June 18, 2009

The Honorable Richard L. Skinner
Office of the Inspector General
U.S. Department of Homeland Security
1120 Vermont Avenue, NW
Washington, D.C. 20528

Re: OIG audit request regarding ICE detainees with mental health concerns

Dear Inspector General Skinner:

We are writing to request that the Office of Inspector General (OIG) conduct an audit into whether the Department of Homeland Security, Immigration and Customs Enforcement (ICE) adequately meets minimum standards of care and protections for immigration detainees with mental health concerns. This request follows a related meeting with your office on June 10, 2009.

As explained by immigration advocates, disability rights advocates, and mental health professionals on June 10, 2009, ICE's current policies and practices do not provide adequate safeguards to due process, basic health, or legal standards for non-citizens suffering from mental disabilities or other mental health conditions. Firsthand accounts from legal service providers who serve detained immigrants, media stories, lawsuits, published reports from non-governmental organizations, and Congressional testimony strongly indicate that existing standards of care and protections for detainees with mental health concerns are both inadequate and are regularly disregarded.[1] These shortcomings are critical as detainees facing mental health concerns are extremely vulnerable and often unable to advocate for themselves. Indeed, it is an established legal norm of fundamental fairness that people with mental disabilities require additional protections to safeguard their basic rights, but existing DHS standards of care and protections fail to ensure fundamental fairness for immigration detainees with mental disabilities. According to an investigative report by the Washington Post that was nominated for a Pulitzer Prize,

> [P]eople with mental illness are relegated to the darkest and most neglected corners of the system, according to interviews and thousands of internal documents. . . . The records reveal failures of many kinds. Suicidal detainees can go undetected or unmonitored. Psychological problems are mistaken for physical maladies or a lack of coping skills. In some cases, detainees' conditions severely deteriorate behind bars. Some get help only when cellmates force guards and medical staff to pay attention. And some are labeled psychotic when they are not; all they need are interpreters so they can explain themselves.[2]

[1] See background materials provided during June 10, 2009 meeting and attached.
[2] "Careless Detention, Suicides Point to Gaps in Treatment: Errors in Psychiatric Diagnoses and Drugs Plague Strained Immigration System," Dana Priest and Amy Goldstein, May 13, 2008, available at http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d3p1.html

We believe a focused audit on the identification by ICE of mental health concerns among the detained population, detainee access to treatment and mental health care, compliance with the detention standards related to mental health, and due process protections for detainees with mental health concerns during removal proceedings is critical to improve compliance and to ensure that immigrant detainees suffering from poor mental health are humanely treated and provided with legal safeguards, fundamental fairness, and standard of care. This audit should also encompass any related guidance that has been issued or training that has been conducted by ICE.

First, initial decisions by ICE to detain mentally ill detainees vary immensely and are seemingly arbitrary. Insufficient screening of detainees for mental health concerns leads to inappropriate detention, prolonged detention, and mental deterioration of detainees with psychiatric illnesses and other mental health conditions. Although reliable and cost-effective alternatives to detention exist, they are too rarely utilized for vulnerable populations, including those with mental health concerns, who suffer in detention. Indeed, for many long-term permanent residents with mental disabilities, release to state-based mental health programs in combination with appropriate conditions under an Order of Supervision will often be the most cost-effective option for DHS and the best way to provide mental health care to the non-citizen. In contrast, detention facilities used by ICE lack the adequate personnel and accommodations to properly care for detainees with mental health concerns. As a result, detainees are often provided with erratic, inappropriate or insufficient medicine, diagnoses, and treatment. According to numerous reports, the already fragile psychological health of immigrant detainees worsens with continued detention and has lingering detrimental effects.[3]

Second, more information is sorely needed regarding the true prevalence of mental health concerns among the immigrant detainee population. Gathering such data is standard practice for law enforcement agencies.[4] While mental health screenings of detainees are one tool for collecting prevalence data, concerns exist about these screenings not being conducted in a language the detainees understand, not identifying detainees who have existing diagnoses of mental illness, and not identifying detainees whose mental illness may become evident subsequent to booking. Additionally, the prevalence of mental health concerns is difficult to gauge in part because detainees may fear being placed in segregation should they report mental health symptoms.[5] In 2008, Division of Immigration Health Services officials reportedly estimated that the percentage of mentally ill individuals among

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[3] "From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers," Physicians for Human Rights and The Bellevue/NYU Program for Survivors of Torture, June 2003, at 56, available at http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf; "Mental health implications of detaining asylum seekers: systematic review," The British Journal of Psychiatry, 2009, Katy Robjant, Rita Hassan and Cornelius Katona, 194: 306–312, (Finding high levels of mental health problems among detained asylum seekers and refugees and a suggested independent adverse effect of detention on mental health).

