Office for Civil Rights and Civil Liberties
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

September 28, 2022

MEMORANDUM FOR: Tae D. Johnson
Acting Director
U.S. Immigration and Customs Enforcement

Kerry E. Doyle
Principal Legal Advisor
Office of the Principal Legal Advisor
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FROM: Peter E. (b) (6)
Senior Official Performing the Duties of the
Officer for Civil Rights and Civil Liberties

Susan Mathias /s/
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SUBJECT: Implementation of ICE's Segregation Oversight Program
Complaint No. 20-05-ICE-0381

Purpose:

As a continuation of the extensive work the U.S. Department of Homeland Security (DHS), Office for Civil Rights and Civil Liberties (CRCL) has done with U.S. Immigration and Customs Enforcement (ICE) related to the use and oversight of segregation for detained individuals in ICE custody, and pursuant to CRCL's authority to "periodically review Department policies and procedures to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities,"[1] CRCL undertook a periodic review[2] to examine how ICE Headquarters (HQ) and ICE Enforcement and Removal Operations (ERO) field offices have implemented requirements in ICE Directive 11065.1: *Review of the Use of Segregation for ICE Detainees* (Segregation Directive).[3]

[1] 6 U.S.C. § 345(a)(3) (2002).
[2] CRCL seeks to proactively and periodically review the Department's policies and programs to strengthen civil rights and civil liberties protections and address any gaps that might lead to allegations of civil rights and civil liberties violations.
[3] U.S. Immigration and Customs Enforcement (ICE), Directive 11065.1: Review of the Use of Segregation for ICE Detainees (Sept. 4, 2013) [hereinafter Segregation Directive].

Executive Summary:

CRCL believes that ICE must more clearly define the policies and guidelines regarding the use of segregation in order to qualitatively differentiate ICE segregation from what is commonly understood as solitary confinement.[4]

CRCL recognizes the efforts ICE has undertaken since the issuance of the Segregation Directive to strengthen and improve the segregation oversight program, such as reducing the number of primary placement reasons in the Segregation Review Management System (SRMS) to improve data quality,[5] providing segregation training to the field office staff to improve consistency in reporting, and providing segregation-related resources on ICE's internal website. Through a years-long effort, ICE also incorporated the requirements of the Segregation Directive into the ICE detention standards in an effort to ensure facility compliance with the reporting requirements.[6]

In the course of CRCL's day-to-day work, we have, however, seen ICE's efforts to develop this segregation oversight program be undercut by several factors, including fluctuations in leadership support on detention reform efforts understaffing, a hesitancy to "second-guess" decisions made at the facility or field level, and a lack of supportive alternatives for vulnerable individuals, all of which have inhibited ICE from strengthening and growing the program and fully adhering to the Segregation Directive requirements.

CRCL continues to receive, track, monitor, and, in some cases, open investigations into allegations involving the use of segregation in ICE custody. From Fiscal Year (FY) 2014 to FY 2021, which represents the seven full fiscal years since the Segregation Directive was issued, CRCL has issued to ICE approximately 185 recommendations related to the use of segregation in ICE detention. This includes 55 recommendations related to the provision of mental health care, 54 recommendations related to conditions of detention associated with administrative or disciplinary segregation,[7] 45 recommendations related to suicide prevention, 14 recommendations related to access to privileges, 11 recommendations related to due process, and six recommendations related to individuals with special vulnerabilities.

Through this work, CRCL has identified issues with prolonged stays in administrative segregation, the use of segregation cells for medical isolation, and inadequate access to

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[4] Although ICE primarily uses the term "segregation," the term is synonymous with other terms such as restrictive housing unit (RHU), special management unit (SMU), secure housing unit (SHU), and isolation. International human rights bodies, professional organizations, and researchers often use the term "solitary confinement" to describe the conditions of isolation that occur in segregation. For this reason, throughout this memorandum, we use segregation, solitary confinement, SMU, SHU, and RHU synonymously.

[5] With the issuance of the Segregation Directive in 2013, ICE developed the Segregation Review Management System (SRMS), a SharePoint-based case management system that functions as a centralized database and automatic notification system for tracking segregation placements for ICE personnel in HQ and the field.

[6] ICE incorporated requirements from the Segregation Directive into the 2011 Performance Based Detention Standards, 2016 Revisions, and the 2019 National Detention Standards. Segregation is prohibited at ICE's family residential centers and as a result, the Segregation Directive requirements are not incorporated into ICE's Family Residential Standards.

[7] For example, this includes recommendations related to close supervision and monitoring, PREA policies, daily record keeping, classification, privacy issues, cell modifications, disciplinary hearing, and disciplinary charges.

privileges and recreation for individuals in administrative segregation. CRCL has raised additional concerns related to the provision of medical and mental health care to individuals in segregation, including serious issues involving the placement of individuals with mental health diagnoses, illnesses, and symptoms into disciplinary segregation without adequately considering the contributory impact that the mental illness had on the behavior. CRCL has routinely identified the need to improve suicide prevention policies such as suicide proofing segregation cells used for suicide watch and improving one-to-one monitoring for individuals placed on suicide precautions in segregation. Additionally, CRCL has highlighted issues with incomplete or missing segregation orders for individuals placed in segregation and incomplete or missing documentation in their detention files.

These concerns—combined with developments among other international, federal, state, and local confinement systems to limit the use of segregation as well as the increasing consensus on the detrimental mental and physical effects of segregation—contributed in large part to CRCL's decision to launch this review.

As discussed in greater detail below, we are issuing the following recommendations herein for ICE to implement:

1. (b) (5) [redacted]
2. (b) (5) [redacted]
3. (b) (5) [redacted]
4. (b) (5) [redacted]
5. (b) (5) [redacted]
6. Develop Special Purpose Housing Units
7. Develop a Strategic Plan to Limit Disciplinary Segregation
8. (b) (5) [redacted]
9. Enhance Pro-Social Programming in General Population
10. Establish De-escalation Rooms
11. (b) (5) [redacted]
12. (b) (5) [redacted]
13. (b) (5) [redacted]
14. Generally Prohibit Segregation for Individuals on Suicide Precautions
15. Generally Prohibit Segregation for Individuals on Hunger Strike

[8] *See* U.N. General Assembly, Resolution 70/175, "United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)," (Jan. 8, 2016) [hereinafter the Nelson Mandela Rules].
[9] While CRCL understands that neither ICE nor any other US entity is bound by the U.N, guidelines, CRCL posits that this is the action to take to address the core issues with segregation. ICE may certainly choose to adopt the UN's position and definition should they want to do so.

16. Enhance Therapeutic Alternatives to Segregation
17. Strengthen Procedures to Support Housing Transgender and/or Non-binary individuals by Gender Identity and/or Preference
18. Develop an Enhanced Data Tracking System
19. Implement Facility Data Entry in New System
20. Develop a Segregation Data Quality Assurance Program
21. (b) (5) [redacted]
22. Track all Segregation Placements
23. Publish System-wide Segregation Data
24. Integrate Findings from Inspections into Segregation Tracking and Reform Efforts
25. (b) (5) [redacted]
26. (b) (5) [redacted]
27. Engage Subject Matter Experts to Design and Implement Segregation Reform
28. Solicit and Implement Dedicated Funding
29. Conduct Segregation Surveys Among Staff and Detained Individuals
30. (b) (5) [redacted]
31. Develop Training and Messaging on Effects of Segregation

Background:

Since its inception, CRCL has worked within the Department and with ICE to strengthen safeguards for detained individuals placed in restrictive housing units cells, also known as segregation, that separate individuals from general population housing units.[10] CRCL's segregation oversight work has been wide-ranging: from 2012-2013, CRCL worked closely with ICE to draft ICE Directive 11065.1, *Review of the Use of Segregation for ICE Detainees* (Segregation Directive); from 2014 to 2017, pursuant to the directive, CRCL raised concerns on a regular basis[11] about individual segregation placements from reviewing exported data from ICE's Segregation Review Management System (SRMS); from 2015 to 2018, CRCL convened six meetings of the segregation subcommittee of ICE's Detention Monitoring Council to raise

[10] ICE utilizes two forms of segregation: administrative segregation and disciplinary segregation. ICE defines administrative segregation as a "non-punitive form of separation from the general population for administrative reasons" such as for protective custody, separation pending an investigation or hearing for a facility rule violation, or when an individual presents a clear threat to the security of the facility. Individuals placed in administrative segregation are required to generally receive the same privileges as individuals in general population. ICE defines disciplinary segregation as a "punitive form of separation from the general population for disciplinary reasons." Disciplinary segregation may only be authorized pursuant to an order from the facility's disciplinary panel and following a hearing into the individual's involvement in the rule violation. *See* Segregation Directive, *supra* note 3 §§ 3.1 and 3.1, at 2.

[11] CRCL provided weekly comments, then bi-weekly comments, and then monthly comments to ICE related to segregation from 2014-2017.

systemic concerns with ICE's use of segregation; from 2015 to 2019, CRCL also participated in ICE working groups to strengthen protections and parameters around the use of segregation through revisions to ICE's detention standards.

Of note, in 2016 specifically, in response to a Presidential directive to review the U.S. Department of Justice's (DOJ) "Report and Recommendations Concerning the Use of Restrictive Housing"[12] (DOJ Report), CRCL worked collaboratively with ICE to develop a report to the White House on the reforms that ICE had implemented and the additional subsequent policy changes that ICE intended to adopt in light of the recommendations in the DOJ report. Throughout, CRCL has also conducted investigations and issued expert recommendations involving the use of segregation at individual ICE detention facilities.

Given ICE's unique structure as a national agency overseeing a network of locally-operated detention facilities, ICE's Segregation Directive was developed to establish policies and procedures for ICE HQ offices and the field to review the segregation placement decisions of individual facilities. By evaluating agency-level requirements in the Directive in this periodic review, CRCL has assessed the overall state of ICE's segregation oversight program to recommend changes to enhance the program into the future. As part of the review, CRCL engaged the assistance of a conditions of detention subject matter expert who has worked with CRCL for 10 years and has extensive knowledge of ICE, immigration detention, and the use of segregation, as well as particular expertise relating to the care and custody of vulnerable populations, individuals who are limited English proficient, and individuals with disabilities.

2013-2016: Establishing Segregation Oversight

In FY 2013, CRCL collaborated with ICE to conduct a full assessment of the use of segregation in ICE detention facilities. Following this review, on September 4, 2013, ICE promulgated the Segregation Directive, which sets forth certain requirements for individuals placed in segregation. The Segregation Directive requires ICE to track and report the placement of any individual who has been in segregation for a period of 14 consecutive days or 14 days out of a 21-day period, and any placement of an individual with a special vulnerability (as defined in the Segregation Directive). The Segregation Directive also requires ICE Field Office Directors and various offices within ICE Headquarters to regularly review the segregation placements in order to assess the appropriateness of the placement and effectuate less restrictive custodial options when appropriate. ICE created a SharePoint-based system called SRMS to track segregation placements.

In addition to calling for improved reporting and tracking mechanisms, the Segregation Directive established a new segregation subcommittee of the Detention Monitoring Council (DMC) to ensure effective, timely, and comprehensive review of the segregation reports generated by SRMS. The subcommittee was to be co-chaired by the Office of Detention Policy and Planning (ODPP) (a former Assistant Director level office that was dissolved in May 2018) and Custody Management Division (CMD) within ERO, and include representatives from several other ICE offices. Under the Directive, a representative of CRCL could request to participate in the

[12] U.S. Department of Justice (DOJ), Report and Recommendations on the Use of Restrictive Housing (January 2016) [hereinafter DOJ Report].

subcommittee meetings as CRCL deems appropriate.[13] However, since the issuance of the Directive, CRCL has not be able to request to participate in the DMC segregation subcommittee meetings because ICE has not notified CRCL about when they occur. The only DMC segregation subcommittee meetings that CRCL has attended or is aware of are the six that CRCL initiated itself between 2015 and 2018.

After the Segregation Directive was issued, ICE began convening weekly meetings to review the segregation placements reported into SRMS. Despite the fact that these weekly meetings involved all of the same offices represented in the DMC segregation subcommittee meeting and were reviewing individual segregation placements as outlined under the responsibilities of the subcommittee, ICE maintained that these weekly meetings were separate from the segregation subcommittee meetings established by the Directive. While CRCL requested to participate in ICE's weekly segregation meetings and/or receive meeting minutes, ICE leadership did not approve multiple requests from CRCL to join, call-in, or receive minutes from the weekly meetings. As a result, CRCL conducted its own separate reviews of the SRMS data from 2014 to 2017, first on a weekly and then a monthly basis, in an attempt to determine whether the individual segregation placements, and field/HQ-level reviews of those placements, were in compliance with requirements from the Segregation Directive and detention standards.

By 2016, CRCL's segregation oversight work was hampered by several challenges. For example, while CRCL sought to conduct in-depth reviews and discussions with the ICE Segregation Coordinator on both individual segregation placements and specific trends, the effectiveness of these meetings was limited due an unwillingness from ICE personnel to gather additional information for CRCL from the facility and/or field. Other challenges included the fact that the information in the SRMS exports included insufficient information, on its own, to determine whether the placement and field/HQ-level assessments of the placement were in compliance with ICE policy. In addition, as noted in more detail on page 12, CRCL identified larger systemic concerns on a regular basis and noted that these overarching issues were going unaddressed. Some of the questions raised by CRCL also appeared duplicative with internal discussions ICE was having during the weekly meeting on many of the same cases. It became apparent that CRCL's reviews were not yielding substantive or qualitative changes in individual or collective segregation placement decisions.

To address these challenges, CRCL continued to request to participate in ICE's weekly segregation meetings and to receive direct access to SRMS which would have allowed CRCL to view facility/field-based supplemental documentation (e.g., disciplinary reports and segregation orders) for individuals placed in segregation as well as their prior segregation history. Access to SRMS would also have enabled CRCL to better conduct data analytics to identify trends and other overarching concerns, which was difficult to do based on the individual spreadsheet exports from SRMS. These requests were, however, denied, and ICE noted that CRCL could instead request that ICE convene the DMC segregation subcommittee meetings to ask specific questions or relay concerns with various segregation placements.

In response, beginning in 2015, CRCL did initiate and participate in six DMC segregation

[13] Segregation Directive, *supra* note 3.

subcommittee meetings.[14] At each meeting, CRCL developed the agenda and highlighted several cases that exemplified specific areas of concern. It was also during these meetings that CRCL would receive quarterly statistics of segregation placements by Area of Responsibility (AOR), ICE detention facility, placement reason, and average duration in segregation, among other data points. Ultimately, CRCL ceased to request the meetings given many of the same concerns noted above which rendered the meetings unproductive. As noted above, despite language in the Segregation Directive regarding CRCL's participation in the DMC segregation subcommittee meetings, CRCL has not been informed or invited to any DMC segregation subcommittee meetings. CRCL also no longer receives the quarterly statistics on segregation placements prepared by ICE.

In response to the issuance of the DOJ Report, in March 2016, the President directed DOJ to implement the overarching principles recommended in the report in order to limit the use of segregation and directed other federal agencies with confinement facilities to assess the applicability of the report's recommendations. As a result, on March 10, 2016, the CRCL Officer issued a Memorandum for the Deputy Secretary with CRCL's priority segregation reform recommendations based on CRCL's review of the DOJ Report.[15] Throughout the rest of 2016, CRCL continued to participate in meetings with ICE, the DHS Front Office, and the White House to discuss the applicability of DOJ's principles at ICE's detention facilities. CRCL also worked collaboratively with ICE to develop a report to the White House on the applicability of the DOJ recommendations in immigration detention facilities, the reforms that ICE had already implemented, and the additional policy changes that ICE intended to adopt in light of the DOJ recommendations.

As part of this effort, CRCL also worked with ICE to incorporate the DOJ recommendations into ICE's 2016 revisions of the 2011 Performance-Based National Detention Standards (PBNDS 2011 (2016)). As a result, the PBNDS 2011 (2016) include requirements related to the DOJ report such as a multi-disciplinary panel at each facility conducting weekly reviews of all segregation placements, greater involvement from mental health and medical professionals when

[14] In September 2015, CRCL raised concerns about thirteen detainees who had been in segregation for more than a year; in February 2016, CRCL raised concerns about detainees who had received extended disciplinary segregation sanctions because they had received multiple charges for a single incident; in May 2017, CRCL raised general concerns about ICE's new detention standards for over seven-day and under-seven day non-dedicated facilities; in August 2017, CRCL raised concerns about detainees placed in disciplinary segregation who had recently been discharged from suicide precautions; in December 2017, CRCL raised concerns about detainees with mental illness who had been placed in segregation for over a year; and in March 2018, CRCL raised concerns about detainees with a mental illness who had been in segregation for over 60 days at a facility inspected under the National Detention Standards.

[15] CRCL recommended that ICE develop special-purpose housing units to provide a more supportive environment for vulnerable detainees who might otherwise end up in long-term administrative segregation; develop step-down units for detainees with mental health concerns; enhance out-of-cell time and programming and privileges; prohibit the placement of suicidal detainees or detainees with active psychotic symptoms in segregation; prohibit the use of segregation for 300-level offenses; develop comprehensive training on the effects of segregation, methods for limiting the use of segregation, how to address the needs of individuals with vulnerabilities while in segregation, and young adult brain development and appropriate de-escalation techniques; and limit the use of segregation for young adults and pregnant and postpartum women. *See,* CRCL, "Priority Segregation Reform Recommendations and Comparative Analysis of Department of Justice's 2016 Report and Recommendations Concerning the Use of Restrictive Housing and Immigration and Customs Enforcement's Current Policies," (March 10, 2016) (on file with author).

a detainee is placed in the Special Management Unit (SMU), specialized training for staff assigned to SMUs, and greater clarity on the timeliness and processes for disciplinary hearings related to SMU placements.[16]

2017-Present: Strengthening Segregation Oversight – A Continuing Effort

In FY 2017 and FY 2018, CRCL participated in ICE's working group to revise the National Detention Standards (NDS) ensuring that the stronger protections from PBNDS 2011 (2016) were incorporated into the NDS 2019.[17] However, CRCL's complaint and onsite investigation work[18] continued to show repeat problems with the use of segregation at ICE facilities.[19] Through these reviews, CRCL became concerned that the principles that were incorporated in the ICE policies were not being borne out in practice at the facility-level.

This is not to say ICE has not continued to try to improve the systems in place. To date, ICE continues to track segregation placements through SRMS and has over time sought to strengthen and improve the quality of the information entered into SRMS. For example, in January 2017, ERO issued a broadcast to the field with expanded guidance on submitting segregation notifications into SRMS with new requirements to improve data quality and the timely reporting of the segregation placements. Representatives from Field Operations, Custody Programs Division (CPD), the Office of the Principal Legal Advisor (OPLA), and ICE Health Service Corps (IHSC) have also continued to conduct weekly segregation meetings—now termed the Tuesday medical/mental health meetings—where they review and discuss a subset of segregation placements involving individuals who have medical/mental health concerns.[20] During this time, CPD has also developed additional guidance and training for the field on the Segregation Directive's reporting requirements.

