

IMMIGRATION DETENTION & PUBLIC HEALTH OVERSIGHT

Executive Summary

One of the six indicators put forth by Governor Newsom's plan to reopen the state is the ability to prevent COVID-19 outbreaks in facilities that are vulnerable to infection, including detention facilities.¹ California is home to six immigrant detention facilities, five of which are operated by for-profit private corporations with no direct state oversight. All five of these private facilities have been the site of COVID-19 outbreaks.

While immigrant detention facilities are under the jurisdiction of the federal government, there are clear requirements for the operation of these facilities, which include explicit requirements to coordinate with and abide by state and local public health mandates. Despite these requirements, private detention operators have consistently failed to meet these standards. In some, cases they have refused to comply with requests by local public health departments, in contravention of their own federal contracts.

Problem: Federal immigration detention facilities are required to abide by state and local health care plans related to COVID-19. Immigration detention operators, particularly private operators, have failed to abide by these requirements. To date public health authorities have failed to exercise this legal authority in coordinating with these facilities, and have failed to formulate a comprehensive plan or undertake strategic intervention to protect public health and mitigate the spread of COVID-19 in these facilities.

Recommendations²

- 1.) **Understand Roles & Responsibility-** Clarify the role that local and state public health authorities have in safeguarding public health in immigrant detention facilities, according to guidance issued by the federal government.
- 2.) **Develop a Plan** - Recognize the threat posed to surrounding communities by outbreaks in detention facilities and formulate a clear plan to mitigate the spread of COVID-19.
- 3.) **Take Action** -Undertake strategic actions to ensure oversight, compliance and consistency with respect to public health standards in immigration detention facilities.



Private Immigration Detention Facilities in California

- **Otay Mesa Detention Center** - Capacity 1,970³ (Operated by CoreCivic Inc.)
- **Mesa Verde ICE Processing Center** - Capacity 400 (Operated by The GEO Group Inc.)
- **Golden State Annex** - Capacity 700 (Operated by The GEO Group Inc.)
- **Adelanto ICE Processing Center** - Capacity 1,940 (Operated by The GEO Group Inc.)
- **Imperial Regional Detention Facility** - Capacity 782 (Operated by Management & Training Corp)

Public Immigrant Detention Facilities

- **Yuba County Jail**- Capacity 220 (Operated by Yuba County)

Total Detention Capacity: 6,012⁴

¹ See California's Roadmap to Modify the Stay-at-Home Order, pg 7

² For full recommendations see page 7

³ This total includes individuals detained by ICE as well as the U.S. Marshall Service

⁴ An additional 1,400 private detention beds are slated to be added to this total by ICE pending local permits.

Background

Immigration detention facilities in the state of California pose a unique and critical challenge with respect to public health and safety during the COVID-19 pandemic. These facilities also receive transfers from state prisons and jails, and as such, are part of a larger challenge posed by facilities vulnerable to COVID-19 infections. The potential humanitarian crisis posed by the spread of COVID-19 in immigration detention facilities in California can have disastrous consequences for those detained in these facilities, as well as neighboring communities.

Just as nursing homes have proven to be distinct from other businesses during the COVID-19 based on the high risk to human lives under negligent care, immigrant detention facilities, especially those operated by for-profit corporations pose similar challenges.

The threat is further compounded by the fact that five of the six facilities used to house immigrants by the federal government are operated by for-profit, private corporations that routinely fail to meet minimum standards for health and safety. During a pandemic in which the actions of a few can impact the well being of so many, accountability for private prison operators is paramount.

