AMERICAN IMMIGRATION LAWYERS ASSOCIATION

November 26, 2018

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Re: Proposed changes to the ICE National Detention Standards

Dear Ms. Trickler-McNulty,

Thank you for offering AILA the opportunity to provide its views on the draft National Detention Standards (NDS) 2000. Our concerns about the agency's process for revising NDS 2000 fall generally into several categories. First, ICE has disregarded instructions from Congress by failing to adequately consult with NGOs, in contrast to the practices followed by prior Administrations. Second, ICE's proposal would allow a large number of non-dedicated detention facilities to revert to NDS from the more rigorous Performance Based National Detention Standards (PBNDS) in direct contradiction to its representations to Congressional Appropriation Committees and in defiance of the wishes of Congress. Third, Congress directed ICE to develop the new standards as a subset of the ICE PBNDS 2011 (as revised in 2016). Instead, ICE has used the 18-year-old NDS as its starting point and selectively inserted enhancements. Finally, the draft revised standards omit many important safeguards contained in PBNDS 2011, and, in some cases, even watered-down protections contained in NDS.

While overall the proposed revised National Detention Standards are an improvement over the version promulgated nearly twenty years ago, especially in those instances where the draft incorporates verbatim safeguards that currently appear only in PBNDS 2011, ICE should include far more enhancements to bring the standards up to date. More importantly, ICE should move aggressively to ensure adoption of PBNDS 2011 to the greatest extent possible, including at non-dedicated facilities.

Transparency

AILA objects to the agency's inadequate consultation with NGOs and other important stakeholders. ICE stated it would only accept comments on the draft standards from four groups: AILA, the American Bar Association, the Women's Refugee Commission, and Just Detention International. The agency's decision excludes numerous organizations that have particular expertise in this area, have worked for reforms to the immigration detention system for years, and have engaged constructively in dialogue with ICE in the past. The refusal to establish a more inclusive process also defies clear instructions from Congress:

> While the Committee understands that ICE's intention in adopting this new framework is to increase its flexibility in managing the detained population and ensure the availability of detention capacity, it is concerned about the potential impact on detention standards. If ICE

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AILA Doc. No. 18121407. (Posted 12/14/18)

> proceeds in establishing this new framework, it should adopt specific detention standards for USD [Under Seven-Day] and OSD [Over Seven-Day] facilities that are developed through a transparent process, such as the informal comment and roundtable process the agency employed when developing the 2008 PBNDS.[1]

Congress wanted input from stakeholders precisely because it was concerned the agency's new standards would otherwise be inadequate. Unfortunately, ICE has adopted a process that is anything but transparent, and which is nothing like the example cited in the Committee's report. During the Bush Administration, ICE invited NGOs to submit detailed comments on successive drafts of PBNDS 2008 prior to finalizing the standards, and held working group meetings on substantive issues. No NGOs were excluded from the process, and numerous groups participated. The final version of the standards, while far from perfect, was shaped to a large extent by suggestions from external stakeholders. In the Obama Administration, ICE continued to engage in close consultation with NGOs, not just with respect to new detention standards but also on other proposed policies.

ICE is not only failing to follow Congress's instructions, but also missing the point. The excerpt above makes clear that any new detention standards must be *developed* through the collaboration with stakeholders. In contrast, ICE sent an apparently finalized draft. We hope that the lack of full consultation does not reflect a lack of receptivity to suggested changes. ICE's process will prevent the airing of important concerns, while an inclusive and transparent process would have allowed ICE to benefit from the views of organizations with varying expertise and priorities.

Reversing Progress on PBNDS Implementation

ICE's plans to implement its revised NDS at all non-dedicated facilities represents a reversal of a central and longstanding detention reform priority. Not only is ICE putting the brakes on expanding PBNDS, it now plans to move a large number of detention facilities from PBNDS back to NDS. There is no operational or policy justification for such a move, and it is antithetical to the clearly and repeatedly expressed wishes of Congress. As ICE proceeds with its efforts to update NDS at smaller IGSAs where NDS will remain in effect, it should be working simultaneously and vigorously to transition additional non-dedicated detention facilities to PBNDS 2011.

Beginning with the Bush Administration and continuing through the duration of the Obama Administration, ICE gradually expanded the reach of its PBNDS through negotiations with detention facility operators. The agency's long-stated goal was to implement the improved standards at both dedicated and non-dedicated facilities, at facilities operated by contractors as well as at jails operated by local governments.

The agency's progress was too slow for Congress, which has repeatedly stated in appropriations report language its preference for greater adoption of PBNDS 2011 and demanded that ICE provide justifications whenever it entered into new contracts, or modified existing ones, without adopting PBNDS 2011 (as revised in 2016). The bipartisan Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, passed by the Senate in 2013, required that ICE implement PBNDS 2011 at

[1] *See* House Report 115-239 (incorporated by reference in the Explanatory Statement accompanying the Consolidated Appropriations Act of 2018, HR 1625, P.L. 115-141).

all of its detention facilities within a year; temporary waivers were permitted only for facilities negotiating in good faith to adopt the new requirements.[2] And in report language accompanying the Senate Appropriations Committee's Homeland Security funding legislation for fiscal year 2019, the Committee indicated that it expects ICE to publish a schedule for achieving 100 percent compliance with PBNDS 2011, as revised in 2016.[3]

