

October 9, 2020

Jose Correa, Field Office Director
San Antonio ICE Field Office
1777 NE Loop 410, 15th Floor
San Antonio, TX 78217
Via email to Jose.Correa@ice.dhs.gov

Dear Director Correa:

The undersigned *pro bono* organizations respectfully write to request a virtual meeting to discuss our concerns about ongoing access to counsel issues at the South Texas Detention Center in Pearsall, Texas. All of our organizations provide free or reduced fee legal services to individuals in Pearsall. We realize that the Covid-19 pandemic has caused significant changes implemented for the safety of everyone who enters STDC. However, as the pandemic continues, we have encountered increasing obstacles to representing our clients detained in Pearsall to the point that their right to access to counsel is no longer guaranteed.

Although the population at STDC is lower than at previous points in time, it is increasing with new arrivals, and the demand for our services has not diminished. We continue to receive more requests for representation than our organizations can take on. Moreover, due to the catastrophic economic impact of Covid-19, more of STDC's population is unable to afford to hire private counsel. Many of us cannot in good conscience take on new clients because we fear that we will not be able to discharge our ethical duties¹ to our clients due to extremely limited means of communication.

The PBNDS requires meaningful access to counsel, but in person visits are currently not feasible.

STDC is subject to ICE's 2011 Performance Based National Detention Standards (PBNDS), first issued in 2011 and revised in 2016.² The PBNDS requires "[d]etainees shall have access to courts and counsel." *See* PBNDS 6.3(II)(6). In addition, "[d]etainees shall be able to have confidential contact with attorneys and their authorized representatives in person, on the telephone *and* through correspondence." PBNDS 6.3(II)(7) (emphasize added). Although in person visitation is still allowed, in-person visits are impossible when our clients are restricted due to potential Covid-19 exposure or if we are prevented from accessing the facility due to Covid-19 exposure or symptoms. Many of our clients have been on and off restriction many times since March 2020. There is no way to predict when a client will be available for in-person visits and we cannot afford the time and cost of traveling to Pearsall if we will not be able to meet with our client.

¹ For example, Texas Disciplinary Rules for Professional Conduct 1.03(a) states lawyers "shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Tex. R. Disc. P. 1.03(a). Moreover, the rules regarding confidentiality states: "[f]ree discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the full benefit of the legal system. The ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance." *Id.* at Comment 1 to Rule 1.05.

² *See* ICE Performance Based National Detention Standards (2011, rev. 2016), available at <https://www.ice.gov/detention-standards/2011>.

We can provide examples of instances when it has been impossible to meet with a client for over a month at a time, including for an individual scheduled for trial who needs to be prepared for court. Additionally, because at least 196 detainees have tested positive while detained at STDC³, the highest number of all the detention centers in the San Antonio Field Office, many of our staff are not willing to risk their health and safety by entering the facility. Finally, even if counsel is allowed into the facility and our clients are not restricted, GEO currently allows one attorney visit at a time. Thus, we have attorneys who have waited over 4 hours and had to leave without speaking to a client. Taking into account the travel time, this is almost a whole day of work lost. This is not meaningful access to counsel. Additionally, the unknown visitation possibilities are not something we can plan around when we have deadlines and court hearings.

In order to improve access to in-person visits, we request that for the duration of the one attorney at a time visitation rule, ICE and GEO implement a system for attorneys to sign up in advance for a block of visitation time. Part of that system should include GEO or ICE notifying the attorney at least two hours in advance if the client or clients they plan to visit are medically restricted and unable to have in person visits.

The PBNDS require that calls to legal representatives are free and made in a manner that protects confidentiality.

The standards governing legal calls at STDC require that detainee calls to legal representatives are free, unmonitored, and take place in an area where staff or other detained individuals cannot overhear privileged attorney–client conversations in order to preserve confidentiality. *See* PBNDS 5.6(V)(B); PBNDS 5.6(V)(F)(2). The PBNDS suggests several options, including telephones with sufficiently spaced privacy panels, telephones isolated from areas where conversations may be overheard (e.g., areas where other detained individuals may be waiting to use the telephone), and allowing use of telephones in offices. *See* PBNDS 5.6(V)(F)(2).

