



**Homeland
Security**

August 13, 2021

MEMORANDUM FOR: Troy A. Miller
Senior Official Performing the Duties of the Commissioner
U.S. Customs and Border Protection

Scott K. Falk
Chief Counsel
U.S. Customs and Border Protection

FROM: Katherine Culliton-González (b) (6)
Officer for Civil Rights and Civil Liberties

Susan Mathias /s/
Assistant General Counsel, Legal Counsel Division
Office of the General Counsel

SUBJECT: CBP's Treatment of Children with Disabilities
Follow-Up Memorandum
Complaint Nos. 18-09-CBP-0354, 18-09-CBP-0366
18-09-CBP-0473, and 18-09-CBP-0565

This memorandum is a follow up to the response of U.S. Customs and Border Protection (CBP) to the September 10, 2020, memorandum from the Office for Civil Rights and Civil Liberties (CRCL) and the Office of the General Counsel (OGC) titled "CBP's Treatment of Children with Disabilities" ("CRCL Memo"). As set forth in the memorandum, CRCL investigated several complaints alleging that CBP separated children with disabilities from their parents or legal guardians and offered eight policy recommendations. CBP responded on January 28, 2021.

In its response memo ("CBP Response"), CBP divided three of CRCL's recommendations into subparts, resulting in 14 total responses to CRCL's recommended actions. Of these, CBP concurred with six of CRCL's recommended actions, partially concurred with two, and non-concurred with the remaining six recommended actions. We write this follow-up memorandum to thank CBP for the actions it has taken to address our concerns, and to respectfully request that CBP reconsider the non-concurrences discussed below. We believe these recommendations are especially urgent in light of the family separations that continue to occur under existing procedures.

Concurrences

CRCL is pleased that CBP concurred with six recommended actions, resulting in several positive outcomes, including:

- CBP issued a muster to CBP Officers and U.S. Border Patrol Agents reminding them to record any known history of current known or reported medical or mental health issues in the appropriate systems of record.
- CBP advised that it was implementing the CBP Disability Access Plan and stated that disability awareness training will be integrated into academy curriculum this fiscal year. A Performance and Learning Management System course for completion by officers and agents is also pending development.
- CBP issued a muster and memoranda providing instructions on how document family separations in the appropriate systems of record.

Partial Concurrences and Non-Concurrences

CBP partially concurred with two recommended actions and non-concurred with six recommended actions made by CRCL.

With respect to the following non-concurrence, CRCL is satisfied that its concerns have been addressed:

- CRCL recommended that CBP provide training to ensure that employees and medical contractors continue to document any disabilities that a child has in the systems of record.¹ (b) (5) [REDACTED]. Because CBP issued a muster to remind CBP employees to record information relating to disabilities in the system of record, CRCL's concerns are satisfied with respect to this recommendation.

CRCL still has concerns relating to the remaining actions, which generally relate to crafting guidance that specifically recognizes heightened concerns when considering separation of children with disabilities, crafting more specific guidance regarding separations based on criminal history, and tracking family separations involving children with disabilities.

Specific Guidance Relating to Family Separations Involving Children with Disabilities

With respect to family separation guidance, CRCL recommended that CBP attempt to the greatest extent possible to maintain the unity of families that include a minor who has a disability.² CBP concurred in part, noting its adherence to TEDS requirements relating to family unity and at-risk individuals. CBP noted that “a different standard does not exist for children who have a disability” and stated that CBP management reviews and considers the totality of circumstances within the confines of legal and policy requirements when determining if separation is permissible.

¹ CBP Response, Recommendation 1(b).

² CBP Response, Recommendation 5.

CRCL also recommended that CBP craft guidance regarding family separation when a minor has a disability to ensure that CBP's actions are consistent with Section 504 obligations, including a fact-specific inquiry to evaluate any accommodations needed, including altering a detention decision.³ (b) (5)