In response, ICE has consistently committed to Congress that it would continue to expand the adoption of PBNDS 2011. Specifically, ICE states that "its goal is to bring the percentage of the detained population subject to the 2011 PBNDS up to 80 percent over the next few years" even as it proceeded with its plans to revise National Detention Standards.[4] And yet, if all non-dedicated facilities reverted to NDS, as ICE intends, the percent of the detained population covered by either PBNDS 2011 or PBNDS 2008 would shrink from 72% to 52%. The Authorized Detention Facility List posted on the ICE website indicates that in FY 2018, non-dedicated facilities that complied with either version of PBNDS constituted 20% of ICE's total average daily population (ADP), fully half of the ADP for that facility category (7% of the total ADP was in a non-dedicated PBNDS 2011 facility, 13% of the total ADP was in a non-dedicated PBNDS 2008 facility, and only 20% of the total ADP was in a non-dedicated NDS facility).[5]

According to ICE's plans, these non-dedicated facilities would be permitted to revert to simpler NDS standards, even though they have for years been inspected against PBNDS. The justification ICE provided to Congress for applying less robust safeguards was "to increase its flexibility in managing the detained population and ensure the availability of detention capacity."[6] But this is not a rationale for applying an inferior set of standards to facilities that have been inspected on PBNDS compliance for many years, often as required contractually. The non-dedicated facilities operating under PBNDS include most of those with larger ADPs, including 8 of the 10 non-dedicated facilities with ADPs exceeding 500, and 4 of the 10 non-dedicated facilities with ADPs between 500 and 250.

Further, non-dedicated facilities include those operated by private contractors as opposed to county jails, many of them exclusively or primarily holding detainees for the federal government (i.e. ICE detainees and US Marshall's prisoners). Many of these contractors have experience complying with PBNDS at other facilities, and in several cases are currently complying with PBNDS at their non-dedicated facilities.

ICE suggests in the introduction to its draft standards that it can apply less prescriptive detention standards to county jails because the agency's law enforcement partners have proven they can "successfully manage their own populations." In fact, a number of the jails that hold ICE detainees have failed to ensure humane and safe detention conditions for either their own county prisoners or for ICE detainees, and county jails should not now be provided even greater latitude in their treatment of federal detainees through relaxed standards. Further, the ICE detained population is very different than the prisoner population that county jails typically hold, and housing ICE detainees requires special policies, different training, and greater vigilance.

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[2] See Section 3716 of S. 744.
[3] See S. Rpt. No. 115-283.
[4] House Report 115-239.
[5] https://www.ice.gov/facility-inspections (accessed on 11/18/18, also on file with AILA).
[6] House Report 115-239.

Inappropriately Using NDS 2000 As the Baseline for the New Standards

Although Congress expressed concerns about the new standards that ICE proposed to develop for non-dedicated detention facilities, it was under the impression that the new standards would at least be a "subset" of the PBNDS 2011 standards, as opposed to a revised version of NDS.[7] That characterization suggests that clearly outdated and unnecessarily prescriptive requirements – such as those found in the NDS standards on "Key and Lock Control", "Tool Control" and "Post Orders" – might be removed or simplified, but that the improved versions of important and still relevant PBNDS 2011 standards – such as those related to detainees' health, safety, and legal rights – would be largely preserved.

In fact, ICE has drafted a new version of the standards that clearly used NDS 2000 as a starting point. The text primarily consists of the minimal NDS safeguards, with selected PBNDS 2011 enhancements inserted. The only PBNDS 2011 standard that was preserved is the new standard "Sexual Abuse and Assault Prevention and Intervention," which contains safeguards that are already mandated by 2014 DHS regulations. And in several respects even the NDS 2000 text has been diluted. For example, ICE has removed all requirements explicitly applicable to SPCs and CDFs in NDS (i.e. requirements printed in italicized text). However, NDS permitted IGSAs to have in place alternative procedures on the condition that "they meet or exceed the objective represented by each standard." In most places ICE has not replaced those deleted specific requirements with anything conveying the important aspects of the requirements.

Analysis of Standards

AILA submits its comments on the specific detention standards with several caveats. Importantly, our analysis is limited to a comparison with analogous safeguards in PBNDS 2011, as revised in 2016. We are not including our more sweeping concerns about the nature of ICE detention. Even the requirements in PBNDS 2011 carry little weight without an effective oversight and enforcement mechanism, which ICE is sorely lacking. And even rigorous compliance with PBNDS 2011 requirements would not address systemic shortcomings related to the inappropriately punitive and penal nature of ICE detention.

For example, although PBNDS 2011 contains several key safeguards related to medical care, it does not regulate the quality of medical care that is offered, nor does it address the severe understaffing of medical personnel at ICE detention facilities. Although detention standards theoretically guarantee private legal visitation seven days per week, many detention facilities nevertheless lack sufficient attorney-client meeting areas to accommodate visiting attorneys, and in any event the remote locations of many of the agency's largest detention facilities often make legal visits impractical if not all but impossible. While detainees in administrative segregation (i.e. solitary confinement) are theoretically required to receive the same privileges available to the general population, in practice detainees are almost always confined to their cells for all but one hour per day and forced to recreate alone in tiny areas surrounded by razor wire, even if they pose no threat to the safety of others.

