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California's protection and advocacy system

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Timothy Aitken
Immigration and Customs Enforcement
Field Office Director for Northern California
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Re: Treatment of ICE detainees at private psychiatric hospitals

Dear Messrs. Baker, Phillips and Aitken:

Disability Rights California (DRC) is a statewide non-profit organization that works to advance the rights of Californians with Disabilities and is specifically authorized by federal statute to take appropriate legal action to protect the rights of individuals with mental illness who are receiving care or treatment in the state. See 42 U.S.C. § 10801 et seq. DRC has begun investigating the treatment of Immigration and Customs Enforcement (ICE)

detainees with mental disabilities who are transferred to private psychiatric hospitals for acute psychiatric care.

FACTS

Our investigation of the conditions of detention at one of these contracted hospitals, Alvarado Parkway Institute (API) in La Mesa, has revealed the following facts:

- All ICE detainees are assigned two armed guards per person;
- All ICE detainees are kept with one ankle shackled to the bed, 24 hours per day, during the entire course of their stay at API, except to use the toilet or shower;
- All ICE detainees are kept in virtual isolation (except for 20 to 50 minutes of individual therapy each day) and are denied all opportunities for socialization, group therapy, phone calls, visitors (except for attorneys or patients' rights advocates), and watching television;
- Even after transfer to API is complete, family and friends are not informed of the ICE detainees' whereabouts nor are detainees allowed to contact them. ICE often fails to notify legal counsel of record as well of such transfers. Moreover, if family or friends of detainees inquire, they are told that the detainee has been transferred and refused any further information; and
- The only opportunity for exercise provided ICE detainees at API is "at bedside" with shackles on.

Ironically, API follows all the procedural protections set forth in the Lanterman-Petris-Short Act (LPS) for detaining mental health clients for evaluation and treatment, see Welf. & Instn. Code §§ 5150, 5250, *except for an automatic denial to ICE detainees of all rights guaranteed by LPS.*

Moreover, we are informed that these above-described conditions are typical of that experienced by ICE detainees with mental disabilities at other ICE-contracted psychiatric hospitals throughout the state.

As a preliminary matter, we must emphasize that, from a legal and due process standpoint, ICE detainees are not prisoners in punitive criminal custody, despite ICE's treatment of them as such and holding them in highly secure detention centers (like the Otay Detention Facility) that are similar to prisons. Rather, they are civil detainees being detained prior to

adjudication by an immigration court for alleged *civil* violations of immigration laws. Moreover, many detainees have no criminal history whatever, and those that do have often been found guilty of only minor non-violent felonies and have already served their time. Thus, any reliance on laws relevant to prisoners and the criminal justice system is misplaced for these ICE civil detainees.

DRC sought in writing to obtain from John Garzon, Assistant Field Director at Otay Detention Facility, the legal authority upon which ICE relies to justify the onerous conditions of ICE detainees at API. Mr. Garzon responded to our inquiry by referring to the Use of Force and Restraints Standard found in ICE's Performance Based Detention Standards and provided us with no additional authority. He acknowledged that while detainees were in off-site hospitals "additional security procedures are provided in order to protect the detainee and to protect, as necessary, other patients, treating staff and facility property." Thus, Mr. Garzon explained, "these outside treatment facilities do not offer the same protections as are available in a detention facility." At the same time, he implied that ICE made an *individual* assessment of risk to detainee or others, flight risk and other factors. This latter claim is inconsistent with the information we have received from API management that 24 hour shackling of detainees and deprivation of patients' rights are uniformly applied as a matter of course.

ICE also emphasized in our meetings that security concerns drove these policies, i.e., that the locked psychiatric facility at API was less secure than the Otay Detention facility, for example; that ICE was concerned about the possibility of escape from API (apparently, despite the presence of two armed guards per detainee); that a television could be used as a weapon; and that API had no provisions for monitoring mail or telephone calls, normally done at the Otay facility. In addition, API management informed us that the rules had grown stricter (such as the prohibition against watching television) in the aftermath of the 9/11 terrorist attacks. Notably, Mr. Garzon was unable to point to *any* of the 700 detainees currently held at Otay that were being charged with terrorism or a terrorism-related crime and we are unaware of any relationship between national security concerns and the issues addressed herein.

