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U.S. Immigration and Customs Enforcement  
Department of Homeland Security  
Washington, D.C. 20536

Dear Ms. Trickler-McNulty:

On behalf of the American Bar Association (ABA), I write to share our comments on the draft 2018 revisions to the National Detention Standards (revised standards).

As you know, the ABA has long been involved with issues related to conditions in immigration detention. During the late 1990’s, the ABA, along with other organizations, participated in a lengthy negotiation process with the former Immigration and Nationality Service over several years to develop the 2000 National Detention Standards (2000 NDS). The ABA was instrumental in drafting the “legal access” standards addressing law libraries and legal materials, group legal rights presentations, telephone access, visitation, and correspondence. We similarly participated in discussions regarding the development of the 2008 Performance Based Detention Standards (PBNDS).

As a key stakeholder in the development of the standards, the ABA is committed to their full and effective implementation, and we have worked collaboratively with ICE to try to facilitate that goal. Following the issuance of the 2000 NDS, the ABA created the Detention Standards Implementation Initiative to recruit lawyers to participate on a pro bono basis in delegations to tour selected detention facilities and provide a report with their findings regarding standards implementation to the relevant ICE Field Office.

The ABA also regularly receives information on detention issues from our own pro bono projects in Harlingen, Texas and San Diego, California, as well as from attorneys representing detained immigrants, immigration advocacy groups, and direct letters and phone calls from detained immigrants around the country. For nearly 15 years, the ABA has operated a telephone hotline through which detainees can make free calls to seek information on NGOs that provide legal representation in their facilities, to learn about their legal rights, and to report complaints about detention conditions. The detainee hotline receives calls from three to four hundred unique
callers each month, with a significant number of those callers alleging violations of the standards.

Recognizing the continuing challenges surrounding immigration detention, the ABA has supported efforts to periodically review, strengthen, and increase oversight of the standards. The move toward the Performance Based National Detention Standards was an important development because the inclusion of expected outcomes and practices provided significantly more detailed instructions to facilities and reflected changes necessary to address issues raised by detainees and advocates over the years. We commend ICE’s efforts to improve the standards over time, but note there has been significant delay in transitioning facilities to the most recent and more protective standards – the 2011 PBNDS. Now, it appears that ICE has abandoned the goal of implementing the 2011 PBNDS altogether for non-dedicated facilities. We are concerned not only about this proposal, but also the process that ICE has put in place to implement it.

While the ABA greatly appreciates the opportunity to review and provide input on the draft revised standards, we are troubled that only four organizations have been consulted and invited to submit comments. In our view, it would benefit ICE to engage in a broader and more collaborative stakeholder review process, as was done for the development of the 2008 PBNDS. This would help ensure not only that substantive issues are identified to improve the standards, but also that community stakeholders are invested in and support the outcome.

We understand that the revised standards would be applied to all non-dedicated facilities that house ICE detainees. The vast majority of these facilities are still using the 2000 NDS and transitioning them to the revised standards would without question provide enhanced protections for detainees. However, for those facilities that have already adopted the 2011 PBNDS, transitioning them to the revised standards would mark a step backwards. Moreover, one of the purposes of moving toward implementation of the 2011 PBNDS at all facilities is to provide one set of standards, implemented and enforced consistently across the country. Continuing to maintain three sets of standards creates confusion for ICE and facility staff, as well as for detainees who are transferred between facilities that use different standards.

In reviewing the draft revised standards, we compared the text of selected standards with the original 2000 NDS. In most cases, we recommend changes where the revised standards have omitted important provisions from the 2000 NDS and, in some cases, recommend inclusion of additional language from the 2011 PBNDS. We have focused our specific comments on the draft standards related to legal access, the disciplinary system, and Special Management Units. Our lack of comment on the remaining standards does not reflect a lack of importance or imply approval of the proposed revisions.

While beyond the scope of these comments, we would note that the longstanding and serious deficiencies in conditions of detention as well as the significant barriers faced by detainees in obtaining legal representation are key reasons why the ABA opposes the detention of noncitizens except in extraordinary circumstances. The ABA instead supports the use of cost-effective, humane alternatives to detention, for individuals who would otherwise be detained, that are the least restrictive necessary to ensure appearance in court. For those who are detained, it is essential to provide uniform and consistent standards to ensure that all facilities housing
immigration detainees are safe and protect detainees’ statutory and constitutional rights. In our view, this would best be accomplished by fully implementing and enforcing the 2011 PBNDS at all facilities that hold immigration detainees.