[7] "DOSDs would adhere to the 2011 PBNDS, while USD and non-dedicated OSD facilities would be held to a subset of those standards." (House Report 115-239).

Finally, AILA did not examine each of the standards in the draft NDS, nor are we offering a comprehensive list of the inadequacies in the standards we did review.

Access for Non-Governmental Organizations

AILA is concerned that the draft NDS inappropriately and unnecessarily restricts NGO access to facilities. Congress mandated that NGOs have an absolute right to visit detention facilities for a variety of specified purposes, requiring ICE to "ensure that non-governmental organizations are provided independent and timely access to all facilities for the purpose of providing representation, legal education, and programming, and for purposes of monitoring and visitation."[8]

In response, ICE should have implemented new policies and procedures at all of its detention facilities, including those governed by PBNDS. The new policies should have guaranteed timely access to all facilities and should have detailed and explained the various activities in which NGOs were entitled to participate. The NDS revisions in particular should have incorporated the requirements laid down by Congress. Instead, ICE has gone in the opposite direction in its draft NDS, removing substantial requirements and explanatory text that appears in PBNDS 2011 and entirely rescinding a relevant standard from PBNDS 2011 without addressing the Congressional language.

The draft NDS text does not guarantee NGO access to all detention facilities, as required by Congress, instead leaving it to ERO and the facility to decide whether to approve an NGO's request. It is also not clear who at ERO would be receiving and reviewing NGO requests. ERO is directed to take into account not just safety and security concerns, but also "the availability of personnel," and the facility retains the right to reject the request independent of ERO.

PBNDS 2011 contained a new Standard 7.2 "Interviews and Tours", containing substantial detail governing media and NGO access to detention facilities. In the draft revised NDS, ICE deletes that standard and largely retains the more minimal content that appears in NDS 2000 in the Visitation Standard. The draft revised NDS Visitation Standard omits key details regarding procedures, including the right of NGOs to pre-identify any detainee with whom they may wish to speak by providing ICE with a list of specific detainees in advance, and to permit NGOs to seek meetings with detainees who have not been pre-identified. Requirements that facility personnel facilitate tours by posting sign-up sheets and stakeholder notification flyers in advance of the tour have been removed. Also removed are requirements that on the day of the visit, the facility provide the NGO access to pre-identified detainees and those who have signed up in advance, and provide an appropriate space for the visit.

It is essential that ICE respect Congress's instructions by improving NGO access to detention facilities, rather than further limiting it. NGO access to detention facilities has served many vital functions, which Congress clearly intended to protect. The access allows NGOs to learn about detention facility conditions so that they may provide information and concerns to the public and to Congress. It has allowed NGOs to conduct oversight, often in ways valuable to DHS, detainees, and other stakeholders. NGOs are able to provide vital information to detainees, and not just related to their immigration proceedings. And NGO

[8] House Report 115-239.

access often provide detainees their only viable avenue for sharing their experiences, including their accounts of harms they have experienced while in DHS custody.

Legal Access Issues

Telephone Access

Immigration detainees have the right to be represented by counsel, but are not guaranteed legal representation. Given that most ICE detainees are held in remote locations that make in-person visits with legal counsel extremely difficult, telephone access is critical for detainees to locate, retain, and seek advice from immigration attorneys or other legal advocates. For those who cannot afford an attorney and are not able to retain pro bono counsel, telephone access is essential to gather the evidence and government documents needed for defending against removal charges, locating witnesses, and doing other things necessary to represent themselves in their immigration proceedings.

In response to litigation brought by the American Civil Liberties Union, ICE agreed to address this problem by improving detainee telephone access at the detention facilities located in the San Francisco Area of Responsibility (AOR).[9] The same serious, systemic problems raised in *Lyon v. ICE* apply throughout the ICE detention system, yet ICE has not applied the constructive solutions defined in the Lyon Settlement Agreement outside of Northern California. Congress recognized this asymmetry and demanded that ICE attempt to improve telephone access at all of its facilities. Specifically, the Explanatory Statement accompanying the Consolidated Appropriations Act of 2018 states:

> The *Lyon v. ICE*, et al. Settlement Agreement required ICE to improve detainee telephone access in four detention facilities in Northern California. ICE is directed to ensure appropriate telephone access for detainees at all of its facilities, including contracted facilities, and to brief the Committees on the feasibility, benefits, and costs of adhering to some or all of the telephone access parameters of the settlement agreement at all facilities within 90 days of the date of enactment of this Act.

House Committee Report 115-239 was even stronger, directing ICE "to apply the terms of the *Lyon v. ICE, et al*. Settlement Agreement regarding detainee telephone access to all of its detention facilities to the greatest extent possible, and . . . to brief the Committee on the status of ensuring such access within 90 days after the date of enactment of this Act."