At the same time, over the last several years, ICE's use of segregation has garnered Congressional and public interest, in part stemming from a reported whistleblower complaint detailing alleged concerns with DHS's oversight of segregation placements.[21] Throughout this time, CRCL and other oversight bodies, such as the DHS Office of the Inspector General (OIG)

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[16] ICE, 2011 Operations Manual ICE Performance-Based National Detention Standards (last visited April 19, 2022).
[17] The 2019 NDS were implemented on March 1, 2020.
[18] Per the complaint process, incoming allegations related to segregation are processed and reviewed as potential complaints, and a subset of those are opened and investigated, possibly resulting in recommendations to ICE. As part of CRCL's onsite investigations at ICE detention facilities, CRCL typically has a corrections expert review the facility's use of segregation from a systemic perspective. These investigations are followed by expert recommendations to ICE addressing any issues found.
[19] As stated on page 2 of this memorandum, from Fiscal Year (FY) 2014 to FY 2021, CRCL has issued to ICE approximately 185 recommendations related to the use of segregation in ICE detention. This includes 55 recommendations related to the provision of mental health care, 54 recommendations related to conditions of detention associated with administrative or disciplinary segregation, 45 recommendations related to suicide prevention, 14 recommendations related to access to privileges, 11 recommendations related to due process, and six recommendations related to individuals with special vulnerabilities.
[20] The original focus of the meeting was not solely on medical/mental health cases and the former Office of Detention Policy and Planning (ODPP) used to participate and lead the meeting prior to ODPP's dissolution in 2018.
[21] See Ellen Gallagher, The other problem with ICE detention: Solitary confinement, The Washington Post, Aug. 28, 2019 (last visited August 19, 2019).

and the Government Accountability Office,[22] have conducted reviews based on allegations involving the alleged misuse of segregation at individual facilities and/or ICE's compliance with the Segregation Directive and respective detention standards.

OIG inspections of ICE field offices and detention facilities have found deficiencies that are consistent with CRCL's own investigative findings. In September 2017, the OIG reported irregular, missing, or inaccurate documentation and reporting of segregation placements; lack of physical welfare checks; restricted privileges for detainees placed in administrative segregation; inaccurate reports indicating detainees were receiving recreation time when they were not; as well as use of administrative segregation for long-term protective custody. Since then, the OIG has continued to document similar findings in several other inspection reports.[23]

In 2021, the OIG issued OIG-22-01, *ICE Needs to Improve its Oversight of Segregation Use in Detention Facilities*, a systemic review of ICE's oversight of individuals placed in segregation by reviewing a random statistical sample of 265 detainees' detention files.[24] The OIG found significant data quality errors between the segregation data tracked at individual facilities and within SRMS, concerns with timely and accurate reporting, and notably, a lack of evidence that ICE was considering alternatives for segregation (as required by the Segregation Directive) for a majority of the statistical sample.[25] ICE concurred with all three of the OIG's recommendations that ICE should track all segregation placements through SRMS instead of the current required subset, that ICE should require detention facilities to collect and track standardized information for all segregation placements, and that ICE should update policies to ensure compliance with record retention schedules for segregation placements.[26]

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[22] The Government Accountability Office (GAO) is currently undertaking its own review of ICE's use of segregation through GAO 105366: ICE Segregated Housing.

[23] DHS Office of Inspector General, OIG-17-119, ICE Field Offices Need to Improve Compliance with Oversight Requirements for Segregation of Detainees with Mental Health Conditions at 1-6 (Sept. 29, 2017) (finding field offices did not always properly report segregation to ICE Headquarters in SRMS or report it timely; FOD reviews not recorded in SRMS or not properly documented; and observing that "even if the reviews had been completed, without comprehensive information, ICE headquarters cannot adequately assess the effects of segregation on these detainees"); DHS OIG, OIG-20-45, Capping Report: Observations of Unannounced Inspections of ICE Facilities in 2019 at 5-7 (July 1, 2020) (finding failures to consistently include documentary support for segregation placement; failure to physically observe detainees during welfare checks; placing segregated detainees in restraints when they left their cells for activities); DHS OIG, OIG-21-03, ICE Needs to Address Concerns About Detainee Care and Treatment at the Howard County Detention Center (Oct. 28, 2020) at 4 (failure to consistently document medical visits to detainees in segregation); DHS OIG, OIG-21-12, ICE Needs to Address Prolonged Administrative Segregation and Other Violations at the Imperial Regional Detention Facility (Dec. 18, 2020) at 4-5 (finding that "IRDF medical staff were conducting inadequate medical checks — conducting visits when administratively segregated detainees were sleeping — and not physically observing and speaking with each detainee"); DHS OIG, OIG-21-61, Violations of ICE Detention Standards at Otay Mesa Detention Center (Sept. 14, 2021) (finding that segregated detainees were not consistently provided same privileges as general population); DHS OIG, OIG-21-32 Violations of ICE Detention Standards at Pulaski County Jail (April 29, 2021) at 9 (finding that physical welfare checks were not occurring for individuals in segregation).

[24] DHS OIG, OIG-22-01, ICE Needs to Improve its Oversight of Segregation Use in Detention Facilities (Oct. 13, 2021) [hereinafter OIG-22-01].

[25] *Id.* at 5.

[26] *Id.* at 11.

Most recently, on May 25, 2022, the President issued Executive Order 14074, *Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety*, which calls upon DOJ to report on what steps "DOJ has taken, consistent with applicable law, to ensure that restrictive housing in Federal detention facilities is used rarely, applied fairly, and subject to reasonable constraints" and to ensure "DOJ's full implementation … [of] the recommendations of the DOJ's January 2016 Report and recommendations Concerning the Use of Restrictive Housing…."[27] The recent issuance of this Executive Order reaffirms the need for DHS to reevaluate and assess its use and oversight of segregation.

CRCL Segregation Periodic Review Investigation:

CRCL conducted this review in accordance with its longstanding role in segregation oversight as well as with its statutory role to advise Department leadership and oversee compliance with constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department.[28]

In addition to CRCL's investigative authority at 6 U.S.C. § 345 under which CRCL issued the retention documents,[29] under 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1, CRCL is specifically charged with "periodically review[ing] Department policies and procedures to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities."[30] In accordance with this authority, CRCL seeks to proactively and periodically review the Department's policies and programs to strengthen civil rights and civil liberties protections and address any gaps that might lead to allegations of civil rights and civil liberties violations.

Conduct and Contents of the ICE Segregation Periodic Review (Methodology)

In this review, CRCL examined ICE HQ and the field's role, responsibilities, and obligations associated with the following topics and policy requirements:

- Segregation Review Coordinator Role
- Field Office Role
- IHSC Role
- Detention Monitoring Council Role
- Segregation Review Management System
- Oversight of Disciplinary Segregation
- Oversight of Administrative Segregation

[27] E.O. 14074, Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety, 87 Fed. Reg. (May 31, 2022) at 32959.
[28] 6 U.S.C. § 345(a)(4) (2002).
[29] CRCL Complaint No. 20-05-ICE-0381, ICE's Oversight Concerning the Use of Segregation (May 28, 2020) (on file with author).
[30] 6 U.S.C. § 345(a)(3) (2002).

- Oversight of Segregation Placements for Vulnerable Populations
- Oversight of Segregation Placements for Detainees on Suicide Precautions
- Availability of Supportive Housing for Vulnerable Populations
- Development of Facility Resources and Capabilities for Segregated Detainees
- Development of Segregation-related Training Materials

On May 28, 2020, CRCL issued a retention memorandum and information request to ICE initiating the investigation.[31] Over the next three months, ICE gathered responsive information from multiple offices and divisions within ERO, including CPD and IHSC, as well as from the Office of Detention Oversight (ODO) within the Office of Professional Responsibility. CRCL received and reviewed hundreds of documents and segregation placement records during the course of this review, including policies, procedures, training slide decks, guidance documents and emails, as well as SRMS data, detention records, facility-specific data as it relates to segregation, and ODO's Compliance Inspection reports. CRCL subsequently requested and received detention files and SRMS records for individuals who met certain criteria.[32]

From September 2020 to January 2021, CRCL also conducted nine interviews with ICE personnel: two sets of interviews with personnel from CPD and IHSC, as well as interviews with personnel from five of ICE's 25 field offices.[33] CRCL also analyzed recommendations from previous CRCL onsite investigations from January 2013 to March 2022; reviewed several pieces of Informal Advice previously sent to ICE concerning the use of segregation in ICE detention facilities;[34] and reviewed seven OIG inspection reports involving the use of segregation and segregation oversight.[35]

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[31] CRCL Complaint No. 20-05-ICE-0381, s*upra* note 29.

[32] CRCL requested the detention files and SRMS notes for nineteen individuals who met the following criteria: individuals who have died in segregation since 2013; individuals placed in segregation while on suicide precautions since January 2018; individuals placed in administrative segregation for more than 30 days since January 2018; individuals placed in disciplinary segregation for more than 30 days since January 2018; individuals placed in segregation with a diagnosed mental illness since January 2018; elderly individuals placed in administrative segregation since 2018; individuals on hunger strike placed in administrative segregation since January 2018; and individuals who self-identify as LGBTQI+.

[33] CRCL interviewed personnel from the following ICE field offices: Philadelphia Field Office on January 11, 2021; the San Antonio Field Office on January 12, 2021; the Chicago Field Office on January 13, 2021; the Boston Field Office on January 19, 2021; and the Los Angeles Field Office on January 19, 2021. We chose these field offices based on a variety of factors, including field offices in different quadrants of the country as well as field offices whose areas of responsibility include the various different types of ICE facilities (i.e., Service Processing Centers, Contract Detention Centers, Inter-governmental Service Agreements, and U.S. Marshal Service facilities.)

[34] CRCL reviewed Informal Advice in Complaint No. 21-03-ICE-0145 regarding Adelanto ICE Processing Center in Adelanto, California, sent to ICE on June 22, 2021. CRCL also, reviewed Informal Advice in Complaint No. 001594-21-ICE regarding Caroline Detention Center in Bowling Green, Virginia, sent to ICE on March 14, 2021. CRCL reviewed Informal Advice in Complaint No. 20-06-ICE-0572 regarding a 504 complaint at Irwin County Detention Center in Ocilla, GA, sent to ICE on December 7, 2020. Additionally, CRCL reviewed Informal Advice in medical referral complaint(s) No. 20-01-ICE-0058 regarding Strafford County Corrections in Dover, NH (sent to ICE on April 29, 2020); No. 20-07-ICE-0546 regarding Krome North Service Processing Center in Miami, FL (sent to ICE on February 1, 2021); and No. 19-05-ICE-0183 regarding Suffolk County House of Corrections in Boston, MA (sent to ICE on September 3, 2019).

[35] *See* list of OIG inspection reports in *supra* note 23 and 24.

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Global Recommendations for ICE's Segregation Oversight Program:

Following the extensive review by CRCL of ICE's segregation oversight program, CRCL recommends that ICE HQ implement the following high-level recommendations:

I. Defining Segregation

Throughout the last several decades, international human rights mechanisms have expressed concern over the use of solitary confinement around the world and specifically in the United States. In December 1990, the United Nations (U.N.) General Assembly adopted the Basic Principles for the Treatment of Prisoners, which encouraged U.N. Member States to undertake efforts to abolish "solitary confinement as a punishment, or to [restrict] its use."[36] U.N. treaty bodies and the U.N. Special Rapporteur on Torture have called upon the U.S. to strictly limit the use of solitary confinement, including in immigration detention.[37]

These pronouncements are based on the recognition that solitary confinement has been shown to be significantly and demonstrably harmful in some cases. Research indicates that solitary confinement can lead to substantial and lasting psychological, neurological, and physiological damage. The physical and social isolation, along with sensory deprivation and forced idleness, can cause a variety of conditions, including depression, anger, paranoia, insomnia, impulse control, cognitive disturbances, and post-traumatic stress disorder. Solitary confinement has been shown to cause or worsen hypertension, heart attacks, strokes, and other preexisting medical problems. Numerous studies have found that solitary confinement has a disproportionate impact on Black and brown people, youth, lesbian, gay, bisexual, transgender, queer, and/or questioning, intersex (LGBTQI+) individuals, and individuals with mental illnesses and disabilities. Solitary confinement additionally poses unique difficulties for women.[38]

What is Solitary Confinement?

While there is no universally agreed upon definition of what constitutes "solitary confinement," professional organizations, U.S. state and local jurisdictions, national civil rights organizations, and international human rights bodies, among others, have begun to establish formal definitions for the term solitary confinement in an attempt to implement parameters around its use. At the very core, defining the conditions that amount to solitary confinement is necessary in order to limit it. In December 2015, the U.N. General Assembly issued a nonbinding resolution that reflected, for the first time, agreed upon principles across the international community about the definition, effects, and use of solitary confinement: the Standard Minimum Rules for the

[36] United Nations (U.N.) Office of the High Commissioner for Human Rights, Basic Principles for the Treatment of Prisoners, (Dec. 14, 1990) (adopted by General Assembly resolution 45/111).
[37] "…the Committee remains concerned by reports of substandard conditions of detention in immigration facilities and the use of solitary confinement." *See,* Committee Against Torture, Concluding observations on the combined third to fifth periodic reports of the United States of America, ¶19 (Dec. 19, 2014); and "The Committee is concerned about the continued practice of holding persons deprived of their liberty, including, under certain circumstances, juveniles and persons with mental disabilities, in prolonged solitary confinement and about detainees being held in solitary confinement in pretrial detention." See, Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America, ¶ 20, (Apr. 23, 2014).
[38] Kayla James and Elena Vanko, The Impacts of Solitary Confinement, Vera Institute of Justice (April 2021).

Treatment of Prisoners (also known as the Nelson Mandela Rules). The Nelson Mandela Rules define solitary confinement as the confinement of an individual for 22 hours or more a day without meaningful human contact.[39] When the Nelson Mandela Rules were adopted in 2015, the U.S. Department of State—on behalf of the U.S. government—"whole-heartedly" endorsed all of the rules.[40]

A universal definition of solitary confinement is, however, difficult to establish because, as noted earlier, different terms are used to describe the same principle; the National Commission on Correctional Health Care (NCCHC) emphasizes that, "Different jurisdictions refer to solitary confinement by a variety of terms, such as isolation; administrative, protective, or disciplinary segregation; permanent lockdown; maximum security; supermax; security housing; special housing; intensive management; and restrictive housing units. Regardless of the term used, an individual who is deprived of meaningful contact with others is considered to be in solitary confinement."[41]

Segregation versus Solitary Confinement in ICE Detention

The findings from CRCL's forthcoming segregation expert recommendations, past complaint recommendations, and extensive experience conducting inspections of ICE detention facilities support the fact that segregation in ICE detention is often indistinguishable from what is commonly understood as solitary confinement. While ICE does not use the term solitary confinement[42] and instead prefers the terms "administrative or disciplinary segregation," "special management units, "restrictive housing," and "protective custody," ICE's policies around these terms do not strictly prohibit conditions that would amount to solitary confinement, i.e., the confinement of an individual for 22 hours or more a day without meaningful human contact. In fact, ICE's Segregation Directive only broadly defines segregation as the "separation from the general population" and does not include any clear parameters for the maximum hours that an individual can be confined to their segregated cell.[43]

ICE's detention standards only require one to two hours of out-of-cell time for recreation (so long as the "detainee's recreational activity [does not] unreasonably endanger safety or

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[39] Under Rule 43, indefinite and prolonged solitary confinement are equated with torture or other cruel, inhuman or degrading treatment or punishment and should be completely prohibited. Under Rule 44, solitary confinement refers to the confinement of prisoners for 22 hours or more a day without meaningful human contact; prolonged solitary confinement is solitary confinement in excess of 15 consecutive days. Under Rule 45, solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review; imposition should be prohibited in cases where mental or physical disabilities would be exacerbated by such measures; and it is prohibited in cases involving women and children. *See* Nelson Mandela Rules, *supra* note 8.

[40] DOJ OIG, Review of the Federal Bureau of Prisons' Use of Restrictive Housing for Inmates with Mental Illness (July 2017) at 21.

[41] National Commission on Correctional Health Care (NCCHC), Position Statements, Solitary Confinement (Isolation) (2016).

[42] "Your letter also raises concerns over the use of what you refer to as 'solitary confinement,' which is not a housing designation used by ICE." *See* ICE Response Letter to American Civil Liberties Union of Virginia (March 7, 2022) at 2 (on file with author). "ICE Contractor Says It Doesn't Use Solitary Confinement. Photos of its Isolation Cells Reveal Otherwise," *The Intercept* (March 22, 2018) (last accessed April 5, 2022).

[43] Segregation Directive, *supra* note 3 at §§ 3.1 and 3.2.

security"[44]). Out-of-cell recreation is also not required every day of the week: under the NDS 2019, out-of-cell recreation is only required five days per week for both administrative and disciplinary segregation, and under PBNDS 2011 (2016), out-of-cell recreation is only required five days a week for disciplinary segregation.[45] There is, therefore, nothing in ICE's policies or standards that strictly prohibits some facilities from confining individuals to segregation cells for 23 hours on weekdays, 24 hours on weekends, or even longer if recreation privileges have been suspended, which is allowed under the standards. At best, facilities that have agreed to implement the optimal provisions in the PBNDS 2011 (2016) are still only required to offer two hours of exercise each day for individuals placed in administrative segregation and one hour of exercise each day for individuals placed in disciplinary segregation.[46] ICE's policies do not, therefore, include clear guardrails to prevent segregation from resulting in conditions that—at some facilities and in some situations—may meet the U.N. definition of solitary confinement under the Nelson Mandela Rules.