[4] Mental Health Problems of Prison and Jail Inmates, U.S. Department of Justice, Bureau of Justice Statistics, 2006, available at http://www.ojp.usdoj.gov/bjs/abstract/mhppji.htm

[5] Testimony of Homer D. Venters, M.D., Attending Physician, Bellevue/NYU Program for Survivors of Torture, Public Health Fellow, New York University, House Judiciary Committee's Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Hearing on Problems with Immigration Detainee Medical Care, June 4, 2008, available at http://judiciary.house.gov/hearings/pdf/Venters080604.pdf

the detained immigrant population is 15% and rising.[6] A 2003 study by Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture found "extremely high symptom levels of anxiety, depression and post-traumatic stress disorder (PTSD) among detained asylum seekers."[7] In addition to survivors of trauma and torture, the detained immigrant population also includes many long-term permanent residents and other non-citizens with long-term ties to the United States who have chronic psychiatric illnesses, which is a population with materially different needs and resources than asylum seekers.

Next, existing legal protections are wholly inadequate to ensure a fair day in immigration court for ICE detainees with mental health issues. For example, ICE Detention and Removal Officers and attorneys in the Office of Chief Counsel routinely elicit legal admissions or proceed with removal charges against detainees who demonstrate profound mental disabilities. As a matter of fundamental fairness, detainees with questionable mental competency should not be asked to sign stipulated orders of removal or face charges of removability in immigration court while unrepresented. However, current regulations and guidance provides no mechanism to request psychological evaluations, conduct competency hearings, appoint counsel, or appoint guardians ad litem for detainees in removal proceedings who might be mentally incompetent. These safeguards are basic protections routinely provided to litigants with mental disabilities in other legal contexts. Furthermore, current regulatory language at 8 C.F.R. §1240.4 fails to safeguard the due process rights of incompetent detainees by instructing that an adverse party- ICE, as the custodian of the respondent- appear on behalf of an incompetent respondent who is not otherwise represented. Representation by an agent of the adverse party is patently unfair and inconsistent with due process. Moreover, ICE provides no guidance that we are aware of to ICE attorneys or Detention and Removal Officers regarding pursuing removal of non-citizens with competency concerns.

Given the grave concerns with ICE's care for and prosecution of detainees with mental health concerns, we respectfully request that the OIG thoroughly evaluate and offer related recommendations on the following:

i) ICE's current processes to identify mental health concerns among detainees, track prevalence rates of mental health conditions, and plan for meeting future mental health concerns among detainees. Exploration is also urged of the process and statistics for detainees requesting mental health care, including rates of approval for such requests;

ii) The need for ICE to detain individuals who present, at any point, with mental health issues;

iii) Current guidance and practices in custody determinations involving mentally ill non-citizens apprehended by ICE, including the use of alternatives to detention or hospitalization in cases where individuals demonstrate mental health concerns;

[6] Careless Detention, see footnote 2.
[7] From Persecution to Prison, see footnote 3, Executive Summary pg. 2.

