

**SANTA FE
DREAMERS
PROJECT**



ACLU
New Mexico

VIA EMAIL AND US MAIL

March 25, 2019

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**RE: Detention Conditions Impacting the Safety and Well-Being of LGBTQ
Immigrants in the Otero County Processing Center**

Dear Assistant Field Office Director Cox, Acting Inspector General Kelly, Officer Quinn,
Coordinator Trickler-McNulty, and Warden Orozco:

Over the past few weeks, we¹ have visited twelve gay men and transgender women who are detained in the Otero County Processing Center—a private detention center operated by Management and Training Corporation (“MTC”) in Chaparral, New Mexico. All of the men and women we spoke with are seeking asylum in the United States because of the persecution they survived in the countries they fled—and in most cases, because of their gender identity or sexual orientation.

We write to ask for a meeting with U.S. Immigration and Customs Enforcement (“ICE”) and Warden Orozco to speak about our grave concerns about the conditions in which ICE is confining gay men and transgender women in the Otero County Processing Center.

We also ask that the U.S. Department of Homeland Security (“DHS”) Office of Inspector General, the DHS Office of Civil Rights and Civil Liberties, and the ICE Prevention of Sexual Assault Coordinator immediately investigate the conditions we outline in this letter.

We request a response to this letter by 5 PM this Friday, March 29, 2019, with specific information detailing when ICE and Warden Orozco will meet with us to discuss these conditions and when DHS will investigate them.

The twelve men and women have repeatedly complained to U.S. Immigration and Customs Enforcement (“ICE”) and Otero staff, including Warden Orozco, about the conditions we outline in this letter. Instead of meaningfully addressing their complaints, ICE and Otero have retaliated against them in three ways. First, in some cases, ICE and Otero placed people in solitary confinement immediately after they complained. Second, Otero guards have warned others not to complain, threatening that they will place them in solitary confinement. Third, ICE and Otero recently retaliated against all gay men and transgender women by reassigning them to barracks where they are confined with cisgender, heterosexual men. This change in detention assignment has increased their social isolation and makes them even more vulnerable to abuse.

ICE and Otero must do better. We offer a brief summary of the conditions we have documented at Otero and recommend several specific changes that Otero must make immediately to stop violating the law and to comply with ICE’s own rules.

Unconscionable Conditions: the Experiences of Transgender Women and Gay Men in the Otero County Processing Center

¹ We write jointly from Las Americas Immigrant Advocacy Center, the Santa Fe Dreamers Project, and the American Civil Liberties Union of New Mexico (ACLU-NM).

The conditions we have documented over the past several weeks raise serious questions about Otero and ICE’s compliance with the Prison Rape Elimination Act (PREA), ICE Performance-Based National Detention Standards, and the U.S. Constitution.² ICE’s practices at Otero have created an unsafe environment for transgender women and gay men who are detained there.

Rampant sexual harassment, discrimination, and abuse. People detained at Otero report that guards bark transphobic commands like “Walk like a man! You better sit like a man!” They force transgender women to bathe and sleep in units with men who sexually harass and threaten them. Some of the men even intrude on women while they are bathing in the shower, leering at them and offering to “help” them bathe. Other men ask women for sex while they try to sleep. Guards subject the gay men and transgender women to frequent pat-down searches. One woman said that male guards appear to single her out, typically patting down her body three times each day. The men and women cannot eat in the cafeteria or walk through the detention center without enduring homophobic and transphobic slurs from other detained people, which the guards do not address.

Inadequate Medical Care. Many of the transgender women and gay men detained at Otero do not receive necessary medical care. Three women who had been taking hormones for gender dysphoria in the countries they fled told us that they have repeatedly requested that the Otero medical staff provide hormones and treatment. The Otero medical staff rebuff them, telling them simply, “ICE won’t give you hormones,” or “This isn’t your home.” The message to detained people is clear: they cannot expect necessary and appropriate medical care in ICE detention. When the women and men have submitted requests for medical care, including mental health care, they report that Otero takes days, if not weeks, to respond to them.