Moreover, even though ICE's policies have sought to require that individuals in administrative segregation "generally" receive the same privileges as those in general population, the detention standards provide facilities with broad discretion to effectively prevent individuals from being placed in conditions that amount to solitary confinement. Under the standards, facilities are able to alter or restrict nearly every privilege—including recreation, telephone access, visitation, and religious services—afforded to an individual placed in segregation based on "any safety and security considerations" and whether "space and resources are available."[47] The only privileges that a facility may not restrict are correspondence, legal visits, and legal materials.[48] Between the caveats that allow facilities to restrict privileges and the lack of out-of-cell requirements for privileges other than recreation, ICE's policies create a situation where facilities may confine individuals to segregation cells—whether administrative or disciplinary—for 22 hours or more a day without meaningful contact all while staying within the bounds of the detention standards. Although this may not occur in all or most facilities, it can occur and to do so would not be a violation of the ICE detention standards. As the purpose of the detention standards is to ensure guardrails are in place at ICE facilities, that such restriction would be allowed cannot be overlooked. As a result, the standards afford facilities with too much discretion related to how, and even whether, they provide the privileges that would ensure that segregated individuals do

[44] PBNDS 2011 (rev. 2016), Standard 2.12, Special Management Units, § V.Z.4 at 186. Under NDS 2019, recreation privileges may also be suspended. *See* NDS 2019, Standard 2.9, Special Management Units, § II.V.1. at 65.
[45] Under NDS 2019, facilities are required to provide at least one hour of recreation outside of their cell five days a week for both administrative and disciplinary segregation. *See* Standard 2.9, *Id.* § II.V. at 65. Under PBNDS 2011, facilities that have not signed onto the optimal provisions are required to provide at least one hour of recreation outside of their cell five days a week for disciplinary segregation and one hour outside of their cell seven days a week for administrative segregation. Standard 2.12, *supra* note 44, § V.Z.2, at 186.
[46] Standard 2.12, *supra* note 44, § V.Z.2, at 186.
[47] Standard 2.12, s*upra* note 44, § V.L.1. at 181; Standard 2.9, s*upra* note 44, § II.J.1. at 61.
[48] For example, the following caveats are included for meals ("ordinarily from the same menu," § V.Q, at 183); laundry, hair care barbering, clothing, bedding, and linen ("consistent with safety and security of the facility," § V.R, at 183); visitation ("ordinarily retains visiting privileges"… "visitation may be restricted or disallowed," § V.T, at 184); religious practices ("consistent with the safety, security, and orderly operation of the facility," § V.V, at 184); law library ("unless compelling security concerns require limitations, § V.Y, at 185); recreation ("shall be denied or suspended only if the detainee's recreational activity may unreasonably endanger safety or security," § V.Z, at 186); and telephone access ("consistent with the special safety and security requirements," § V.BB, at 187). Standard 2.12, s*upra* note 44.

not experience the conditions of solitary confinement. In other words, ICE detainees may be placed into solitary confinement without violating the relevant detention standards.[49]

Limiting Solitary Confinement by Defining It

While there is no universally agreed upon definition of solitary confinement, over the last several years, several states and local jurisdictions in the U.S. have begun to adopt the U.N. definition of solitary confinement under the Nelson Mandela Rules. By adopting the U.N. definition, these jurisdictions have expressly prohibited confining an individual for more than 22 hours in a cell without meaningful contact.[50] Other states and local jurisdictions have, however, gone further to define solitary confinement as confinement to a cell for more than 20 hours a day (e.g., Allegheny County, PA,[51] Cook County, IL,[52] and New Jersey[53]), and as even anything more than 17 hours a day in the case of New York State.[54]

Findings and Recommendations:

1. **Finding**: Over the course of many years of work on ICE detention-related issues, CRCL finds that segregation in ICE detention can be at times indistinguishable from the conditions defined in the U.N. Nelson Mandela Rules' definition of solitary confinement: confinement of an individual for 22 hours or more a day without meaningful human contact. Despite the well-documented psychological and physical effects that isolation without meaningful human contact has on an individual, ICE's detention standards provide facilities with considerable discretion to restrict out-of-cell privileges and only explicitly mandate one to two out-of-cell hours for recreation; in facilities governed by the NDS 2019, no out-of-cell time is required on weekends.

   Recommendation #1 – (b) (5) [redacted] (b) (5) [redacted]

[49] In the past, there was additional flexibility built into the detention standards. In at least one instance, ICE had officially waived the requirement to provide detainees in administrative segregation with additional opportunities to spend time outside of their cells beyond the required recreation period. In August 2022, however, ICE provided CRCL with a new guidance, "Waivers of ICE Detention Standards," that was issued on September 2, 2021 related to the issuance and oversight of waivers: the guidance outlines submission criteria for waiver requests, an adjudication process for new waivers, and an annual review process for waivers that are currently in effect. This new guidance alleviates CRCL's concerns that there is not a rigorous process in place to assess and approve new waiver requests related to critical services and protections in the detention standards.

[50] Colorado (Title 17 CO. Rev. Stat. Art. 26, § 302(6)); Arkansas (Arkansas Code § 12-32-104 (2021)) (applying to female and juvenile inmates/detainees); Maryland (Ch. 527 Ann. Code. MD § 9-614 (a)(3)(1)); Connecticut (Conn. Exec. Order [Gov. Lamont], No. 21-1, June 30, 2021); and New Jersey (NJ Rev. Stat. § 30:4-82.7 (2021) (defining solitary as 22 hours or more in county correctional facilities and 20 hours or more in state correctional facilities).

[51] Allegheny County, Pennsylvania, Admin. Code § 205-30 (2021) (resulting from approved ballot initiative to prohibit solitary confinement).

[52] *See*, Valerie Kiebala, "Chicago Jail's Quest to End Solitary Confinement is a Work in Progress," *Solitary Watch* (Jan. 6, 2020); and Tom Dart, "Opinion: My jail stopped using solitary confinement. Here's why," *The Washington Post* (Apr. 14, 2019).

[53] New Jersey, A 314/S 3261, Isolated Confinement Restriction Act, 2018-2019 Leg., Reg. Sess. (Jul. 11, 2019).

[54] New York, S 2836, Humane Alternatives to Long-Term Solitary Confinement (HALT) Act, 2021-2022 Reg. Sess. (January 25, 2021).

(b) (5) [redacted]

2. **Finding**: ICE does not explicitly define segregation or include prescriptive out-of-cell requirements for individuals placed in segregation other than for one to two hours of recreation, five to seven days a week. Without prescriptive out-of-cell minimum time requirements, ICE cannot ensure that—in practice—individuals in administrative segregation will receive the same privileges as those in general population or individuals in disciplinary segregation will receive the privileges afforded to them by ICE's detention standards. While ICE operates a civil detention system, its approach to segregation is equivalent to, or more restrictive than, some state criminal correctional systems.

Recommendation #2 – (b) (5) [redacted]

II. Understanding and Defining Prolonged Segregation

In addition to efforts to limit the number of hours that individuals are isolated without meaningful contact while in restrictive housing, international human rights organizations, national civil rights organizations, correctional departments, legislators, and medical and mental health professional organizations have also raised concerns and issued calls to prohibit placements in solitary confinement that are "prolonged"—i.e., as defined by the Nelson Mandela Rules, placements that last more than 15 days.[55]

Prolonged Segregation in ICE Detention

While ICE does not have a definition of prolonged segregation, the Segregation Directive and detention standards do refer to any placement over 14 days as "extended."[56] Some prolonged segregation placements may also go unnoticed because SRMS lacks the functionality to flag situations where an individual is removed from segregation for a brief period of time and then returned to segregation for new placement—i.e., placements that collectively amount to prolonged segregation during a set period of time.

Despite the 2016 and 2019 revisions to PBNDS 2011 and NDS, respectively, that encouraged limiting disciplinary segregation sanctions to 30 instead of 60 days and prohibited the stacking of

[55] Nelson Mandela Rules, *supra* note 39.
[56] Segregation Directive, *supra* note 3, at § 5.1; Standard 2.12, s*upra* note 44, § V.C. at 178; and Standard 2.9, s*upra* note 44, § II.C. at 57.

disciplinary segregation charges, ICE's detention standards do not include strict limits on the length of stay in segregation. Under PBNDS 2011 (2016), the maximum disciplinary sanction is generally 30 but up to 60 days,[57] and the NDS 2019 does not prescribe an upper limit for "extraordinary circumstances."[58] Neither set of standards includes a limit on the length of stay for individuals placed in administrative segregation. While the Segregation Directive established timeframes to review all such placements at 14 and then 30 day intervals, an individual's placement in administrative segregation can, hypothetically, still be extended indefinitely.[59] An individual's placement in disciplinary segregation could also extend beyond 60 days if the individual commits another infraction during their placement in segregation and is sanctioned to additional time in disciplinary segregation.[60] Cumulative caps on the length of time that someone may spend in segregation do not exist in ICE's policies for either disciplinary or administrative segregation.

In CRCL's information request, CRCL requested the placement information for individuals placed in administrative segregation and disciplinary segregation for more than 30 days. In response, ICE provided placement data for individuals between January 1, 2018 and June 25, 2020 (the date the data was extracted). The data reflects the last placement reason in the system at the time that the individual was removed from segregation. As a result, while the data below may in fact reflect situations where an individual's placement reason was changed multiple times throughout their stay in segregation, SRMS does not currently capture placement reason changes. Nonetheless, we are presenting this data here as it reflects what was provided to CRCL. During this same time period, ICE reported to CRCL that 7,815 segregation placements were reported into SRMS.[61]

Number of Days in Administrative Segregation[1]	Number of Individuals	%
30 days	81	5.44%
31-99 days	1050	70.47%
100-199 days	253	16.98%
200-299 days	68	4.56%
300-399 days	29	1.95%
400-499 days	5	0.34%
500-599 days	2	0.13%
600-699 days	1	0.07%
700-799 days	1	0.07%
30 - 799 days	1490	

Number of Days in Disciplinary Segregation[1]	Number of Individuals	%
30 days	195	22.73%
31-99 days	635	74.01%
100-199 days	23	2.68%
200-299 days	4	0.47%
300-399 days	0	0%
400-499 days	0	0%
500-599 days	0	0%
600-699 days	1	0.12%
30 - 699 days	858	

* SRMS data between January 1, 2018 and June 25, 2020 (the date the data was extracted).

[57] "Disciplinary segregation (up to 60 days)." *See* PBNDS 2011 (rev. 2016), Standard 3.1, Disciplinary System, at Appendix 3.1.A Offense Categories, § 1.A.B.3.
[58] "The maximum sanction is 30 days in disciplinary segregation per incident, except in extraordinary circumstances," *See* Standard 2.9, *supra* note 44, § II.B.1 at 56.
[59] Segregation Directive, s*upra* note 3, at § 5.1.
[60] There is nothing in PBNDS 2011 (rev. 2016) or NDS 2019 prohibiting this practice.
[61] List of Detainees SPC, CDF, IGSA 1.d.xlsx (on file with author).

Effects of Prolonged Segregation

Numerous human rights bodies and experts have equated some forms of prolonged solitary confinement to acts of torture due to the psychological effects of prolonged confinement in poor conditions of detention.[62] The U.N. Committee Against Torture and a U.N. Special Rapporteur on Torture have both affirmed that prolonged solitary confinement can, depending on the circumstances, violate the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[63] an international human rights treaty that the U.S. government ratified in 1994.

This position is not unique to international human rights organizations. In an April 10, 2016, position statement issued by the NCCHC Board of Directors, the NCCHC declared that "prolonged (greater than 15 consecutive days) solitary confinement is cruel, inhumane, and degrading treatment, and harmful to an individual's health," that "prolonged solitary confinement should be eliminated as a means of punishment," and that administrative solitary confinement should never exceed 15 days and "be used only as an exceptional measure when other, less restrictive options are not available, and then for the shortest time possible."[64]

A growing body of research has revealed the detrimental effect that prolonged solitary confinement, in particular, has on an individual's psychological and physical health. According to one report, "[n]early every scientific inquiry into the effects of solitary confinement over the past 150 years has concluded that subjecting an individual to more than 10 days of involuntary segregation results in a distinct set of emotional, cognitive, social, and physical pathologies."[65] Recognizing these health effects, in October 2019, the World Medical Association (WMA) issued support for the Nelson Mandela Rules against the use of solitary confinement beyond 15 days.[66] In 2014, the World Health Organization (WHO) noted the broad range of research supporting the conclusion that solitary confinement results in serious, and at times extreme, negative physiological and psychological consequences.[67]

Efforts to Limit Prolonged Segregation

Significantly, at least four states and one county have banned the use of all forms of solitary confinement beyond 15 days in accordance with the Nelson Mandela Rules:

- Allegheny County, Pennsylvania: Passed in May 2021, a ballot initiative prohibits all solitary confinement (defined as 20 hours or more a day) except in facility-wide

[62] See U.N. OHCHR, United States: prolonged solitary confinement amounts to psychological torture, says UN expert, Press Releases (Feb. 28, 2020); U.N., Solitary confinement should be banned in most cases, UN expert says, *U.N. News*, (Oct. 18, 2011).
[63] Juan Mendez, Interim Report Prepared by the Special Rapporteur of the Human Rights Council on Torture, ¶ 76, (Aug. 5, 2011).
[64] NCCHC, supra note 41.
[65] Alison Shames, Jessa Wilcox, Ram Subramanian, Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives, Vera Institute of Justice (May 2015) at 17.
[66] World Medical Association (WMA), WMA Statement on Solitary Confinement, revised by the 70th WMA General Assembly, Tbilisi, Georgia (October 2019).
[67] Stefan Enggist, et. al., Prisons and Health, World Health Organization, Regional Office for Europe (2014) at 28.

lockdowns, emergency use for 24 hours, or requested protective custody for up to 72 hours.[68]

- Colorado: In October 2017, the Colorado Department of Corrections began prohibiting solitary confinement (defined as 22 hours or more a day) beyond 15 days in state correctional facilities.[69] Signed into law in 2021, the Regulation of Restrictive Housing in Jails also prohibits placing an individual in solitary confinement (defined as 22 hours or more a day) for more than 15 days in a 30-day period without a written court order in jails with over 400 beds.[70]
- Connecticut: Issued in June 2021, Executive Order No. 21-1, prohibits solitary confinement (defined as 22 hours or more a day) for more than 15 days absent a serious incident resulting in a lockdown of a substantial portion of the facility.[71]
- New Jersey: Signed into law in July 2019, the Isolated Confinement Restriction Act restricts solitary confinement (defined as 20 hours or more a day) to 20 consecutive days and 30 days in a 60-day period.[72]
- New York: Signed into law in April 2021, the Humane Alternatives to Long-Term Solitary Confinement Act (HALT) prohibits solitary confinement (defined as 17 hours or more a day) beyond 15 consecutive days.[73]

Several other states have proposed legislation that would do the same: Washington,[74] Oregon,[75] Nebraska,[76] Massachusetts,[77] Virginia,[78] Pennsylvania,[79] and Maine.[80] Nationally, a U.S. House of Representatives bill, H.R. 176, Restricting the Use of Solitary Confinement Act, is currently referred to the Subcommittee on Crime, Terrorism, and Homeland Security, that would prohibit solitary confinement more than 15 consecutive days, or for more than 20 days during any 60-day period.[81] Although this legislation has not become final, it shows the current posture towards solitary confinement and where the states are looking to move in regard to the use of segregation, which should directly inform ICE policy.

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[68] Allegheny Count, PA, s*upra* note 51.
[69] Colorado Department of Corrections, "A.R. 650-03: Restrictive Housing," (Mar. 15, 2020).
[70] Colorado, HB21-1211, Regulation of Restrictive Housing in Jails, 2021 Reg. Sess. (Jun. 24, 2021).
[71] Governor Ned Lamont, Executive Order No. 21-1, (Jun. 30, 2021).
[72] New Jersey, s*upra* note 53.
[73] New York, s*upra* note 54.
[74] Washington, Concerning Solitary Confinement, H.B. 1756, Reg. Sess. 2021-22.
[75] Oregon, Relating to Incarcerated Persons, H.B. 3186, Reg. Sess. 2019.
[76] Nebraska, Limit Use of Restrictive Housing and Solitary Confinement, L.B. 620, Reg. Sess. 2021-22.
[77] Massachusetts, An Act to Provide Criminal Justice Reform Protections to all Prisoners in Segregated Confinement, H.2504/S.1578, Reg. Sess. 2021-22.
[78] Virginia, Correctional Facilities; DOC to Convene Work Group to Study Use of Restorative Housing, S.B. 108, Reg. Sess. 2021-22 (establishing a work group to study the issue and make recommendations on how to end the use of solitary confinement beyond 14 days).
[79] Pennsylvania, An Act Amending Title 62 (Prisons and Parole) of the Pennsylvania Consolidated Statutes, Providing for Solitary Confinement, H.B. 1037, Reg. Sess. 2021-2022.
[80] Maine, An Act to Prohibit Solitary Confinement in Maine's Corrections System, L.D. 696, Reg. Sess. 2021-2022.
[81] Restricting the Use of Solitary Confinement Act, H.R. 176, 117th Cong. (2021).

Findings and Recommendations:

3. **Finding**: Numerous international human rights bodies, professional organizations, and correctional systems define prolonged segregation as more than 15 days in a confined setting without meaningful contact. ICE does not, however, have a definition for prolonged segregation.

   Recommendation #3 – (b) (5) [redacted]

4. **Finding**: International human rights bodies, the WMA, the NCCHC, and some state and county correctional systems have recognized that segregation beyond 15 days can, depending on the circumstances, amount to cruel, inhuman, and degrading treatment that is harmful to an individual's health. In contrast, ICE policies place very few limits on the length of time that someone may be placed in segregation: an individual may be placed in administrative segregation indefinitely, and an individual's placement in disciplinary segregation may extend beyond 60 days in extraordinary circumstances at some facilities or if he/she accrues additional time for subsequent infractions.

   Recommendation #4 – (b) (5) [redacted]

5. **Finding**: In addition to including very few limits on the length of individual placements in segregation, ICE's detention standards do not include cumulative caps on the use of segregation over a period of time. In the absence of a cumulative cap on segregation, individuals may be placed in segregation indefinitely. A cumulative cap on segregation placements will help ensure that facility, field, and HQ-level personnel make concerted efforts to consider less restrictive housing options and appropriate alternatives, which are long-standing requirements from the Segregation Directive but have not borne out in practice. If ICE implements a prohibition on prolonged segregation placements, a cumulative cap will also help ensure that an individual is not temporarily removed from segregation every 15 days in order to avoid the 15-day prohibition.

   Recommendation #5 – (b) (5) [redacted]

6. **Finding**: While ICE's Segregation Directive and detention standards contemplate the placement of individuals in protective custody and administrative segregation for non-

disciplinary reasons, in reality, administrative segregation and protective custody are currently not substantially distinct from the conditions of disciplinary segregation: typically the same cells are used for both types of segregation, individuals in administrative and disciplinary segregation may be commingled within the same cell block (though not the same cell);[82] individuals in administrative segregation only receive an additional 2 hours of out-of-cell recreation each week at facilities governed by the PBNDS 2011 (2016) and no additional out-of-cell recreation time at facilities governed by the NDS 2019;[83] and facilities have discretion to limit the privileges provided to individuals in administrative segregation.

Recommendation #6 – (b) (5) [redacted]

III. Limiting Segregation for Disruptive Behavior

In addition to growing concerns about the use and effects of restrictive housing generally and prolonged segregation specifically, international human rights organizations, correctional departments, legislators, and medical and mental health professional organizations have also raised concerns about the use of segregation for disciplinary sanctions.

Disciplinary Segregation in ICE Detention

As aforementioned, while both the PBNDS 2011 (2016) and NDS 2019 mandate that the maximum disciplinary sanction is 30 days per incident, the standards allow for longer disciplinary segregation sentences "in extraordinary circumstances."[84] Under the PBNDS 2011 (2016), a detainee may in fact be placed in disciplinary segregation for up to 60 days for a single incident associated with a 100-level charge.[85] Moreover, under the NDS 2019, there is no limit on the length of a disciplinary sanction in "extraordinary circumstances."[86] Furthermore, unlike the PBNDS 2011 (2016), the NDS 2019 does not require facilities to follow prescribed offense codes and sanctions, leaving what constitutes an "extraordinary circumstance" up to each individual facility to decide. While the 2016 revisions introduced the requirement that multiple sanctions arising out of the same incident should be served concurrently (as opposed to stacking charges consecutively),[87] this requirement was not included in the NDS 2019 and neither set of standards impose limits (i.e., cumulative caps) on concurrent disciplinary segregation placements.