At present, California is home to five privately operated civil detention facilities that have the capacity to hold more than 5,600 individuals at any given time, with future plans to expand to as many as 7,200. To date, COVID-19 infections have been reported at each of these facilities, with an outbreak of over 160 individuals occurring at the Otay Mesa detention facility which at one point was reportedly the largest in the country.⁵

While the consequences of COVID-19 in immigration detention are dire for those detained, it should be of grave concern given the significant challenges this potential outbreak has for California as a whole. A study published in the [Journal of Urban Health](#) on the spread of COVID-19 in immigration detention facilities estimates that coronavirus outbreaks among a minimum of 65 ICE facilities (59%) would overwhelm ICU beds within a 10-mile radius and outbreaks among a minimum of 8 ICE facilities (7%) would overwhelm local ICU beds within a 50-mile radius over a 90-day period, provided every ICU bed was made available for sick detainees.⁶

In response to the COVID-19 pandemic, Immigration and Customs Enforcement (ICE) released a set of mandatory requirements for all detention facilities, which expressly require coordination with state and local public health departments.⁷ The requirements include but are not limited to the following:

- Each facility should “comply with current and future plans implemented by federal, state or local authorities addressing specific public health issues including communicable disease reporting requirements.”⁸

⁵ Otay Mesa COVID-19 Outbreak Now the Largest At A US Immigration Facility

<https://www.kpbs.org/news/2020/apr/14/otay-mesa-detention-center-now-largest-immigration/>

⁶ Modeling COVID-19 and Its Impacts on U.S. Immigration and Customs Enforcement (ICE) Detention Facilities, 2020

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7228433/>

⁷ ICE ERO COVID-19 Pandemic Response Requirements (Version 3.0, July 28, 2020)

<https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>

⁸ ICE Performance-Based National Detention Standards (PBNDS) for 2008 and 2011

- Each facility should actively engage with local health departments to understand in advance which public health entity has jurisdiction over public health measures for COVID-19 in the facility.⁹
- Each facility must develop a COVID-19 mitigation plan. Administrators should plan and prepare for COVID-19 by “[c]oordinating with public health and correctional partners.” As well as “[i]dentify points of contact in relevant state, local, tribal, and/or territorial public health departments before cases develop.”¹⁰

In addition to the mandatory requirements related to public health, ICE has issued broad requirements related to the day to day operations of these facilities, including requirements related to health and safety in these facilities. Based on reports in the press and by those detained inside these facilities, it appears that these private corporations routinely violate the health and safety requirements for these facilities in their daily operations.

For example it has been reported that a private operator, CoreCivic, attempted to require detainees in the Otay Mesa Facility to sign legal waivers before providing them personal protective equipment. Detainees which protested this requirement were subsequently pepper sprayed.¹¹ Accounts from the Adelanto detention facility operated by the GEO Group reveal that detainees have been exposed to hazardous chemicals in the facility, resulting in serious health conditions.¹² In the Mesa Verde Detention facility also operated by the GEO Group, guards placed a 74 year old man with a documented history of suicide attempts in solitary confinement with improper supervision. The man was later found dead of an apparent suicide.¹³

The potential threat posed by negligence in for-profit detention facilities is particularly dire as the two additional detention facilities are set to open in the coming months, bringing the total number of individuals detained in the state to more than 7,200 and the total number of private facilities to seven.

Outreach to Public Health Officials

In an effort to understand what level of coordination has been taking place between private detention facility operators and local and state public health officials, Immigrant Defense Advocates in coordination with other community partners, American Civil Liberties Union- San Diego and Imperial Counties, American Friends Service Committee, California Collaborative for Immigrant Justice, Centro Legal de la Raza, Desert Support for Asylum Seekers, Inland Empire Coalition for Immigrant Justice, Pueblo Sin Fronteras, and Rapid Response Network of Kern, Kern Welcoming and Extending Solidarity to Immigrants, as well as elected officials conducted

⁹ This requirement is from CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities pg 5, guidance which is mandatory for all ICE detention facilities.