iv) Detainee access to care, treatment, and monitoring for those suffering from psychiatric conditions, including both asylum seekers facing effects of past trauma and torture and individuals facing chronic disorders such as schizophrenia or bipolar disorder;

v) Sufficiency of the detention standards and compliance with the detention standards that govern treatment of detainees facing mental illness, including mental health screening, evaluation, and provision of care, availability of mental health programs within detention facilities, use of force and restraints, involuntary administration of psychotropic medications, transfer to outside mental health facilities, placement in special management units or medical isolation and subsequent monitoring, suicide prevention, and continuity of care protections upon transfer or release;

vi) Current practices governing detainee access to private mental health records and ICE access to and use of detainee private mental health records;

vii) Current use of specialized psychiatric hospitals to house detainees, including processes by which detainees are selected for and transferred to private psychiatric hospitals, processes for ongoing custody review while detainees are held at these hospitals (including safeguards against prolonged detention), processes for release from these hospitals, conditions of detention at these hospitals, and the effect on removal proceedings of a transfer to such a hospital;

viii) Sufficiency of existing regulations, guidance and current processes for protecting the due process rights of detainees with diminished mental competency, including the use of stipulated orders of removal, the initiation and conduct of removal proceedings, the use of guardians ad litem under 8 C.F.R. §1240.4 before the Immigration Court, and the lack of a competency hearing regime and provisions for appointed counsel.

To successfully and thoroughly complete the requested audit, we urge the following be incorporated into any audit that is undertaken:

i) The OIG should visit a range of detention facilities, including Service Processing Centers, facilities operated through Inter-Governmental Service Agreements, and psychiatric hospitals with contracts to treat ICE detainees. We suggest the OIG visit each of the following facilities, as they represent a spectrum of detainee needs and models of care:
  1) Krome Service Processing Center (Miami, FL),
  2) San Diego Correctional Facility (Otay Mesa, CA),
  3) Pinal County Jail, (Florence, AZ),
  4) York County Prison (York, PA),
  5) Willacy County Processing Center (Raymondville, TX),
  6) Columbia Regional Care Center (Columbia, SC), and
  7) Bergen County Jail or Monmouth County Correctional Institution (NJ);

ii) OIG auditors should speak with non-governmental organizations, law school clinics, immigration judges, and individual attorneys familiar with the detainee population at each facility visited. We would be happy to provide contact information for such organizations wherever possible;

iii) Health providers, professional staff, and correctional officers should be surveyed at each facility visited;

iv) Outside experts, such as mental health professionals, are essential to include during field study so that findings can be qualified and quantified. Medical experts offer a necessary perspective on standards of care, alternative practices, and long-term consequences of inadequate care.

If the OIG finds a systemic violation of the detention standards governing treatment of detainees with mental health concerns, we request that the OIG recommend that detention standards be placed into regulations and also require that ICE and jail staff who come into contact with mentally ill immigration detainees complete training on the detention standards. The DHS Office for Civil Rights and Civil Liberties should be consulted in the development and implementation of training materials and protocols. Likewise, if the OIG finds inadequate protections of the rights of detainees with compromised mental health in removal proceedings, we request that the OIG recommend more robust regulations and guidance to ICE's Office of Chief Counsel and Detention and Removal staff to safeguard the legal rights of detainees. We believe such changes to the standards and regulations will eliminate confusion and improve compliance by those who are required to follow them. Alternatively, we request that the OIG issue concrete recommendations to ICE for improving compliance with the existing detention standards and regulations.

Thank you for your consideration. For follow-up please contact Brittney Nystrom at the National Immigration Forum (202) 383-5991.

Sincerely,

The National Immigration Forum,
Shoba Sivaprasad Wadhia, Clinical Professor and Director of the Center for Immigrants' Rights and Penn State Dickinson School of Law (affiliation listed for informational purposes only),
The Capital Area Immigrants' Rights Coalition,
Mental Health Advocacy Services, Inc.,
Florence Immigrant and Refugee Rights Project,
Rights Working Group,
Pennsylvania Immigration Resource Center,
Homer D. Venters, M.D., NYU Medical Center,
Lutheran Immigration and Refugee Service,
The Bellevue/NYU Program for Survivors of Torture
Center for Constitutional Rights

Cc: Dr. Dora Schriro, DHS, Special Advisor on ICE and Detention & Removal
Esther Olavarria, DHS Deputy Assistant Secretary for Policy
Rebekah Tosado, DHS, Office for Civil Rights and Civil Liberties, Senior Advisor to the Officer for Civil Rights and Civil Liberties
Captain Jose Rodriguez, U.S. Public Health Service Division of Immigration Health Services, Director
Susan Cullen, ICE, Director, Office of Policy