

***Fraihat v. ICE* // Citations to October 7, 2020 Motion to Enforce Order**

This document provides cites to the October 7, 2020 Order GRANTING in part and denying in part Plaintiffs' Motion to Enforce the April 20, 2020 Preliminary Injunction Order (Dkt. No 172)

Fraihat Class Counsel believes this Order provides extensive language that may be useful in any immigration detention litigation, COVID-19 or otherwise.

I. ICE'S FAILURE TO IDENTIFY, TRACK, AND MEANINGFULLY REVIEW FOR RELEASE ALL FRAIHAT SUBCLASS MEMBERS

Fraihat "subclass members" are all people in ICE detention who have Risk Factors that make them particularly vulnerable to COVID-19 infection. On October 7, the Court found that ICE had violated the April 20 order by failing to identify subclass members and failing to consistently give individuals' Risk Factors "significant weight" in the Fraihat review determinations. The Court clarified that only in rare cases can a subclass member not subject to 1226(c) ("mandatory detention") remain detained after a Fraihat review and that even 1226(c) subclass members are entitled to individualized and meaningful review for release. The court further ordered that determinations should not take longer than one week, that Defendants provide the individual and their attorney with notice of the result and, in the case of non-release, Defendants must provide a justification. (see section V. "Orders" below)

"The process is meant to ensure medically vulnerable and elderly detainees are quickly identified and released where possible, and in all cases are accorded minimally adequate conditions of confinement to protect them from severe illness and death from COVID-19." P.14

"[T]he Preliminary Injunction... requires **tracking and individualized consideration** of each elderly and medically vulnerable detainee." P.15

"[T]he Court is gravely concerned that Fraihat custody decisions are a **disorganized patchwork of non-responses or perfunctory denials.**" P.8

"Although one would expect an increase in releases since the PI Order, Defendants have not documented a change... Compounding the problem, **Defendants have used inconsistent risk factor identification and custody review procedures.**" P.16

"Defendants repeated that some released Subclass members would have received Fraihat custody determinations. Defendants could not point to evidence that field offices consistently give **significant weight** to the presence of a Risk Factor." P.14

"**Blanket or cursory denials do not comply** with the Preliminary Injunction or with the Docket Review Guidance's instruction to make individualized determinations." P.17

"**Only in rare cases** should a Subclass member not subject to mandatory detention **remain detained**, and pursuant to the Docket Review Guidance, a **justification is required.**" P.17

“[D]etainees should generally be released absent a **specific finding** they would pose a danger to property or persons.” P. 14

“The Court is especially distressed that about 70% of the detained Subclass members are not subject to mandatory detention yet have not benefited from the Docket Review Guidance, which instructs that the presence of a risk factor should be a significant discretionary factor in favor of release.” P.8

“The PI Order assumed the Docket Review Guidance ... would result in meaningful reviews and the release of significant numbers of Subclass members.” P.14

○ **1226(c) or “Mandatory Detention” subclass members**

“Detention under Section 1226(c) is still civil detention and detention **cannot be punitive, or deliberately indifferent.**” P.15

“Defendants shall not apply the Docket Review Guidance rule against release of Section 1226(c) detainees so inflexibly that none of these Subclass members are released. Section 1226(c) Subclass members should only continue to be detained after **individualized consideration** of the risk of severe illness or death, with **due regard to the public health emergency.**” P.17-18

“[T]he Court expected that some individuals subject to mandatory detention would be released under the Docket Review Guidance and Preliminary Injunction, due to the public health emergency and extremely high degree of risk posed to some Section 1226(c) detainees.” P.15

II. CONDITIONS INSIDE OF ICE FACILITIES

“Significant numbers of ICE detainees have been infected with COVID-19. More than 700 ICE detainees currently in custody have tested positive and are under active isolation or monitoring for the disease.” P.5

“Defendants continue to arrest, detain, and deport large numbers of noncitizens, including individuals with Risk Factors.” P.7

“[T]he risk of COVID-19 outbreaks is especially acute at detention facilities with high turnover, admitting new entrants daily who may have been exposed . . . in the surrounding community and in networks of facilities with daily staff movements and transfer between facilities and systems.” P.5 **citing** July 22 CDC Guidance

“[ICE’s] daily snapshots do not account for the rapid turnover in detainee population.” P. 7 n.6

“The number of ICE detainees that cycle through facilities each year is far greater than the number detained at any given moment.” P. 5

“[E]ven facilities at half capacity and that have attempted to follow ICE’s guidelines up to this point can suffer dangerous outbreaks and death.” P. 7 n.6

III. ICE’S FAILURE TO PROVIDE ADEQUATE COVID-19 PROTOCOLS

From April - June 2020, ICE published four slightly different versions of their Pandemic Response Requirements (“PRR”), which they alleged adequately defined minimum acceptable detention conditions for people in ICE detention with Risk Factors (“subclass members”), as required by the April 20 order. On October 7, the Court held that none of ICE’s protocols, or “performance standards,” were adequate. (see section V. “Orders” below)

