



National Immigrant Justice Center

April 13, 2011

Officer Margo Schlanger
Department of Homeland Security
Office for Civil Rights and Civil Liberties
Review and Compliance
245 Murray Lane, SW
Building 410, Mail Stop #0190
Washington, D.C. 20528

**Redacted Copy for Public
Distribution**

**Complainants' full names and
personal information have been
removed from this document in
order to protect their privacy.**

E-mail: crcl@dhs.gov

**Re: Submission of Civil Rights Complaints regarding Mistreatment and Abuse of
Sexual Minorities in DHS Custody**

Dear Ms. Schlanger:

Heartland Alliance's National Immigrant Justice Center (NIJC) submits a multi-individual complaint for 13 clients detailing civil and human rights violations committed against sexual minorities in the custody of the Department of Homeland Security (DHS). Due to the systemic and severe abuses against lesbian, gay, bisexual and transgender (LGBT) individuals in immigration detention, we urge the Office of Civil Rights and Civil Liberties (CRCL), pursuant to its authority under 6 U.S.C. § 345, to investigate these complaints, to develop and implement policies to address the violations, and to provide oversight on the implementation of the new policies.

Although we recommend several incremental improvements, DHS cannot, consistent with its constitutional obligations, continue to detain vulnerable individuals whom they are unable to protect. This letter summarizes the enclosed complaints and provides recommendations to address the civil rights violations.

NIJC, based in Chicago, provides direct legal services to and advocates for immigrants, refugees, and asylum seekers through policy reform, impact litigation, and public education. NIJC's National Asylum Partnership on Sexual Minorities protects the rights of immigrant sexual minorities by representing individual clients, providing training and support to attorneys who serve LGBT and HIV-positive immigrants, and seeking legal reform.

Complainants are 13 gay and transgender immigrants detained by DHS's Immigration and Customs Enforcement (ICE) at various facilities nationwide, including Service

Processing Centers (SPCs), Contract Detention Facilities (CDFs), and facilities detaining immigrants pursuant to intergovernmental service agreements (IGSAs).

NIJC represents the following clients:

1. SD
2. A
3. C
4. JL
5. D
6. B
7. M
8. X
9. E
10. JZ
11. S
12. L
13. JA

In addition to these 13 clients, NIJC continues to represent [R], who previously filed a complaint with CRCL on July 22, 2010. ICE's Office of Professional Responsibility (OPR) opened an investigation pursuant to referral from CRCL of [R]'s complaint. To date, nine months later, no findings have been issued. Similarly, NIJC obtained permission to reference the complaint of "T" in the Appendix to this complaint, who also recently filed a complaint with CRCL based on her sexual assault and lack of mental health care.¹ We request that CRCL revisit the complaints of [R] and T in its review of the systemic issues raised by today's filings.

Reports of abuse from NIJC's 13 clients, as well as the mistreatment suffered by [R] and T, occurred in detention facilities and county jails nationwide – in Arizona, California, Florida, Illinois, Louisiana, New Mexico, Pennsylvania, Texas and Wisconsin – highlighting the systemic nature of this problem. These individuals allege harsh mistreatment and abuse in DHS custody, including:

- Sexual assault
- Denial of adequate medical care
- Long-term solitary confinement
- Discrimination and abuse
- Ineffective complaints and appeals process

As is clear from the enclosed statements, the complainants' treatment was not reasonably related to any legitimate safety or security objective. Under the Due Process clause of the

¹ The individual is referenced as "T" to protect privacy and confidentiality.