While promulgating robust detention standards is critical to the effort of ensuring both the safety and rights of detainees, the standards in and of themselves are not enough. The most rigorous standards are meaningless if they are not fully implemented and enforced, and if the detainees are not aware of their rights. Adequate resources should be provided for the monitoring of facilities’ compliance with the standards, and those facilities that fail to do so should be held accountable.

We hope that ICE renews its previous commitment to eventually implement the 2011 PBNDS at all facilities holding immigration detainees. Should ICE proceed with development of the revised standards, we hope that you will incorporate our suggested revisions as provided in the attached comments. Finally, the ABA would encourage a broader stakeholder engagement process and would be pleased to help in facilitating such engagement.

Thank you for your consideration of our views.

Sincerely,

Robert M. Carlson

Attachment
American Bar Association  
Comments re: National Detention Standards, Revised 2018 (2018 NDS) 

5.1 CORRESPONDENCE AND OTHER MAIL  

II. STANDARDS AND PROCEDURES 

G. Rejection of Incoming and Outgoing Mail 

This standard should ensure that arriving mail that is to be used as documentation in a detainee’s legal case, and which depicts violence or other otherwise prohibited subject matter, is not automatically considered contraband. To establish eligibility for certain applications of relief, including political asylum, withholding of removal under INA §241, and protection under the Convention Against Torture, among others, an applicant must establish persecution or other harm in their country of origin. Quite often, the documentation that proves these elements includes news reports and photographs that include graphic descriptions and images of violence. Facilities often have rules that classify any document depicting violence or gang activities as contraband, meaning that they will be automatically confiscated. This section should incorporate language from the 2011 PBNDS to ensure that facilities recognize such materials may be relevant to a detainee’s legal case and should therefore not be considered contraband. 

H. Contraband Recording and Handling 

The 2018 NDS should provide that incoming mail that includes identity documents be placed in a detainee’s A-file and that a certified copy of those documents be provided to the detainee upon request. It is important to ensure that detainees have a certified copy of their identity documents available to them since these documents are often required to demonstrate eligibility for certain types of legal relief and to show proof of identity for a custody redetermination hearing. We recognize that there is a similar provision in 2018 Standard 2.4, II, B., but believe that it should be retained in this section as well to emphasize the appropriate treatment of such documents received by mail. This language has been included in all three prior versions of the standards. 

I. Postage Allowance 

Indigent detainees should be permitted to mail all correspondence related to a legal matter at government expense. The 2018 NDS would limit indigent detainees to mailing only five pieces of special correspondence, including legal mail, per week. The 2000 NDS provide that indigent detainees are permitted to mail all correspondence related to a legal matter at government expense. Because immigration detention facilities are often located in remote areas and phone calls can be prohibitively expensive, detainees are especially dependent on mail to prepare for their case.
5.4 TELEPHONE ACCESS

II. STANDARDS AND PROCEDURES

F. Telephone Usage Restrictions

The standards should emphasize that telephone restrictions must not unduly limit a detainee’s attempts to obtain legal representation. The 2000 NDS language provides that facilities “may place reasonable restrictions on the hours, frequency, and duration of the other direct and/or free calls listed above, but these must not unduly limit a detainee attempting to obtain legal representation.” The 2018 NDS excludes the underlined language. While we recognize that the words “or to obtain representation” were added to the preceding paragraph in this section, we believe that it is important to retain the prior language to emphasize the importance of access to legal representation. INA §292 (8 U.S.C. §1362) provides for the right to counsel in immigration removal proceedings and in any appeal from such proceedings. This right is virtually negated when detained respondents face barriers in their ability to use the telephone to seek legal representation.

5.5 VISITATION

II. STANDARDS AND PROCEDURES

B. Notification

Facilities should be required to ensure that visiting hours are available to the public through a telephonic recording. Requiring that visiting hours be available over the telephone, as was previous practice, ensures that the detainees’ families who do not have computer access can properly plan for visitation and the facility can avoid unexpected visitors thereby maintaining the efficient functioning of the facility. This language has been included in all three prior versions of the standards.