¹⁰ *Id.* at pg 6

¹¹ Kate Morrissey “Detainees at Otay Mesa detention centers were offered masks but only if they signed contracts” The San Diego Tribune, April 10, 2020
<https://www.sandiegouniontribune.com/news/immigration/story/2020-04-10/otay-mesa-detention-center-gets-masks-but-asks-detainees-to-sign-contract-first>

¹² Rebecca Plevin “Immigrants, advocates, members of Congress decry chemical use at ICE facility in Adelanto”, Palm Springs Desert Sun, June 27,2020
<https://www.desertsun.com/story/news/politics/immigration/2020/06/27/immigrants-members-congress-decry-chemical-use-ice-facility-adelanto/3273095001/>

¹³ “Death of 74-year-old in immigration jail is seen as suicide”, The Associated Press, May 19, 2020
<https://abcnews.go.com/Health/wireStory/death-74-year-immigration-jail-suicide-70774858>

outreach to local public health departments, and the California Department of Public Health (“CDPH”). This includes informational inquiries sent to the following public health departments.¹⁴

- Kern County
- Yuba County
- San Diego County
- Imperial County
- San Bernardino County

The responses obtained from each public health department have varied, with some departments being open to a discussion and acknowledging limited coordination with private detention operators, while others treated the inquiry as a Public Records Act request and are presently releasing documents on a rolling basis that only further engender concern.

Far from actively engaging with public health departments, as mandated by ICE, private detention facility operators have seemingly provided limited information to local public health departments, and do not appear to be engaged in cooperation or joint planning around the containment of COVID-19 in these facilities. Some of the key findings include¹⁵:

- A refusal by Core Civic, the private operator of the Otay Mesa Detention Facility, to abide by CDPH recommendations to test all staff, despite an ongoing outbreak of COVID-19. With the assistant Warden stating “Just so we’re clear - at this point we have no intention to mass test our staff.”¹⁶ In other instances, San Diego County officials simply ask the private corporation if there is anything they can do to help “mitigate the spread [redacted]We talk [sic] about this previously...but wanted to ask again .”¹⁷
- None of the local public health departments contacted indicated that they had been consulted by detention providers in formulating a COVID-19 mitigation plan, nor had any received any such plan from the detention providers in their jurisdiction.
- The majority of the local public health departments had not developed a COVID-19 plan for the facility in their jurisdiction. Some departments stated the reason for this was because they lack jurisdiction over the facility in question¹⁸, noting its status as a federal facility, while others provided no explanation for this gap.
- Involvement by CDPH at each facility has been inconsistent with no indication of contact or collaboration in the case of one facility, Imperial Regional Detention Facility, and quite limited in the case of others.¹⁹ The Kern County Department of Public Health where the Mesa Verde Detention Facility is located, referenced what appeared to be its first meeting with CDPH on August 24, 2020, notably the same date that advocates sent an informational inquiry to the Kern County Department of Public Health.²⁰
- At least two of the local public health departments stated that they are not receiving any notification from the private facility operator about impending releases of individuals into the community²¹, raising grave concerns about whether facilities are providing proper care, orientation and screenings to individuals who are released into the community.

¹⁴ For copies of each letter and responses see generally Appendix

¹⁵ Id.

¹⁶ Email correspondence between San Diego County and Core Civic Appendix, pg 15

¹⁷ Email correspondence between San Diego County and Core Civic Appendix, pg 18

¹⁸ Response from the Kern County Public Health Department, Appendix, pgs 10-11

¹⁹ Response from the Imperial County Public Health Department, Appendix, pgs 28-31

²⁰ Response from the Kern County Public Health Department, Appendix, pgs 10-11

²¹ Responses from the Kern County Public Health Department and San Bernardino County Department of Public Health Appendix, pgs 10-11, 23-24

The information obtained from these local departments raises serious questions about the lack of clarity regarding the role and responsibility of public health entities with respect to detention facilities in the state of California, what information they are entitled to and what actions they can take.