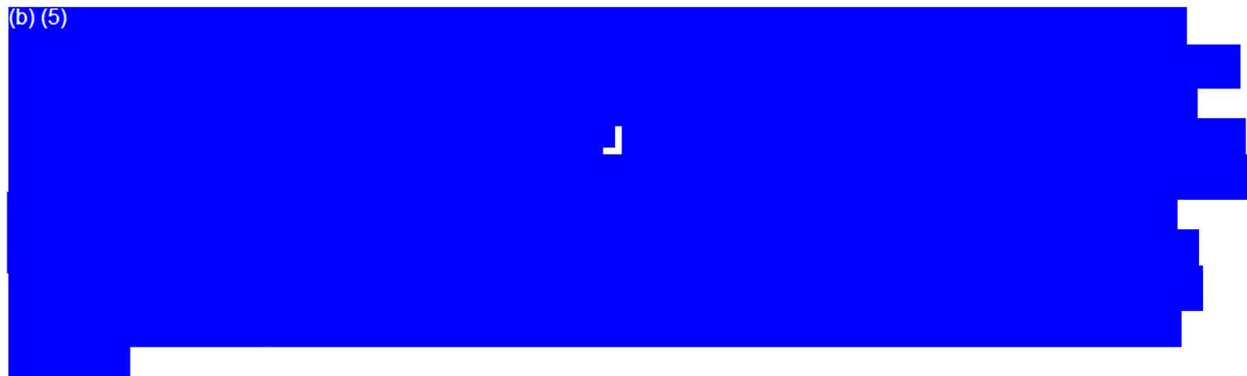
(b) (5)
CBP stated that it will continue to adhere to existing legal requirements and policies related to family separation guidance.

CRCL appreciates CBP's obligations to adhere to TEDS and existing legal requirements related to family separation and recognizes that existing CBP procedures require consideration of the totality of the circumstances. However, CRCL respectfully requests that CBP reconsider its position regarding guidance specifically addressing family separations involving children with known or reported disabilities. CRCL believes the potential harm that could occur to this at-risk group outweighs the concerns regarding creating an exception.

The existing TEDS requirements state that CBP will treat at-risk populations (which include juveniles and those with identified disabilities) with dignity, respect, and special concern, but do not address the issue of family separation as it pertains to children with disabilities. As discussed in the CRCL Memo, children with certain types of disabilities may lack the capacity to articulate basic information, including information about their health conditions and needs, to CBP. Because these children may be at heightened risk if separated from their parent or guardian, and TEDS already requires this population to be treated with "special concern," CRCL encourages CBP to treat such children with special care, and to expressly take their disability into account when determining whether family separation is appropriate.

Avoid Separations Except in Instances of Danger, Fraud, or Criminal History

(b) (5)



(b) (5)



³ CBP Response, Recommendation 2.

⁴ CBP Response, Recommendation 6(a).

⁵ CBP Response, Recommendation 6(d).

(b) (5)



With respect to family separations based on criminal history, CRCL appreciates that the safety of children is the foremost concern. As described in the CRCL Memo, CRCL investigated complaints involving children with disabilities separated from their parent due to criminal history and observed a lack of clear guidelines in place. We were pleased to see updated CBP guidance that clarified that parents should not be separated from children solely on account of prior removals or arrests with no conviction.⁶ As we have noted in the CRCL Memo and in informal advice recently provided to CBP, we believe that more detailed instruction should be developed with respect to family separations based on criminal history. For example, extenuating circumstances should be considered, such as the passage of time since the past crime, the nature of the past felony, the reliability of the information available regarding past crimes, and the age and any special needs of the child who would be separated from his or her parent or guardian. Even if crafting definitive guidance articulating specific crimes that necessitate separation is impractical, additional guidelines would help ensure that the appropriate information is being considered in making separation determinations. CRCL believes general guidance could be created that would not implicate the differences between federal, state, and local laws while still ensuring that prior to separation, children with disabilities are provided an enhanced review given their special vulnerability.

Tracking Family Separations Involving Children with Disabilities

(b) (5)



(b) (5)



⁶ Exhibit 9 of CBP Response, “U.S. Border Patrol Family Unit Separation Guidance,” issued January 7, 2020.

⁷ CBP Response Memo, Recommendation 8 (a) and 8 (c).

Conclusion

It is CRCL's statutory role to advise Department leadership and personnel about civil rights and civil liberties issues, ensuring respect for civil rights and civil liberties in policy decisions and implementation of those decisions. We appreciate the important work that has been done by CBP to address CRCL's concerns. As mentioned above, CRCL respectfully requests that CBP reconsider their non-concurrences as noted above and would be pleased to offer assistance should CBP accept any of these recommendations. If you have any questions, please contact the Dana Salvano-Dunn, Director of the Compliance Branch, at (b) (6)

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