F. Visits by Family and Friends

1. Hours and Time Limits

Facilities should be encouraged to establish evening visiting hours. The 2000 NDS do not require a facility to have evening visiting hours, but do provide that facilities may establish evening visiting hours, where staff resources permit. This language should be retained. Some individuals have inflexible schedules that will not allow them to visit during regularly-scheduled hours or on weekends and facilities should be encouraged to address that need, when practicable. Encouraging facilities to provide flexible visitation hours helps to meet the goal of the visitation standard to encourage visits from family and friends to maintain detainee morale and family relationships. This language has been included in all three prior versions of the standards.
Immediate family members detained in the same facility should be allowed visitation. The 2000 NDS, and subsequent versions of the standards, allow visitation by immediate family members detained in the same facility. To maintain detainee morale and allow detained family members to efficiently decide how to proceed in their cases, it is essential to permit in-person communication when family members are detained in the same facility. We would encourage that ICE incorporate the 2011 PBNDS language that allows such visitation regardless of gender, when practicable. Allowing family members to meet will enable them to proceed more efficiently in their cases and may help avoid lengthy continuances in immigration court. This language has been included in all three prior versions of the standards.

6.3 LAW LIBRARIES AND LEGAL MATERIALS

II. STANDARDS AND PROCEDURES

A. Law Library

Facilities should be required to have a designated law library, with sufficient space and seating, located in a well-lit room and reasonably isolated from noisy areas. The practice of providing computers equipped for legal research in housing units can be useful as it allows detainees to access legal information without the formality and inconvenience of filing a request to visit the library and being escorted to another room. However, this does not negate the need for a designated law library. The 2000 NDS requires facilities to provide a law library in a designated room with sufficient space to facilitate detainees’ legal research and writing and that the library have a sufficient number of tables and chairs to allow detainees to work comfortably. For example, the ABA once visited a facility that had two computers and one chair. In addition, the requirement that the room be reasonably lit and isolated from noisy areas is necessary to enable detainees to concentrate on legal research and writing, considering that these are complicated matters and difficult for non-lawyers to understand even in the best of circumstances. Any legal resources provided in the housing units should supplement, not replace, a designated law library. This language has been included in all three prior versions of the standards.

6.4 LEGAL RIGHTS GROUP PRESENTATIONS

I. POLICY

Facilities should be required to fully cooperate with authorized persons seeking to make group presentations on legal rights. Group legal rights presentations provide vital information to detained respondents on legal rights and responsibilities, help improve the functioning of detention facilities, and may decrease the number of days that detainees spend in detention. The 2000 NDS contained language requiring all facilities to fully cooperate with authorized persons seeking to make such presentations. This language has been included in all three prior versions of the standards and should be retained here to emphasize the facilities’ responsibilities in this regard.
II. STANDARDS AND PROCEDURES

A. Requests to Make Group Presentations on Legal Rights

Specific language should be maintained to preserve the ability of legal assistants and paralegals to conduct group presentations in appropriate circumstances. We note that although the appendix with definitions is not included in the draft made available for review, the term “legal representatives” is defined elsewhere in the 2018 standards as “an attorney or other person representing another in a matter of law, including: law students or law graduates not yet admitted to the bar under certain conditions; Executive Office for Immigration Review accredited representatives; and accredited officials and attorneys licensed outside the United States.” There are circumstances where legal assistants and paralegals may not meet this definition, therefore we would urge that language from the 2000 NDS or some similar language be included in the 2018 NDS to ensure that facilities are required to allow legal assistants and paralegals to conduct or assist with group presentations.

B. Scheduling Presentations

The 2018 NDS should clarify facilities’ responsibilities to arrange group legal rights presentations. The 2000 NDS provides that facilities are not required to arrange presentations in the absence of a request by authorized persons seeking to make such presentations or if ICE does not approve the request. As currently written, the 2018 NDS excludes the underlined language and therefore appears to give facilities blanket permission to refuse to cooperate even when the request is approved by ICE. Immigration law is highly complex and frequently changing and, historically, only 15-20 percent of detained immigrants and asylum-seekers obtain legal representation. A group legal rights presentation therefore may be a detainee’s only opportunity to receive information on immigration law and the court process. We suggest revising the 2018 language to track previous versions of the language by providing that the facility is not required to arrange presentations only if attorneys or other legal representatives make no requests or if ICE does not approve the request.

