

U.S. Commission on Civil Rights
Briefing: “The State of Civil Rights at Immigration Detention Facilities”
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Good Morning. Thank you to the U.S. Commission on Civil Rights for hosting this important briefing and inviting me to participate on today’s panel. I am Megan Mack, the Officer for Civil Rights and Civil Liberties at the Department of Homeland Security. CRCL, as my office is known, truly is unique – it is an office created by the Homeland Security Act to “ensure that the civil rights and civil liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland.” Every day, my staff and I work to fulfil that mission, both by providing proactive policy advice on civil rights and civil liberties issues to Department leadership, and by investigating complaints and other allegations received from the public about those issues. We work collaboratively with U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) to ensure civil and human rights and civil liberties are incorporated into immigration-related programs, policies, and operation throughout the Department. In addition, complaints related to immigration apprehension and detention are the largest share of the complaints we investigate.

I would emphasize that CRCL’s efforts on immigration detention have been of great importance to me. I joined the Department from the American Bar Association, where I was the Director of the ABA Commission on Immigration and spent many years working on a range of immigration detention issues, including access to counsel and legal materials and other conditions of confinement.

Equal Protection Considerations

I understand that today's briefing is to help you consider equal protection in the administration of justice in our immigration detention facilities. My colleagues and I will address detention standards and the Prison Rape Elimination Act, which you identified as subjects of interest. But since the subject of equal protection in DHS programs and activities, including immigration detention, lies at the heart of my Office's role, I wanted to spend a moment on two other particular topics to which we devote substantial resources: language access and providing appropriate treatment for persons with serious medical or mental health issues or disabilities.

On language access, the Department recognizes its responsibility to communicate with detainees in a language they can understand. This requires affirmative steps to ensure effective communication – having interpreters and telephone services readily available, having appropriate staff trained to use them, and having the right policies and procedures in place for language access. This means avoiding reliance on bilingual staff who are not qualified to provide interpretation, and ensuring that fellow detainees are not relied on for interpretation, apart from emergency situations before appropriate language services can be obtained. In the context of sexual assault prevention and response, where the stakes are especially high, the requirements of the Department's rule under the Prison Rape Elimination Act (or PREA) for language access are understandably quite specific. I would note that we face a particular challenge in providing appropriate language access for detainees who speak languages spoken only in relatively small communities, where commercial interpretation services are substantially more difficult to engage, and of course to detainees who are not literate in any language, and so cannot be served by translation of written materials.

The Department has taken many important steps to acknowledge the special vulnerabilities of individuals with serious medical and mental health conditions who are in civil immigration detention, and the obligation to provide appropriate and reasonable accommodations to detainees with disabilities to ensure they can participate fully in the programs and services offered across the Department, including in detention. So, for example, in 2013 ICE issued a directive on segregated housing (often called “solitary confinement”) that ensures regular review of all long-term placements in a special housing unit, but has substantial additional requirements for initial and regular review of detainees in special housing who have a serious medical or mental health condition or a disability. And we prohibit placement in special housing solely on the basis of one of those conditions, as well as other particular characteristics or vulnerabilities such as sexual orientation or gender identity. Nonetheless, provision of services to people with serious medical or mental health conditions in a confinement institution requires a high level of vigilance, and the majority of detention complaints investigated by my office involve medical care. We review these complaints with the assistance of contracted medical and mental health experts, and engage with ICE regularly to monitor the provision of appropriate care and placement.

PREA and Detention Standards

I will now address both PREA and ICE’s detention standards. On March 7, 2014, DHS finalized Department-wide regulations under the Prison Rape Elimination Act (PREA) to prevent, detect, and respond to sexual abuse and assault in DHS confinement facilities. DHS components operate two types of confinement facilities that are covered under these regulations. The first type is immigration detention facilities, which hold people for more than 24 hours, and are all operated under ICE’s authority. And the second is holding facilities, which are operated

by both ICE and CBP, and are short-term facilities that hold detainees after arrest and before transfer to another facility or agency. While the DHS components had policies in place before PREA to prevent sexual abuse, the DHS PREA regulations created more uniform, effective safeguards against sexual abuse in ICE and CBP custody. My colleagues from ICE and CBP will discuss the implementation of the regulations within their Components in more detail. From my office's perspective, we operate a Department-wide working group to facilitate consistency in implementation – where that is appropriate – and we assist the Components on various PREA issues where we can be of help to them.