The revised National Detention Standards should be an obvious initial mechanism for implementing Congress's instructions to improve detainee telephone access. Telephone access may be a greater problem at county jails, which do not use the ICE-contracted telephone service provider that administers the ICE telephone pro bono platform. Further, county governments and jail administrators may see telephone access as a less pressing concern, considering that other prisoners awaiting trial have counsel who would

[9] *Lyon v. ICE, et al* - Settlement Agreement and Release, N.D. California, June 14, 2016.

typically be based in the region. However, even facilities governed by PBNDS 2011 will need to improve telephone access to move in the direction of the *Lyon* Settlement parameters.

AILA is concerned that the draft revised NDS standard "Telephone Access" contains no enhancements compared to PBNDS 2011 requirements to move ICE in the direction of the *Lyon* settlement. In fact, the standard is almost a verbatim restatement of the current NDS 2000. Further, the revised draft NDS fails to include provisions added in PBNDS 2011 intended to improve detainees' telephone access. Areas of concern include the following:

- Unlike in the *Lyon* Settlement Agreement, the draft NDS permits detainee telephone calls to be recorded. Many detention facilities do not exclude detainees' legal calls from recording.
- The *Lyon* Settlement Agreement required ICE and the San Francisco AOR detention facilities to offer direct and free telephone calls to numbers including state and federal courts and attorneys who provide pro bono immigration representation, in addition to the entities already included on the ICE detainee telephone service provider pro bono platform. The draft NDS requires detention facilities to offer free and direct calls to a list of entities, such as immigration courts and consular officials, only "[i]f telephone service is limited to collect calls" at the facility. Hopefully this is a drafting error; PBNDS 2011 requires such calls "Even if telephone service is generally limited to collect calls."
- Even assuming the limitation to facilities offering only collect calls is a drafting error, the draft NDS standard is also internally contradictory regarding whether free calls are provided to the list of entities, or only direct calls. The sentence cited above requires direct and free calls for all detainees at the facility. However, in another paragraph the draft standard seems to limit free calls to indigent detainees.
- Free telephone access to attorneys providing pro bono legal services was a central issue in the *Lyon* litigation. But even to the extent free calls are permitted to some entities, the draft NDS does not require detention facilities to offer detainees free and direct telephone calls to pro bono providers. In this respect, the draft is worse than PBNDS 2011 and PBNDS 2008, which require such calls to "legal service providers or organizations listed on the ICE/ERO free legal service provider list." Instead, the draft standard offers detention facilities "access" to the ICE detainee telephone service provider pro bono platform, but it does not require facilities to use the service.
- The ICE list of legal service providers referenced in detention standards is known to be inadequate. For that reason, the *Lyon* settlement agreement establishes a process for attorneys offering pro bono legal services to be added to the free call list. The draft NDS includes no comparable process.
- The *Lyon* Settlement Agreement requires that calls can be made to listed attorneys without needing a live person to answer the phone. This is not included in the draft NDS.
- The *Lyon* Settlement Agreement requires the installation of phone booths and the availability of private phone rooms, to ensure privacy for legal calls. This is not included in the draft NDS.
- The *Lyon* Settlement Agreement doesn't permit automatic cut-offs for any calls of less than 40 minutes, unless ICE can demonstrate a need in individual circumstances. The draft NDS permits automatic cut-offs of legal calls after 20 minutes and does not establish any specific time limit on other essential calls, such as those to consular officials, courts, and the DHS Office of the Inspector General. In fact, the draft NDS permits facilities to impose any "reasonable restrictions" on the hours, frequency, and duration of such calls.

Many important detainee legal calls will not be free even under the *Lyon* Settlement Agreement, such as those to attorneys not listed as pro bono providers and those otherwise essential to the preparation of a detainee's legal case. Of course, telephone access is vital to detainees for other reasons, such as maintaining contact with loved ones; unlike counties with respect to their own prisoners, ICE typically transports its detainees far from their homes and families, precluding personal visits. We are therefore concerned that the draft NDS standard eliminates the following provisions appearing in PBNDS 2008 and 2011 that are meant to ensure reasonably priced telephone services:

> Each facility shall provide detainees with access to reasonably priced telephone services. Contracts for such services shall comply with all applicable state and federal regulations and be based on rates and surcharges comparable to those charged to the general public. Any variations shall reflect actual costs associated with the provision of services in a detention setting.

Telephone rates at jails are often notoriously expensive. Telecommunications providers pay hefty commissions to county governments and even contractor operators of detention facility in exchange for lucrative monopoly access to the facilities. The problem was so pervasive that the Federal Communications Commission promulgated regulations prohibiting commissions and setting caps on telephone rates at prisons, jails and ICE detention facilities, regulations which have been rescinded under new FCC leadership. At a minimum, the draft NDS should retain the PBNDS requirements, but ICE should also examine the problems recognized by the FCC and take actions to address them at ICE detention facilities. Otherwise, detainees' ability to preserve their family and personal relationships will depend on the capriciousness of where they are housed and transferred.

Legal Visitation and General Visitation

The draft revised NDS authorizes detention facilities to have standard operating procedures that mandate strip searches "after every contact visit with a legal representative," language that doesn't appear in PBNDS 2011. Confidential legal visits in private conference rooms should not be considered "contact visits", as it is presumed that there will be no physical barriers separating the legal representative from the detainee, and the purpose of the visit is not to allow physical contact between the detainee and his or her legal representation. Strip searches are highly intrusive, and it is inappropriate to subject a detainee to such a search as a condition for receiving a guaranteed legal visit.