[82] Standard 2.12, s*upra* note 44, § V.A. at 173.
[83] Standard 2.12, s*upra* note 44.
[84] Standard 3.1, s*upra* note 57 and Standard 2.9, *supra* note 44.
[85] Standard 3.1, s*upra* note 57.
[86] Standard 2.9, *supra* note 44.
[87] Standard 3.1, s*upra* note 58, § V.K.3 at 222.

For example, in the February 2022 SRMS export, of the 274 placements, 72 of them were for disciplinary segregation.[88] While the spreadsheet indicates that only one detainee had received more than 30 days for a single incident (45 days at Otay Mesa), seven other detainees were serving longer disciplinary sanctions (ranging from 45 to 210 days) for their original and subsequent infractions.[89] Similarly, in the January 2022 SRMS export, three detainees received more than 30 days for a single incident (one 45-day sanction and two 60-day sanctions).

While these sanction lengths appear to be in compliance with ICE detention standards, they wouldn't be in compliance with the U.N. Nelson Mandela Rules the majority of the time. Specifically, ICE's detention standards are inconsistent with the 15-day prohibition on prolonged segregation in 47 of the 72 disciplinary sanctions (or 65 percent). The NCCHC's 2016 position statement,[90] as well as a 2013 policy statement from the American Public Health Association,[91] opposes the use of prolonged solitary confinement for punishment as well as the use of prolonged administrative segregation for facility security threats. In the February 2022 SRMS export, of the individuals placed in segregation for "Facility Security Threat," one individual had been in segregation for seven months since August 2021 and another for five months since the end of October 2021.

Ineffectiveness of Disciplinary Segregation

In addition to the psychological and physical health concerns discussed in the previous sections, there is growing consensus that disciplinary segregation does not, in fact, deter disruptive behavior. While the notion of disciplinary segregation is based on the theory of deterrence (that disciplinary segregation will deter subsequent misbehavior from both the individual and group), recent empirical research supports the idea that segregation either has no effect on subsequent behavior[92] or may in fact exacerbate it.[93] Researchers posit that segregation may exacerbate subsequent behavior due to "increased levels of psychological distress post-exposures" (the strain theory); due to limiting social interactions that would otherwise serve as a "protective factor" against misbehavior (the social support theory);[94] or due to the segregated individual's

[88] Another 18 were due to Facility Threat, and 11 were pending investigation of disciplinary violation
[89] An eighth detainee was serving a 45-day sanction, however, no details were provided about the origin of the sanction.
[90] NCCHC, *supra* note 41.
[91] American Public Health Association (APHA), Policy Number 201310, Solitary Confinement as a Public Health Issue (Nov. 5, 2013).
[92] Robert G. Morris, "Exploring the Effect of Exposure to Short-Term Solitary Confinement Among Violent Prison Inmates," *Journal of Quantitative Criminology* (January 2015) at 28; Youngki Woo, et al. "Disciplinary Segregation's Effects on Inmate Behavior: Institutional and Community Outcomes," *Criminal Justice Policy Review,* 31(7) (Aug. 2020) at 16; Benjamin Steiner and Calli M. Cain, "The Relationship Between Inmate Misconduct, Institutional Violence, and Administrative Segregation: A Systematic Review of the Evidence," in *Restrictive Housing in the U.S.: Issues, Challenges, and Future Directions*, ed. by Marie Garcia, Washington, DC: U.S. Department of Justice, National Institute of Justice (2016).
[93] Justine A. Medrano, Turgut Ozkan, and Robert Morris, "Solitary confinement exposure and capital inmate misconduct," *American Journal of Criminal Justice, 42*(4) (2017); Peter Suedfeld, Ramirez Carmenza, John Deaton, and Gloria Baker-Brown, "Reactions and Attributes of Prisoners in Solitary Confinement," Criminal Justice and Behavior, 9 (1982).
[94] Youngki Woo, et al. "Disciplinary Segregation's Effects on Inmate Behavior: Institutional and Community Outcomes," *Criminal Justice Policy Review*, 31(7) (Jul. 2019) at 3-5.

perceptions of the unjustness of the punishment (the defiance theory).[95] CRCL theorizes that the defiance theory may play a more significant factor for individuals detained in immigration detention who may already view their detention in and of itself as unjust.

Among U.S. states, there is growing acknowledgement of the ineffectiveness of disciplinary segregation as a deterrent to disruptive behavior. A Washington State Department of Corrections fact sheet, dated September 1, 2021, acknowledges that disciplinary segregation "is not effective at changing behavior, deterring future infractions, or preventing violence" (emphasis in original). The factsheet goes on to say, "we shouldn't take things away for so long that people lose hope of getting them back and give up on trying to behave."[96] Complementing research on the ineffective deterrent effect of disciplinary segregation is other research on the beneficial effect of incentivizing positive behavior: "Research suggests that the most-effective structured approaches to behavior modification provide a framework for officers to acknowledge and reward incarcerated people's positive behaviors rather than focusing solely on responding to rule violations."[97]

In August 2022, ICE informed CRCL that it had established a "pilot" program providing behavioral health and pro-social programming—the Enhanced Group Therapy Program—at the Adelanto ICE Processing Center in an effort, in part, to "to address the facility's reliance on segregation housing."

Efforts to Ban or Limit Disciplinary Segregation

Recognizing the psychological and physical effects of segregation, the ineffectiveness and potentially counterproductive effect of using segregation as deterrence, and the effectiveness of other methods to promote positive behavior, the following states have instituted changes to greatly limit the length of disciplinary segregation sanctions or in some cases eliminate it completely: California,[98] Connecticut,[99] Colorado,[100] Delaware,[101] Idaho,[102] New York,[103]

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[95] Robert G. Morris, "Exploring the Effect of Exposure to Short-Term Solitary Confinement Among Violent Prison Inmates," Journal of Quantitative Criminology (January 2015) at 5-6.
[96] The fact sheet also acknowledges the harmful effects that segregation has on physical and mental health. *See,* Department of Corrections, Elimination of Disciplinary Segregation Frequently Asked Questions, (Sept. 01, 2021).
[97] Léon Digard, Elena Vanko, and Sara Sullivan, Rethinking Restrictive Housing: Lessons From Five U.S. Jail and Prison Systems*, Vera Institute of Justice,* (May 2018) at 37.
[98] No individual shall be kept in disciplinary detention for more than ten days. Disciplinary segregation can only be longer than ten days if the individual poses "an extreme management problem" or safety threat; the director must give written approval for such exceptions. *See* 15 Cal. Code Regs. § 3322.
[99] Outside of extraordinary circumstances, disciplinary segregation shall not be imposed for more than 15 consecutive days or 30 days in a 60-day period. *See supra* note 71.
[100] Disciplinary segregation shall not be imposed for more than 15 consecutive days. *See* Colorado*, supra* note 70.
[101] Disciplinary segregation shall not be imposed for more than 15 consecutive days. *See* Delaware, Department of Corrections, Elimination of Restrictive Housing in DOC.
[102] Disciplinary segregation shall not be imposed for more than 15 consecutive days, and division chief approval is required if an individual will be sanctioned to two consecutive disciplinary sanctions totaling more than 15 days within a thirty-day period. *See* Idaho Department of Corrections, "Disciplinary Procedures for Inmates," (Oct. 05, 2018).
[103] In addition to the general prohibition on placement in restrictive housing for more than 15 days, disciplinary segregation shall only be imposed as a last resort. *See supra* note 54.

Nebraska,[104] Texas,[105] and Washington State.[106]

Even among states that have not implemented maximum disciplinary segregation sanction limits, many states have implemented other reforms to reduce the reliance on disciplinary segregation more generally, including Illinois, Maine, New Mexico, and Pennsylvania.[107] In doing so, alternative strategies (in addition to training on these concepts and strategies) have been implemented such as:

- Narrowing criteria for placement by creating a new disciplinary segregation matrix and prohibiting segregation for minor infractions;
- Developing positive incentive programming and Privilege Level Systems to reduce misbehavior and provide objective mechanisms for staff to reward and incentivize positive and pro-social behavior;
- Developing pro-social programming to reduce misbehavior such as Washington State's Motivating Offender Change program, which provides opportunities to learn and practice cognitive-behavioral skills to help reduce violent behavior;"[108]
- Creating de-escalation rooms where individuals can go for a "time-out" to calm down, such as Oregon's Blue Rooms where individuals could view soothing nature videos and Colorado's de-escalation rooms that have soothing wall colors, dim lights, calming music, and comfortable chairs;[109] and
- Developing limited privileged housing units with greater amounts of out-of-cell time.

Findings and Recommendations:

7. **Finding**: In addition to recognizing the psychologically and physically harmful effects of prolonged segregation generally, confinement systems across the world and the United States are recognizing that disciplinary segregation does not have a deterrent effect on negative behavior and in some cases can exacerbate it.

   Recommendation #7 – Develop a Strategic Plan to Limit Disciplinary Segregation: ICE, in consultation with CRCL, should develop a plan with short-, mid- and long-term goals to limit the use of disciplinary segregation in ICE detention. The strategic plan's short-term goals should include establishing a new disciplinary matrix that narrows the criteria for placement in disciplinary segregation; (b) (5) [redacted]

[104] Disciplinary segregation has been eliminated as a punishment and segregation shall only be used to manage risk. *See* Nebraska Administrative Code, "Title 72 - Chapter 1 - Restrictive Housing."
[105] On September 1, 2017, the Texas Department of Criminal Justice eliminated solitary confinement for discipline. *See* Texas Department of Criminal Justice, "Disciplinary Rules and Procedures for Offenders" (Aug. 2019).
[106] As of Sept. 16, 2021, Washington State is no longer using solitary confinement for discipline. *See* Washington State Department of Corrections, "Washington State Department of Corrections Ends Disciplinary Segregation," (Oct. 1, 202).
[107] Shames, et.al, s*upra* note 65 at 20.
[108] *Id.* at 16.
[109] *Id.* at 29.

(b) (5) [redacted]

8. **Finding**: While ICE operates a civil detention system, the current detention management approach focuses primarily on control and punishment as opposed to encouraging expected behavior through incentives. Research indicates that the use of incentives has a greater effect on promoting positive behavior than negative consequences. Promoting positive behavior could therefore decrease the reliance on using disciplinary segregation to deter negative behavior.

   Recommendation #8 – (b) (5) [redacted]

9. **Finding**: Reducing the reliance on and use of disciplinary segregation requires enhancing pro-social programming in general population. Confinement systems across the country have recognized that behavioral modification therapy and other pro-social programming helps reduce the incidence of misbehavior. To address the reliance on segregation at one facility, ICE established a "pilot" program providing behavioral health and pro-social programming—the Enhanced Group Therapy Program—at the Adelanto ICE Processing Center.

   Recommendation #9 – (b) (5) [redacted]

10. **Finding**: De-escalation or "time-out" rooms have proven effective for both detainees and staff to calm down and de-escalate from a heightened situation.

    Recommendation #10 – Establish De-escalation Rooms: ICE should survey its facilities to identify which facilities may have available space and/or are willing to create a de-escalation room. (b) (5) [redacted]

IV. Limiting Segregation for Vulnerable Detainees

International human rights organizations, national civil rights organizations, correctional departments, legislators, and medical and mental health professional organizations have also raised concerns about the use of segregation for particularly vulnerable individuals.

Segregation of Vulnerable Populations in ICE Detention

While the Segregation Directive defines certain categories of individuals as having a special vulnerability,[110] the Segregation Directive and detention standards only narrowly limit the placement of some vulnerable populations but not all. The only vulnerable population that is prohibited from being placed in segregation "as a general matter" are women who are pregnant or post-partum.[111] The Segregation Directive does, however, prohibit placing an individual in segregation *on the sole basis* of their age, physical disability, sexual orientation, gender identity, race, or religion.[112]

CRCL's forthcoming expert recommendations will discuss the heightened vulnerability that individuals who are limited English proficient face when placed in segregation. Ensuring that language services are appropriately provided in the lead up to and during an individual's placement in segregation is a critical protection that could be further emphasized in ICE's current segregation policies.

While ICE's former family residential centers did not include restrictive housing units, the Family Residential Standards do not explicitly prohibit the placement of juveniles or other family members in isolation, and ICE's policies are silent on the use of segregation for the juveniles that ICE occasionally detains in juvenile detention facilities. And while individuals with a serious mental illness (SMI) are prohibited from being "automatically placed in an SMU on the basis of such mental illness"[113] their placement in segregation is otherwise allowed, albeit with requirements for greater oversight and clinical contact.

The reporting requirements for other vulnerable populations is, however, also limited; for example, under the Directive, the placement of an elderly, pregnant, or LGBTQI+ individual would only trigger the 72-hour reporting requirement if their placement reason was *on the basis* of their special vulnerability.[114] The Directive also falls short of identifying all LGBTQI+ individuals as having a special vulnerability—rather, the Directive appears to convey that sexual

[110] Individuals with special vulnerabilities are defined as those who have "mental illness or serious medical illness; who have a disability or are elderly, pregnant, or nursing; who would be susceptible to harm in general population due in part to their sexual orientation or gender identity; or who have been victims…of sexual assault, torture, trafficking, or abuse." *See* Segregation Directive, *supra* note 3, at § 3.3.
[111] Standard 2.12, s*upra* note 44, § V.P.2. at 183.
[112] Segregation Directive, s*upra* note 3, at § 5.2.1.
[113] Standard 2.12, s*upra* note 44, at § II.8.
[114] Segregation Directive, s*upra* note 3, at § 5.2.2.

orientation and gender identity alone are not sufficient to characterize an individual as vulnerable to harm.[115]

While the data quality errors that are identified in OIG-22-01, *ICE Needs to Improve its Oversight of Segregation Use in Detention Facilities,* make SRMS a poor source of information from which to draw conclusions, in the data provided in response to CRCL's information request, of the 7,815 individuals who were placed in segregation between January 1, 2018, and June 25, 2020:

- 2,474 individuals had a mental illness or serious mental illness;
- 354 individuals were on suicide precautions;
- 301 individuals had serious medical illness;
- 300 individuals were on a hunger strike;
- 220 individuals were known to be LGBTQI+;[116]
- 72 individuals were 65 years or older;
- 50 individuals had a disability; and
- Zero individuals were pregnant or nursing mothers.

During this same time period, four individuals died in segregation, three by suicide. Since 2013, of the 12 people who have died in ICE segregation, seven have died by suicide.[117]

While ICE's Segregation Directive and detention standards implicitly acknowledge—through the references to segregation being a serious step and by instituting heightened reporting and tracking requirements—the harm that segregation may cause individuals who are particularly vulnerable, ICE's policies do not include an explicit, clear position on the use or harms of segregation. And while the detention standards require facilities to implement training on the effects of segregation,[118] ICE does not require or provide such training to its own personnel in HQ or the field. In contrast, NCCHC's Standard on Segregated Inmates (Standard E-09), requires that health care personnel keep custody officials informed about 'the latest scientific information concerning the health effects of segregation."[119]

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[115] "Detainees with special vulnerabilities include those…who would be susceptible to harm in general population *due in part* (emphasis added) to their sexual orientation or gender identity…." *See* Segregation Directive, *supra* note 3, at § 3.3.

[116] Eighty-one of the 220 placements involved transgender individuals who either self-requested being placed in segregation or were placed in segregation due to safety concerns with their continued placement in general population.

[117] Six of the individuals who committed suicide died by hanging. Details were not provided for the seventh. *See,* 20_CRCL_2959_1.j.xlsx (on file with author).

[118] Standard 2.12, s*upra* note 44, at V.O, 182; Standard 2.9, s*upra* note 44, at II.L, 61.

[119] As referenced in, Anne Arundel County Department of Detention Facilities, MD, (Jun. 26, 2015).

Calls to Limit Segregation of Vulnerable Populations

The U.N. and various international human rights instruments recommend prohibiting placing certain vulnerable groups in restrictive housing, including pregnant, post-partum and breastfeeding women;[120] juveniles under 18;[121] and, "when their conditions would be exacerbated by such measures," individuals with disabilities or mental illness.[122] The NCCHC's 2016 Position Statement supports the prohibition against placing these vulnerable populations in restrictive housing as well: "Juveniles, mentally ill individuals, and pregnant women should be excluded from solitary confinement of any duration."[123]

Other professional organizations have weighed in on the placement of vulnerable individuals in segregation. The American Psychiatric Association has issued two position statements, in 2012 and 2018, respectively, calling on confinement facilities to avoid, absent rare exceptions, placing individuals with mental illness in prolonged segregation[124] and juveniles in segregation for any duration.[125] In 2013, the American College of Correctional Physicians emphasized that "prolonged segregation [beyond four weeks] of inmates with serious mental illness [including developmental disabilities], with rare exceptions, violates basic tenets of mental health treatment."[126] Also in 2013, the American Public Health Association asserted that, "Patients whose medical or mental health conditions contraindicate placement in segregation should be categorically excluded from solitary confinement, as should juveniles," acknowledging that solitary confinement "can cause significant mental suffering" and "such isolation creates barriers to providing necessary medical and mental health care, creating substantial risks that health will deteriorate."[127] The National Alliance on Mental Illness also "opposes the use of solitary confinement and equivalent forms of administrative segregation for people with mental health conditions."[128] Plainly stated by the NCCHC, "It is well established that persons with mental illness are particularly vulnerable to the harms of solitary confinement."[129] This position is supported by medical and mental health research, federal court cases, and legal settlements.

Within the Federal government, the DOJ Report goes further than ICE's current policies but stopped short of calling for a complete prohibition on placing individuals with SMIs in

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[120] "Punishment by close confinement or disciplinary segregation shall not be applied to pregnant women, women with infants and breastfeeding mothers in prison," *See* Rule 22 of the U.N. General Assembly, Resolution 65/229, "Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders," (Oct. 6, 2010). Nelson Mandela Rules, s*upra* note 39.

[121] "All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned," *See* Rule 67 of the U.N. General Assembly, Resolution 45/113, "Rules for the Protection of Juveniles Deprived of their Liberty," (Dec. 14, 1990). Nelson Mandela Rules, s*upra* note 39.

[122] Nelson Mandela Rules, s*upra* note 39.

[123] NCCHC, *supra* note 41.

[124] American Psychiatric Association (APA), "Position Statement on Segregation of Prisoners with Mental Illness," (Dec. 2012).

[125] APA, "Position Statement on Solitary Confinement (Restricted Housing) of Juveniles," (Jul. 2018).

[126] American College of Correctional Physicians, "Restricted housing of Mentally Ill Inmates," (Jul. 2013).

[127] APHA, s*upra* note 91.

[128] National Alliance on Mental Illness (NAMI), "Solitary Confinement," (last accessed Apr. 20, 2022).

