



Homeland
Security

February 14, 2024

MEMORANDUM FOR: Patrick J. Lechleitner
Deputy Director and
Senior Official Performing the Duties of the Director
U.S. Immigration and Customs Enforcement

Kenneth Padilla
Acting Principal Legal Advisor
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FROM: Dana Salvano-Dunn (b) (6)
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SUBJECT: Disparate Impact Analysis of Mental Healthcare of
Noncitizens in ICE Detention Facilities
Complaint No. 008601-24-ICE

Pursuant to 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1, the U.S. Department of Homeland Security (DHS) Office for Civil Rights and Civil Liberties (CRCL) is conducting a data-driven assessment of health equity in the systemic provision of mental healthcare for female noncitizens in Immigration and Customs Enforcement (ICE) facilities.¹ The purpose of this memorandum is to notify you of the investigation and explain how CRCL will work with ICE during this investigation.²

BACKGROUND

Paramount within CRCL's authority to investigate civil right violations, is the ability to address large systemic concerns that may occur in DHS programs and activities. A method through

¹ Under 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1, CRCL's Compliance Branch receives information and opens complaint investigations into violations of civil rights and civil liberties in DHS policies, programs, and activities. CRCL may issue formal recommendations to a DHS Component or Office when CRCL's complaint investigation reveals a civil rights and civil liberties policy and/or operational gap or violation.

² This memorandum supersedes the memo dated March 14, 2023, with the subject *Disparate Impact Analysis of Mental Healthcare of Noncitizens in ICE Detention Facilities*.

which to address these issues is to identify possible disparate outcomes when a policy that is seemingly neutral leads to unintentionally differing outcomes for protected classes of people.³ CRCL has identified mental healthcare policies as the area of review to determine if there are disparate outcomes, specifically related to the healthcare policies for women in immigration detention,⁴ compared to men. This issue is of acute concern to CRCL as policies that unintentionally impact access to quality mental healthcare can lead to adverse effects and may cause serious harm as well as increase civil rights related liability for the Department. As of February 1, 2024, ICE has 5,918 female noncitizens in its custody and has hundreds of facilities available to accept female noncitizens. This number has increased, and many facilities were recently changed from all-male to a male and female population to address population demands.

To complete its analysis CRCL will utilize the disparate impact methodology as it is widely accepted in other similar civil rights contexts, such as race and nationality.⁵ Accordingly, CRCL will apply a four-step process to identify disparate impact in this investigation: (1) identify the specific policies or practices at issue; (2) assess whether there is an adverse effect on a member of a protected class; (3) evaluate whether disparity is established; and (4) evaluate whether a causal connection between the facially neutral policy and a disproportionate and adverse impact on the protected class is established.⁶ Whether or not disparity exists will be determined in part by identifying whether various aspects of mental healthcare in ICE facilities are the same for non-citizens as would be expected in the general population. The following facilities have been selected as representative samples:

1. Geauga County Jail, Chardon, Ohio
2. South Texas Family Residential Center, Dilley, Texas
3. San Luis Regional Detention Center, San Luis, Arizona
4. Orange County Jail, Goshen, New York
5. El Valle Detention Facility, Raymondville, Texas
6. Northwest ICE Processing Center, Tacoma, Washington
7. Port Isabel Service Processing Center, Los Fresnos, Texas

³ Disparate Impact analyses are frequently applied within the health equity context. Health equity does not rely on specific statutes or constitutional jurisprudence, but on broader theories of social justice and fairness. It is “ethical concept, grounded in principles of distributive justice.” *See, e.g.,* Whitehead M. The concepts and principles of equity in health. *Int J Health Serv* 1992;22:429–445; Beauchamp TL, Childress JF, eds. *Principles of biomedical ethics*. New York: Oxford University Press, 1994:326–59; CDC (Centers for Disease Control and Prevention). 2017. Healthy People 2020. <https://www.healthypeople.gov>. (visited November 16, 2023).

⁴ “Women” includes cisgender (an individual whose gender identity matches the sex they were assigned at birth) women, transgender women and individuals who identify as women.

⁵ Gender is not a category currently covered by Title VI; however, CRCL will apply the disparate impact methodology as it is a valuable tool to assess how facially neutral policies may have significant civil rights implications in various areas, such as health equity and gender.

⁶ *See FN 2 supra.*

8. Otay Mesa Detention Center, San Diego, California

In addition to the gender equity analysis, CRCL may find concerns with the mental health care of women generally during the investigation. Should CRCL find concerns outside the analysis, CRCL will make recommendations addressing these issues, but noting they are not related to disparate impact.

FOCUS OF THE REVIEW

This investigation seeks to determine whether there is evidence of disparate impact over the last approximately 36 months in the application of otherwise neutral mental healthcare detention policies and procedures in ICE facilities. CRCL will review policies, procedures, and activities at selected ICE facilities (the Subject Facilities) in the provision of mental healthcare to determine whether they adversely impact noncitizens on the basis of gender. The Subject Facilities represent a stratified random sample of all ICE facilities currently housing noncitizens, based on the ICE detention standards in effect at those facilities.

