related regulations. The California Attorney General has determined that the Board of Corrections (the predecessor to the BSCC) is not authorized to institute legal action or impose sanctions against a local agency for a failure to bring a juvenile facility into compliance with the minimum standards established by the board. 83 Ops.Cal.Atty.Gen. 111 (2000).

<sup>ii</sup> Apoorva Mandavilli, "New Studies Add to Evidence That Children May Transmit the Coronavirus," *The New York Times* (*The New York Times*, May 5, 2020), <https://www.nytimes.com/2020/05/05/health/coronavirus-children-transmission-school.html>.

<sup>iii</sup> Ben Poston, Tony Barboza, and Alejandra Reyes-Velarde, "Younger Blacks and Latinos Are Dying of COVID-19 at Higher Rates in California," *Los Angeles Times* (*Los Angeles Times*, April 25, 2020), <https://www.latimes.com/california/story/2020-04-25/coronavirus-takes-a-larger-toll-on-younger-african-americans-and-latinos-in-california>.

<sup>iv</sup> "COVID Response?: 15 Children Hospitalized In New York With Dangerous Inflammatory Syndrome," *Kaiser Health News*, May 5, 2020, <https://khn.org/morning-breakout/covid-response-15-children-hospitalized-in-new-york-with-dangerous-inflammatory-syndrome/>; Jessica Glenza, "New York Reports 15 Cases of Rare Illness in Children Possibly Linked to Covid-19," *The Guardian* (*Guardian News and Media*, May 5, 2020), <https://www.theguardian.com/us-news/2020/may/05/children-coronavirus-illness-new-york-rare-cases>.

<sup>v</sup> Apoorva Mandavilli, "New Studies Add to Evidence That Children May Transmit the Coronavirus," *The New York Times* (*The New York Times*, May 5, 2020), <https://www.nytimes.com/2020/05/05/health/coronavirus-children-transmission-school.html>.

<sup>vi</sup> "COVID Response?: 15 Children Hospitalized In New York With Dangerous Inflammatory Syndrome," *Kaiser Health News*, May 5, 2020, <https://khn.org/morning-breakout/covid-response-15-children-hospitalized-in-new-york-with-dangerous-inflammatory-syndrome/>; Jessica Glenza, "New York Reports 15 Cases of Rare Illness in Children Possibly Linked to Covid-19," *The Guardian* (*Guardian News and Media*, May 5, 2020), <https://www.theguardian.com/us-news/2020/may/05/children-coronavirus-illness-new-york-rare-cases>.

<sup>vii</sup> California Board of State and Community Corrections website *COVID-19 Probation Survey of Juvenile Facility Admissions and Release Practices*, <https://app.smartsheet.com/b/publish?EQBCT=c65e92c7e0ae461b947138a1b263e2f4>

<sup>viii</sup> *Ibid.*

<sup>ix</sup> *Ibid.*

<sup>x</sup> California Governor Gavin Newsom, Executive Order N-38-20, March 27, 2020. <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.27.20-N-38-20.pdf>.

<sup>xi</sup> This is the standard adopted by Michigan Governor Gretchen Whitmer in her Executive Order 2020-29 (March 10, 2020), requiring release of youth from detention facilities who are not "a substantial and immediate safety risk to others." [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-523422--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-523422--,00.html).

<sup>xii</sup> The United States Supreme Court has held that in jurisdictions that combine probable cause determinations with arraignments the hearing must occur within 48 hours of arrest, and intervening weekends or holidays do not constitute extraordinary circumstances to extend that period. *Riverside v. McLaughlin* (1991) 500 U.S. 44, 56-59. California's statutory scheme for youth (Welf. & Inst. Code sections 631-632), exceeds that period in allowing extra time for weekends and holidays, plus an extra day for going to court. During the COVID-19 crisis, youth should be afforded an initial hearing within the time that adults in California always receive.