[129] NCCHC, *supra* note 41.

segregation. The report stated that "generally, adults in custody with serious mental illness (SMI) should not be placed in restrictive housing."[130] The DOJ Report was silent, however, on the placement of individuals with other disabilities in segregation.

Effects of Segregation on Vulnerable Populations

These position statements recognize that solitary confinement is particularly harmful for certain vulnerable populations and not, as sometimes mistakenly believed, a source of protection for them:

- *Individuals with a serious mental illness*: The effects of isolation and the lack of intensive therapeutic mental health services[131] compound and exacerbate symptoms of mental illness and/or prompt new episodes to occur and can lead to the decompensation of the individual.[132] Placing individuals with mental illness in isolated settings also "causes adverse long-term consequences for cognitive and adaptive functioning."[133]Placing individuals with serious mental illness in isolation may also create barriers to their equal opportunity to participate and benefit from services while in detention, which could result in discrimination against them based on their disability in violation of Section 504 of the Rehabilitation Act.
- *Individuals on suicide precautions*: Contrary to the notion that putting someone in restrictive housing protects them from committing suicide or self-harm, research indicates that suicide and self-harm rates and attempts are significantly higher for individuals placed in segregation;[134] that individuals with SMIs and juveniles are associated with higher rates of self-harm in solitary confinement; that the placement itself increases the risk of suicide attempts and self-harm because it causes individuals to "do anything to escape" the isolated setting;[135] and that suicidal individuals are less likely to report their suicidal ideation in order to avoid being placed in segregation and other restrictive settings that feel punitive.[136] Placing an individual who is on suicide precautions in segregation is also "detrimental to the inmate because isolation escalates the sense of alienation and further removes the individual from proper staff supervision."[137]

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[130] DOJ Report, s*upra* note 12, at 99.
[131] Please note, CRCL refers to "intensive therapeutic mental health services" which is different from routine "medical or mental health care." CRCL does not dispute that ICE has mental health care services, however, as a general rule, it does not have the therapeutic services needed to successfully affect the need for segregation of individuals with an SMI.
[132] James and Vanko, s*upra* note 38, at 1-2; Shames, et.al., *supra* note 65, at 17; and Jeffrey L. Metzner, MD, and Jamie Fellner, Esq., "Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics," Journal of the American Academy of Psychiatry and the Law Online," 38 (1) (Mar. 2010), at 104-105.
[133] NAMI, *supra* note 128.
[134] Shames, et.al., *supra* note 65, at 17; Metzner and Fellner, *supra* note 132, at 105.
[135] Fatos Kaba et al., "Solitary Confinement and Risk of Self-Harm Among Jail Inmates," *American Journal of Public Health* 104, no. 3 (March 2014) at 446.
[136] Lindsay M. Hayes, "Controversial Issues in Suicide Prevention," *CorrectCare* (Spring 2017) at 12-13.
[137] Lindsay M. Hayes, "Guide to Developing and Revising Suicide Prevention Protocols within Jails and Prisons," (Revised July 2017) at 3-4.

- *Minors*: Due to adolescent brain development, young people are less emotionally and mentally resilient than adults and are therefore particularly prone to the psychiatric consequences of isolation, including depression, anxiety, psychosis, and self-harm.[138]
- *Pregnant, post-partum, and nursing women*: Segregation is particularly psychologically, emotionally, and physically harmful for pregnant, post-partum, and nursing women due to its exacerbating effect on anxiety, stress, and depression.[139] Placing a pregnant woman in solitary confinement increases the risk of preterm labor, miscarriage, or low birth weight in babies; isolation also prevents a pregnant woman from maintaining appropriate levels of physical activity and accessing pre-natal care.[140]
- *Individuals with physical and mental disabilities*: Placing individuals with disabilities in restrictive housing may exacerbate existing physical and mental disabilities: individuals who are deaf or blind "experience even greater isolation and sensory deprivation in solitary"[141] and isolation may create barriers to their effective and meaningful communication. Individuals with developmental disabilities are "less resilient to the absence of social interaction and the enforced idleness of solitary confinement."[142] Individuals with disabilities may have unique medical and mental health needs and placing them in an isolated setting where they have limited access to physical activity, medical care, and potentially any assistive devices they may need will have a detrimental effect on their mental and physical health.[143] Placing individuals with other disabilities in isolation may also create barriers to their equal opportunity to participate and benefit from services while in detention, which could result in discrimination against them based on their disability in violation of Section 504 of the Rehabilitation Act.
- *Elderly individuals*: Isolation also has particularly harmful mental and physical effects on elderly individuals (defined as 55 or older under New York's HALT Act[144] and 65 or older under New Jersey's Isolated Confinement Restriction Act[145]). The sensory deprivation of isolation can worsen confusion and memory loss in older individuals.[146] Elderly individuals are also more likely to have chronic health conditions and placing them in isolation where they have limited access to physical activity and medical care puts them at greater risk of developing or exacerbating chronic health conditions.[147]

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[138] American Academy of Child and Adolescent Psychiatry, Solitary Confinement of Juvenile Offenders, (Apr. 2012) and NYCLU, The Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act (last visited Apr. 21, 2022).
[139] NYCLU, *supra* note 138.
[140] *Id.* and James and Vanko, *supra* note 38, at 8.
[141] James and Vanko, *supra* note 38, at 9.
[142] Margo Schlanger, "How the ADA Regulates and Restricts Solitary Confinement for People with Mental Disabilities," *American Constitution Society Issue Brief* (2016) at 9.
[143] Jamelia N. Morgan, "Caged In: The Devasting Harms of Solitary Confinement On Prisoners with Physical Disabilities," *American Civil Liberties Union* (Jan. 2017), at 24-37.
[144] New York, *supra* note 54.
[145] New Jersey, *supra* note 53.
[146] Brie A. Williams, "Older Prisoners and the Physical Health Effects of Solitary Confinement," *American Journal of Public Health* 106 no. 12 (Dec, 2016).
[147] Lucius Couloute, Aging Alone: Uncovering the Risk of Solitary Confinement for People Over 45, Prison Policy Initiative (last accessed April 21, 2022); and NYCLU *supra* note 138.

- *LGBTQI+ individuals*: Restrictive housing is also particularly harmful for LGBTQI+ individuals who, as a population, experience higher rates of victimization, discrimination, harassment and are twice as likely to experience mental health issues—due to their past histories of discrimination and victimization—than non-LGBTQI+ individuals.[148] The isolated environment in restrictive housing may therefore compound the psychological effects of past trauma and other mental disorders. Some members of the LGTBQI+ community, such as transgender individuals and HIV-positive individuals, may have unique medical care needs which may not be met when placed in an isolated setting without meaningful contact.

Efforts to Limit Segregation for Vulnerable Populations

In response to this increased understanding and research about the particular harm that isolation in restrictive housing inflicts on vulnerable populations, numerous states have begun to limit or prohibit—either through legislation, administrative policy changes, or court orders and settlement agreements—the use of restrictive housing for members of these groups. For example, the Federal government and at least 23 states limit or generally prohibit the placement of juveniles in restrictive housing.[149] At least thirteen states limit or generally prohibit the use of restrictive housing for pregnant women (in some cases including post-partum women).[150] At least 14 states limit or generally prohibit the placement of individuals with serious mental illness[151] (the definition of which varies across states[152]).

Three states also explicitly ban restrictive housing for individuals with certain disabilities other than serious mental illness.[153] One state prohibits the placement of individuals who have recently committed "serious self-mutilation" in restrictive housing,[154] and another has received a court order to cease placing inmates released from suicide watch into restrictive housing cells.[155]

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[148] JL Heinze, Fact Sheet on Injustice in the LGBTQ Community, National Sexual Violence Resource Center (Jun. 24, 2021).
[149] First Step Act of 2018 (P.L. 115-391); and Anne Teigen, States that Limit Or Prohibit Juvenile Shackling and Solitary Confinement, National Conference of State Legislatures (Aug. 30, 2021).
[150] Georgia, Louisiana, Maryland, Massachusetts, Montana, Nebraska, New Jersey, New Mexico, New York, Pennsylvania, South Carolina, Texas, and Virginia. *See* Arthur Liman Center at Yale Law School, Time-in-Cell 2019: A Snapshot of Restrictive Housing (Sept. 14, 2020) at 81 [hereinafter Time-in-Cell]; ACLU, Still Worse Than Second-Class: Solitary Confinement of Women in the United States (2019) at 15-16.
[151] Alabama, Arkansas, Colorado, Maine, Massachusetts, Mississippi, Montana, Nebraska, New Mexico, New Jersey, New York, Ohio, Pennsylvania, and Vermont. *See* Time-in-Cell, *supra* note 150, at 66 and 82; Arthur Liman Center at Yale Law School, Regulating Restrictive Housing: State and Federal Legislation on Solitary Confinement as of July 1, 2019 (Jul. 18, 2019) [hereinafter Liman Legislative Research].
[152] *See* Appendix C, Definition of "Serious Mental Illness of Time-in-Cell, *supra* note 150.
[153] New York, *supra* note 54 (EXC. § 292. Definitions: "The term 'disability' means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques)54; New Jersey, *supra* note 53 ("An inmate is a member of a vulnerable population…if he or she…has a developmental disability;…has a significant auditory or visual impairment); Nebraska, A Bill for an Act Relating to Criminal Justice, L.B. 686, Reg. Sess. 2019 (a developmental disability as defined in section 71-1107, or a traumatic brain injury as defined in section 79-1118.01).
[154] New Jersey, *supra* note 53.
[155] Alabama, *Braggs v. Dunn*, 257 F. Supp. 3d 1171 (M.D. Ala. 2017).

At least six states have policies that gender identity alone cannot be the basis of an LGBTQI+ individual's placement in restrictive housing.[156] One state, however, goes further to prohibit the placement of LGBTQI+ individuals for any reason in restrictive housing.[157]

Among states that have created definitions for certain vulnerable populations and issued prohibitions on their placement in restrictive housing, these prohibitions generally include only rare exceptions. For example, New York's HALT Act requires that individuals who meet the act's definition of "special population" may only be temporarily placed in restrictive housing after a disciplinary incident and must be transferred to a "residential rehabilitation unit" (designed for "therapy, treatment, and rehabilitative programming") or to a mental health treatment unit within 48 hours.[158] Under New Jersey's Isolated Confinement Restriction Act, restrictive housing is allowed for a facility-wide lockdown, emergency confinement for no more than 24 hours, medical isolation in the medical unit due to a mental health emergency and based on a physician's orders; or voluntary or involuntary protective custody to "prevent reasonably foreseeable harm."[159]

Alternatives to Segregation for Vulnerable Populations

While limiting the use of restrictive housing for vulnerable populations may in part require the development of therapeutic treatment units/behavioral health units and smaller-scale special purpose housing units, other non-structural reforms include enhancing staff training on crisis intervention, trauma-informed approaches, de-escalation techniques, interacting and communicating with individuals with mental illness and physical disabilities as well as enhancing the mental health care that is provided to all individuals in custody in general. In fact, ICE noted in their comments, that this has already been accomplished in the Krome facility.

For other vulnerable populations, continued placement in general population also remains a viable option. For example:

- *Individuals on Suicide Precautions*: While individuals on suicide precautions are routinely placed in segregation in ICE detention when there is no space in the medical housing unit, the NCCHC and suicide prevention experts do not recommend placement in segregation. Instead, the NCCHC and some suicide prevention experts state that some suicidal individuals could still remain in general population, with a primary emphasis on being located close to staff and the space being free of all obvious protrusions that could be used to commit suicide.[160]

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[156] Time-in-Cell, *supra* note 150, at 66.
[157] New Jersey, *supra* note 53.
[158] New York, *supra* note 54.
[159] New Jersey, *supra* note 53.
[160] "To every extent possible, suicidal inmates should be housed in general population, mental health unit, or medical infirmary, located close to staff," *see* Hayes, *supra* note 137 at 3; NCCHC, Suicide Prevention Resource Guide https://nicic.gov/sites/default/files/NCCHC-AFSP_Suicide_Prevention_Resource_Guide.pdf at 27; "Unless constant supervision is maintained, a suicidal inmate is not isolated but is housed in the general population, mental health unit, or medical infirmary and located in close proximity to staff. All cells or rooms housing suicidal inmates are as suicide-resistant as possible (e.g., without protrusions that would enable hanging," see NCCHC, J-B-05,

- *Transgender and/or Non-binary Individuals*: Instead of placing transgender and non-binary individuals in administrative segregation for their purported safety, confinement systems around the country and world have moved towards housing transgender and/or non-binary individuals according to the individual's preference.[161] As discussed in the National Prison Rape Elimination Commission Report (June 2009)[162] and in the preamble to DOJ's Prison Rape Elimination Act (PREA) regulation,[163] dedicated pods may not necessarily increase safety, may prevent transgender individuals from receiving equal access to the facility's programming and services, and could inadvertently create a punitive, discriminatory, and isolating environment. Furthermore, CRCL understands from conversations with ICE over the course of several years that such pods can be difficult for ICE to execute due to physical space limitations and cost, and due to the fact that some transgender noncitizens may not want to change the venue of their immigration case and transfer to a new facility far away from family, friends, and attorneys.

  Placing transgender and/or nonbinary individuals in specialized or dedicated transgender housing units may unintentionally result in the same issues that occur when placing an individual in in segregation, i.e., that isolation or separation from the general population may be demoralizing, lead to "dangerous labeling," and may prevent equal access to programming and privileges. While the National Prison Rape Elimination Commission, established under the Prison Rape Elimination Act (PREA) of 2003, affirmed that "segregation must be a last resort and interim measure only,"[164] segregation may become the default when transgender individuals are not housed according to gender identity and/or preference. Placing a transgender and/or nonbinary individual in general population based on their gender self-identification and self-assessment of their own safety needs, while also taking into account the facility's safety and security needs, is also consistent with the DHS PREA Standards.[165].

Suicide Prevention and Intervention, at 40; DOJ, National Institute of Corrections, National Study of Jail Suicide: 20 Years Later (Apr. 2010) at 26-27.

[161] *See* National Center for Transgender Equality, Policies to Increase Safety and Respect for Transgender Prisoners at 65. Specific jurisdictions include: Vermont and Massachusetts, *see* National Center for Transgender Equality, Policies to Increase Safety and Respect for Transgender Prisoners, at 20 and 24, (Oct. 2018); New Jersey, *see* Sonia Doe v. New Jersey Department of Corrections, et al. Settlement Agreement and Release (Jun. 29, 2021) at 5; Cook County, Illinois; Cumberland, Maine; Denver, Colorado and Washington DC, *see* Lambda Legal, FAQ: Answers to Common Questions About Mistreatment of TGNC Incarcerated People "How do Prisons Decide Whether to House a Transgender Person in a Male or Female Facility?").

[162] The Commission noted that units used to house individuals "based solely on their sexual orientation or gender identity could lead to demoralizing and dangerous labeling." *See* National Prison Rape Elimination Commission Report (Jun. 2009) at 8.

[163] In DOJ's final PREA regulation, stakeholders expressed concerns that these housing units could be isolating, do not necessarily increase safety, may prevent transgender individuals from receiving equal access to the facility's programming and services and could be used to punish individuals for their sexual orientation or identity. In response to the comments, DOJ recognized the risks of dedicated facilities, units or wings to house "LBGTI" individuals and decided to prohibit the use of housing units based on sexual orientation or gender identity in adult prisons and jails and juvenile detention facilities unless mandated by a consent decree, legal settlement or legal judgment. *See* National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. at 37105, 37153 (Jun. 20, 2012).

[164] National Prison Rape Elimination Commission (NPREC) NPREC REPORT (Jun. 2009) at 8.

[165] "The facility should not base placement decisions of transgender or intersex detainees solely on the identity documents or physical anatomy of the detainee…." *See* 6 C.F.R. 115.42.

- *Individuals on Hunger Strike*: While the WMA,[166] and International Committee of the Red Cross[167] have issued position statements on the treatment of hunger strikers in custody, these position statements do not include a clear position on whether it is appropriate to place hunger strikers in restrictive housing. However, the WMA's statement does note that, "[t]he physical environment should be evaluated in order to develop recommendations for preventing negative effects."[168] As discussed throughout this memorandum, the negative psychological and physical effects of restrictive housing are well-documented and individuals placed in administrative segregation in ICE detention may experience conditions indistinguishable from what is known as solitary confinement. Furthermore, CRCL has received allegations that noncitizens were retaliated against and punitively placed in administrative segregation because they were exercising their First Amendment rights through a hunger strike.[169] In 2021, the ACLU and Physicians for Human Rights issued a report documenting allegations that ICE has used segregation as a punitive and retaliatory measure against hunger strikers.[170] There also does not appear to be a medical need to place an individual who is on a hunger strike in restrictive housing.[171] CRCL's subject matter medical expert (a medical doctor) affirms that restrictive housing is never indicated for hunger strike management from a medical perspective.[172]

IHSC's Oversight of Segregation Placements for Individuals on Hunger Strikes, Suicide Precautions, and LGBTQI+ Individuals

Under the Segregation Directive, IHSC is responsible for evaluating the appropriateness of the segregation placement for individuals on suicide precautions and individuals who are on a hunger strike.[173] For all such individuals, IHSC is responsible for conducting an individualized assessment of whether a less restrictive option is appropriate and for reviewing the treatment plan, monitoring care on an ongoing basis, and ensuring appropriate health care is provided. For all other individuals with vulnerabilities (such as LGBTQI+ individuals), the FOD is the primary party responsible for conducting the individual assessment "in consultation with IHSC, as appropriate."[174]

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[166] World Medical Association (WMA), Declaration of Malta on Hunger Strikers, (Nov. 1991, as revised Oct. 2017).
[167] International Committee of the Red Cross (ICRC), Hunger Strikes in Prisons: The ICRC's Position, (Jan. 31, 2013) (last accessed April 24, 2022).
[168] WMA, *supra* note 166 at ¶ 12.
[169] For example: 19-05-ICE-0169, 19-05-ICE-0161, and 002401-21-ICE.
[170] In 2021, the ACLU and Physicians for Human Rights issued a report documenting allegations that ICE has used segregation as a punitive and retaliatory measure against hunger strikers. *See,* ACLU and Physicians for Human Rights, Behind Closed Doors: Abuse and Retaliation Against Hunger Strikers in U.S. Immigration Detention (2021), at 40-44.
[171] *Id.* at 40.
[172] In September 2022, CRCL requested that one of its medical doctor (M.D.) subject matter experts (SME) review IHSC's comments on this memorandum, stating that "[Hunger strike] [i]ndividuals are placed in isolation only to prevent other individuals from passing food and liquids. This aids in adequately monitoring intake and clinical status. Hunger Strike cases are placed in isolation as stated in the BOP CPG [sic] to prevent other inmates from passing food or liquid items to the inmate/detainee on hunger strike status." In response, CRCL's M.D. SME stated that: "Segregation is never indicated for hunger strike management from a medical perspective. … segregation is all about security and control. … medical justification for placement of a hunger striker in segregation for medical reasons does not exist."
[173] Segregation Directive, *supra* note 3, at §§ 5.2 and 7.3.
[174] *Id.* § 5.2.6.

