Practice Advisory: Health Care for ICE Detainees after the *Woods v. Morton* Settlement

Introduction

The district court in *Woods v. Morton* recently approved a class-wide settlement agreement (the "Settlement" or "Settlement Agreement") establishing standards for ICE detainee health care at the San Diego Correctional Facility ("SDCF") in Otay Mesa, California. This practice advisory explains the key terms of the Settlement. While the Settlement covers only detainees at the Otay Mesa facility, it includes modifications to the medical benefits package applicable nationwide, and its other standards may provide guidance for advocates to pursue adequate medical care for detainees in other parts of the country. A copy of the Settlement is available at http://www.aclu.org/prisoners-rights/woods-v-morton-settlement-agreement.

Background on *Woods v. Morton*

In 2007, the ACLU National Prison Project, ACLU Immigrants' Rights Project, ACLU of San Diego & Imperial Counties and Cooley LLP brought *Woods* as a class action challenging the inadequate medical care provided to ICE detainees at SDCF. The lawsuit followed from the well-publicized death of SDCF detainee Francisco Castaneda after ICE refused to authorize diagnosis and treatment of his cancer, conduct that a district court found to be "beyond cruel and unusual."[1] Like Mr. Castaneda, the *Woods* plaintiffs had suffered pain or severe health consequences due to the denial of care. At the center of the *Woods* plaintiffs' challenge was the Division of Immigration Health Services ("DIHS") benefits package ("Benefits Package") of 2006. The Benefits Package primarily covered only emergency health services for detainees. The resulting delay or deny medical care to detainees who desperately needed it created pressure for them to concede to removal from the United States.

The *Woods* plaintiffs argued that the Due Process Clause of the Fifth Amendment guarantees immigration detainees, whose detention is civil rather than criminal, conditions of detention superior to those of pre-trial criminal detainees. *See Jones v. Blanas*, 393 F.3d 918, 931-34 (9th Cir. 2004) (discussing substantive due process standard for those detained under civil authority). Without deciding whether an immigration detainee is entitled to the more generous due process standard, the district court denied in part the defendants' motion to dismiss because many of the plaintiffs' allegations satisfied a more exacting "deliberate indifference" standard applied to convicted criminal prisoners. *See Estelle v. Gamble,* 429 U.S. 97, 104-05 (1976) (holding that the Eighth Amendment standard for prisoner medical claims is "deliberate indifference to serious medical needs").

While allowing plaintiffs' core claims to move forward, the district court denied class certification and the plaintiffs appealed that denial to the Ninth Circuit. After oral argument, the Ninth Circuit referred the case for mediation. The parties reached a settlement agreement in December 2010. The Settlement went into effect on June 10, 2011.

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[1] *See Castaneda v. United States*, 538 F. Supp. 2d 1279, 1298 (C.D. Cal. 2008), *judgment reversed sub nom. Hui v. Castaneda*, 130 S.Ct. 1845 (2010).

Summary of the Settlement Agreement

- Class of detainees covered: All immigration detainees in ICE custody at SDCF for duration of agreement.
- Duration: June 10, 2011-June 9, 2012.
- Substantive provisions:
    - Health care in a number of areas shall meet or exceed National Commission on Correctional Health Care *Standards for Health Services in Jails* (2008) ("NCCHC *Standards*"). See below for more information.
    - Increased mental health care staffing.
    - Expedited consideration of requests for non-emergency treatment.
    - Modification of the Benefits Package, including, among other provisions, coverage of serious medical needs and expansion of normal coverage beyond emergency care. Around the same time the Settlement Agreement was finalized, the ICE Health Services Corps – successor agency to DIHS – released a revised detainee benefits package that is consistent with the terms of the Settlement. *See Detainee Covered Services*, available at http://inshealth.org/ManagedCare/IHSC%202010%20Detainee%20Covered%20Service%20Package_12-28-10.pdf ("Covered Services").
- Provisions for monitoring and confirmatory discovery. See below for more information.
- Reservation of district court jurisdiction for disagreements about parties' compliance with the settlement.

Detainee Rights Under the *Woods* Settlement

Treatment for serious, non-emergency medical needs: Under the new benefits package, ICE recognizes that detainees are entitled to treatment for serious medical needs, and the expected length of their detention cannot affect that entitlement:

> A given medical condition could qualify as a 'serious medical need' if, when left untreated, it could result in further significant injury or unnecessary infliction of pain. Serious medical needs include conditions that affect daily activities or which cause chronic and substantial pain. This duty applies with equal force, notwithstanding the expected timing of a detainee's release or removal, except that a physician may consider the timing of a detainee's removal or release from custody for purposes of recommending an overall treatment plan to be included in the continuity of care plan that is provided to a detainee upon his/her release or removal. Medical care, including for critically ill cases, will be provided until removal unless beginning treatment is deemed medically detriment to the detainee.

Covered Services at 2. This benefits package applies to detainees in ICE custody throughout the country, not just at SDCF.

> **Practice pointer**: Even if your client is not part of the *Woods* class, he or she is still entitled to treatment for ***serious medical needs even if they do not involve an emergency.*** Although the

new benefits package states that it creates no rights of action, and individuals detained outside SDCF are not entitled to seek enforcement of the Settlement, ICE is constitutionally required to provide treatment for all detainees' serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976) (deliberate indifference to convicted prisoners' serious medical needs is actionable under Eighth Amendment); *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004) (civil detainees protected by due process standard that is "more protective" than Eighth Amendment standard).