CRCL was involved over the course of several years in the development of ICE's 2008 and 2011 Performance-Based National Detention Standards (PBNDS) and Family Residential Standards, which accomplish most of the safeguards enumerated in the PREA standards for detention facilities. Those standards currently apply to facilities housing approximately 94 percent of ICE's average detainee population. (To be clear, this calculation excludes those detainees who are held in Department of Justice (DOJ)-contracted facilities, who are instead covered by DOJ PREA regulations). ICE is also revising PBNDS 2011 to incorporate some additional PREA requirements for detention facilities, and is undertaking a substantial revision of the family residential standards as well, in which my office is providing technical and other assistance.

I would emphasize that we understand, and take seriously, our responsibility to ensure not only that the right policies are in place – and PREA and the PBNDS are substantial and real improvements over their predecessors – but also that we follow those policies in practice, and that we have the right mechanisms in place to consider policy changes where needed. While the Components have their own policymaking, monitoring, and inspection offices and programs,

CRCL provides a more arm's-length form of monitoring and oversight. Through our policy work and our investigation of complaints, we provide recommendations on policy, practice, and training. While our policy advice ranges across the whole of the Department, ICE and, to a lesser extent, CBP detention make up the lion's share of the complaint investigations and related policy recommendations in my office. In the first half of fiscal year 2014, for example, about half of the new investigations we opened (71 of 149) pertained to immigration detention, with more than 20 others involving unaccompanied minors and CBP ports of entries and checkpoints.

Unaccompanied Children

Finally, I will speak to the issues presented by unaccompanied children who are apprehended by the Department without lawful immigration status. As the Commission is aware, during the spring and summer of 2014, the United States experienced a humanitarian crisis along the southwestern border, particularly in the Rio Grande Valley of Texas, as tens of thousands of unaccompanied children and adults traveling with children crossed the border. In the immediate crises, we focused on getting those adults and children, many of whom had undertaken an extremely dangerous journey, into a safe and secure environment where they could be processed. While DHS is, by law, only to hold unaccompanied children for up to 72 hours outside of exceptional circumstances, the spring and early summer did present exceptional circumstances. Accordingly, while some children did remain in DHS custody for more than three days, we undertook a significant, government-wide response to address the humanitarian crisis that included the establishment of a Unified Coordination Group that brought the assets of multiple federal agencies to bear on the urgent situation. This group included the departments of Homeland Security, Health and Human Services, State, Justice, and Defense, as well as the General Services Administration. I am glad to report the volume of unaccompanied children

and adults with children apprehended near the border has substantially diminished, our capacity to process them has expanded, and unaccompanied children are now transferred more expeditiously to the custody of the Department of Health and Human Services, generally in less than one day.

Outside of exceptional circumstances, unaccompanied children are in DHS custody only briefly. Under U.S. law, an unaccompanied child is one under 18 years old, who has no lawful immigration status and no parent or legal guardian in the United States available to provide care and legal custody. Unaccompanied children are inherently vulnerable, so we place a high priority on identifying any protection concerns. Under the Trafficking Victims Protection Reauthorization Act of 2008, whenever DHS encounters an unaccompanied child from a contiguous country, such as Mexico, the child is screened to identify potential victims of human trafficking and to determine whether the child has a fear of persecution if returned to his or her home country. As a matter of policy, DHS conducts that same screening of all unaccompanied children, regardless of country of origin.

Unaccompanied children from contiguous countries who do not present any such protection concerns, and who are determined to have sufficient mental capacity, may be allowed to voluntarily withdraw their application for admission to the United States, and are subsequently returned.

All other unaccompanied children are transferred to the Department of Health and Human Services for care and custody. While they are in CBP custody, requirements for their care are given by federal and state law and a litigation settlement known as the *Flores* agreement.

While unaccompanied children are typically not in CBP custody for more than a few hours or days, ICE has opened family residential facilities in Karnes City and Dilley, Texas, to detain adults traveling with children who recently crossed the border. These residential centers operate in an open environment, which includes medical care, access to legal counsel, social workers, play rooms, and educational services. Asylum officers and immigration courts are available to conduct credible fear and reasonable fear interviews at these facilities (in person or by video link), providing individuals with the opportunity to put forth claims for asylum and other forms of protection to the extent available under the law. The Department remains committed to safe, appropriate facilities for housing this important and vulnerable population, and to ensuring appropriate consideration of viable claims to relief.

In both the temporary holding facilities and family residential facilities, my office is heavily engaged in developing the applicable detention standards and policies, investigating complaints, and making recommendations on an ongoing basis to ensure that the facilities are safe, appropriate, and consistent with the rights and liberties of people DHS holds in civil confinement.

Again, I thank you for this opportunity and appreciate your attention to these critical issues.