Currently, there is no meaningful access to calls that comply with the PBNDS cited above. Although a handful of requests for free confidential calls were granted since the Covid-19 restrictions were implanted, those are the exception, not the norm. Repeated requests for ICE to schedule free, unmonitored calls from a place in the facility where our clients can speak in a setting that ensures confidentiality have been either ignored entirely, or resulted in ICE stating that such arrangements are “not possible.” Because we cannot visit our clients in person as indicated above, our clients and us need these reasonable accommodations when we need to have confidential conversations with clients, especially for the following tasks:

- Drafting I-589 asylum applications and supporting declarations;
- Preparing clients to testify for trial;
- Getting details of sensitive criminal history; and
- Doing initial intakes with individuals applying for legal services with our organizations.

Our clients should not be expected to discuss these matters while standing at a pay phone in a noisy dorm with other individuals nearby who can hear what they are saying. The presence of other people who can hear our clients clearly violates the PBNDS 5.6(V)(F)(2). Thus, even though

³ See <https://www.ice.gov/coronavirus> Detainee Statistics, current as of 10/9/2020.

clients can call some of our organizations for free, those calls from the dorm payphones do not comply with the PBNDS because they do not guarantee privacy. Moreover, many clients, especially those who do not speak English or Spanish, are unable to navigate the phone system in order to use our *pro bono* codes to call us. Our clients cannot be expected to pay out of pocket to call us, nor can we be expected to deposit money to our clients in order for them to call us, as some deportation officers have instructed *pro bono* counsel to do. Our organizations cannot use our limited funding to pay for our clients to call us.

Finally, the free minutes given to our clients in order to make up for their inability to have visits are extremely problematic for legal calls because they are only in 10 or 15-minute increments. Many of us work with clients with whom we have to use interpreters to communicate. In those short calls, it takes at least 3 minutes to get an interpreter on the line, sometimes significantly longer. When the call cuts off, we have to start all over, almost always with an entirely different interpreter, making conversations choppy and very difficult to follow. Again, those calls suffer from the same problem of taking place in an area that does not guarantee confidentiality, contrary to the PBNDS.

Lastly, relying on clients to call us is extremely problematic when we have an unanticipated need to speak to a client about recent developments or issues. Although we can call to the facility and leave messages, all of us have experienced repeated instances when those messages are never delivered to our clients, especially those who do not speak or read English or Spanish, which constitutes a separate violation of the PBNDS. *See* PBNDS 5.6(V)(J). Additionally, when messages are delivered, it usually take hours or sometimes messages are not delivered until the next day. When time-sensitive legal matters cannot be discussed, clients lose important legal rights.

Arranging phone calls or other means of confidential communication such as televideo meetings is consistent with your agency's guidance and is done by other facilities. *See* ICE's ERO's COVID-19 Pandemic Response Requirements (PRR) (Version 4.0, September 4, 2020)⁴, which speaks directly to access to counsel issues, including free, confidential legal phone calls:

“ICE continues to explore opportunities to enhance attorney access while legal visits are being impacted. For facilities at which immigration hearings are conducted or where detainees are otherwise held who have cases pending immigration proceedings, this may include:

- Requiring facilities to establish a process for detainees/attorneys to schedule appointments and facilitate the calls;
- Leveraging technology (e.g., tablets, smartphones, phones, VTC) to facilitate attorney/client communication;

⁴ Available at <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>.

- Working with the various detention contractors and telephone service providers to ensure that all detainees receive some number of free calls per week.”

ICE ERO PRR at 18-19. To our knowledge, the only item on this list implemented at STDC is providing some free minutes to detainees, but this is insufficient because those calls do not comply with the PBNDS regarding confidentiality as noted above.