Unlike the PBNDS 2011 standard on visitation, the draft NDS does not encourage detention facilities to offer legal representatives extended visits or visits outside normal facility visiting hour in emergency circumstances. Unlike PBNDS 2011, the draft NDS unreasonably limits privacy and confidentiality for "consultation visits" (for detainees subject to Expedited Removal) to visits that occur during legal visitation hours, and does not extend those protections to consultation visits that occur during general visitation hours. The draft NDS removes language that appears in all prior versions of the standards regarding the contents of a facility's written legal visitation policy, which is required to be made available upon request.

General visitation requirements have also been diluted from the standard established in PBNDS 2011. Most significantly, under the draft NDS, facilities will only be required to offer visits lasting 30 minutes, compared to one hour in PBNDS 2011. The draft NDS entirely excludes a section found in PBNDS that guarantees that minor children will be able to visit their parents, and that immediate family members

detained at the same facility will be able to visit with each other. Unlike PBNDS 2011, the NDS Visitation standard does not list the items that visiting family members must be permitted to bring to detainees, such as legal documents and papers, prescription glasses, religious items and reading materials, and wedding rings.

Legal Correspondence

Both PBNDS 2011 and the original NDS permit indigent detainees to mail unlimited legal correspondence at government expense. The draft revised NDS would unreasonably limit legal correspondence for indigent detainees to five pieces of mail per week. There can be no rationale for abandoning a detainee right that has been in effect for nearly 20 years, especially as detainees representing themselves in their immigration proceedings rely on mail to prepare and adjudicate their cases.

Medical Care

Numerous reports by the DHS Office of the Inspector General and other oversight entities, NGOs, and the media have documented systemic problems with medical care in ICE detention. These include analyses of ICE Detainee Death Reviews (DDRs), which describe in detail the failures and negligence that contributed to a large percentage of the detainee deaths. And yet the draft revised NDS includes many examples of weakened safeguards in this area.

Care for Transgender Detainees

Federal courts have repeatedly held that prisons and jails must provide medically necessary and appropriate care to transgender detainees, such as hormone therapy. Consistent with these constitutional requirements, PBNDS 2011 guarantees hormone therapy to transgender detainees, as well as "access to transgender-related health care and medication based on medical need," as well as treatment that follows "accepted guidelines regarding medically necessary transition-related care." Notwithstanding court rulings that are as applicable to county jails as they are to ICE, the draft revised NDS replaces the detailed PBNDS requirements with a single sentence that omits any specific guarantee of adequate care for transgender detainees and absolves detention facilities of responsibility: "[t]he facility will notify ICE/ERO of any self-identified transgender detainees and coordinate care as appropriate."

Paying for Medical Care

The draft revised NDS does not include a prohibition against detainees being charged for medical services, including pharmaceuticals dispensed by medical personnel, a key protection found in PBNDS 2011. Many jails require medical co-pays from their non-indigent prisoners. Most ICE detainees, even those who don't qualify as indigent, have very little money in their accounts. Charging detainees for their health care discourages them from seeking needed medical attention, and is especially inappropriate considering that ICE is already compensating detention facilities for the full costs of housing ICE detainees, including medical care.

Medical Screening

Rigorous medical screening upon a detainee's arrival at a facility is essential to collect information about medical conditions and to detect potential illnesses that could worsen if left untreated. Indeed, detainee deaths in ICE custody disproportionately occur soon after detainees' arrival at the detention facilities, often because continuity of care is neglected and sometimes because of the effects of a rigorous border crossing or other traumas that precede the detainees' apprehension. Nevertheless, the draft revised ICE NDS standard removes the detailed list of medical screening questions that appear in PBNDS 2011 and condenses into a single paragraph the lengthy requirements regarding how facilities should conduct screening and how medical personnel should follow up on medical concerns.

Continuity of Care

Concerns about continuity of care are not limited to a detainee's arrival at a detention facility, but also relate to a detainee's possible transfer, release, or removal. An entire section in PBNDS 2011 on continuity of care has been removed from the revised draft NDS, and that term appears only once, in the paragraph on medical screening. Among the omitted requirements, PBNDS 2011 requires that facility medical personnel ensure that a plan is developed that provides for continuity of medical care in the event of a change in detention placement or status, and that the detainee's medical needs are taken into account prior to any transfer of the detainee so that medical personnel can consider whether the transfer will cause a disruption to necessary medical care.

Medical Emergencies

NGOs have identified a number of cases in which an inadequate response by facility medical and security personnel contributed to deaths in ICE custody, based on an examination of DDRs conducted by ICE. And yet, ICE has stripped out important requirements regarding medical emergencies, including some that appeared in the current NDS.

The draft revised NDS omits the PBNDS requirement that all medical and detention staff be trained annually on cardio pulmonary resuscitation (CPR) and emergency first aid training, and on responding to health-related emergencies within four minutes. ICE used to consider this annual training such an essential requirement that it was identified as a "Mandatory Component," meaning an inspection finding that the requirement was not met was sufficient to cause the facility to fail the entire inspection.