Fifth Amendment, inflicting arbitrary conditions of detention upon civil detainees is considered punitive and is not constitutionally permissible.²

Sexual Assault

Some of the most egregious complaints involve sexual assault and abuse. As numerous reports have demonstrated, sexual abuse is widespread in immigration detention.³ As in previous complaints and reports, DHS officers and contracted staff were unable or unwilling to protect or provide counseling services to victims of sexual abuse. For example:

- [JL] was sexually assaulted by two other detainees. Despite repeated requests for a transfer to another facility because he feared for his safety [JL] was not transferred until three months after the incident, when ICE Headquarters intervened. In the meantime, the only “protection” that the Otero County Detention Center offered was placement in the “hole.” (*Otero County Detention Center, New Mexico*)
- T was sexually assaulted by a guard while in segregation. Subsequent to this assault, she was only provided with cursory mental health counseling despite experiencing serious trauma. Following this incident she was granted Withholding of Removal but remained in ICE custody for a further three months. During this time she suffered another sexual assault at the same facility. (*Eloy Detention Center, Arizona*)

Denial of Adequate Medical Care

HIV-Positive Individuals

Constitutionally mandated due process protections include the right to privacy and the right to adequate medical care. HIV-positive individuals in DHS custody experience the denial of these rights. The following two cases document these issues:

- [SD] describes how he was transported to a doctor’s appointment for an HIV checkup while his feet, waist, and hands were shackled. A doctor and a nurse repeatedly asked the facility officer to remove the shackles so that they could draw blood. The officer refused. [SD] explained:

² *Bell v. Wolfish*, 441 U.S. 520 (1979); *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004); *Seling v. Young*, 531 U.S. 250 (2001).

³ See National Prison Rape Elimination Commission, “Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails: Supplemental Standards for Facilities with Immigration Detainees” (NPREC Report), June 2009, <http://www.ncjrs.gov/pdffiles1/226680.pdf>, p. 174-188; Human Rights Watch, *Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention*, August 25, 2010, <http://www.hrw.org/en/reports/2010/08/25/detained-and-risk-0>; Women's Refugee Commission, *Halfway Home: Unaccompanied Children in Immigration Custody*, February 2009, <http://bit.ly/dZbgPo>.

“Even though the nurses and doctors asked them, that they could not withdraw blood like that, the officers from CCA [Corrections Corporation of America] didn’t care, and they had to take blood from my hand, and even though I cried from pain, they didn’t care.”

Having learned of [SD]’s HIV status, facility staff mocked [SD]. (*Houston Processing Center, Texas*)

- [A] encountered a number of serious problems accessing her HIV medication and receiving the results of medical tests. On one occasion, she was advised by medical staff that they had no anti-viral medication available because the medical log was for 30 days only, and once the 30-day period had lapsed, detainees were required to re-request their medication. This resulted in [A] missing her HIV treatment for a week. (*Santa Ana City Jail, California*)

Transgender Individuals

Transgender individuals – those who do not identify with the gender assigned to them at birth – often meet the criteria for a diagnosis of Gender Identity Disorder (GID). The American Psychiatric Association recognizes GID and has set forth GID diagnostic criteria.⁴ The standard of care for treating GID includes, *inter alia*, the provision of hormone therapy to individuals who wish to conform their physical appearance to their gender identification.⁵

Courts have uniformly recognized that GID is a serious medical condition, and that failure to treat gender dysphoric individuals in prisons is a violation of the Eighth Amendment prohibition against cruel and unusual punishment.⁶

As documented in the enclosed statements, ICE officials deny hormone treatment to detained transgender individuals. Santa Ana City Jail, California, for example, maintains a blanket policy of denying hormone treatment to detainees. Individuals detained at this facility report distress and depression due to the withdrawal of hormone treatment. As the following complaint indicates:

⁴ See *Diagnostic and Statistical Manual of Mental Health Disorders*, 4th Edition, Text Revised (DSM-IV-TR).