Standards for Care: The Settlement incorporates NCCHC Standards covering nineteen standards of care. The following is a brief summary of the incorporated provisions (for more detail, consult the relevant sections of the NCCHC *Standards*):

1. *Access to Care for Serious Medical, Dental and Mental Health Needs*. Requires timely access to professional clinical care, and prohibits excessive co-pays or punishment of inmates for seeking such care. § J-A-01.

2. *Medical Autonomy*. All clinical decisions must be made by health care professionals, and administrative and custodial decisions must take professional medical opinion into account. § J-A-03.

3. *Staffing*. SDCF must employ an adequate number of professional medical staff, § J-C-07, and in particular has undertaken to hire an additional full-time psychiatrist and four additional full-time psychiatric nurses, Settlement ¶ 9.

4. *Pharmaceutical Operations*. SDCF must maintain formulary, keep records of prescriptions, a system for notifying clinicians when they expire, proper conditions of storage for medications, emergency antidotes, and a written policy on meeting these and other standards. § J-D-01.

5. *Medication Services*. The relevant clinician must make all decisions about prescribing medications, and all inmates who are on prescription drugs when they enter the facility must continue to receive the prescribed medication or an alternative. § J-D-02.

6. *Receiving screening*. All arriving inmates must receive a medical screening as soon as possible, and patients urgently in need of medical care must be given such care immediately. The screening must use an approved form, include a comprehensive inquiry into inmates' past and current health problems, and reflect a written policy. § J-E-02.

7. *Initial Health Assessment*. In accordance with a written policy, the facility must perform either (1) an initial health assessment for all inmates within fourteen calendar days of arrival, including a physical examination, recording of vital signs, tests for communicable diseases where the prevalence rate merits such testing, and immunizations if appropriate or (2) a more comprehensive initial health assessment within two days of admission for inmates whose receiving screenings indicate that it is necessary. § J-E-04.

8. *Mental Health Screening and Evaluation*. Inmates must receive a mental health screening from a qualified professional within fourteen days of arrival at the facility. The screening must include a structured interview on the inmate's mental health history and current status. Inmates whose interviews reveal mental health problems must be referred for treatment, if necessary to another facility. § J-E-05.

9. *Oral Care*. All inmates must receive an oral screening with fourteen days of admission and a more comprehensive oral examination with twelve months of admission. Oral treatment must be available when, in the judgment of a dentist, lack of treatment would harm an inmate's health. § J-E-06.

10. *Nonemergency Health Care Requests and Services*. Inmates must have a daily chance to ask for health care during a sick call held by health professionals. § J-E-07.

11. *Emergency Services*. The facility must provide emergency medical, dental and mental health care twenty-four hours a day, including provision for emergency transport or an on-call physician. § J-E-08.

12. *Segregated Inmates*. Inmates who are detained separately from others must be monitored by a health professional. Specifically, (1) inmates who have little or no contact with others must be monitored daily by medical staff and weekly by mental health staff, (2) inmates who have limited contact with staff or other inmates must be monitored three times a week by medical or mental health staff, and (3) inmates who are separate but have some form of routine social contact must be monitored weekly by medical or mental health staff. § J-E-09.

13. *Patient Escort*. The facility must accommodate patients' health needs and confidentiality during transport. § J-E-10.

14. *Continuity of Care*. The facility must provide the treatment and diagnostic tests that clinicians recommend, as well as follow-up care by physicians when inmates return from hospitalization. § J-E-12.

15. *Basic Mental Health Services*. All patients must have access to mental health services, including on-site counseling and crisis intervention, and transfer to an in-patient mental health facility if necessary. § J-G-04.

16. *Suicide Prevention*. The facility must make provision for staff to identify suicidal inmates, provide evaluations by mental health professionals, place actively suicidal inmates under constant observation and provide for irregularly timed checks less than fifteen minutes apart for potentially suicidal inmates. § J-G-05.

17. *Care of Pregnant Inmates*. The facility must offer prenatal care (including medical exams, lab and diagnostic tests, and counseling), postpartum care, and obstetrical services when necessary. § J-G-07.

18. *Aids to Impairment*. The facility must provide, in a timely manner, prostheses, orthoses, and other aids to impairment (such as braces, splints, tooth implants, glasses, etc.) when the lack of such aids would harm an inmate's health. § J-G-10.

19. *Health Record Format and Contents*. Health records must include a minimum set of elements, including identifying information, immunization records, information release and consent forms, a medical/mental health problem list, screening forms, progress notes, clinician orders, flow sheets, lab records, results of specialty consultations, and hospital discharge summaries. § J-H-01.

    Practice Pointer: Seek care for your clients based on NCCHC *Standards*, which are themselves based on the "serious medical need" standard (§ J-A-01). Even if your client is not a class member in *Woods*, the NCCHC *Standards* form a reasonable baseline for the care that any ICE detainee should be afforded. The NCCHC *Standards* were developed to cover pre-trial criminal detainees, and civil detainees such as ICE detainees are entitled to at least the same standard of care as pre-trial criminal detainees. *See Jones v. Blanas*, 393 F.3d 918, 931-32 (9th Cir. 2004).

Monitoring and Enforcement

During the year in which it is in effect, the Settlement provides for detailed monitoring and enforcement. The defendants are required to seek a finding from the NCCHC itself that they are in compliance with the incorporated sections of the NCCHC *Standards*. The defendants must also produce documentation of required changes in staffing, the medical request processing process, and the medical intake process, as well as written policies and procedures and photocopies of the medical records of detainees. Plaintiffs' counsel welcomes any information about SDCF detainees' medical care and defendants' compliance with the agreement. If you have a client at SDCF who may not be receiving adequate medical care, please contact ACLU of San Diego & Imperial Counties at (619) 232-2121 or info@aclusandiego.org.