Legal violations

Based on these facts, the detention conditions of these ICE detainees, including the wholesale denial of rights, is excessive, unjustifiable, and

punitive, and is in violation of (a) ICE's own detention standards; (b) patients' rights as provided under the LPS Act; (c) the due process clause of the U.S. Constitution; and (d) Section 504 of the Rehabilitation Act.

a. ICE's detention standards

The treatment of ICE detainees at private psychiatric hospitals violates even ICE's own detention standards. ICE's new performance-based detention standards released in 2008 allow restraints to be used "only as a precaution against escape during transfer; for medical reasons...or to prevent self-injury, injury to others and property damage." ICE/DRO Detention Standards (2008) "Use of Force & Restraints" V. (B) (1). Restraints may be applied "for the least amount of time necessary to achieve the desired behavioral objective." *Id.* Hard restraints, including leg irons, are to be used only after soft restraints prove ineffective with a particular detainee. *Id.* at V. (B) (12).

Even those detainees who are segregated into Special Management Units for administrative or disciplinary reasons retain their right to recreation (one hour per day), to write and receive mail, their access to telephone, and opportunities for general visitation. ICE Detention Standards (2008) "Special Management Units" II (2), (13), (14). Such visitation "may only be disallowed when a detainee has been charged with or has been found to have committed a prohibited act related to visiting privileges or has otherwise acted in a way that would reasonably indicate that he or she would be a threat to the orderliness or security of the visiting room." *Id.* at V (B) (13). An instance of recreational privileges can only be curtailed "when necessary to curtail an immediate situation for reason of safety and security..." *Id.* at V (B) (19).

The section on transfer of detainees provides that within 24 hours of arrival to the final destination, all detainees should be given the opportunity to make a telephone call. ICE/DRO Detention Standard "Transfer of Detainees" (2008) V (E) (1). Should the detainee be indigent, the call shall be made at government expense. *Id.*

The medical standard states that restraints for medical or mental health purposes must be done under the authority of the facility's clinical medical authority. ICE/DRO Detention Standard (2008) "Medical Care" II (22). The clinical medical authority is only authorized to place a detainee in medical isolation if the detainee "is at high risk for violent behavior because of a

mental health condition.” *Id.* at V (K) (5). However, this decision must be reassessed on a daily basis. *Id.*

Restraints for medical or mental health reasons may only be authorized after reaching the conclusion that less restrictive means are not appropriate. In an apparent reference to the LPS Act and similar state civil commitment laws, the standard specifically provides that prior to placement in a non-detention facility, a detainee shall be afforded with due process in compliance with applicable laws. *Id.* at V (K) (6).

Similarly, the earlier INS Detention Standards (2000) provide for access to telephone (though non-legal calls may be monitored); and mail (though subject to inspection for contraband). INS Detention Standard (2000) “Telephone Access III (A) & (K); “Correspondence & Other Mail” I (E) & (F). Transferred detainees have a right to a single domestic telephone call upon arrival at their final destination. *Id.* “Detainee Transfer” III (G).

Again, our investigation of conditions at API and at similar ICE-contracted psychiatric hospitals in California reveals that these standards are routinely violated. Remarkably, there is nothing to be found in *either* the 2008 or 2000 detention standards allowing this blanket denial of rights of ICE detainees that is occurring at API and other psychiatric hospitals throughout the state.

b. Rights guaranteed under the LPS Act

California law guarantees a number of rights to all persons involuntarily detained for psychiatric treatment. Welf. & Instn. Code § 5325 et seq. These rights include the right to see visitors each day, the right to reasonable access to a telephone to make and receive calls, and to send and receive unopened correspondence. *Id.* at § 5325(c)-(e). These rights may only be denied for good cause where the professional person in charge of the facility has good reason to believe that the exercise of the right would be either injurious to the patient, infringe on the rights of others, or cause the facility to suffer serious damage. *Id.* at § 5326.

In addition, there must be no less restrictive way of protecting these interests. 9 Cal. Admin. Code tit 9, §865.2(a)(4). The reason used to justify the denial of right must be related to the specific right denied. *Id.* at

§ 865.2(b). Moreover, a right may not be denied “as a punitive measure or as a privilege to be earned.” *Id.*

Moreover, the LPS Act provides certain rights to mental health patients that may not be denied, even for good cause. Welf. & Instn. Code § 5325.1. These rights include the right to treatment that is least restrictive of the personal liberty of the individual; a right to dignity, privacy and humane care; and a right to be free from unnecessary or excessive physical restraint or isolation, abuse, or neglect; a right to social interaction; and a right to physical exercise and recreational opportunities. *Id.* at §5325.1(a)-(c), (g), (h).