To accomplish this, at the selected facilities, CRCL will seek to (1) identify relevant mental healthcare policies, procedures and activities, (2) determine whether evidence exists presenting disparate impact and/or harm on the basis of gender, and, if so, (3) establish a causal connection between the policy and the harm. Eight representative facilities (the Subject Facilities) will be included in this disparate impact analysis.

As stated above, CRCL may make additional general recommendations noting they are not related to the disparate impact analysis.

1. Application of Disparate Impact Analysis Methodology

This investigation will follow the established analytical process for disparate impact analyses:

(a) Identify specific policy or practice under review

CRCL has identified the provision of mental healthcare at ICE detention facilities as the specific policy or practice for review.

(b) Determine whether the policy of practice results in adversity/harm

CRCL seeks to determine whether the provision of mental health care to noncitizens detained in ICE facilities has resulted in unintentionally adverse or harmful consequences for ICE noncitizens on the basis of gender by:

- a. Conducting interviews of detained men and women noncitizens.
- b. Surveying of detained men and women.
- c. Investigating all open complaints that allege concerns with provision of mental healthcare.
- d. Reviewing referrals to outside providers for mental healthcare.

- e. Assessing availability of mental health care services for detained men and women.
- f. Requesting additional data and documents as identified through initial investigation.

CRCL will use quantitative and qualitative evidence to establish whether there is disparity between the provision of mental health care on the basis of gender in ICE detention facilities, and whether the findings are similar to what would be expected in the general population.⁷

(c) Determine whether causation is established

CRCL will seek to determine whether the harm/adversity experienced on the basis of gender is causally linked to ICE’s policies and practices around mental health care.

CRCL

CRCL Mission. CRCL supports the Department’s mission to secure the Nation while preserving individual liberty, fairness, and equality under the law. CRCL integrates civil rights and civil liberties into all the Department’s activities:

- Promoting respect for civil rights and civil liberties in policy creation and implementation by advising Department leadership and personnel, and state and local partners;
- Communicating with individuals and communities whose civil rights and civil liberties may be affected by Department activities, informing them about policies and avenues of redress, and promoting appropriate attention within the Department to their experiences and concerns;
- Investigating and resolving civil rights and civil liberties complaints filed by the public regarding Department policies or activities, or actions taken by Department personnel; and,
- Leading the Department’s equal employment opportunity programs and promoting workforce diversity and merit system principles.

CRCL authorities. Under 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1, CRCL is charged with investigating and assessing complaints against DHS employees and officials of abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion. The procedures for our investigations and the recommendations they may generate are outlined in DHS Management Directive 3500.

Access to information. More particularly, 42 U.S.C. § 2000ee-1(d) grants CRCL access to the “information, material, and resources necessary to fulfill the functions” of the office, including the complaint investigation function. Management Directive 3500 further authorizes CRCL to:

⁷ If CRCL identifies an individual in custody who appears to be at heightened risk of harm during the investigation, we will follow up separately with ICE, as appropriate.

- “Notify[] the relevant DHS component(s) involved of the matter and its acceptance by CRCL, and whether the matter will be handled by CRCL or by the component organization;”
- “Interview[] persons and obtain[] other information deemed by CRCL to be relevant and require[e] cooperation by all agency employees;” and
- “Access[] documents and files that may have information deemed by CRCL to be relevant.”

Reprisals forbidden. In addition, 42 U.S.C. § 2000ee-1(e) forbids any Federal employee to subject a complainant or witness to any “action constituting a reprisal, or threat of reprisal, for making a complaint or for disclosing information to” CRCL in the course of this investigation.

This memorandum and its accompanying request for information are issued pursuant to these authorities.

Privilege and required transparency. Our communications with DHS personnel and documents generated during this review, particularly the final report, will be protected to the maximum extent possible by attorney-client and deliberative process privileges. Under 6 U.S.C. § 345(b), however, we submit an annual report to Congress—also posted on CRCL’s website—that is required to detail “any allegations of [civil rights/civil liberties] abuses . . . and any actions taken by the Department in response to such allegations.”

We look forward to working with your staff on this matter and will report back to you our findings and recommendations.

SCOPE OF REVIEW

The purpose of our review is to utilize the disparate impact methodology to assess whether differences exists in healthcare treatment and outcomes based on gender in immigration detention. If our findings suggest that the Constitution, a Federal statute, or a Departmental policy has been violated; and what steps, if any, should be taken by DHS to address the impacts, both individually (if the matter is ongoing) and as a matter of policy.

This review also will examine mental health care generally for women in ICE detention in the context of civil rights and civil liberties protections.

QUESTIONS PRESENTED

(b) (5) [Redacted]

(b) (5) [Redacted]

It is possible that our investigation will reveal other matters of concern; if this occurs, we will inform you.

INITIATING THE INVESTIGATION

CRCL will request additional information in the subsequent request for information (RFI) and/or request interviews as the investigation proceeds. Additionally, during the course of this review, CRCL may identify additional ICE detention facilities to conduct onsite inspections.

At this time, we request that ICE schedule initial discussions with (b) (6) and (b) (6) (b) (6) as soon as possible related to this investigation and the plans to review this matter. We look forward to working together. If you have any questions, please do not hesitate to contact Ms. (b) (6) at (b) (6) or Ms. (b) (6) at (b) (6) (b) (6).

Enclosure

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