It is particularly concerning that seemingly the first meeting with CDPH regarding the Mesa Verde facility did not occur until that late in August when there had been a documented COVID-19 outbreak at that facility at the beginning of August and countless prior reports of reckless behavior by the private operator of that facility that would undoubtedly lead to an outbreak, including failure to test detained individuals not because testing was unavailable but because of the “housing” problem it would create for the private operator managing the facility.²²

In addition to letters sent to local public health departments, on October 12th, twenty-six members of the California legislature penned a letter to the California Department of Public Health with respect to reports of ICE raids targeting sanctuary cities in the state, and the issue of public health in immigration detention. The letter expressed concerns about the threat posed to public health and safety by ICE raids in the community and asked CDPH to clarify what if any coordination or collaboration was ongoing between their department and ICE detention operators.

The letter also asked the department whether ICE detention facilities in California are currently in compliance with state and federal COVID-19 reporting requirements, and if the department had undertaken an assessment on the potential impact of a statewide enforcement operation on public health. The Department has yet to respond to the letter.

The inconsistent responses by local public health departments, and the seeming lack of knowledge with respect to ICE’s mandatory requirements for detention operators underscores an important gap in understanding and policy making that must immediately be addressed in the midst of this public health crisis.



ICE Detention Mandatory Public Health Guidelines

- ICE detention standards **require** facilities to collaborate and comply with federal, **state, and/or local authorities** addressing public health issues, including communicable diseases.²³
- ICE detention facilities must **actively engage with the health department** to understand in advance which entity has jurisdiction to implement public health control measures for COVID-19 in a particular correctional or detention facility.²⁴
- Report all confirmed and suspected COVID-19 cases to the local ERO Field Office Director (or designee), Field Medical Coordinator, and local health department immediately.²⁵

²²<https://www.latimes.com/california/story/2020-08-06/amid-coronavirus-outbreak-at-bakersfield-immigration-facility-emails-show-ice-deliberately-limited-testing>. See also:

<https://www.aclunc.org/news/judge-orders-ice-provide-covid-19-testing-detained-immigrants-after-emails-reveal-ice-s>

²³ The Performance-Based National Detention Standards (PBNDS) 2008 and 2011 both require facilities to “comply with current and future plans implemented by federal, state or local authorities addressing specific public health issues including communicable disease reporting requirements.” The 2019 National Detention Standards (NDS) similarly require “collaboration with local or state health departments in accordance with state and local laws and recommendations.”-ICE ERO - COVID-19 Pandemic Response Requirement, June 22, 2020

²⁴ Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities pg 5

²⁵ ERO COVID-19 Pandemic Response Requirements (Version 2.0, June 22, 2020) pg 10

- Each facility must develop a COVID-19 mitigation plan. **Administrators should plan and prepare for COVID-19 by “Coordinating with public health and correctional partners.”** As well as “Identify **points of contact in relevant state, local, tribal, and/or territorial public health departments** before cases develop.”²⁶
- Facilities are encouraged **to limit or entirely eliminate transfers.** “Where possible, put plans in place with other jurisdictions to prevent confirmed and suspected COVID-19 cases and their close contacts from being transferred between jurisdictions and facilities unless necessary for medical evaluation, medical isolation/quarantine, clinical care, extenuating security concerns, or to prevent overcrowding.”²⁷

Conclusion

Faced with the current coronavirus pandemic, California must take immediate steps to prevent the unnecessary loss of human lives in immigration detention and surrounding communities, particularly in light of the federal government’s perilous refusal to take action on the matter. California has the legal authority and moral responsibility to protect the health and welfare of immigrants detained in our state.

Drastic steps and intervention in this respect are warranted and have precedent, including state intervention to take over the administration of private nursing homes, and other ongoing oversight and intervention in private detention facilities.²⁸ The need to take action on this issue is not only underscored by the unabated spread of COVID-19 in these facilities, the shocking information revealed through litigation about private operator negligence, but also by the pending expansion of private facilities in the state.