Retaliation and Unlawful Use of Solitary Confinement. When gay men and transgender women have complained about these conditions, the guards have retaliated against them by placing them in solitary confinement and isolating them from their peers. While we urge that solitary confinement is always inappropriate in immigration detention, even the DHS Office of Inspector General recently condemned the “potential misuse of solitary confinement” in the Otero County Processing Center. In a damning 2017 report about conditions at Otero and other detention facilities, DHS’s own watchdog agency wrote:

The Otero County Processing Center . . . [was] violating the [ICE Performance-Based National Detention Standards] PBNDS in the administration, justification, and documentation of segregation and lock-down of detainees. Staff did not always tell detainees why they were being segregated, nor did they always communicate detainees’

² U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011 (2016), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf>.

rights in writing or provide appeal forms for those put in punitive lock-down or placed in segregation. In multiple instances, detainees were disciplined, including being segregated or locked down in their cells, without adequate documentation in the detainee's file to justify the disciplinary action. For example, one detainee reported being locked down for multiple days for sharing coffee with another detainee. We also identified detainees who were held in administrative segregation for extended periods of time without documented, periodic reviews that are required to justify continued segregation. Some detainees were locked down in their cells for violations of minor rules without required written notification of reasons for lock-down and appeal options. Documentation of daily medical visits and meal records for detainees being held in segregation was also missing or incomplete. Some of these issues may simply be a matter of inadequate documentation, but they could also indicate more serious problems with potential misuse of segregation.³

Moreover, about two weeks ago, the guards separated all of the transgender women and gay men and reassigned them to housing units with cisgender, heterosexual men. It is unclear whether Otero complied with PREA in making these new housing assignments. PREA requires Otero to consider several factors when assessing risk and making housing decisions. After ICE reassigned her to an all-cisgender, heterosexual male barracks, one woman told us, "I am afraid to be with them [the men] because I feel like all their eyes are on me."

Otero and ICE's Legal Responsibilities and Recommendations

We start with this premise: the safest place for all people, and particularly for vulnerable people, is to be with their communities and families, not in detention. But when the government detains a person, it has a legal obligation to ensure that the person is safe. Otero and ICE must ensure the safety of transgender women and gay men, accounting for their particular vulnerabilities⁴ and ending the climate of sexual harassment and discrimination that pervades the detention center.

The 2015 ICE Memorandum on the Care of Detained Transgender People,⁵ acknowledges that transgender people are particularly vulnerable in detention. The memorandum

³ DEPARTMENT OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES (Dec. 2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf>

⁴ ICE's Performance-Based National Detention Standard 2.2, *supra* note 2 at 62, requires ICE to consider in classifying a person "any factor that would raise the risk of vulnerability, victimization or assault. Detainees who may be at risk of victimization or assault include, but are not limited to, persons with disabilities, persons who are transgender, elderly, pregnant, suffering from a serious medical or mental illness, and victims of torture, trafficking, abuse, or other crimes of violence." Almost all of the people we met fall into this category.

⁵ THOMAS HOMAN, EXECUTIVE ASSOCIATE DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FURTHER GUIDANCE REGARDING THE CARE OF TRANSGENDER DETAINEES (June 19,

explicitly states that ICE Field Office Directors (“FODs”) should “consider whether the use of detention resources is warranted for a given individual and shall consider, on a case by case basis, all relevant factors in this determination, including whether an individual identifies as transgender.” The memorandum further urges FODs to exercise prosecutorial discretion “as early in the case or proceedings as possible.”⁶ In other words, ICE must consider a person’s transgender status as one basis that weighs in favor of releasing them.

When ICE detains a person, it must “provide a respectful, safe, and secure environment for all detainees, including those individuals who identify as transgender. Discrimination or harassment of any kind based on a detainee’s actual or perceived sexual orientation or gender identity is strictly prohibited.”⁷

Discrimination against a person based on their gender identity or sexual orientation violates the Equal Protection Clause.⁸ Further, the First Amendment expansively protects forms of expression, including one’s expression of their gender identity. ICE’s own Performance-Based National Detention Standards oblige ICE to refrain from discriminating against people because of their gender identity or sexual orientation.