PBNDS 2011 requires the Health Services Administrator (HSA) and facility administrator to complete a detailed competency assessment to ensure that medical and non-medical facility staff have appropriate competency in implementing the facility's emergency services plan for delivery of 24-hour emergency health care. This requirement has been omitted, as are the detailed required elements of the written emergency health care plan.

Medical Housing

Although not all detention facilities have medical housing, those facilities that have such units should be governed by reasonable requirements to guarantee the health and safety of detainees being housed there. PBNDS 2011 contains detailed requirements related to necessary medical staffing, staff supervision of detainees, detainee hygiene, and services available. These provisions have been entirely omitted from the draft revised NDS.

Medical Understaffing

Insufficient medical staffing is a serious problem at ICE detention facilities. Nevertheless, the draft revised NDS omits a PBNDS 2011 requirement that a staffing plan be reviewed at least annually to identify the positions needed to perform the required medical services.

Special Management Units

The misuse of solitary confinement is a serious problem at ICE detention facilities, and revised detention standards should add stronger safeguards addressing the unique risks and stark conditions inherent in such housing. Detainees who have no personal contact other than with security officers, and who only receive one hour of out-of-cell time, are more likely than general population detainees to suffer deterioration in their physical and mental health. Suicides occurring in the ICE detention system have disproportionally involved detainees housed in special management units (SMUs). Detainees in SMUs are also especially vulnerable to abuse and excessive use of force at the hands of security staff.

The revised NDS should adopt and build on protections for detainees in SMUs that were added to PBNDS 2011, including 2016 revisions that incorporated reforms recommended by the Department of Justice in its 2016 "Report and Recommendations Regarding the Use of Restrictive Housing." The standards should also fully incorporate the requirements of the 2013 ICE Directive "Review of the Use of Segregation for ICE Detainees." Although NDS does include some of these new safeguards, many have been omitted. In some cases the draft NDS is a step backwards even from the NDS promulgated in 2000.

PBNDS 2011, as revised in 2016, limit the uses of segregated housing, and the reasons for placing detainees there. A number of those limitations have been stripped away in the draft revised NDS. For example, PBNDS 2011 includes limits on the use of pre-disciplinary hearing detention, a status which, if abused, allows facility staff to punish detainees prior to any disciplinary hearing, or to extend time served in segregation beyond permissible periods. Unlike the revised draft NDS, PBNDS 2011 establishes that pre-disciplinary hearing detention may be ordered only as necessary to protect the security and orderly operation of the facility, may not be used as a punitive measure, and that time served in pre-disciplinary hearing detention must be deducted from any period in segregation ordered by the Institution Disciplinary Panel (IDP).

PBNDS 2011 includes important limits on an individual's placement in an SMU based on a determination that he or she is a security threat. The limits, which do not appear in the draft revised NDS, are intended to prevent detention facilities from using a security threat determination as a way of punishing misconduct without providing the due process afforded by disciplinary hearings. They also discourage detention facilities from relying indefinitely on such as a determination, instead requiring ongoing review of a detainee's behavior while in segregation, and require an effort to seek alternatives to segregation such as higher security general population housing units.

Some detention facilities have, as a default rule, automatically placed in protective custody segregation individuals in certain categories perceived as at-risk, such as transgender detainees. Nevertheless, the revised draft NDS omits language appearing in PBNDS 2011 that "[a] detainee's age, disability, sex, sexual orientation, gender identity, race, color, national origin, or religion may not provide the sole basis for a decision to place the detainee in involuntary segregation."

The PBNDS 2011 standard "Significant Self-harm and Suicide Prevention and Intervention" strongly discourages the use of SMU housing for suicidal detainees who have been placed on suicide precautions. SMUs are uniquely ill-suited for such detainees, yet many detention facilities place suicidal detainees in SMUs because the facilities lack sufficient medical housing to accommodate them. PBNDS 2011 makes clear that a suicidal detainee requiring a special isolation room should be placed in an SMU only temporarily and as a last resort. In such cases, facility administrators are required to immediately notify ICE of the placement and work with ICE to identify alternative placements. This language is entirely omitted from the draft NDS. In fact, the draft revised standard on suicide prevention makes no mention of the use of SMUs for housing suicidal detainees, much less establish parameters for their use.

In response to the recommendations made by the Department of Justice in 2016, PBNDS 2011 was revised to require that a multi-disciplinary committee of facility staff, including facility leadership, medical and mental health professionals, and security staff, meet weekly to review all detainees currently housed in the facility's SMU. The purpose of the weekly meeting is to ensure all staff are aware of the detainee's status, current behavior, and physical and mental health, and to consider whether any change in status is appropriate, a model has also been adopted by the Bureau of Prisons. The draft revised NDS does not retain this best practice other than for detainees with serious mental illnesses.