⁵ See World Professional Association for Transgender Health, *Standards of Care for Gender Identity Disorders*, 6th Edition, 2001, http://www.wpath.org/publications_standards.cfm

⁶ *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987). Other circuits are in accord. *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000); *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003); *Phillips v. Mich. Dept. of Corr.*, 932 F.2d 969 (6th Cir. 1991), affg. 731 F.Supp. 792 (W.D. Mich. 1990); *White v. Farrier*, 849 F.2d 322, 325-327 (8th Cir. 1988); *Allard v. Gomez*, 9 Fed. Appx. 793, 794 (9th Cir. 2001); *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995). No circuit has held otherwise. See also *O'Donnabhain v. C.I.R.*, 134 T.C. No. 4 (U.S. Tax Ct. 2010) (recognizing hormone therapy and sex reassignment surgery as accepted GID treatments for which medical expense deduction is allowable).

- [M] continues to be denied hormone therapy, despite her use of hormones for ten years prior to immigration detention, and her physical and psychological reliance on them. [M], now detained for over five months, told NIJC staff, “I can’t even look at myself in the mirror anymore,” due to returning facial and body hair and other distressing changes. [M], an asylum seeker who has suffered grave past abuse in Mexico, also received no treatment for her trauma-related depression. She attempted suicide in February 2011 – the facility put her in solitary confinement as punishment. (*Santa Ana City Jail, California*)

Long-Term Solitary Confinement

ICE detained a number of the complainants in restrictive segregation – ranging from solitary confinement to “lock down” in their cells for 22 hours per day. Complainants endured this treatment for extended periods – up to months at a time – without formal determinations of the necessity of segregation and without an appeals process. At least one court has found that a blanket policy of placing transgender immigration detainees in restrictive segregation, absent articulation of a specific need to do so, violates due process rights.⁷ Other practices and policies detailed in the complaints, such as restricting access to recreation and reading material, are blatantly punitive in nature and thus violate constitutional protections. As the following complaints highlight:

- [D] was held in segregation for four months, justifying their decision on the basis that [D] presented “effeminately.” Facility staff refused to provide [D] a Bible and permitted him only one hour of recreation – in a cold nine-by-thirteen-foot cell – per day. (*Houston Processing Center, Texas*)
- [R]’s freedom of movement was restricted and she was denied privileges such as reading material available to the general population. (*McHenry County Jail, Illinois*)
- Sexual minorities were assigned to 22-hour lock down (“protective custody”) without individualized analysis of the need for this restriction, and without affording detainees the opportunity to rebut this classification. Individuals in “protective custody” had far less freedom of movement and access to recreation than individuals in the general population. Facility staff often restricted recreation time for sexual minorities to less than one hour a day. (*Theo Lacy Facility, California*)

ICE’s recent issuance of guidance (“Housing Directive”) on restrictive housing assignments⁸ does not sufficiently address detention facilities’ inability to provide safe, unsegregated and unrestrictive housing for a vulnerable detainee. The Housing Directive proposes transferring the individual to another facility; that does not address the issue. Rather than shuffling detainees between inadequate detention centers, as happened for

⁷ *Medina-Tejada v. Sacramento County*, 2006 WL 463158 (E.D.Cal. 2006).

⁸ Enforcement & Removal Operations, “Field Guidance on Classification,” March 7, 2011.

several of the individuals submitting complaints, ICE should acknowledge its inability to provide legally adequate detention conditions and prioritize alternatives to detention.

Discrimination and Abuse

Sexual minority individuals experience continuous harassment, humiliation, and discrimination from facility staff and ICE personnel while detained. For example:

- [A] was repeatedly called a “faggot” by guards, who also made jokes about her dying of AIDS. They singled her out for public searches in which they forced her to remove her outer clothing and mocked her exposed breasts. (*Theo Lacy Facility, California*)
- [R] suffered severe psychological abuse by, and with the acquiescence of, facility staff. After months of strain, [R] had a mental breakdown at and was transferred to the hospital ward of another detention facility. (*Kenosha County Detention Center and Kenosha County Jail, Wisconsin, and McHenry County Jail*)
- After [JL] suffered a sexual assault motivated in part by his perceived effeminacy, a guard at the same facility told him publicly, “Walk like a man, not like a gay man.” (*Otero County Detention Center, New Mexico*)

Other complaints previously filed by detainees nationwide further demonstrate the scope of this endemic and severe mistreatment.⁹ Like policies that result in the segregation of sexual minority detainees, the pattern and practice of animus-motivated abuse by facility staff constitutes impermissibly punitive conditions of confinement. Unless and until ICE is able to ensure that the basic dignity of sexual minorities in immigration detention will be respected, these civil rights violations will persist.