These patients’ rights are applicable to ICE detainees at API and at other contracted private psychiatric hospitals, as they are to all mental health patients in California. The immigration status of the patient is *irrelevant*.

c. Due Process clause of U.S. Constitution

ICE detainees, like other persons civilly detained, have constitutionally protected liberty interests under the due process clause of the Fifth and Fourteenth Amendments. These interests include the right to minimally adequate care and treatment and to be free from unreasonable bodily restraints. *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982); *Jones v. Blanas* 393 F. 3d 918, 932 (9th Cir. 2004).

Indeed, under the due process clause, persons civilly detained (including those detained for mental health treatment under the LPS Act) as well as criminal pretrial detainees are entitled to “more considerate treatment” as compared to convicted criminals whose confinement is for purposes of punishment. *Jones*, 393 F. 3d at 932; see also *Youngberg*, 457 U.S. at 321-22. In *Jones*, a jail detainee under the Sexually Violent Predator’s Act was denied exercise, phone calls, and visits, conditions that were substantially *more* restrictive than those convicted and serving out their sentences. *Jones*, 393 F. 3d at 924. The Court found a presumption of punitiveness in these conditions in violation of the detainee’s due process rights, because the manner of detention appeared “excessive in relation to the non-punitive purpose.” *Jones*, 393 F. 3d at 932.

Likewise, the security interests of ICE, including the need to ensure the presence of detainees at immigration hearings, does not justify the extreme and harsh measures to which detainees with mental health disabilities

treated at private psychiatric hospitals are being subjected. Because the manner of detention is far more restrictive than for those convicted of crimes, or even than the conditions of ICE detainees at the Otay Detention facility itself, it is excessive in relation to its purpose and cannot survive constitutional scrutiny.

Finally, we note as well our concern with the lack of transparency regarding what procedures ICE uses to determine that psychiatric hospitalization is appropriate in a particular ICE detainee's case. Under Supreme Court case law, federal prisoners and detainees have the right to a fair hearing before involuntary psychiatric hospitalization. *Vitek. v. Jones*, 445 U.S. 480 (1980). We are concerned that ICE is failing to provide adequate due process in the involuntary transfer of detainees to API and other similar facilities in California.

d. Section 504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act prohibits discrimination against otherwise qualified individuals with disabilities in any program receiving federal funds or conducted by an Executive agency. Section 504 applies to the Department of Homeland Security and its subdivisions, including ICE, whether acting directly or through contractual arrangements. See 6 C.F.R. §15.30(b)(1)(ii).

The Department of Homeland Security is specifically prohibited from utilizing methods of administration that would have the *purpose or effect* of discriminating against persons with disabilities. 6 C.F.R. § 15.30(b)(4)(i). The Department is mandated to administer the program in the most integrated setting appropriate to the needs of individuals with disabilities. *Id.* at § 15.30(d).

Unnecessary segregation has been held to be a form of discrimination under section 504 and the Americans with Disabilities Act (ADA). See *Helen L. Didario*, 46 F. 3d 325, 333 (3d Cir. 1995); *Olmstead v. LC ex rel Zimring* 527, US 581, 600 (1999); see also *Howe v. Hull*, 873 F. Supp. 72, 78 (ND Ohio, 1994) (“discrimination...can take the form of segregation unnecessary for the provision of effective medical treatment...or provision of unequal medical benefits based on disability.”).

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ICE utilizes unnecessary segregation and restraints on its detainees with disabilities being treated at psychiatric hospitals, thereby denying them their right to treatment in the most integrated setting possible. These methods of administration are discriminatory against persons with disabilities in ICE custody in violation of section 504 of the Rehabilitation Act.

Conclusion

Based on the above, Disability Rights California requests that ICE take all necessary action to modify its policies in order to quickly bring the detention conditions of detainees with disabilities being treated at psychiatric hospitals into full compliance with the requirements of LPS, section 504, and the U.S. Constitution.

Please contact me within ten (10) days of the date of this letter to let me know whether ICE is agreeable to this request or whether, alternatively, we will be forced to consider available legal remedies.

Yours very truly,

Ann E. Menasche
Attorney
DISABILITY RIGHTS CALIFORNIA

Cc: Sean Riordan, ACLU of San Diego and Imperial Counties
Greg Pleasants, Mental Health Advocacy Services, Inc.