Despite the Segregation Directive's emphasis on conducting individualized assessments, for one vulnerable group in particular, IHSC's internal policies specifically require placing hunger strikers in isolation: "IHSC staff must isolate the detainee… IHSC staff should place detainees on hunger strike in the Medical Housing Unit (MHU), if available, or a Special Management Unit (SMU) for monitoring."[175] In contrast, ICE's detention standards only call for isolating a hunger striker "when medically advisable," and if a hunger striker is placed in a single occupancy room, medical personnel must "document the reasons" for doing so.[176]

Under PBNDS 2011 (2016), an individual on suicide precautions "may, as a last resort, be temporarily placed in an administrative segregation cell in a Special Management Unit, provided space has been approved for this purpose by the medical staff and such space allows for constant and unobstructed observation."[177] Under NDS 2019's suicide prevention standard, segregation is not explicitly referenced but detainees must be placed in "suicide-resistant cells."[178] IHSC's internal directive on Suicide Prevention and Intervention also allows IHSC to use segregation to house individuals who are on all three levels of suicide precautions (i.e., suicide watch,[179] constant watch,[180] and mental health observation[181]). While the policy requires that the Health Services Administrator work to identify alternative placements to segregation,[182] the policy does not include any language that highlights the concerns associated with placing a suicidal individual in segregation nor does it emphasize that segregation should only be used as a last resort. The policy requires that individuals on "suicide watch" (the highest risk level) be placed in a "suicide resistant" cell, which may be located within segregation. [183] A suicide resistant cell is not required for individuals on the moderate or low risk levels of suicide precautions. In addition to this implicit acceptance of using segregation for suicide precautions, the policy also explicitly calls for placing individuals with the lowest risk level ("mental health observation") into segregation: "the patient may be housed individually or with other patients in the medical housing unit or *other non-general population housing area*" (emphasis added).[184]

For LGBTQI+ individuals in segregation, under the Segregation Directive, the FOD has the primary responsibility to conduct the individualized assessment "in consultation with IHSC, as

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[175] IHSC, Directive 03-24: Hunger Strike (May 25, 2017).
[176] ICE, PBNDS 2011 (rev. 2016) Standard 4.2, Hunger Strikes, § II.4 at 253.
[177] PBNDS 2011 (2016 rev.), Standard 4.6, Significant Self-harm and Suicide Prevention and Intervention, at V.F., 334.
[178] NDS 2019, Standard 4.5, Significant Self-Harm and Suicide Prevention and Intervention, at II.F., 132.
[179][179] Individuals who are at high risk of suicide and are actively suicidal because they have a plan *and* intent to commit suicide, or are threatening or engaging in self-harm are placed on "suicide watch." *See,* IHSC, Directive 07-04: Suicide Prevention and Intervention (April 30, 2019), §§ 8-1 and 8-11.1.
[180] Individuals who are at moderate risk of suicide and are potentially suicidal because they may have a plan but no intent to commit suicide or have preoccupations about suicide and self-harm are placed on "constant watch." *Id.* § 8-2.
[181] Individuals who at low-risk for self-harm because they demonstrate some concerning behavior and potential for self-injury but are not actively or expressly exhibiting self-harm behavior and denies suicidal ideation are placed on "mental health observation." *Id.* § 8-5.
[182] The HSA must work with the clinical director (CD) or designee to identify alternative placements to the special management unit (SMU) cell," *Id.* § 8-5.
[183] *Id.* § 6-3.3.c.
[184] *Id.* § 6-3.3.c.

appropriate."[185] However, ERO's and IHSC's policies on transgender care do not provide sufficient guidance regarding the placement of transgender individuals in segregation and regarding housing transgender individuals according to their gender identity as an alternative to segregation. While ICE's 2015 Further Guidance Regarding the Care of Transgender Detainees (Transgender Care Memorandum) emphasizes that placing transgender individuals in segregation should only occur "when necessary" and "as a last resort,"[186] the memo does not provide guidance on how to conduct individualized assessments or provide affirmative guidance to encourage the housing of transgender individuals according to their gender identity. While Attachment 1, ICE Detention Facility Contract Modification, does include housing transgender individuals according to their gender identity as one of four housing options, this option is presented alongside options for housing the individual according to their biological sex or in administrative segregation, neither of which may be appropriate options unless requested as the first preference of the individual.[187]

IHSC's recently issued Directive 03-25, *Transgender Care and Management,* supports the placement of transgender individuals in general population in accordance with their "gender expression" as well as the provision of equitable programming access.[188] This is a significant change from the prior 2015 policy that supported housing transgender individuals according to their current genitalia.[189] Missing from the updated policy, however, is any guidance that generally deters all individuals who are LGBTQI+ from being placed in segregation or requires that individualized assessments are conducted when such individuals are placed in segregation.

IHSC's Oversight of Segregation Placements for Individuals with Mental Illness

Under the Segregation Directive, IHSC is also responsible for evaluating the appropriateness of the segregation placement for individuals who have a medical/mental illness.[190] For individuals with medical/mental illnesses, IHSC is required to conduct an individualized assessment of whether a less restrictive option is appropriate and for reviewing the treatment plan, monitoring care on an ongoing basis, and ensuring appropriate health care is provided. [191] IHSC is required to do the same for individuals with physical disabilities in addition to consulting with facility staff, in coordination with the FOD, about any necessary accommodations. [192] The Segregation Directive does not, however, make the connection between these oversight requirements and ICE's obligations under Section 504 of the Rehabilitation Act.

In response to long-standing concerns among DHS's oversight bodies and external advocates regarding the provision of medical and mental health care in ICE detention and the placement of individuals with mental illness in segregation, IHSC has sought to pursue some reforms and develop alternatives. For example, in January 2019, ICE opened the 30-bed Krome Behavioral

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[185] *Id.* § 5.2.6.
[186] ICE, Further Guidance Regarding the Care of Transgender Detainees (Jun. 19, 2015) § 3.c., at 4 [hereinafter Transgender Care Memorandum].
[187] ICE, Transgender Care Memorandum, Attachment 1: ICE Detention Facility Contract Modification, § 3.e.i., at 9.
[188] ICE IHSC, IHSC Directive 03-25, Transgender Care and Management (Apr. 19, 2021) § 6-7, at 4.
[189] ICE IHSC, Clinical Guidelines for the Treatment of Gender Dysphoria, Attachment E (February 2015) at 2-3.
[190] Segregation Directive, *supra* note 3, §§ 5.2 and 7.3.
[191] *Id.*
[192] Segregation Directive, *supra* note 3, § 5.2.

Health Unit to support detainees "who exhibit debilitating symptoms of psychological distress/disorders."[193] And in response to CRCL's 2016 findings and recommendations that the Adelanto ICE Processing Center cease to inappropriately place individuals with serious mental illnesses in administrative segregation and establish a therapeutic unit, in February 2021, ICE formalized "dedicated mental health staffing and programming" at Adelanto.[194]

In addition to the requirements in the Segregation Directive and detention standards, IHSC has issued several IHSC-specific policies that address the oversight and tracking of individuals with mental illness in ICE custody, including when placed in segregation.[195] At non-IHSC facilities, Field Medical Coordinators (FMCs) coordinate with medical staff at every facility within their AOR (one to three FMCs are assigned to each AOR) to identify and report on the placement of individuals with mental illness in segregation.[196] The FMCs, who are situated under the Medical Case Management Unit (MCMU), report segregation placements to the FODs and to MCMU staff who provide updates on those individuals to IHSC's Behavioral Health Unit (BHU).[197] These updates occur via email and through the IHSC Form 884 as opposed to being documented in IHSC's electronic system of record, the eCW. At IHSC-staffed facilities, the behavioral health provider (BHP) is required to notify the Health Services Administrator (HSA), and the HSA then notifies the FOD. The BHP is also required to report segregation placements involving individuals with mental illness to BHU through the Segregation and SMI Smart Form in eCW.[198] The Segregation Smart Form appears to be a comprehensive questionnaire utilized by behavioral health providers in IHSC-staffed facilities to gather relevant information about the individual and their segregation placement for HQ-level review and approval.[199]

Despite having these reporting and oversight procedures in place, CRCL's 2020 expert recommendations regarding medical and mental health care provided by IHSC (hereinafter IHSC expert recommendations) identified that medical staff at both IHSC-staff and non-IHSC facilities are conducting inadequate mental health evaluations of individuals placed in segregation. CRCL's IHSC expert recommendations also identified systemic issues with the inconsistent use of the SMI list that is designed to report individuals with SMIs to the FODs and HQ. CRCL's forthcoming expert segregation recommendations confirm these findings and identify systemic concerns with the evaluations, assessments, and input that facility medical and mental health care staff are supposed to provide when individuals are placed in segregation and the lack of

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[193] ICE ERO Mental Health Care Infographic (on file with author).
[194] *Id*.
[195] *See,* for example, IHSC, Policy 11067.1: Identification of Detainees with Mental Disorders or Conditions (May 7, 2014) (requiring notifications to the FOD of any individual with a mental illness who has been placed in segregation); IHSC, Directive 03-06: Health Evaluation of Detainee in Segregation (Mar. 24, 2016); IHSC, Directive 07-02: Behavioral Health Services (Overview) (Mar. 25, 2016); IHSC, 07-02 G-01: Behavioral Health Services Guide (Sept. 2020); IHSC, Directive 07-04: Suicide Prevention and Intervention (Apr. 30, 2019); IHSC, Directive 07-05: Serious Mental Disorders and Conditions (Jul. 25, 2019); IHSC, Operations Manual (OM) 16-019: Mental Health Case Management (Mar. 24, 2016); and IHSC, Medical Case Management Unit (MCMU) Program Guide (March 24, 2016).
[196] IHSC Guide 07-02 G-01, *supra* note 195, at 28; IHSC Directive 07-05, *supra* note 195, at § 6.4; IHSC OM 16-019, *supra* note 195, at § 4.1.
[197] "The IHSC MCMU provides mental health case management services to ICE detainees in conjunction with the IHSC Behavioral Health Unit (BHU)," *See,* IHSC OM 16-019, *supra* note 195, at § 4.
[198] *See,* IHSC Guide 07-02 G-01, *supra* note 195, at 18.
[199] *See,* IHSC Directive 07-05, *supra* note 195, § 6.3; IHSC Guide 07-02 G-01, *supra* note 195, at 18.

individualized assessments of those placements by the FODs and IHSC. Under PBNDS 2011 (2016), Standard 2.12 - SMU, facility medical professionals are required to conduct 1) evaluations of all individuals before they are placed in segregation; 2) daily face-to-face medical assessments; 3) additional medical/mental health evaluations "where reason for concern exists;" 4) out-of-cell confidential psychological assessments "whenever possible;" and 5) face-to-face psychological reviews at least every 30 days.[200] Additional requirements exist for individuals with an SMI, including 1) mental health consultations within 72 hours of being placed in segregation; 2) weekly multi-disciplinary committee reviews; and 3) weekly face-to-face clinical contact.[201]

The detention standards also include additional requirements when individuals who have or who demonstrate symptoms of a mental illness or mental disability are charged with committing a prohibited offense. Under PBNDS 2011 (2016), Standard 3.1, Disciplinary System, facility mental health professionals are required to provide input on the individual's competence to participate in the disciplinary hearing, any impact the individual's mental illness may have had on the misbehavior, as well as any other mitigating factors. When determining the type of sanction (and whether a sanction is even appropriate), the disciplinary panel is required to consider whether an individual's mental illness contributed to the misbehavior and is required to consult with a facility mental health provider about whether disciplinary segregation is inappropriate for the individual given his/her treatment and/or recovery plan.

CRCL's expert segregation recommendations indicate systemic issues with these requirements either not occurring or occurring in a manner that is not qualitative and substantive. These findings reflect failures with the identification, evaluation, and clinical care of individuals with mental illness placed in segregation at the facility level, and failures with the review and oversight of such placements at the field and HQ-level.

While the Segregation Smart Form in eCW is designed to provide BHU with comprehensive information, CRCL's expert segregation recommendations raise concerns about the level of oversight IHSC is providing for placements involving individuals with special vulnerabilities at both IHSC and non-IHSC staffed facilities. While IHSC-staffed facilities appear to have effective processes in place and direct reporting to IHSC HQ, the review and oversight process at IHSC HQ does not appear to be identifying and rectifying the compliance concerns associated with the above requirements from the detention standards.

At non-IHSC staff facilities, CRCL is concerned that IHSC's ability to provide effective oversight, as required by the Segregation Directive, is hampered by several factors: a reliance on FMCs (who are limited in number and have numerous job responsibilities) to identify individuals with vulnerabilities within every facility within their AOR; the use of paper rather than electronic health records at some facilities and the lack of interoperability between the electronic health records of other facilities with IHSC's eCW; the lack of direct reporting to IHSC from non-IHSC facilities and the multi-tiered communication structure from the FMCs to MCMU to BHU and vice versa; and finally, as discussed below, legal liability concerns that may be preventing IHSC from fulfilling its oversight requirements from the Segregation Directive.

[200] Standard 2.12, *supra* note 44, § P. at 182.
[201] Standard 2.12, *supra* note 44, § P.1. at 182-183.

As noted in two IHSC policy documents, IHSC maintains a legal liability posture that prevents IHSC from providing input on the medical care provided to individuals detained at non-IHSC facilities.[202] IHSC's MCMU Program Guide explicitly states that based on Logue v. United States, 412 U.S. 521, 528 (1973), "[u]nder the Contractor Exclusion, the United States is not accountable for the negligence of IGSA employees as the IGSA is a "contractor" and not a federal agency, and the federal agency has no authority to control the activities of the IGSA employees." "As a result, FMCs are not authorized to provide recommendations on detainee medical care to IGSAs."[203] Additionally, the guide states that if IHSC decides that the IGSAs "treatment does not meet standards of care and directs the IGSA's treating medical staff to alter the treatment in some specific way," that this would "constitute enough day to day control over the operations that ICE could be held liable for the negligence of an IGSA."[204] This point is also emphasized in IHSC Directive 11067.1: Identification of Detainees with Mental Disorders, where a footnote states, "[i]n facilities not staffed by IHSC, IHSC and the FMC will work with facility medical staff, but will not control or provide direct medical care."[205]

The level of IHSC oversight envisioned in the Segregation Directive does not, however, appear compatible with this posture. Under the Segregation Directive, IHSC is required to "evaluate the appropriateness of the placement and ensure appropriate health care is provided," recommend removal from segregation "if the IHSC determines that the segregation placement has resulted in deterioration of the detainee's medical or mental health care," and "review the detainee's treatment plan, [and] monitor the detainee's care on an ongoing basis." All of these requirements could in some way involve IHSC making recommendations about detainee medical care. For example, one cannot substantively evaluate the appropriateness of a segregation placement without reviewing an individual's medical and mental records and reviewing the evaluations, assessments, and input provided by facility medical personnel. If a deficiency is identified that leads IHSC to believe that the placement is not appropriate because the placement is negatively affecting the individual's medical or mental health or because the individual is being sanctioned for behavior that is the result of his or her mental illness, such findings and any resulting recommendations to remove the individual from segregation are directly related to the detainee's medical care. CRCL is concerned that IHSC HQ-level personnel and the FMCs may be hesitant to substantively evaluate segregation placements at non-IHSC facilities if the general posture is that IHSC employees should avoid providing recommendations on detainee medical care to non-IHSC facility medical providers.[206]

Findings and Recommendations:

11. **Finding**: IHSC's ability to perform effective oversight and conduct individualized assessments of segregation placements involving individuals who are members of vulnerable populations appears hampered by policy and resource gaps, as well as by IHSC's legal liability posture towards medical care at non-IHSC facilities. IHSC's policies on segregation oversight also do not encompass all vulnerable populations as defined by the Segregation Directive, lack clear position statements on the effects of

[202] MCMU Program Guide, *supra* note 195 and IHSC Directive 11067.1, s*upra* note 195.
[203] MCMU Program Guide, *supra* note 195, at 50-51.
[204] MCMU Program Guide, *supra* note 195, at 50.
[205] IHSC Directive 11067.1, s*upra* note 195, at fn 3.
[206] Segregation Directive, *supra* note 3, at § 5.2.5.

segregation on these populations, and do not include clear procedures for how IHSC personnel should conduct effective individualized assessments. Furthermore, ICE's current legal liability posture towards medical care at non-IHSC facilities is not only incompatible with IHSC's requirements in the Segregation Directive but also inconsistent more broadly with IHSC's role to provide and manage the health care of all individuals in ICE custody.

Recommendation #11 – (b) (5) [redacted]

12. **Finding**: Recognizing that restrictive housing exacerbates symptoms of mental illness and can lead to the decompensation of the individual, international human rights organizations, national civil rights organizations, and medical and/or correctional professional organizations have called for prohibitions or strict limitations on the placement of individuals with mental illness in restrictive housing. Placing individuals with serious mental illness in isolation may also create barriers to their equal opportunity to participate and benefit from services while in detention, which could result in discrimination against them based on their disability in violation of Section 504 of the Rehabilitation Act. In 2016, DOJ expressed its support of generally not placing individuals with serious mental illness in restrictive housing. To date, at least 14 states have prohibited or generally limited the placement of individuals with serious mental illness in restrictive housing. In contrast, ICE has sought to limit the placement of individuals with mental illness in segregation through enhanced tracking and policy requirements, but these efforts have not been effective; individuals with mental illness continue to make up one third of the total placements reported into SRMS and systemic concerns exist related to whether facilities are complying with the requirements that were put into place.

Recommendation #12 – (b) (5) [redacted]

13. **Finding**: Placing individuals with physical, cognitive, and developmental disabilities in restrictive housing is particularly harmful for their physical and mental health, exacerbates existing symptoms, and creates barriers to their equal opportunity to participate and benefit from services while in detention which could result in discrimination against them based on their disability in violation of Section 504 of the Rehabilitation Act. At least three states have explicitly banned placing individuals with disabilities in restrictive housing.

Recommendation #13 – (b) (5) [redacted]

14. **Finding**: While ICE's detention standards recognize that placing individuals in "conditions of confinement that are worse than" the general population may deter individuals from expressing suicidal intentions, the standards do not acknowledge that segregation increases the risk of self-harm or provide strict limits on placement in segregation.[207] Contrary to the notion that restrictive housing is a safe environment for someone who is expressing suicidal ideation, research indicates that suicide and self-harm rates and attempts are significantly higher for individuals placed in restrictive housing and that the placement itself increases the risk of suicide attempts and self-harm.

    Recommendation #14 – Generally Prohibit Segregation for Individuals on Suicide Precautions: ICE should adopt a general prohibition on the placement of individuals on suicide precautions in segregation. (b) (5) [redacted]

15. **Finding**: National civil rights organizations and noncitizens who have engaged in hunger strikes in ICE detention have alleged that placing hunger strikers in administrative segregation is retaliatory and punitive. Furthermore, isolating hunger strikers in segregation is not medically necessary. Nonetheless, it is IHSC's policy to always isolate hunger strikers, whether in the MHU or in segregation.