We recommend that ICE make the following changes.

1. Safety in Housing Units

ICE must ensure the safety of transgender women and gay men in Otero’s housing units at all times, including while they are sleeping and bathing. PREA requires that ICE “house detainees to prevent sexual abuse, taking necessary steps to mitigate any such danger.”⁹ PREA further requires that ICE consider a detained person’s “gender self-identification and an assessment of the effects of placement on the detainee’s health and safety.”¹⁰ We urge ICE to

2015),

<https://www.ice.gov/sites/default/files/documents/Document/2015/TransgenderCareMemorandum.pdf>.

⁶ *Id.* at 1.

⁷ *Id.* at 2.

⁸ *See, e.g., Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730 (E.D. Va. 2018) (“Mr. Grimm was subjected to sex discrimination because he was viewed as failing to conform to the sex stereotype propagated by the Policy.”); *Whitaker v. Kenosha Unified School Dist. No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017) (finding an equal protection claim where “the School District treats transgender students like Ash, who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently. These students are disciplined under the School District’s bathroom policy if they choose to use a bathroom that conforms to their gender identity.”); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (“discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”).

⁹ 6 C.F.R. 115.41(a).

¹⁰ 6 C.F.R. § 115.42(b).

make individualized housing assignments according to a person's gender identity and where the person states that they feel the safest.

ICE's actions in reassigning transgender women and gay men to housing units with cisgender, heterosexual men raise serious questions about its compliance with PREA. In many cases, the new housing assignments have made people less safe. It is particularly alarming that ICE has placed transgender women in barracks where they must bathe and sleep with men.¹¹

2. Medical Care.

People in immigration detention have the constitutional right to receive adequate medical care, including mental health care. This means that ICE and Otero medical staff must respond to medical complaints in a timely manner and must provide care. To ensure that ICE and Otero do not put another detained person's life or health at risk, we urge ICE to make the following changes.

ICE must ensure that transgender people in its custody receive medical care, including hormone therapy and other transgender-related health care. To do this, ICE should contract with appropriate medical care providers. ICE PBNDS 4.3(W) states, "[t]ransgender detainees who were already receiving hormone therapy when taken into ICE custody shall have continued access. All transgender detainees shall have access to mental health care, and other transgender-related health care and medication based on medical need. Treatment shall follow accepted guidelines regarding medically necessary transition related care."¹² Further, the 2015 ICE Memorandum on the Care of Detained Transgender People states that ICE should contract with medical care providers who have experience providing care to transgender people, including hormone therapy.¹³

ICE must provide timely medical care, including mental health care. ICE PBNDS 4.3(II)(4) expresses ICE's expectation that "[d]etainees shall be able to request health services on a daily basis and shall receive timely follow up."¹⁴ Otero is consistently failing to meet this standard. ICE must ensure that Otero's contracted medical provider is staffed adequately to respond to detained people's medical needs in a timely way. Doing anything less violates detained people's constitutional right to adequate medical care.

3. End Retaliation.

¹¹ 6 C.F.R. § 115.42(c) ("When operationally feasible, transgender and intersex detainees shall be given the opportunity to shower separately from other detainees").

¹² *Supra* note 2.

¹³ *Supra* note 5 at 4.

¹⁴ *Supra* note 2.

ICE and Otero must respond in a timely manner to complaints and must stop retaliating against detained people who exercise their First Amendment rights to grieve and complain about detention conditions.

ICE and Otero must end their practice of placing LGBTQ people in solitary confinement in retaliation for complaining about conditions. Numerous ICE PBNDS provisions prohibit ICE and Otero guards from retaliating against people who complain about or grieve sexual abuse and, in fact, oblige staff to report other staff members who retaliate or threaten to retaliate against a complainant.¹⁵ PBNDS 6.2(II)(8) could not be clearer: “No detainee shall be harassed, disciplined, punished or otherwise retaliated against for filing a complaint or grievance.” Under PBNDS 6.2(G), “Actions are considered retaliatory if they are in response to an informal or formal grievance that has been filed and the action has an adverse effect on the resident’s life in the facility.”