D. Entering the Facility

The 2000 NDS language ensuring that interpreters be allowed to enter the facility with the presenters should be retained. Detained individuals come from all over the world and speak hundreds of different languages. For a legal rights presentation to be effective, it should be interpreted by a qualified, in-person interpreter. While there is language in the visitation standard that specifies that the interpreters must be allowed to enter the facility for the purposes of “legal visits”, there is a concern that a facility could narrowly define this to include only legal visits for representation purposes. Therefore, we recommend that similar language be included in this section to avoid misunderstandings regarding such access for Legal Rights Group Presentations. This language has been included in all three prior versions of the standards.
E. Presentation Guidelines

Facilities should be encouraged to authorize the extension of the one-hour minimum time for group legal rights presentations, when necessary. In practice, it has become clear that a group legal rights presentation, followed by individual questions with detainees, often requires more than one hour to complete. ICE has recognized that the legal rights presentations help to decrease detainee stress and anxiety and improve the overall functioning of the detention facilities. It is in the interest of ICE, the facilities, and detainees to ensure that there is adequate time for robust group presentations and related activity. The 2000 NDS, and subsequent versions of the standards, allow for extensions when the OIC deems appropriate and such language should be retained here.

I. Video Presentations

The 2018 NDS should retain a specific provision regarding the replacement of the Know Your Rights presentation video. The 2000 NDS includes language requiring the facility to maintain the video in good condition and promptly notify ICE when a video is stolen, destroyed, or otherwise becomes unusable. We have observed during visits to some detention centers that Know Your Rights videos are simply not provided when the DVD becomes unusable, this occurs even though the ABA has indicated it will provide a new DVD to any detention center upon request. The 2018 NDS should clarify that a facility must replace a DVD or other form used to display the rights’ presentation when necessary. This language has been included in all three prior versions of the standards.

6.2 GRIEVANCE SYSTEM

II. STANDARDS AND PROCEDURES

A. Grievance Procedure

1. Informal/Oral Grievances

Facilities should be required to provide interpretation assistance, if necessary, to detainees pursuing oral grievances. This section of the 2000 NDS specifically provides that “Translating assistance shall be provided upon request.” The 2018 NDS appears to require communication and other assistance only for detainees with disabilities. We would urge you to include language requiring that all detainees receive interpretation assistance upon request as a part of the oral grievance process. Similar language has been included in all three prior versions of the standards.

D. Retaliation

The 2011 PBNDS language which states that any actions that have an adverse effect on the resident’s life in the facility would amount to prohibited retaliation should be incorporated into this standard. The language in the 2018 NDS regarding retaliation has been included in all previous versions of the standards, but the 2011 PBNDS added a sentence to expand the
definition of retaliation to any action which has an adverse effect on the resident’s life. This emphasizes that retaliation of any kind is prohibited.

H. Detainee Handbook

The facility-specific detainee handbook should include information on how to file a written complaint to the Department of Homeland Security Inspector General and Joint Intake Center. The 2018 NDS includes a provision requiring that the facility-specific detainee handbook include procedures for contacting ICE/ERO to grieve directly. Detainees have often reported difficulties in filing complaints by telephone with the Office of the Inspector General. Some detainees prefer to send their complaint through sealed legal mail because they fear that reporting issues over monitored telephones will result in retaliation. We understand this information is included in the National Detainee Handbook but believe that ICE also should require its inclusion in the facility-specific handbook.

3.1 DISCIPLINARY SYSTEM

II. STANDARDS AND PROCEDURES

A. Guidelines

The 2000 NDS prohibition on denial of access to correspondence privileges and recreation as a form of discipline should be included in the 2018 NDS. In addition, the 2018 NDS language regarding the “deprivation of legal access and/or legal materials” is ambiguous. The language should be clarified to specifically prohibit the denial of legal visitation, legal mail, access to the law library, and/or removing a detainee’s legal papers. It is critical to explicitly state which disciplinary actions are prohibited because these standards will be interpreted and implemented in a variety of settings. Often, county jails that have their own unique forms of punishment that should not be imposed on ICE detainees. In a recent example, the ABA encountered a jail that denies reading material to county inmates detainees in solitary confinement for disciplinary reasons, a practice that would be unacceptable for ICE detainees. This language has been included in all three prior versions of the standards.