In addition to increasing state regulation of private corporations that operate detention facilities, California public health officials should understand the legal consequences for private corporations that violate the law, including federal contractors who breach their contracts. The murky legal area that private corporations acting as federal contractors occupy vis-à-vis state regulation is complex, but must be carefully addressed and clarified.

Requirements related to health, safety, and welfare placed on detention operators by ICE can and should be viewed as legally binding. If and when a federal contractor violates the terms of their contract, they are no longer acting as an extension or agent of the federal government, but instead a private entity in violation of the law, and thus subject to the jurisdiction of the state in which they operate.

The Supreme Court has held that a federal contractor who violates the express terms of their contract are no longer protected by derivative sovereign immunity and thus subject to regulation by the state in which they operate. “When a contractor violates both federal law and the government’s express instructions... there is no immunity”. - See *Campbell-Ewald Co. v. Gomez*, 577 U.S. 663 (2016).

In addition, public health authorities should explore the full extent to which they can provide clear guidance, both to local public health authorities, as well as detention operators to clarify questions related to jurisdiction and authority.

²⁶ Id. at pg 6

²⁷ CDC Guidance pg 6

²⁸ This includes the Attorney General’s ability to monitor health and safety of immigrant detention facilities under AB 103.

Lastly, it is incumbent on public health authorities to formulate policies, mandates and directives which will ensure proper health and safety standards in these facilities, and protect and preserve human lives.

Below are recommendations that are by no means exhaustive but provide a high-level roadmap for addressing the challenge posed by immigrant detention facilities in California.

Recommendations

- 1.) **Understand Roles & Responsibility-** California public health authorities must receive clear guidance with respect to their roles and responsibilities related to immigrant detention facilities.
 - a.) This guidance should clarify the mandatory requirements and obligations imposed by the federal government on detention facility operators, including clarifying requirements related to local and state public health.
 - b.) State authorities should understand their responsibility to regulate private corporations operating detention facilities.
 - c.) A legal analysis of the police powers reserved by the state of California which extend to federal facilities.²⁹
- 2.) **Develop a Plan -** Recognize the threat posed to surrounding communities by outbreaks in detention facilities and formulate a clear plan to mitigate the spread of COVID-19.
 - a.) Public health authorities should develop a state-wide comprehensive plan to ensure that immigrant detention facilities do not become the scene of COVID-19 outbreaks, and do not spread to the local community or threaten public health resources. This plan should be part of the broader plan to reopen the state safely.
 - b.) Public health authorities should also develop localized plans for each detention facility, integrating it with plans already in place at the local level and acknowledging unique factors or challenges in each region.
 - c.) Public health authorities should identify preventative strategies and intervention points in which they can proactively protect the health and safety of detainees, staff, and community members.
- 3.) **Take Action -** Undertake strategic actions to ensure oversight, compliance and consistency with respect to public health standards in immigration detention facilities.
 - a.) Audit and inspect detention facilities, including requesting COVID-19 mitigation plans and other records related to detainee, employee and public health and safety.
 - b.) Issue mandates with respect to COVID-19 testing in detention facilities, coordination and information sharing with public health authorities and other forms of oversight and compliance.
 - c.) Formulate a special task force which includes the California Division of Occupational Safety and Health (CAL/OSHA) to investigate workplace safety conditions in detention facilities, including labor undertaken by detainees.
 - d.) Issue public health mandates suspending the transfer of individuals between state detention facilities and immigration detention facilities.
 - e.) Take legal action against private corporations operating detention facilities when they violate public health protocols.
 - f.) Appoint or establish administrators responsible for health and safety in private facilities that fail to adhere to public health mandates.³⁰

²⁹ For further information see *United States v. California, No. 18-16496 (9th Cir. 2019)* holding that “California possesses the general authority to ensure the health and welfare of inmates and detainees in facilities within its borders.”

³⁰ Similar state intervention took place in private nursing homes that failed to provide adequate care during the COVID-19 pandemic.