    Recommendation #15 – Generally Prohibit Segregation for Individuals on Hunger Strike: ICE should adopt a general prohibition on the placement of individuals who are on a hunger strike in segregation. (b) (5) [redacted]

16. **Finding**: While ICE opened a 30-bed Behavioral Health Unit at Krome in January 2019 and has developed dedicated mental health programming at the Adelanto ICE Processing Center, ICE has not developed sufficient therapeutic alternatives, whether through additional behavioral health units or through enhanced behavioral health programming, to help reduce the reliance on using segregation for individuals whose mental illness may be contributing to disruptive behavior.

    Recommendation #16 – (b) (5) [redacted]

[207] PBNDS 2011 (2016 rev.), Standard 4.6, Significant Self-harm and Suicide Prevention and Intervention, at V.F.1., 335.

(b) (5) [redacted]

17. **Finding**: Housing transgender and/or non-binary individuals in segregation for their protection or in general population according to their biological sex has been the norm in ICE detention as opposed to placing them in general population according to their gender identity and/or preference.

Recommendation #17 – (b) (5) [redacted]

V. Enhancing Data Tracking and Reporting

Segregation data tracking has been a significant component of efforts across the country to provide greater transparency and oversight into the use of segregation in confinement systems.[208] In the DOJ Report, DOJ recommended that confinement systems collect data on restrictive housing use in order to publicly report on "system-wide data" (including demographic information about individuals in each type of restrictive housing and their average length of stay) and to provide correctional systems with inmate-level data for internal oversight and tracking purposes.[209]

ICE's reforms, in this regard, were several steps ahead of confinement systems across the country. As aforementioned, with the issuance of the Segregation Directive in 2013, ICE established new oversight requirements for the tracking of all segregation placements over 14 days as well as all special vulnerability placements within 72-hours.[210] In order to fulfill these tracking and review requirements, ICE developed SRMS, a SharePoint-based case management system that functions as a centralized database and automatic notification system for ICE personnel in HQ and the field.

[208] Liman Legislative Research, *supra* note 151, at 8.
[209] DOJ Report, s*upra* note 12, at 103.
[210] Segregation Directive, *supra* note 3, at §§ 5.1 and 5.3.

To enter the data into SRMS, facility personnel email field office personnel, who then enter the information into SRMS.[211] Nearly all of the field office personnel that we spoke to during the course of this review reported that they receive and track all segregation placements within their AOR on local spreadsheets developed internally within that field office, and they then separately input the cases that meet the Segregation Directive's timeframes into SRMS. In OIG-22-01, *ICE Needs to Improve its Oversight of Segregation Use in Detention Facilities*, the OIG also emphasizes that among facilities, great variation exists regarding how segregation placements are tracked and reported to the field offices.[212]

Despite the fact that SRMS has been operational for eight years, ICE continues to encounter data quality issues with the information entered into SRMS. Over time, ICE has sought to rectify these issues and to enhance the qualitative information that is entered into SRMS. For example, in 2015, ICE issued a broadcast to require the field to request the segregation orders from the facilities, to provide a qualitative placement narrative, and to require the Assistant Field Office Director or designee to approve the placement;[213] in 2017, ICE issued another broadcast to remind the field of these requirements;[214] and most recently, in January 2021, ICE reduced the number of primary placement reasons that may be selected in SRMS from 23 to five in order to limit data quality errors.[215] CRCL also reviewed a series of emails from FY 2019 that reflect correspondence between CPD's Segregation Coordinators and field POCs to correct placement errors, question whether less restrictive housing had been considered, request details about what privileges the individual is receiving, and confirm whether a mental health professional had been consulted for the disciplinary process involving individuals with mental illness. Despite these changes and efforts, CRCL not only shares the OIG's findings in OIG-22-01, *ICE Needs to Improve its Oversight of Segregation Use in Detention Facilities,* about data quality errors within SRMS but also continues to be concerned that the information in SRMS is insufficiently descriptive and that SRMS is not designed to capture relevant data points.

SRMS for Oversight of Individual Placements

CRCL's expert recommendations affirm CRCL's long-held concerns that the information captured in SRMS is too high-level and lacks sufficient qualitative detail to enable reviewers to conduct "individualized assessments"[216] of whether the placement is in accordance with the detention standards and whether the individual is receiving appropriate privileges, out of cell time, and adequate medical and mental health care while in segregation. Despite CPD's efforts to

[211] CPD reported to us that officers within the Detention Standards Compliance Unit are typically the ones responsible for entering the cases into SRMS.
[212] OIG-22-01, *supra* note 24, at 7-8.
[213] ICE, Expanded Guidance for Submitting Segregation Notifications (January 6, 2017) (on file with author).
[214] ICE, Updated Guidance for Submitting Segregation Notifications to ERO Headquarters (April 24, 2015) (on file with author).
[215] The new list of primary placement reasons include: Disciplinary, Pending Investigation of Disciplinary Violation, Protective Custody, Facility Security Threat, and Medical/Mental. When "protective custody" or "medical/mental" are selected as primary placement reasons, the user will be required to select a secondary placement reason. The user will be required to designate whether the protective custody was facility or detainee initiated as well as whether the "medical/mental" placement was related to "hunger strike," "suicide risk," "medical observation," or "mental health observation." *See* ICE, Placement Reason Changes: Guidance for Users of the Segregation Review Management System (SRMS) (January 6, 2021) [hereinafter ICE Placement Reason Changes] (on file with author).
[216] Segregation Directive, s*upra* note 3, at § 5.1.7 and § 5.2.6.d.

solicit this information for the sample of medical/mental health cases that are reviewed during the Tuesday medical/mental health meetings between Field Operations, CPD, OPLA, and IHSC, some of the responses back from the field were still insufficient, e.g., "[d]etainee…is afforded all the privileges as the rest of the detained population and is accommodated on a daily basis yet complying with classification standards;" and [mental health provider] was consulted and she stated that detainee should be charged for the offense."[217]

This finding is also supported by OIG-17-119, *ICE Field Offices Need to Improve Compliance with Oversight Requirements for Segregation of Detainees with Mental Health Conditions*, which affirmed that "even if the reviews had been completed, without comprehensive information, ICE headquarters cannot adequately assess the effects of segregation on these detainees."[218] CRCL's expert recommendations also substantiate the OIG's finding in OIG-22-01, *ICE Needs to Improve its Oversight of Segregation Use in Detention Facilities*, that ICE is not consistently considering alternatives to segregation. The OIG found that alternatives were not considered in 72 percent of the records they reviewed, which included detention files and SRMS records.[219] CRCL is also concerned that when alternatives are considered, they may not actually be documented in SRMS, making SRMS an unreliable system of record from which one can draw conclusions. ICE reported to CRCL that neither email communications between HQ and the field nor discussions from the weekly medical/mental health segregation meetings are captured in SRMS. From CRCL's own experience reviewing the EARM records of detained individuals, CRCL has identified that some ICE officers include notes in EARM about segregation placement discussions between HQ and the field, but the inclusion of this information in EARM is not consistent or required.

The findings from CRCL's 2020 IHSC expert recommendations on the inadequate use of the SMI list for detainees placed in segregation also call into question whether the data reported in SRMS on individuals with mental illness is accurate. CRCL's review of SRMS data further supports this previous finding. In the February 2022 SRMS export, 47 of the 274 placements were identified as having a mental illness. While only seven of the 47 individuals were flagged in the system as having a SMI, many more appeared to be suffering from an SMI from the associated comments. For example, one comment noted that the detainee was being treated for "auditory hallucinations" and another was specifically referred to as suffering from "serious mental health issues." In addition to the 47 individuals who were identified as having a mental illness, 37 separate individuals were placed in segregation for "mental health observation." Upon further analysis of the comments in SRMS, 27 of those 37 individuals who were supposedly placed in segregation for "mental health observation" were actually placed in segregation for COVID-19 quarantine protocols; in this case, officers in the field should have selected "medical observation" and reviewers at HQ should have corrected the inaccurate placement reason.

While the February 2022 SRMS export did not include any placements designated as "suicide risk," a search and find of the spreadsheet indicated three individuals who were in fact placed in segregation for suicide precautions. A review of the SRMS data going back to November 2021

[217] ICE, Guidance.pdf (on file with author).
[218] OIG-17-119, *supra* note 23, at 7.
[219] Alternatives were not considered in 342 of 474 records in the OIG's statistical sample. *See* OIG-22-01, *supra* note 24, at 5.

indicates multiple individuals were placed in suicide precautions, however, the "suicide risk" placement reason was not used in a single instance. While SRMS also records the "report type"—i.e., whether the placement is associated with a 72-hour, 14-day, or 30-day interval report—the February 2022 export included 32 placements that were initiated between June and December 2021 that were still identified as "14 day" reports despite reflecting placements that were over 60 days long. Such inaccurate data threatens the integrity of ICE's oversight efforts and ability to identify placements that require greater scrutiny and review.

CRCL is concerned that in addition to these data quality errors, the decision to streamline the placement reasons in 2021 led to the removal of critical data points that would otherwise help identify vulnerable individuals for heightened review. As a result, placement reasons associated with whether someone has a disability or is "LGBT" are no longer available.[220] CRCL did confirm that these are no longer category options during the drafting of this memorandum. While CRCL believes that streamlining the placement decisions will in fact help improve data quality, removing these specific data points from SRMS limits its utility as an effective oversight tool, both for ensuring the safety of individual placements as well as for trend analysis. Also, despite the fact that the Segregation Directive explicitly includes elderly, pregnant, and nursing individuals and individuals who are victims of sexual assault, torture, trafficking or abuse as members of vulnerable populations, specific data points and tracking procedures have not been developed to identify, track, and review any placements of such individuals.[221]

SRMS's effectiveness as an oversight mechanism for individual placements is also hindered by its lack of inter-operability with other ICE systems of record, such as EARM. Nearly every field office reported that interoperability between SRMS and EARM would be beneficial. The lack of interoperability increases barriers to effective and efficient oversight since relevant information about the individual's behavior, vulnerabilities, and mental health history may be included in EARM and not SRMS. For example, EARM might include relevant notes about previous transfers to mental health hospitals or references to relevant significant incident reports. Other relevant information may be housed in ERO's sexual abuse allegation database, SAAPI-CM, or IHSC's eCW. Individualized assessments require cross-referencing all the information contained about an individual in other ICE data systems as well as the facility's own detention records. While the Segregation Directive contemplates the FOD reviewing, "where relevant, the full detention file and EARM records,"[222] CRCL's review and expert recommendations found no indications that such comprehensive reviews are taking place.

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[220] "Protective Custody: LGBT," and "Medical: Disabled or Infirm" were removed from the list of placement reasons. *See* ICE Placement Reason Changes, *supra* note 215. While ICE noted in in their response to the draft version of this memorandum that these placement reasons continue to be secondary placement reasons, this is incorrect per information CRCL subsequently requested and received from ERO. Per information provided in August 2022, the current secondary placement reasons are: Protective Custody: Facility Initiated and Detainee Requested; and Medical/Mental: Hunger Strike; Suicide Risk; Medical Observation; and Mental Health Observation. As a result, this list continues to lack placement reasons associated with disabilities and LGBT status.
[221] Segregation Directive, *supra* note 3, at § 5.2.
[222] Segregation Directive*, supra* note 3, at § 5.1.

SRMS for Trend Analysis and Reform

In addition to using SRMS to review and track individual placements, ICE envisioned that SRMS would support data analysis and segregation reform efforts and, at one point, intended to make system-wide segregation data publicly available.[223] And although ICE has produced dashboards with segregation-related data analysis and trends dating back to 2013, it does not appear that this information has been consistently used to identify problem areas or initiate reforms as envisioned by the Segregation Directive, such as identifying facilities with a disproportionate use of segregation or underreporting.

SRMS appears to lack sufficient functionality and data fields to make it an effective source of archival data that would enable ICE to evaluate trends, including, for example, the alleged discriminatory use of segregation. Human Rights Watch issued a February 2022 report on Cameroonian asylum seekers that details allegations of discriminatory and retaliatory use of segregation against Black individuals in ICE custody.[224] Additional allegations involving the inappropriate use of segregation against Black individuals in ICE custody have been opened as complaints by CRCL.[225] While SRMS does include a data point to capture national origin, it does not capture race or ethnicity. Nor does it capture religion or as described above, sexual orientation, gender identity, or disability-status. However, even if SRMS captured these data points, if ICE does not collect this information in an accessible system of record more broadly across the entire detained population, then ICE will be unable to conduct analyses to determine whether segregation is being used in a discriminatory manner on the basis of protected classes. ICE should be collecting this information, in order to ensure that it is not using segregation in a discriminatory manner.

In a segregation training that CPD provided to ODO personnel in April 2022, CPD reported that while they can search SRMS by name and A#, they are unable to search and view archival data in SRMS using other data points and instead must request data exports from contractors.[226] In order to respond to CRCL's information request for the number of individuals who have died in segregation since 2013, ICE had to manually review and compile information from multiple sources. In addition, for eight of the 12 deaths reported, CPD noted that the data provided was "not found in SRMS and was gathered from individual detainee death reviews."[227] And no data was submitted in response to CRCL's request for the number of suicide attempts in segregation since January 1, 2018 (despite the fact that IHSC affirmatively stated during interviews that they do track all suicide attempts through the Significant Event Notification System). The inability to use SRMS to track and assess the rate of significant incidents, like suicide attempts and deaths, in segregation, limits ICE's ability to identify systemic problems that require corrective action.

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[223] "ICE intends to make system-wide segregation data available to the public on its website." *See* DHS Report on the Use of Restrictive Housing in ICE Detention Facilities (2016) at 25 (on file with author) [hereinafter DHS Segregation Report].

[224] Human Rights Watch, How Can You Throw Us Back? Asylum Seekers Abused in the US and Deported to Harm in Cameroon (Feb. 2022) at 88.

[225] CRCL Complaint Numbers 000993-21-ICE and 001009-21-ICE.

[226] CRCL observed the training that CPD delivered to ODO on April 13, 2022.

[227] In the information provided by CPD, CPD also reported that "Data used for this report came from the Segregation Review Management System, Detainee Death Cumulative Report, and Individual Detainee Death Reviews." *See* 20 CRCL 2959 1.j.xlsx (on file with author).

As aforementioned, ICE does not use SRMS to capture all of the relevant information or discussions about the placement decisions, such as emails between CPD and the field requesting updates or the discussions that occur during ICE's Tuesday medical/mental health meetings (CRCL understands that the meeting notes from the Tuesday medica/mental health meetings are not documented or recorded, in any capacity). ICE's ability to use SRMS to analyze archived detainee-level data is hindered when critical information or discussions about placements are not captured in SRMS and is not accessible for data analysis in the future.

Despite ICE's long-standing goals of using SRMS for segregation data collection and analysis, as previously noted, the OIG recently found in OIG-22-01, *ICE Needs to Improve its Oversight of Segregation Use in Detention Facilities,* that due to conflicting information between what was recorded in SRMS and at the facility level, "we have no assurance ICE's segregation data in SRMS is complete and accurate."[228] In its audit, the OIG determined that 13 percent of segregation placements that they identified were not recorded in SRMS—either because the facilities had not reported these placements to ICE or because ICE field offices did not record them in SRMS, or both.[229] These data quality concerns are supported by the results of ICE ERO's own FY 2019 Self-Inspection Program Results Report, which found that twenty percent of ERO field offices reported deficiencies with the reporting, tracking, and documentation requirements of the Segregation Directive.[230] These data integrity issues may result, in part, from the fact that the reporting process is not simple or consistent across facilities and field offices, that facility and field personnel lack sufficient training on the processes; or that facility or field personnel are not prioritizing the agency's efforts to conduct segregation oversight.

Until the data quality errors are corrected and the database functionality improved, ICE's ability to use SRMS to examine overall trends, identify areas requiring corrective action, and evaluate successes in order to implement best practices will continue to be limited.

Findings and Recommendations:

18. **Finding**: SRMS is not inter-operable with other ICE systems of record, which creates barriers to conducting individual assessments of placement decisions, and it lacks sufficient functionality and relevant data fields to make it an effective source of archival data to inform both individual placement reviews as well as conduct trend analyses.

Recommendation #18 – Develop an Enhanced Data Tracking System: ICE should dedicate funding and staff resources to develop and implement an enhanced data and case tracking system that is, for example, inter-operable with other ICE systems of record, such as EARM and, where applicable, eCW, and allow for access by CRCL and other offices involved in segregation oversight. The system should be linked to IHSC's lists of individuals with serious mental illness, medical illness, and disabilities to ensure accurate data and to inform all placement decisions. Significant events, such as suicide attempts, deaths, sexual abuse allegations, and use of force incidents that occur in segregation

[228] OIG-22-01*, supra* note 24, at 8.
[229] *Id.* at 6.
[230] OPR Management Inspections Unit, ERO Self-Inspection Results Report FY 2019 (November 2018), at 12-13.

should be captured in the new system in a manner that is easily searchable. In addition, the new system should capture critical data points involving all individuals defined as having a special vulnerability as well as all demographic information associated with protected bases in a manner that is easily accessible and identifiable in order to enhance ICE's oversight of individual placements and overall trend analysis. The new system should be able to easily track and display an individual's segregation placement history and cumulative time spent in segregation in order to better identify concerning placement patterns and any associated behavior or mental health issue that could be a contributing factor.

19. **Finding**: SRMS has significant data quality issues which may result, in part, from the current reporting procedures that require facility personnel to send information to field office personnel, who then input the information into SRMS. In addition, ICE's previous efforts to request that facility personnel provide the field office with more detailed information about the segregation placements have not generated the intended results. Finally, the information included in SRMS is not qualitatively descriptive enough to assess individual segregation placements.

    Recommendation #19 – (b) (5) [redacted]

20. **Finding**: Despite requiring segregation reporting and review requirements since 2013, ICE continues to encounter significant non-compliance issues with the reporting and review of segregation placements and, as a result, significant data quality errors continue to persist in SRMS.

    Recommendation #20 – (b) (5) [redacted]

21. **Finding**: Over the last several years, DHS has received multiple complaints alleging the racially discriminatory use of segregation in ICE detention. Currently, SRMS only captures limited demographic data associated with protected classes and ICE more generally does not collect a full set of demographic data on the protected class status of the

entire detained population. Furthermore, when such data is collected, it is not captured in an accessible system of record that could be used for data analytics.

Recommendation #21 – (b) (5) [redacted]

22. **Finding**: Currently, ICE does not track all segregation placements, however, this approach limits the ability to use SRMS for trend analysis, limits the transparency of the data, and likely contributes to the inaccuracy of the data being reported into SRMS.

    Recommendation #22 – Track all Segregation Placements: ICE should require the reporting of all segregation placements within 72 hours to enable ICE to access data across its population, which is diverse and de-centralized, in order to ensure that segregation is being used in compliance with ICE detention standards.