The draft revised NDS does not include a large number of other SMU housing safeguards that are contained in PBNDS 2011, and even some appearing in the original NDS 2000, including the following:

- A provision, contained in both NDS 2000 and PBDNS, that an SMU cell may not exceed the capacity for which it was designed except under exigent circumstances, and only then on a temporary basis and with notification to ICE.
- A requirement in both NDS 2000 and PBNDS that a shift supervisor see each SMU detainee daily, and in PBNDS 2011 that the facility administrator or designee visit each SMU daily.
- A provision in both NDS 2000 and PBNDS that detainees in the SMU have access to reading materials. PBNDS 2011 requires that the reading materials be in English, Spanish, and other languages frequently encountered in the facility population.
- A requirement in PBNDS 2011 that the facility administrator establish a standing committee, consisting of security, medical, and other staff, to regularly evaluate SMU policies and practices, and seek to develop safe and effective alternatives to restrictive housing, as well as enhanced SMU conditions and programs.
- A provision in PBNDS 2011 guaranteeing that detainees in the SMU receive access to exercise opportunities and equipment outside the living area and outdoors (as opposed to simply recreation "outside of their cells" that is required in the draft revised NDS).
- A requirement that detainees in administrative segregation receive recreation daily (compared to five days a week in the draft revised NDS).

Use of Force and Restraints

Restraints on Pregnant Women

The draft revised NDS is entirely too permissive in allowing the use of restraints on pregnant women, those in post-delivery recuperation, and especially those in active labor, a cruel practice that has been the subject of intense scrutiny. PBNDS 2011 includes strong restrictions and safeguards that are absent in the

draft NDS. Of greatest concern, PBNDS 2011 established that "[r]estraints are never permitted on women who are in active labor or delivery," whereas the draft NDS fails even to mention such cases. PBNDS 2011 also states: "A pregnant woman or women in post-delivery recuperation shall not be restrained absent truly extraordinary circumstances that render restraints absolutely necessary," and the standard lists narrowly defined and limited criteria where restraints may be used, such as for medical reasons as determined by medical personnel, or when "reasonable grounds exist to believe the detainee presents an immediate and serious threat of hurting herself, staff or others . . . or presents an immediate and credible risk of escape that cannot be reasonably minimized through any other method." Even in these instances, the use of restraints "requires documented approval and guidance from the on-site medical authority." In comparison, the revised draft NDS gives any detention facility supervisor absolute discretion to determine that restraints are necessary:

> A pregnant woman or woman in post-delivery recuperation shall only be restrained in circumstances that render restraints necessary. The use of restraints for pregnant and post-delivery detainees must be approved and documented by a supervisor.

Use of Restraints in SMUs and other provisions

PBNDS 2011 prohibits detention facilities from using restraints on detainees simply because they are housed in Special Management Units – for example, on detainees who pose no threat to the safety of staff or other detainees. In fact, many detainees in SMUs pose no heightened threat to others, including those who have been placed in administrative segregation for their own protection, and yet it is a common practice for detention facilities to have a default practice of placing restraints on all detainees in SMUs prior to escorting them from their cells. The draft revised NDS omits the PBNDS 2011 prohibition on the blanket use of restraints in SMUs. In general, the draft revised NDS contains fewer requirements and less detail governing the use of force and restraints than does PBNDS 2011. For example, the draft revised NDS removes text that appears in both NDS and PBNDS listing non-lethal weapons that are authorized and those that are prohibited, and it removes details regarding their use. It also removes important elements of required training and contains fewer requirements for documenting a use of force and completing after-action reviews.

Custody Classification

ICE detainees in non-dedicated facilities could be placed in greater danger as a result of proposed revisions that would permit detainees with no criminal history to be housed with violent prisoners. The populations at ICE non-dedicated facilities typically include prisoners awaiting trial for state or federal felony charges, including many who have committed serious crimes of violence. ICE detainees are often held in the same housing units as county and US Marshall's prisoners, notwithstanding the differences in the populations. Although some ICE detainees have been convicted of more serious felonies, many others have committed no crimes at all, or only minor non-violent crimes such as traffic offenses and immigration violations. In the absence of appropriate safeguards, housing ICE detainees in such facilities could pose extreme risks of victimization, including physical and sexual assault.

Beginning with NDS 2000, ICE detention standards have contained absolute prohibitions against housing non-dangerous (i.e. "low-level") ICE detainees with any detainee or prisoner who has committed even a single crime involving physical violence. That safeguard has been removed from the draft revised NDS.

All current versions of the detention standards contain detailed provisions, applicable to IGSAs, dictating how to conduct security assessments and develop custody classification levels, which then guide housing assignments. Those details have also been removed. In their place, the detention facility is given essentially unbounded discretion to develop a classification system of its choosing, with the barebones instructions that "[a]ll facilities shall ensure that detainees are housed according to their classification level" and that "[t]he classification system shall assign detainees to the least restrictive housing consistent with facility safety and security."

Admission and Release

The draft revised NDS contains insufficient details on the required admissions process. In particular, the required detailed elements of the orientation provided to incoming detainees has been reduced to less than a sentence. Although the most detailed elements of the orientation described in PBNDS 2011 are specifically required only at dedicated detention facilities, PBNDS does require non-dedicated facilities to establish processes that meet or exceed the intent represented by the PBNDS 2011 requirements. Important omitted elements of the detainee orientation include, for example:

- disciplinary procedures;
- procedures for the detainee to contact the ERO deportation officer handling his or her docket;
- availability of pro bono legal services, and how to pursue such services in the facility, including accessing "Know Your Rights" presentations; and
- how to use the telephone system to make telephone calls, including free telephone calls to consulates and free legal service providers.