Recommendations

NIJC urges CRCL to work with DHS, ICE and the Department of Justice (DOJ) to implement the following recommendations set forth in order to ensure the civil and human rights of individuals held in the immigration detention system.

1. ICE cannot detain sexual minorities until it ensures compliance with constitutional and human rights protections. These complaints establish that ICE is not capable of ensuring non-punitive detention conditions for sexual minorities. Accordingly, ICE should:
 - Consider an individual’s likely vulnerability to abuse in detention and place individuals whom it cannot protect into alternatives to detention programs consistent with the implementation of an individualized assessment.

⁹ See Appendix.

- For those facially subject to mandatory detention, consider release in compliance with the doctrine of constitutional avoidance. Congress cannot have intended that ICE detain immigrants in punitive conditions.¹⁰
- 2. ICE must issue guidance requiring compliance with treatment plans for chronic medical conditions, as determined by independent experts. ICE must issue guidelines specific to particular recurring chronic conditions, such as HIV/AIDS and GID, clarifying facility responsibilities once these conditions have been diagnosed.
- 3. ICE must ensure confidentiality regarding medical conditions and exercise discretion regarding complaints.
- 4. ICE should revisit the Housing Directive, or issue new guidance, clarifying that transgender detainees can and should be detained according to their self-identified gender.
- 5. ICE must immediately conduct a review of all SPC, CDF, and IGSA facilities to determine whether they have non-discrimination policies that encompass sexual orientation and gender identity, and whether facility staff receive adequate training relating to needs of sexual minorities. ICE should engage non-governmental organizations to create training and facility guidelines that respond to the particular concerns of sexual minority immigrants, many of whom are traumatized and vulnerable asylum seekers. Compliance with the training and guidelines should be required in any forthcoming detention standards and any contractual agreements between ICE and detention facilities.
- 6. DHS and DOJ must ensure that detained immigrants are adequately protected against sexual assault by adopting the Prison Rape Elimination Act (PREA) rules.¹¹ For example, all facilities must have protocols for responding to abuse reported by detainees through third-party channels, and ensure proper follow up on such reports. Mental health services and monitoring must be provided immediately and continuously following reported abuse.
- 7. DHS must ensure that an effective, accessible and transparent complaints process is available to detained individuals to report instances of abuse. Investigations into complaints of mistreatment must be timely and comprehensive and detainees must be informed of the outcome of these investigations. Further, findings must be

¹⁰ *Casas-Castrillon v. Dept. of Homeland Security*, 535 F.3d 942 (9th. Cir. 2008) (applying canon of constitutional avoidance to find that INA § 236(c) contains a “reasonableness” limitation to the facial mandatory detention requirement).

¹¹ DOJ’s proposed PREA-implementing rule currently exempts immigration detention facilities. See NIJC public comments regarding National Standards to Prevent, Detect, and Respond to Prison Rape, Docket No. OAG-131, AG Order No. 3244-2011, submitted April 4, 2011, to www.regulations.gov, tracking number 80c1be42.

promptly addressed and recommendations implemented, including policy changes at facilities, disciplinary action, contract termination and staff dismissal, where appropriate.

Thank you for your attention to these complaints and to the civil and human rights violations that exist in the immigration detention system. We look forward to your response and the implementation of meaningful reform.

Should you have any questions, please do not hesitate to contact Mary Meg McCarthy at mmccarthy@heartlandalliance.org or (312) 660-1351 or Eric Berndt at eberndt@heartlandalliance.org or (312) 660-1364.

Sincerely,

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Enclosures

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