4. Training.

ICE must train staff on how to communicate respectfully with LGBTQ people and how to treat them in an inclusive, nondiscriminatory way. Specifically, under ICE PBNDS 2.11(E)(12) staff must be trained on “how to communicate effectively and professionally with detainees, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming detainees[.]”

ICE must re-train staff on searches. Specifically, staff must follow PREA, which protects against cross-gender searches, and ICE PBNDS 2.10(3): “Cross-gender pat-down searches of

¹⁵ *Supra* note 2, PBNDS 2.11(II)(10) (“Staff shall immediately report any knowledge, suspicion, or information regarding an incident of sexual abuse or assault, retaliation against individuals who reported an incident, or any staff neglect or violation of responsibilities which may have contributed to an incident or retaliation.”), 2.11(V)(A)(3)(a) (written policies and procedures for preventing sexual abuse and assault must include “procedures for offering immediate protection, including prevention of retaliation and medical and mental health referrals”), 2.11(E)(3) (staff training must include information about “the right of detainees and staff to be free from sexual abuse, and from retaliation for reporting sexual abuse”), 2.11(F) (detained people’s orientation must include information about the “prohibition against retaliation, including an explanation that reporting an assault shall not negatively impact the detainee’s immigration proceedings”), 2.11(K) (“Protection Against Retaliation”), 2.11(L) (requiring “all staff to report immediately any knowledge, suspicion, or information regarding an incident of sexual abuse that occurred in a facility; retaliation against detainees or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation”), 3.1(II)(18) (“Detainees shall be allowed to appeal disciplinary decisions through a formal grievance system. No staff member shall harass, discipline, punish or otherwise retaliate against any detainee for filing a complaint or grievance”), 3.1(V)(A)(3) (“Disciplinary action may not be capricious or retaliatory nor based on race, religion, national origin, gender, sexual orientation, disability or political beliefs”), 6.2(II)(6) (“Facilities shall allow any ICE/ERO detainee dissatisfied with the facility’s response to a grievance or those fearing retaliation to be able to appeal or communicate directly with ICE/ERO”), 6.2(II)(8) (“No detainee shall be harassed, disciplined, punished or otherwise retaliated against for filing a complaint or grievance”), 6.2(G) (“Retaliation Prohibited”),

female detainees shall not be conducted unless in exigent circumstances.” PREA also prohibits ICE and Otero guards from searching a person in an attempt to determine their gender and requires ICE to train staff on “proper procedures” for searches.¹⁶

ICE must train staff on how to appropriately intervene when other detained people threaten or harass transgender women and gay men because of their gender identity or sexual orientation. This is important to ensure that staff are not complicit in an environment that fosters sexual abuse or sexual assault. Specifically, under the Prison Rape Elimination Act, staff must understand how to prevent and respond to sexual abuse and assault and “take immediate action to protect” people at risk.¹⁷ Under ICE PBNDS 2.11(E)(13) and (14), staff must receive and understand “instruction on reporting knowledge or suspicion of sexual abuse and/or assault” and “instruction on documentation and referral procedures of all allegations or suspicion of sexual abuse and/or assault.”

Again, we ask for a response to this letter by 5 PM this Friday, March 29, 2019, with specific information about when ICE and Warden Orozco will meet with us to discuss these conditions and when the DHS Office of Inspector General, Office of Civil Rights and Civil Liberties, and ICE Prevention of Sexual Assault Coordinator will investigate them. We will invite the copied elected officials and their staff members to join the meeting with ICE and Warden Orozco.

Sincerely,

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¹⁶ 6 C.F.R. § 115.115 (“Limits to cross-gender viewing and searches”).

¹⁷ 6 C.F.R. § 115.62 (“Protection duties”).

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