Moreover, your agency’s public statement on access to legal visits says “Non-contact legal visitation (e.g., Skype or teleconference) should be offered *first* to limit exposure to ICE detainees...”⁵ This is consistent with the CDC guidelines for congregate settings, which recommend facilities “provide alternate means (e.g., phone or video visitation) for incarcerated/detained individuals to engage with legal representatives...”⁶ As noted above, alternate visitation is not only not offered, but when specifically requested, has been denied and no other adequate alternatives have been put in place. In the face of the Covid-19 protocols, visitation via Facetime with iPads was implemented at the Karnes County Family Residential Center. In addition, free confidential phone calls to counsel from the attorney/client visitation rooms have also been available from Karnes. We would like to discuss the feasibility of similar video or teleconference visitation, encouraged by your own agency guidance and the CDC, from STDC.

To comply with the PBNDS, CDC guidance, and ICE’s Pandemic Response Requirements, we are requesting that your office:

- Implement a written policy outlining the procedures by which legal representatives can arrange for free, confidential calls and/or video conferencing with their clients, including notice time, hours, length of calls, how confidentiality will be maintained, and process for prospective clients to request legal consultations;
- Make said procedure publically available, including on the facility’s website;
- Train all relevant GEO and ICE personnel on those procedures; and
- Provide contact information for personnel who can be reached during the hours of attorney visitation for the facility to troubleshoot access to and scheduling such visits, including in cases of an emergency.

These measures are consistent with a recent order issued in *Southern Poverty Law Center v. Department of Homeland Security, et al.*, No. CV 18-760 (CKK), 2020 WL 3265533, at *33–35 (D.D.C. June 17, 2020), which is attached to this letter.

We know Covid-19 presents real challenges for the agency, and that the visitation restrictions are in place for the safety of all involved. Our organizations have also faced challenges, including staff contracting Covid-19, deaths of relatives, and the myriad of challenges presented by remote work. Despite this, we have to comply with our professional obligations to our clients and meet EOIR’s deadlines. We love our jobs and our organizations exist to serve indigent respondents so that all

⁵ See ICE Guidance on COVID-19, Visitation at Detention Facilities, available at <https://www.ice.gov/coronavirus>.

⁶ See Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (July 22, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

immigrants can have access to counsel regardless of their economic situation. We want to provide legal representation to individuals who are actively seeking our services, but we cannot do that without knowing that we will be able to communicate with our clients when necessary to prepare their cases and discharge our ethical and legal duties to provide diligent representation and keep our clients informed.

Currently, many of our organizations are unable to accept new cases, have drastically reduced our detained caseloads, or are only undertaking simple matters short of representation in merits hearings in immigration court because we know we may not be able to visit or communicate effectively with new clients. Although the numbers of Covid-19 infections in Texas are decreasing, it is still an issue at STDC and we know that the pandemic will continue to impact our detained work at least until a vaccine is available. None of us are comfortable with the idea of not providing representation for an extended period of time. The pandemic has pushed for innovation in many areas, and we are confident that we can work with your office to find solutions that work for all the parties while protecting the health and safety of our clients, ourselves, and all facility personnel. We would like to meet via Zoom with you and the other interested stakeholders copied on this letter to discuss ways to increase *pro bono* representation at STDC.

Thank you in advance for your attention to this matter. You can reach me via email or at 956 463 7555. We look forward to discussing our concerns.

Sincerely,



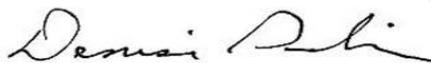
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The Honorable Daniel Daugherty, ACIJ, at Daniel.Daugherty@usdoj.gov
Jose Juarez, Court Administrator, at jose.juarez@usdoj.gov
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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SOUTHERN POVERTY LAW CENTER,
Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY, *et al.*,
Defendants.

Civil Action No. 18-760 (CKK)

ORDER
(June 17, 2020)

For the reasons set forth in the accompanying Memorandum Opinion, it is, this 17th day of June 2020, hereby

ORDERED that Plaintiff's Motion for a Temporary Restraining Order, ECF No. 105, is **GRANTED IN PART** and **DENIED IN PART**. Specifically, the Court **ORDERS** the following relief:

First, in light of the COVID-19 pandemic, which has resulted in in-person legal visits becoming unsafe and not an acceptable alternative, Defendants shall comply with the optimal requirements in PBNDS 5.6, Telephone Access. This includes ensuring that there is, at minimum, one telephone (or VTC console) for every ten detained individuals, *see* PBNDS 5.6(V)(A)(1), and that calls to legal representatives such as Plaintiff are direct or free, *see* PBNDS 5.6(V)(E).

Second, Defendants shall ensure that their telephones, VTC systems, and other technology used to access legal representatives (e.g., tablets) are in proper working order. *See* PBNDS 5.6(V)(A)(3)–(4). Defendants shall implement a clear process in writing for reporting and troubleshooting issues, such as connection or quality issues, with telephone calls or VTCs. As part of that process, Defendants shall designate point(s) of contact at each Facility to assist with or

relay information regarding issues with telephone calls and VTCs. The written process and point(s) of contact shall be shared with internal staff, detained individuals, and legal representatives. *See* PBNDS 5.6(V)(A)(3).

Third, Defendants shall ensure that attorney–client confidentiality can be maintained on all telephone calls and VTCs with attorneys and legal staff. Most importantly, telephone calls and VTCs should not be monitored and should not take place in an area where staff or other detained individuals can overhear attorney–client conversations. *See* PBNDS 5.6(V)(B); PBNDS 5.6(V)(F)(2). The Court will not dictate how Defendants comply with this requirement, as the Court recognizes that each Facility has its own circumstances, but it notes that PBNDS 5.6(V)(F)(2) suggests several alternatives for the Facilities to consider, including telephones with sufficiently spaced privacy panels, telephones isolated from areas where conversations may be overheard (e.g., areas where other detained individuals may be waiting to use the telephone), and allowing use of telephones in offices.

Fourth, Defendants shall devise and implement clear internal and external procedures, in writing, for scheduling and accessing telephone calls and VTCs so that Facility staff, detained individuals, and legal representatives such as Plaintiff and its legal staff have access to clear information regarding these procedures. These written procedures shall include information regarding the point(s) of contact at each Facility for those responsible for scheduling calls/VTCs and maintaining the schedule. Defendants shall provide these written procedures to internal staff, detained individuals, and externally to legal representatives and free legal service providers. These written procedures shall provide requests be responded to, and the requested calls and VTCs, be put on the schedule within 48 hours of the request.

Fifth, Defendants shall comply with the CDC Interim Guidance, especially with respect to

the cleaning of devices and spaces used for remote legal visits. In particular, Defendants shall clean surfaces and objects involved in calls and VTCs after each use. *See* Ctrs. for Disease Control & Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* at 9.

Sixth, Defendants shall create and implement procedures, in writing, through which detained individuals and legal representatives may exchange confidential documents, such as to obtain signatures, via electronic means (that is, not by “snail mail”). The Court will not order what form this system shall take, but in light of the COVID-19 pandemic and the fact that many detained individuals are seeking to be released in response to the pandemic, both the delays claimed by Plaintiff and those inherent in the legal mail process present problematic conditions. Defendants shall ensure that attorney–client confidentiality is maintained with these written procedures. Defendants shall include in the written procedures the point(s) of contact designated for questions or issues with the devised processes. Defendants shall provide these written procedures to Facility staff, detained individuals, and to legal representatives and free legal service providers.

Seventh, Defendants shall provide training to staff at the Facilities regarding the procedures for scheduling remote legal visits through telephone calls and VTCs implemented by the Facilities; on how to ensure attorney–client confidentiality for remote legal visits and communications in accordance with the circumstances and procedures at the respective Facilities; and on the document exchange systems implemented by the Facilities. Staff members who are responsible for escorting detained individuals to VTCs or telephone calls, or who monitor VTCs or telephone calls, should also receive training on who to contact in the event of technical issues arising.

The Court shall require Defendants to file a notice with the Court with either a Certificate of Compliance certifying under oath that the Defendant Facilities are in compliance with the