23. **Finding**: In DOJ's 2016 Report on Restrictive Housing, DOJ recommended that confinement systems collect data on restrictive housing use in order to publicly report on "system-wide data" (including demographic information about individuals in each type of restrictive housing and their average length of stay). ICE does not currently publish system-wide segregation data publicly.

    Recommendation #23 – Publish System-wide Segregation Data: In order to support government transparency and consistent with the recommendation in DOJ's 2016 Report on Restrictive Housing, ICE should begin publishing segregation data on its public website, (b) (5) [redacted]

VI. Bridging the Gap Between Inspections and Segregation Reform

As discussed previously, while one goal of the Segregation Directive was to ensure "timely and effective [field and/or HQ-level] intervention" for individual segregation placements, the Segregation Directive also sought to institutionalize segregation reform measures. Under the Segregation Directive, the former ODPP and the segregation subcommittee of the DMC were afforded clear responsibilities related to both reviewing individual segregation placement decisions as well as identifying facilities for heightened review, identifying underreporting, and developing immediate and long-term remedial plans based on compiled segregation placement data, the results of ICE's individual placement reviews, and findings from DHS's oversight inspections regime.[231]

In addition to using the data collected in SRMS, the Segregation Directive also envisioned drawing from ICE's inspections process to identify concerns and develop reforms. In CRCL's

[231] Segregation Directive, *supra* note 3, at § 7.5.

information request, CRCL requested any significant findings related to segregation identified by ICE's oversight inspections programs, as well as a list of any facilities that have received a contract deficiency report and/or financial penalties due to segregation-related deficiencies. CRCL also requested any documentation related to the DMC segregation subcommittee's review of those significant findings, any recommended immediate and long-term remedial plans, and any facilities that that the DMC segregation subcommittee has designated for heightened review. While ICE provided emails, reports, and spreadsheets of segregation deficiencies that have been identified through ICE's various inspection processes,[232] ICE did not provide responsive documentation to relay how this information has been used as it relates to segregation oversight and reform. As aforementioned, no documentation was provided related to meetings, discussions, or work products of the DMC segregation subcommittee at all.

While ICE monitors detention facility compliance (including the use of segregation) through ICE's and DHS's multi-layered inspections process,[233] and while the Segregation Directive envisioned using this information to inform reform efforts, ICE does not currently have an effective process to synthesize, analyze, and use all of the facility compliance data and information that it collects to institute reforms or inform decision-making of singular placements. During CRCL's interview with CPD, CPD affirmed that segregation deficiencies from ICE's inspections are not cross-referenced during CPD's reviews of individual segregation placements. This is a significant missed opportunity to provide heightened scrutiny of segregation placements that occur in facilities with consistent compliance concerns. For example, if a facility has previously inappropriately restricted privileges for detainees in administrative segregation, field or HQ-level reviewers of current segregation placements should not only avail themselves of the deficiencies ICE is aware of but should use this knowledge to request additional documentation related to the privileges being provided for current placements.

Despite ICE dedicating significant personnel and financial resources to inspections and detention facility compliance, the OIG expressed concerns about ICE's ability to correct facility-level deficiencies and effectively make systematic improvements from information derived from its inspections in its 2018 report, *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*.[234] The Government Accountability Office issued a similar finding in its 2020 report, *ICE Should Enhance Its Use of Facility*

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[232] ICE submitted the following information: ERO Self-Inspection Results FY19 Report; a series of emails from 2020 from ODO to the Segregation Coordinator with the segregation-related findings from ODO's inspections; ODO's inspection reports from 2018-2020; a CMD spreadsheet, exported from the Facilities Performance Management System, which identified segregation deficiencies identified during ERO's pre-occupancy and annual inspections CY 2013 to June 2020; and DMU spreadsheet which identified "compliance monitoring issues" from 2013 to 2020.

[233] Including ODO's biennial compliance inspections, ERO's annual contract inspections, ERO's Detention Service Monitoring program, OIG's detention facility spot inspections, CRCL's onsites, and the Office of the Immigration Detention Ombudsman.

[234] DHS OIG emphasized that while ICE's inspections process does "correct some deficiencies, they do not ensure adequate oversight or systemic improvements in detention conditions…." ICE concurred with all five of the OIG's recommendations and noted steps that it was taking to evaluate the scope and strengthen quality assurance processes in ERO's contracted inspections; develop follow-up inspections process for ODO; and improve processes around corrective actions to ensure that they are not only tracked but also implemented. *See* DHS OIG-18-67, ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements (June 26, 2018), at 4.

Oversight Data and Management of Detainee Complaints.[235] The GAO found that while "ICE collects the results of its various inspections, such as deficiencies they identify, [it] does not comprehensively analyze them to identify trends or record all inspection results in a format conducive to such analyses."[236] The GAO report also identified that ICE does not "comprehensively analyze data on the detention-related complaints received by ICE and DHS offices…", which is another missed opportunity to "identify potential trends in the nature, frequency, locations, or other characteristics of detention-related complaints across ICE's detention facilities either regionally, nationally, by facility type, or over time."[237]

In August 2022, ICE reported to CRCL that the Facility Performance Management System is being modernized to "allow ERO the ability to analyze facility inspection data to identify trends and identify deficiencies. This modernization program was partially in response to GAO recommendations that ICE/ERO be provided data accumulated by the Office of Detention Oversight during their inspections, so ICE can accurately conduct trend analysis for its annual facility inspections."

CRCL applauds ICE's recent efforts and developments in this regard, but notes that the Segregation Directive had envisioned that ICE would, as early as 2013, draw from its oversight inspections to designate facilities for heightened review, review significant findings, discuss national trends, and develop and recommend immediate and long-term remedial plans. These efforts are not possible, however, if ICE does not have the resources to conduct data analysis, the subject matter expertise to draw conclusions from the data or make recommendations, or the database functionality to record all of these inspection results in one place for ease of reference and analysis.

Although CRCL is aware of several current efforts that ICE has undertaken to improve its inspections process,[238] ICE's current inspections process does not consistently capture or determine compliance with the suggestive guidance (as opposed to the strict requirements) within the detention standards that would significantly improve conditions for individuals placed in segregation. While ODO conducts a line-by-line assessment to consider a facility's compliance under the detention standards, ODO reported that in some cases, non-compliance with the suggestive guidance in the standards would result in deficiencies and in other cases, it would result in "Areas of Concern." ODO reported to CRCL that, unlike deficiencies, "Areas of Concern" do not require uniform corrective action plans and do not factor into the overall rating of the facility. For example, if not met, the following suggestive guidance would result in "Areas of Concern" as opposed to deficiencies: "The facility should ***seek*** ways to increase the minimum amount of time that detainees in the SMU spend outside their cells and to offer

[235] U.S. Government Accountability Office, GAO-20-596, ICE Should Enhance Its Use of Facility Oversight Data and Management of Detainee Complaints (August 2020).
[236] *Id.* at "What GAO Found."
[237] *Id.* at 40.
[238] For example, CRCL is participating in a pre-occupancy inspection work group with ICE, and CRCL is aware of the significant enhancements that ODO has implemented in response to the mandates of the administrative provision 215(b) of ICE's appropriation for FY 2020, including the development and use of the Inspection Modernization System and the shift from conducting inspections for a single set of detention facilities once every three years to conducting initial and follow-up inspections of each facility that holds individuals for more than 72 hours and has an average daily population of 10 or more detainees each year.

enhanced in-cell opportunities,[239] and "Facilities are *encouraged* to maximize opportunities for group participation…"[240] (emphasis added).

While these provisions are also included in ICE's ERO's annual inspection worksheets,[241] it appears that not a single facility was deemed to be deficient on these provisions between CY 2013 and June 10, 2020 (the day that ICE exported the data from the Facilities Performance Management System).[242]

Findings and Recommendations:

24. Finding: While the Segregation Directive envisioned that ICE would draw from its inspections process to identify concerns and develop immediate and long-term plans, ICE has not fulfilled these requirements.

Recommendation #24 – Integrate Findings from Inspections into Segregation Tracking and Reform Efforts: ICE should develop a plan to integrate the findings from ICE's and DHS's various inspections processes into ICE's individual segregation placement reviews and long-term reform efforts. To support this effort, ICE should identify the personnel and technological resources that would be necessary to effectively collect all inspection results in a single database and to thereafter analyze the results in order to inform individual segregation placement reviews and identify and implement short- and long-term remedial plans.

25. Finding: DHS's and ICE's own inspections processes have consistently identified facility-level deficiencies related to the use of segregation and data quality issues with the information entered into SRMS. ICE's current inspections process does not consistently capture or determine compliance with the suggestive guidance (as opposed to the strict requirements) within the detention standards.

Recommendation #25 – (b) (5) [redacted]

[redacted]

[239] *Id.* V.AA., at 186.
[240] *Id.* V.Z., at 185.
[241] *See* Key_42_G324A_PBNDS_2011_2016_Revisions_O72_Lyon_Template_.docx and Key_44_G324A_NDS_2019_Template_2021 Corrections_.docx (on file with author).
[242] *See* 20065010 CRCL Investigation_Segregation Deficiencies_6.10.20.xlsx (on file with author).

VII. Prioritizing and Supporting Segregation Reform

The Segregation Directive makes clear that placement of detainees in segregation "is a serious step," and that placement in segregation "should occur only when necessary." Further, placement in segregation due to a special vulnerability "should be used only as a last resort and when no other viable housing options exist."[243] These important principles have not consistently borne out in practice. Despite these pronouncements, and despite the fact that ICE has required the reporting and review of segregation placements for the last eight years, these efforts have not led to a reduction in the use of segregation since 2014.[244] Furthermore, as described throughout this memorandum, the results of the OIG's audits and CRCL's prior complaint investigations reveal, DHS's oversight bodies have consistently identified a lack of compliance with the substantive oversight procedures that the Segregation Directive and detention standards sought to establish. ICE ODO's own inspections indicate that deficiencies related to special management units were the 3rd highest category of deficiencies in FY 2021.[245] While ODO reported in August 2022 that the deficiencies it has found generally relate "to proper administrative documentation and record keeping, and do not support a determination of systemic inappropriate use of SMU and/or [inappropriate] placement of detainees in SMU by facilities," CRCL believes that the lack of documentation and record-keeping impedes the ability for oversight bodies to effectively evaluate the appropriateness of the placements. As a result, it appears that ICE's incremental policy changes around the use of segregation have not elicited substantive changes in practice in ICE detention. This is likely the result of multiple factors, including fluctuations in leadership support for detention reform measures, a lack of prioritization at the field and facility-level, and inadequate implementation of these policy changes.

As discussed previously, while ICE did implement significant measures to track segregation placements through SRMS, enacted some time limits on disciplinary segregation placements, and created new oversight procedures particularly for individuals with SMIs placed in segregation, the bigger picture reform measures, as envisioned by the Segregation Directive, did not materialize. Potentially contributing to this issue was the dissolution of ODPP, which began in 2017 and officially occurred in May 2018.[246] However, even when ODPP existed, the bigger picture role envisioned for the DMC segregation subcommittee, did not take shape either.

As with any new initiative, it takes time for the program to mature, for personnel to gain experience and subject matter expertise, and for the initial achievements to become the steppingstone for future accomplishments. Establishing SRMS and developing mechanisms to report, track, and assess segregation placements per the Segregation Directive and detention standards was a huge initial achievement. But significant and serious data quality errors exist within SRMS that make the next step in the process—drawing conclusions from the data and addressing problem areas—difficult to reliably achieve at this point. While CRCL believes that

[243] Segregation Directive, *supra* note 3, at 2.
[244] In 2014, 2073 placements were reported into SRMS; in 2015, 2390 placements were reported into SRMS; in 2016, 2559 placements were reported into SRMS; in 2017, 2913 placements were reported into SRMS; in 2018, 3081 placements were reported into SRMS; in 2019, 3011 placements were reported into SRMS. *See* List of Detainees, *supra* note 61.
[245] OPR, FY 21 Annual Report, October 1, 2020 – September 30, 2021, at 14.
[246] In May 2018, ODDP was realigned from an independent office that reported directly to the ICE Director to a sub-division within ERO/CMD.

CPD has sought to enhance its oversight role in segregation tracking over the last few years, and has expended additional personnel resources to do so, CRCL believes that additional efforts are required to change the process on the ground.

As aforementioned, in response to CRCL's information request, CPD submitted a series of approximately 40 emails from March through July 2020 where CPD had reached out to the field to request additional information about segregation placements that had been selected for the weekly medical/mental health meeting.[247] While this sample of emails indicate CPD's efforts to comply with the Segregation Directive and conduct individualized assessments of the placements, they also highlight—seven years after the Directive was issued— how the facilities continue to submit, and the field continues to enter, an insufficient level of information into SRMS.[248] For example, the information being sought in these emails (such as the mental health provider's evaluation of an individual with a mental illness who was being charged with a disciplinary infraction) is not reflected in the comments associated with current SRMS placements.[249] In the SRMS export from February 2022, only one of the 274 cases referenced a mental health evaluation.[250]

Furthermore, even though other policy reforms have been in place for approximately five years (such as encouraging enhanced out-of-cell time and providing increased clinical contact with detainees with SMIs), significant changes have also not borne out in practice. While ICE committed itself in 2016 to "continuing to seek to expand the number of non-restrictive protective custody housing units," these efforts faltered over the ensuing years.[251] Renewed focus from ICE leadership and a dedication of personnel and financial resources is necessary to ensure their implementation on the ground and rectify these long-standing and systemic issues.

Segregation reform also goes hand-in-hand with detention reform writ large, which will require a strategic vision of what civil detention looks like, strong leadership support to implement it, and significant training for, and buy-in from, facility and field personnel. As noted by the Vera Institute of Justice, preventing segregation requires "improv[ing] conditions of confinement for the general population to improve the well-being, safety, and conduct of incarcerated people broadly, thereby reducing the need for typical restrictive housing options."[252] Any discussion about segregation reform therefore must go hand-in-hand with a discussion about improving the conditions of confinement in general population, including by expanding programming, education, and pro-social activities, and enhancing access to critical services, such as mental health care.

To be effective, segregation reform must also consider the viewpoints of staff as well as the effects that working in the SMU environment has on staff. If feedback and ideas are not solicited from field and facility-staff, efforts to improve data quality and implement far-reaching reforms will not be effective.

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[247] Guidance.pdf (on file with author).
[248] *Id.*
[249] CRCL Monthly.xlsx (on file with author).
[250] *Id.*
[251] DHS Segregation Report, *supra* note 223, at 14.
[252] Digard, et al., *supra* note 97, at 36.

Findings and Recommendations:

26. **Finding**: The DMC segregation subcommittee diluted the responsibility for more comprehensive segregation reform measures across several divisions within ICE. Pursuing segregation reform through the working group approach is not effective given competing priorities and the limited capacity that current personnel have to perform their current job functions. Furthermore, ICE's current policies and procedures that govern segregation oversight have not achieved the desired outcome—to make segregation a last resort and to limit its use through conducting individualized assessments and establishing and utilizing alternatives to segregation.

Recommendation #26 – (b) (5) [redacted]

27. **Finding**: Converting segregation policy reforms to changes on the ground requires additional resources and expertise.

Recommendation #27 – Engage Subject Matter Experts to Design and Implement Segregation Reform: ICE should solicit support of external subject matter experts to help assess ICE's current policies and practices related to the use of segregation, make recommendations, and support ICE's implementation of reforms designed to reduce the use of segregation in ICE detention and eliminate the situations and conditions that amount to solitary confinement.

28. **Finding**: Enhancing ICE's data systems, expanding personnel resources, enhancing mental health resources and programming, and developing alternative housing units all require significant funding.

Recommendation #28 – Solicit and Implement Dedicated Funding: To implement the recommendations herein and in CRCL's forthcoming segregation expert recommendations, ICE should seek specifically appropriated funding to support these critical reform measures.

29. **Finding**: Implementing segregation reform measures requires more than top-down directives, but requires buy-in from facility staff and a clear assessment of the issues and concerns on the ground from both staff and detainees. Reform measures will not be successful if staff perspectives are not solicited and integrated or if detainee needs are not met.

Recommendation #29 – Conduct Segregation Surveys Among Staff and Detained Individuals: ICE should design and conduct a system-wide survey of facility and field

staff and detainees on their experiences with all aspects of ICE's segregation program. ICE should use the results of the survey to inform segregation reform measures.

30. **Finding**: Prioritizing detention and/or segregation reform and creating a culture change around detention-related issues requires energy, focus, and expertise is essential not just at the HQ-level but within the field. CRCL understands that ICE deportation officers may have limited experience or knowledge of the conditions of confinement in ICE detention, and that detention-related work may be perceived as subordinate to ERO's other missions.

    Recommendation #30 – (b) (5) [redacted]

31. **Finding**: A culture change is required regarding the way that HQ, field, and facility personnel view segregation from the mistaken belief that restrictive housing is an effective method for controlling disruptive behavior or a generally safe housing alternative for vulnerable populations. Research on the detrimental effects of segregation must be understood and accepted within every level of ICE—from facility staff to leadership within HQ and the field—in order to foster the changes envisioned in the Segregation Directive and detention standards.

    Recommendation #31 – (b) (5) [redacted]

Conclusion:

Any effort to implement segregation oversight and reform that qualitatively differentiates ICE segregation from the conditions of solitary confinement must begin by acknowledging what segregation looks like on the ground and be followed by a strategic and agreed upon vision of what it should look like in the future. This will require holding detention facilities accountable for non-compliance by relinquishing or not entering into contracts where requirements are not or cannot be met. It will also require engaging facility and field personnel on their perspectives and needs while providing clear and effective training and guidance on the basis for these reforms. If greater buy-in from facility and field personnel is not sought, ICE will continue to run into roadblocks implementing the *current* requirements, let alone any of the new requirements

[253] Standard 2.12, *supra* note 44, at V.O., 182.

recommended throughout this recommendation memorandum and CRCL's expert segregation recommendations.

While CRCL understands that the recommendations made in this memorandum will require significant personnel and financial resources and are not all achievable in the short-term or at all ICE facility types, ICE must begin by acknowledging and defining what segregation looks like in ICE detention and explicitly prohibiting anything that is more restrictive than the current U.N. definition of solitary confinement. At the same time, incremental policy changes or reporting requirements will not be sufficient to affect conditions on the ground. Recommendations that simply reiterate the current requirements (as was done in response to the deficiencies identified in ICE's FY2019 Self-Inspection Report)[254] will do nothing to effect change and improve compliance.

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. The above recommendations are made pursuant to that role; we believe they will assist you in meeting ICE's important mission. We request that ICE provide a response to CRCL within 120 days indicating whether it concurs or does not concur with each of the above recommendations. If you concur, please include an action plan. Please send your response and any questions to (b) (6) CRCL will share your response with (b) (6) and (b) (6), the Senior Policy Advisors who conducted this investigation.

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[254] ICE FY19 Self-Inspection Report, *supra* note 230 (recommending that FOD taking steps to ensure that he/she is notified; that Field Offices use SRMS to report placements within required timeframes; that field office supervisors concur on segregation placements; and that field offices upload signed copies of the disciplinary, administrative, and IDP forms).

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