D. Unit Disciplinary Committee (UDC)

The intermediate level of adjudication (Unit Disciplinary Committee [“UDC”]) should remain mandatory, as provided in the 2000 NDS. The UDC has no power to place a detainee in disciplinary segregation. Therefore, the behavior cited and the punishments imposed tend to be less severe. The Institutional Disciplinary Panel (“IDP”) handles more serious violations. Detainees report that when they face an IDP hearing, they almost always receive some period in disciplinary segregation. UDCs tend to order minor punishments for minor violations and the IDPs tend to start with the presumption that some time in disciplinary segregation will be warranted for even minor violations. Making the UDC optional would likely result in increasing the number of detainee’s subject to disciplinary segregation.
G. Detainee Assistance

Detainees with a pending disciplinary hearing should be allowed to have a detainee of their choice represent them rather than a staff member. When choosing someone to represent them in a disciplinary hearing, detainees often place greater trust in another detainee rather than a staff member because of the possibility of a real or perceived conflict of interest. The 2018 NDS should incorporate the 2011 PBNDS provision allowing detainees the option of receiving assistance from another detainee of their selection rather than a staff representative, subject to approval from the facility administrator.

J. Disciplinary Severity Scale and Prohibited Acts

The categories of offenses and disciplinary consequences should be included in the 2018 NDS, as it was included in the 2000 “Disciplinary Severity Scale and Prohibited Acts;” the 2008 “Attachment A, Prohibited Acts and Sanctions;” and the 2011 PBNDS “Appendix 3.1.A: Offense Categories.” While the graduated scales of offenses and disciplinary consequences in all previous versions of this standard have been applicable only to SPCs, CDFs, and dedicated IGSAs, we would encourage inclusion of these scales to ensure that detainees are made aware of actions that are prohibited. In addition, having a clearly delineated class of punishments applicable to those prohibited actions encourages fairness and uniformity in imposing discipline.

M. Notice to Detainees

Detainees should receive notice of the right to appeal disciplinary findings. It is important to explicitly state a detainee’s right to appeal an adverse decision by the disciplinary body and to provide specific information on how to submit such an appeal. This language has been included in all three prior versions of the standards.

2.9 SPECIAL MANAGEMENT UNITS

II. STANDARDS AND PROCEDURES

A. Placement in Administrative Segregation

The 2018 NDS should include provisions that pre-disciplinary hearing detention should be used “only as necessary” and that time spent in administrative segregation may be deducted from any time in disciplinary segregation ordered by the Institution Disciplinary Panel (IDP). The 2000 NDS contain a provision that a detainee should be placed in administrative segregation only when necessary, which should prevent such placements becoming standard operating procedure even for minor offenses which do not require segregation. In addition, continuing the practice of allowing “time served” to be deducted from the time ordered by the IDP is important when investigations result in long periods of pre-hearing detention in administrative segregation. This language has been included in all three prior versions of the standards.
E. Basic Requirements for All Special Management Units

The 2018 NDS should include provisions requiring that standard living requirements shall not be modified in SMU for disciplinary purposes, the number of detainees in a SMU cell shall not exceed the rated capacity, and that dry cells shall not be part of the disciplinary unit. Detainees in disciplinary segregation must be provided with humane living conditions. All versions of the standards have singled out specific protections that must be provided and the 2018 NDS are missing several key components previously included in the 2000 NDS Basic Living Standards. For example, dry cells are generally used only in the medical unit when it is believed that a detainee has swallowed contraband, and they should not be utilized for disciplinary purposes. In addition, specific language should be included to ensure the number of detainees housed in a segregation cell does not exceed the capacity for which it was designed.

6.1 DETAINEE HANDBOOK

II. STANDARDS AND PROCEDURES

Facility-specific detainee handbooks should be required to include the topics listed in the 2011 PBNDS “Contents of the Local Supplement.” Detainee handbooks are critical tools to ensure that detainees are aware of their rights and responsibilities. This is particularly important as detainees are often transferred to other facilities, which may have different rules and procedures for which the detainee may be subject to disciplinary action if in violation. The 2011 PBNDS (Standard 6.1,V.,B. Contents of Local Supplement) provides a list of sixteen specific topics for which it is especially important that detainees receive notification in the facility-specific handbook and we urge that provision be included in the 2018 NDS.