The draft revised NDS also fails to include provisions added to PBNDS 2011 to ensure safe conditions of release. The draft NDS does not require detention facilities to provide non-institutional weather-appropriate clothing at the time of their release, nor is it sufficiently descriptive concerning the need to make special arrangements prior to the release of detainees with a range of vulnerabilities, or during adverse weather conditions. Unlike PBNDS 2011, the draft NDS does not require detention facilities to provide detainees with a list of legal, medical, and social services that are available in the release community, or a list of shelter services available in the immediate area along with directions to each shelter.

Religious Practices

The draft revised NDS dilutes or entirely eliminates key provisions in PBNDS 2011 that guarantee detainees' rights to worship according to the precepts of their faith. PBNDS 2011 explicitly guarantees that "[r]eligious practices to be accommodated are not limited to practices that are compulsory, central or essential to a particular faith tradition, but cover all sincerely held religious beliefs," language that is omitted from the draft NDS. In other provisions absent from the draft NDS, PBNDS 2011 also protects detainees from obligatory religious activities, and from being required to "participate in or attend a religious activity in order to receive a service of the facility or participate in other, nonreligious activities."

The draft revised NDS does not include details included in PBNDS 2011 regarding personal religious property detainees are entitled to have, such as holy books, rosaries and prayer beads, prayer rugs,

phylacteries, and religious medallions. Also excluded are descriptions of personal religious items detainees may wear or use during religious services, as well as religious headwear detainees are entitled to wear in all areas of the facility, such as yarmulkes, turbans, and scarves. A provision limiting a facility's right to cut or shave religiously significant hair has been eliminated.

The draft revised NDS also does not provide the same robust guidelines and detailed guidance as PBNDS 2011 regarding detainees whose religious beliefs require adherence to particular dietary laws. PBNDS 2011 regulates the process by which the facility chaplain or religious services coordinator verifies the religious diet requirement, and prohibits facilities from imposing a substantial burden on a detainee's religious exercise or requiring lengthy questionnaires or numerous interviews. In language omitted from the draft NDS, PBNDS 2011 guarantees that "[a]bsent an articulable reason to deny the request, the presumption must be that the detainee's request constitutes a legitimate exercise of religious belief and practice." PBNDS 2011 includes detailed explanations and instructions for accommodating detainees' religious fasts and seasonal observances, such as Lent, Ramadan, and Passover. The draft revised NDS does not include any of reference to these observances.

Disability Identification, Assessment, and Accommodation

As explained on ICE's website, "ICE detention facilities are required to comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended (Section 504), which prohibits discrimination based on disability and requires facilities to provide detainees with disabilities equal access to its programs and activities through the provision of appropriate accommodations, modifications, and services." Accordingly, the revisions made to PBNDS 2011 in 2016 included a new detention standard which, according to ICE, "establishes processes to ensure compliance by detention facilities with the requirements of Section 504."

Most of the substantive text from the new PBNDS 2011 standard has been included in the revised draft NDS. However, the draft omits key PBNDS 2011 provisions that require facilities to expedite and document their reviews of requests for disability accommodations. These omissions could make it exceedingly difficult for oversight agencies and others to ensure that detention facilities are complying with their legal obligations under Section 504. The omissions include the following:

- Although the draft NDS requires that a request for a disability accommodation be reviewed through an "interactive process," it is vaguer than PBNDS 2011 in describing the process, does not require that a request be reviewed by a facility multidisciplinary team, and does not require the participation of a healthcare professional.
- The draft NDS omits any specific timeframes governing the interactive process. For example, where PBNDS 2011 requires that the multidisciplinary team issue a written decision within 5 working days of the request, the draft NDS requires a decision "within a reasonable time of the request or referral." Where PBNDS 2011 requires the facility administrator to complete a review of an accommodation denial within 3 working days of the team's decision, the draft NDS contains no timeframe whatsoever.
- The draft NDS entirely omits all documentation requirements. PBNDS 2011 requires that detention facilities complete detailed written documentation describing the facility's review of the request for an accommodation.

- The draft NDS does not require any re-assessments of approved accommodations. The PBNDS 2011 requirement of an initial assessment after 30 days and periodic reassessments every 90 days thereafter are intended to "evaluate the efficacy of the accommodation(s) provided, the continued need for accommodation and whether alternate accommodation(s) would be more effective or appropriate."

Conclusion

This letter summarizes AILA's key concerns about selected priority areas of the draft detention standards. We reiterate that additional stakeholders with varied interests and areas of expertise could provide ICE with valuable input, if they were permitted participate in this review process.

While the draft revised NDS is an improvement to the current version of the NDS in a number of respects, we encourage ICE to add to those enhancements, and to revisit the many areas where existing PBNDS and NDS 2000 safeguards have been weakened or where longstanding deficiencies in all versions of the standards have been identified. As many facilities as possible should be transitioned to PBNDS 2011, beginning with facilities that have larger ICE ADPs yet remain on NDS 2000 or PBNDS 2008. Lastly, it would be a grave mistake for ICE to permit the many facilities currently inspected against PNDS to drop back to NDS standards that were drafted nearly twenty years ago.

We appreciate the opportunity to comment on the revised standards. Please do not hesitate to contact us with any questions regarding the views expressed in our letter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION