ACCESS TO COUNSEL IN IMMIGRATION DETENTION IN THE TIME OF COVID-19


by
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Introduction

Facilities that house individuals in the custody of Immigration and Customs Enforcement (ICE) must meet published standards for their detention. These detention standards dictate, among other things, how a facility should protect an individual’s access to legal counsel while detained. The standards vary by ICE’s contract with the facility provider, but all facilities approved by ICE to detain persons more than 72 hours must make provision for legal mail, phone calls and visits from retained and prospective attorneys, group legal rights presentations, and access to law libraries and materials for pro se respondents. The COVID-19 pandemic has altered some of the

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2 ICE does not require facilities designated to detain people less than 72 hours to make provision for correspondence and other mail, law libraries and legal material, and legal rights group presentations due to the short term nature of detention however, should the
practices prescribed in the standards, including the way in which detainees access legal counsel, advice, and information. As the ability to visit detention facilities in person is diminished appreciably due to the pandemic, the need for remote access between detainees and legal service providers is greater than ever.

The following information is provided to identify the detention standards that address access to counsel and subsequent instruction from ICE modifying these standards due to the COVID-19 pandemic. Further, this publication provides tools and resources to attorneys and advocates who may encounter difficulty providing legal services to ICE detainees and who wish to assert their clients’ right to access to counsel with the Department of Homeland Security.

I. Access to Counsel, Key ICE Performance-Based National Detention Standards

ICE detention standards delineate an immigration detainee’s right of access to counsel. ICE’s contract or written agreement with detention providers is the means by which ICE provides these critical activities for most persons in its custody.

ICE promulgated several sets of detention standards that are in effect today. These include the ICE 2019 National Detention Standards, the ICE 2008 and 2011 (rev. 2016) Performance-Based National Detention Standards, and the Family Residential Standards. ICE Performance-Based National Detention Standards prescribe both the expected outcomes of each detention standard and the expected practices required to achieve them. The National Detention Standards do not.

ICE National Detention Standards differ from its Performance-Based Detention Standards in several substantive ways. Most notably, there are 44 performance-based standards and only 33 national detention standards. ICE explained that, based on its experience with state and local law enforcement partners, and the understanding that local practice appropriately covers many requirements that were explicitly enumerated in the previous NDS (NDS 2000), NDS 2019 merely streamlined several prior standards. In reality, with a few favorable exceptions, the

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7 NDS 2019, supra, note 3.
8 Especially, the provision for consultation visits for detainees subject to expedited removal and the examination by independent medical service providers and experts.
NDS 2019 eliminated considerable critical content, creating a second tier of standards with less protection for all detainees assigned by ICE to facilities governed by those standards.9

The American Bar Association has produced two handbooks for providers, one to guide those serving detainees in dedicated (ICE-only) facilities, the vast majority of which are bound by the 2011 Performance-Based National Detention Standards (revised 2016),10 and one for those serving detainees in nondedicated (shared-use) facilities, the vast majority of which are bound by the 2019 National Detention Standards.11 If you are uncertain whether a specific detention facility is dedicated or nondedicated, kindly refer to ICE’s current lists on its web site.12

This handbook summarizes access to counsel standards for individuals primarily in ICE dedicated facilities. It is based on the 2011 Performance-Based National Detention Standards (revised 2016).13 The 2008 PBNDS14 are comparable to the 2011 PBNDS (rev. 2016) but you are encouraged to compare standards if you are unsure. Most dedicated (ICE only) detention facilities are required to comply with the 2011 (rev. 2016) set of ICE detention standards; the rest follow the 2008 PBNDS.15

There are three detention standards that expressly affirm all detainees’ access to counsel in the broadest of terms. They are: 6.3 Law Libraries and Legal Material, 6.4 Legal Rights Group Presentations, and 7.4 Detainee Transfers.

A. 6.3 Law Libraries and Legal Material. The purpose of this detention standard is to protect detainees’ rights by ensuring their access to courts, counsel and comprehensive legal materials.16

1. Key ICE Performance-Based Compliance Indicators, Law Libraries and Legal Material.
   a. Detainees shall have access to courts and counsel.
   b. Detainees shall be able to have confidential contact with attorneys and their authorized representatives in person, on the telephone and through correspondence.
   c. Special scheduling consideration shall be given to detainees facing deadlines or time constraints.

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10 2011 PBNDS (rev. 2016), supra note 5.
11 2019 NDS, supra note 3.
12 Facility List supra note 2.
14 2008 PBNDS, supra note 4.
15 Facility List, supra, note 2.
d. Detainees housed in Administrative Segregation or Disciplinary Segregation units shall have the same law library access as the general population, unless compelling security concerns require limitations.

2. COVID-19 Modifications to Law Libraries and Legal Material. ICE recommended facilities extend law library hours of operation and stagger detainee access to improve social distancing.\(^\text{17}\)

B. 6.4 Legal Rights Group Presentations. The purpose of this detention standard is to protect detainees’ rights by providing access to information presented by authorized persons and organizations for the purpose of informing them of U.S. immigration law and procedures.\(^\text{18}\)

1. Key ICE Performance-Based Compliance Indicators, Legal Rights Group Presentations.
   a. Detainees shall have access to group presentations on U.S. immigration law and procedures and all other relevant issues related to the immigration court, appeals and removal processes, including a detainee’s legal rights.
   b. Detainees shall be able to communicate and correspond with representatives from the legal groups that make presentations at the facilities.
   c. Detainees shall have access to information and materials provided by legal groups. Organizations shall be permitted to distribute information in response to specific legal inquiries.

2. COVID-19 Modifications to Legal Rights Group Presentations. In March, ICE suspended all legal orientation programs except for government-sponsored Executive Office for Immigration Review (EOIR) Legal Orientation Program (LOP) presentations provided at a limited number of detention facilities which may continue to conduct detainee presentations.\(^\text{19}\) At the time of publication, most LOP providers were conducting legal orientations remotely.

C. 7.4 Detainee Transfers. The purpose of this detention standard is to ensure the inter-facility transfer of detainees is accomplished in a manner that protects the detainees, staff and the public, produces timely notifications and delivery of required detainee records, and protects detainee funds and property.\(^\text{20}\)

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1. Key ICE Performance-Based Compliance Indicators, Detainee Transfers.
   a. The legal representative-of-record shall be notified as soon as practicable but no later than 24 hours after the detainee is transferred. It is ICE’s responsibility to contact the legal representative-of-record.
   b. The detainee shall be informed of the transfer orally and in writing in a language or a manner that he or she understands, immediately prior to transport. The sending facility shall provide the detainee, in writing, the name, address, and telephone number of the facility to which he or she is being transferred. It is the detainee’s responsibility to notify family members if so desired, upon admission into the receiving facility. The detainee may place a domestic call to a person of their choosing at no cost upon admission into the receiving facility.
   c. ICE policy has no provision to inform the detainee or the detainee’s attorney of record of the name and location of the medical facility to which he or she temporarily has been transferred.

2. COVID-19 Modifications to Detainee Transfers. There are none.

II. Related Standards, Access to Counsel

There are three additional detention standards with portions addressing access to counsel. They are: 5.1 Correspondence and Other Mail, 5.6 Telephone Access, and 5.7 Visitation.

A. 5.1 Correspondence and Other Mail. The purpose of this standard is to ensure that detainees shall be able to correspond with legal representatives, embassies, and consular officials.

1. Key ICE Compliance Indicators, Correspondence and Other Mail.
   a. Detainees shall be able to correspond with their families, the community, legal representatives, government offices and consular officials.
   b. Incoming and outgoing mail, with the exception of special correspondence or legal mail, shall be opened to inspect for contraband and to intercept cash, checks and money orders.
   c. Detainees shall be permitted to send special correspondence or legal mail to a specified class of persons and organizations, and incoming mail from these persons shall be opened only in the presence of the detainees (unless waived) to check for contraband (except when contamination is suspected).
   d. Indigent detainees shall receive necessary postage for privileged correspondence.
   e. Incoming and outgoing letters shall be held for no more than 24 hours and packages no more than 48 hours before distribution, excluding weekends, holidays, or exceptional circumstances.

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21 2011 PBNDS 5.1 Correspondence and Other Mail, [hereinafter 2011 PBNDS 5.1 Correspondence and Other Mail].

f. All facilities shall implement policies and procedures addressing acceptable and non-acceptable mail. Detainees may receive as correspondence any material reasonably necessary for the detainee to present their legal claim, in accordance with this standard.

g. When timely communication through the mail is not possible, the facility administrator may in their discretion allow for a reasonable amount of communication by means of facsimile device between the detainee and his/her designated legal representatives.

h. Detainees in Special Management units (SMU) shall have the same correspondence privileges as detainees in the general population.

2. COVID-19 Modifications to Correspondence and Other Mail. There are none.

B. 5.6 Telephone Access. The purpose of this detention standard is to ensure that detainees may maintain ties with their families and others in the community, legal representatives, consulates, courts, and government agencies by providing them reasonable and equitable access to telephone services.22

1. Key ICE Compliance Indicators, Telephone Access.
   a. Detainees and their legal counsel shall be able to communicate effectively with each other.
   b. Privacy for detainee telephone calls regarding legal matters shall be ensured.
   c. Telephone access procedures shall foster legal access and confidential communications.
   d. Detainees with hearing or speech disabilities shall be granted reasonable accommodations to allow for equal access to telephone services.
   e. Telephones shall be maintained in proper working order.
   f. Detainees shall be able to make free calls to the ICE/ERO-provided list of free legal service providers for the purpose of obtaining initial legal representation, to consular officials, the DHS OIG, and the ICE Office of Professional Responsibility Joint Intake Center.
   g. Indigent detainees, who are representing themselves pro se, shall be permitted free calls on an as-needed basis to family or other individuals assisting with the detainee’s immigration proceedings.
   h. Detainees in Special Management Units (SMU) shall have access to telephones, commensurate with facility security and good order.

2. COVID-19 Modifications to Telephone Access. ICE reiterated facilities must ensure that all detainees are able to make calls to the list of free legal service providers and consulates at no charge to the detainee or the receiving party.23

23 March 27 Memorandum supra note 18.
C. 5.7 Visitation. The purpose of this detention standard is to ensure that detainees shall be able to maintain morale and ties through visitation with their families, the community, legal representatives and consular officials, within the constraints of the safety, security and good order of the facility.\textsuperscript{24}

1. Key ICE Compliance Indicators, Visitation.
   a. Detainees shall be able to receive visits from legal representatives, consular officials, and others.
   b. Visits between legal representatives and assistants and the detainee shall be confidential and shall not be subject to auditory supervision. Private consultation rooms shall be available for such meetings.
   c. Each facility shall permit legal visitation 7 days a week, including holidays, for a minimum of 8 hours per day on regular business days (Monday through Friday), and a minimum of 4 hours per day on weekends and holidays. The facility shall provide notification of the hours for legal visitation.
   d. In visits referred to as legal visitation, each detainee may meet privately with current or prospective legal representatives and their legal assistants. Legal visits may not be terminated for routine official counts.
   e. In emergency circumstances, facilities may consider requests from legal representatives for extended visits or visits outside normal facility visiting hours.
   f. Persons allowed to visit include attorneys and other legal representatives, legal assistants, and translators and interpreters. Additionally, the facility shall permit messengers who are not legal representatives or legal assistants to deliver documents to and from the facility, but not to visit detainees. Once an attorney-client relationship has been established, or if an attorney-client relationship already exists, these persons shall submit a completed Form G-28.
   g. While in administrative or disciplinary segregation status, a detainee ordinarily retains visiting privileges. Segregated detainees may ordinarily use the visiting room during normal visiting hours. However, the facility may restrict or disallow visits for a detainee who violates visiting rules or whose behavior indicates that he/she may be a threat to the security or good order of the visiting room.

2. COVID-19 Modifications to Visitation.
   a. In its March 27 Memorandum to Detention Wardens and Superintendents, ICE affirmed that detainee access to legal representatives remains a paramount requirement and should be accommodated to the maximum extent practicable. Legal visitation must continue unless determined to pose a risk to the safety and security of the facility.\textsuperscript{25} To that end, ICE directed that non-contact legal visitation (e.g., Skype or teleconference) should be offered first to limit exposure to ICE detainees but in-person contact visitation should be permitted if determined

\textsuperscript{25} March 27 Memorandum, supra note 18, Legal Visits, p. 2.
essential by the legal representative. The ultimate approving authority for legal visits however, lies with the Warden or Facility Administrator. ICE instruction to the facilities included that they should notify their local Field Office Director as soon as possible of any denied legal visits. When in-person visits are approved, the legal representative must undergo the same medical screening required for staff entry into the facility. Although ICE is silent regarding personal protective equipment, the CDC recommends that individuals always wear a mask when out in the public.

b. In its subsequent COVID-19 Pandemic Response Requirements, ICE informed the field that it continues to explore opportunities to enhance attorney access while legal visits are impacted. Referring now to the legal visitation program as the modified (legal) visitation program, ICE added that it 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:

i. Adding attorneys of record to the Talton Pro-bono platform,

ii. Requiring facilities to establish a process for detainees/immigration attorneys to schedule telephonic appointments and facilitate the calls,

iii. Leveraging technology to facilitate attorney/client communication, and

iv. Working with detention contractors and telephone service providers to ensure all detainees receive “some number” of free calls per week.

ICE also directed facilities to communicate with the public about any changes to facility operations including visitation programs.”

III. Accommodations Standards, Access to Counsel

ICE detention standards also address accommodations for detainees with disabilities and limited English proficiency as well as detainees in restricted housing units, to ensure they can partake of mandated activities including access to counsel. ICE stated that it revised the PBNDS 2011 in December 2016 so that its standards remained consistent with federal legal and

26 Id.
27 Id.
29 The Pro Bono platform is the telephone platform that allows detainees to make the free legal telephone calls as required to be provided by Standard 5.6.
31 2011 PBNDS, 2016 Revisions, supra note 12, Disability Accommodation and Section 504 of the Rehabilitation Act.
32 Id., Communication Assistance.
33 Id., Special Management Units (SMUs).
regulatory requirements as well as prior ICE and ICE Enforcement and Removal Operations (ERO) policies and policy statements.\(^{34}\)

1. Key ICE Compliance Indicators, Accommodation Standards

   a. The facility will provide detainees with disabilities with effective communication, which may include the provision of auxiliary aids, such as readers, materials in Braille, audio recordings, telephone handset amplifiers, telephones compatible with hearing aids, telecommunications devices for deaf persons (TTYs), interpreters, and notetakers, as needed.\(^{35}\)

   b. The facility will also provide detainees who have limited English proficiency (LEP) with language assistance, including bilingual staff or professional interpretation and translation services, to provide them with meaningful access to its programs and activities.\(^{36}\)

   c. The facility will employ collaborative assessments by detention facility administrators and Field Office supervisory-level staff, utilize segregated housing for approved purposes only, and afford all detainees access to mandated services.\(^{37}\)

2. COVID-19 Modifications to Accommodation Standards. There are none.

IV. Reporting Violations of Detention Standards to DHS

Violations of the detention standards can be addressed directly with DHS at various levels and depending upon the issue, targeting your correspondence may lead to a quicker resolution.

This section includes a description and contact information for the various offices that accept complaints regarding violations of the standards.

\(^{34}\) 2011 PBNDS, 2016 Revisions, \textit{supra} note 12.

\(^{35}\) ICE detention facilities are required to comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended (Section 504), which prohibits discrimination based on disability and requires facilities to provide detainees with disabilities equal access to its programs and activities through the provision of appropriate accommodations, modifications, and services.

\(^{36}\) Title VI of the Civil Rights Act of 1964 prohibits recipients of federal financial assistance from discriminating based on national origin by, among other things, failing to provide meaningful access to individuals who are limited English proficient (LEP). Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, (August 11, 2000), requires all federal agencies to meet the same standards as federal financial assistance recipients in providing meaningful access for LEP individuals to federally conducted programs.

\(^{37}\) Following release of the 2016 DOJ study, Report and Recommendations Concerning the Use of Restrictive Housing, and pursuant to a Presidential Memorandum directing all agencies using restrictive housing to review the DOJ report and implement corresponding changes, ICE issued Directive 11065.1, Review of the Use of Segregation for ICE Detainees.
For issues concerning specific facilities, it may be best to reach out to the corresponding ERO Field Office before elevating your complaint to one of the other offices. If the problem cannot be resolved with the field office or if it is pervasive throughout the field office’s jurisdiction, one of the other offices may be more appropriate. The offices that accept general complaints about DHS personnel can also accept complaints of access to counsel issues, particularly where those issues are inhibiting a detainee’s due process rights. Keep in mind, you may be directed to address your complaint with the relevant field office or the ICE Detention Reporting and Information Line (DRIL) before proceeding with your complaint. As such, you should maintain copies of your correspondence with the field office or DRIL and any relevant case and tracking numbers assigned.

Complaints should always include the relevant language from the standard that applies to the specific facility and should be framed in terms of the violation of the standards.38 To find the applicable standards for the facility about which you have a concern, download the Dedicated and Nondedicated Facility List.39 Prior to the pandemic, this spreadsheet was updated monthly. Also available at this website are the most recent inspection reports for various facilities and up-to-date reports on inspection waivers.40

**DHS/ICE Offices that accept Complaints or Concerns about Detainees’ Access to Counsel**

<table>
<thead>
<tr>
<th>ERO Field Offices: Often issues can be resolved by reaching out to the relevant field office. Be sure to maintain copies and refer to any prior correspondence when following up or reaching out to additional offices.</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Contact information is available at <a href="https://www.ice.gov/contact/ero">https://www.ice.gov/contact/ero</a>.</td>
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<tr>
<th>ICE Office of Detention Legal Access: This contact should be used for issues related to access to counsel (e.g. visitation, free calls to legal representatives), law libraries, group presentations, and any other issues related to the legal cases of detained individuals. Before sending inquiries to this office, you should attempt to resolve the issue with the relevant ERO Field Office (see above).</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Email: <a href="mailto:Detention.LegalAccess@ice.dhs.gov">Detention.LegalAccess@ice.dhs.gov</a>.</td>
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<tr>
<th>ICE Detention Reporting and Information Line (DRIL): The DRIL line allows callers, including detainees, to communicate directly with ICE to answer questions and resolve concerns, including access to counsel issues. Complaints made to this line will be given a tracking number which should be used for further correspondence with other offices.</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Phone: 1-888-351-4024, Detention Speed Dial Code: 9116#</td>
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</table>

39 Facility List *supra* note 2.
40 *Id.*
DHS/ICE Offices that accept Other Complaints or Concerns about Detainees or Detention

| DHS Office of Civil Rights and Civil Liberties (CRCL): | CRCL investigates allegations of discrimination by DHS employees or contractors. Complaints to this office\(^{41}\) can include access to counsel issues if such issues inhibit due process.\(^{42}\) Examples of violations of due process could include instances of an individual being denied access to their attorney in a timely manner or instances of limited access to services due to limited English proficiency.  
| |  
| | - Phone: 202-401-1474, 1-866-644-8360 (toll free), Detention Speed Dial Code: 9097#  
| | - Fax: 202-401-4708  
| | - Email: CRCLCompliance@hq.dhs.gov  

| DHS Joint Intake Center: | The JIC handles allegations of misconduct by ICE employees. Complaints received by the JIC are screened by the DHS Office of Inspector General and when warranted, returned to the JIC for appropriate action by the ICE Office of Professional Responsibility or the Customs and Border Protection Office of Internal Affairs.  
| |  
| | - Phone: 1-877-2INTAKE, Detention Speed Dial Code: 5663#  

| DHS Office of the Inspector General (OIG): | The OIG operates a hotline and online platform\(^{43}\) to report fraud, waste, abuse, mismanagement, and other criminal or noncriminal misconduct. The OIG addresses civil rights or civil liberties abuses involving custodial deaths, denial of rights including due process rights related to access to counsel, profiling, and uses of force.  
| |  
| | - Phone: 1-800-323-8603 or 1-844-889-4357 (TTY), Detention Speed Dial Code: 518#  
| | - Fax: 202-254-4297  

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\(^{41}\) [https://www.dhs.gov/file-civil-rights-complaint](https://www.dhs.gov/file-civil-rights-complaint)  
\(^{43}\) [https://hotline.oig.dhs.gov/#step-1](https://hotline.oig.dhs.gov/#step-1)
V. Sample Language

The following letter suggests how to raise a legal access issue. In all correspondence with DHS, reference the relevant language in those standards.

Date:

Detainee Name: [Redacted]

Detainee A#: [Redacted]

Facility: [Redacted] Detention Facility

To Whom It May Concern:

I am writing about the above-named individual who is currently detained at the [Redacted] Detention Facility. Mr. [Redacted] contacted me to assist him with a problem he is experiencing at the facility and cannot resolve on his own.

Mr. [Redacted] reports that since he was transferred to [Redacted] on March 13, 2020, he has not been able to access the law library to research or print materials and forms for his case. He has made a complaint with the Detention Reporting and Information Line (Tracking # [Redacted]).

[If there is additional procedural history, it may be appropriate to detail it as well]. He reports that he needs access to the law library to properly prepare his immigration case. [State whether time is of the essence and what that critical date is.]

Mr. [Redacted] requests that the facility resolve this situation. The 2011 PBNDS 6.3 Law Libraries and Legal Materials provides, [or cite the governing detention standard and corresponding language] “Detainees shall have meaningful access to a properly equipped law library, legal materials, and equipment including [emphasis added] photocopying resources to facilitate the preparation of documents.”

Please let us know if there is any other information, we can provide to resolve Mr. [Redacted]’s request for assistance.

Thank you, as always, for your time and attention to this matter.

Name
Email Address
Phone Number

* * *