“Defendants have yet to issue a performance standard that unequivocally sets the minimum acceptable conditions of confinement for Subclass members across ICE facilities.” P. 8

“The failure to provide a concrete and comprehensive protocol specifically addressed to Subclass members does establish noncompliance.” P.10

“[T]he Court is dismayed that more than five months after the issuance of the Preliminary Injunction, Defendants have not issued a Performance Standard to address the substantial risk of death to Subclass members during the pandemic.” P.7

“The PRR III and IV alternately muddle, alter, or fail to highlight significant changes in the CDC’s Interim Guidance since late March 2020.” – p. 8

IV. REGARDING ICE’S INADEQUATE MONITORING / ENFORCEMENT MECHANISMS

The April 20 order also required ICE to monitor and enforce facility-wide compliance with their PRR. In response, ICE issued a “Facility Checklist” and a “Detainee Checklist.” In this October 7 order, the court explains in detail why ICE’s mechanisms for monitoring/supervising facilities is wholly inadequate.

“The PRR II, III and IV do include monitoring and enforcement provisions, but they are so vague that the Court concludes they are **unlikely to result in substantial compliance** with the PRR or a future Performance Standard across facilities.” P.12

“Current monitoring efforts rely on a **meager survey that allows facilities to self-report** their level of compliance.” P.7

V. REGARDING ICE’S INSUFFICIENT EVIDENCE

“The Court accords **significant weight to Plaintiffs’ declarations** for four reasons.

1. First, Defendants are **free to offer their own expert opinions but have declined** to do so.
2. Second, **Plaintiffs offer diverse views**, including from detainees themselves, legal service organizations, attorneys who speak to detainees regularly, and area experts (a doctor with corrections experience, an emergency room physician, an epidemiologist, and a professor and former officer and head of civil rights at DHS).
3. Third, **Defendants’ declarations contain significant flaws**.
 - Defendants submit the views of their own supervisory officials and facility directors, as well as an IHSC health official.
 - These officials often describe conditions in conclusory terms, most often at facilities with comparably low numbers of COVID-19 cases.
 - A lead declarant provided incorrect statistics on the rate of testing ...
4. Fourth, **Defendants’ supervisors’ own views of the extent of systemwide compliance are only as reliable as their instruments** for measuring facts on the ground. As discussed below, Plaintiffs raise serious questions about the adequacy of Defendants’ surveys and other PRR monitoring mechanisms.” P. 3

VI. ORDERS

○ Fraihat Custody Redetermination Process

Overview:

1. ICE shall “streamline and clarify procedures” for medical records requests. P.17

2. ICE shall “advertise and implement consistent procedures across field offices” for identifying vulnerable individuals and for conducting custody determinations. P.17

3. ICE shall “centrally track and report” the results of the Risk Factor and custody determinations to Fraihat Class Counsel. P.18

STEP 1 [IDENTIFICATION]: Defendants must “affirmatively identify and track” individuals with Risk Factors¹ **within 5 days** of their detention.

○ *Medical Files and Medical Records:*

- A detained individual or their counsel may **promptly** obtain a copy of ICE’s medical file; and
- may supplement medical records at any time.
- Defendants’ medical personnel must then review newly submitted records within 5 days and inform the individual and their attorney of the result.²

STEP 2 [CUSTODY DETERMINATION]: Within **one week**,³ Defendants must **provide notice** of the result of the **Fraihat** custody determination to the detained individual and their attorney.⁴

○ *The notice must include:*

- the risk factor(s) identified; and
- (If non-release): Justification for continued detention

○ “Defendants shall ensure that the presence of a Risk Factor is given significant weight and that the custody reviews are meaningful.” P.17

○ “Blanket or cursory denials do not comply with the PI.” P.17

○ **ICE Covid-19 Protocols**

Overview:

1. By October 27, 2020, ICE must issue a comprehensive performance standard that provides **specific protections, preventative measures**, and accommodations for all people in ICE detention who have Risk Factors that make them particularly vulnerable to COVID-19 infection. P. 9-10

a. Defendants shall centrally track notices of non-compliance, action plans, corrective action plans, etc., and report these documents to Fraihat Class Counsel. P.13

2. ICE must “promptly investigate and redress” reports of adverse reactions to harsh cleaning products or chemical sprays. P.11

1 The Court rejected Defendants’ narrow definition of the Risk Factor, “Severe Psychiatric Illness,” finding that this Risk Factor “includes psychiatric illnesses that make it difficult for the individual to participate in their own care, that make it unlikely the individual will express symptoms, or that increase the risk of complications from the virus.” P. 18.

2 “[D]etainee medical files might be incomplete. To account for this likelihood, a detainee or their counsel may promptly obtain a copy of the medical file and may supplement medical records at any time. Defendants shall streamline and clarify procedures for such requests. Defendants’ medical personnel shall review newly submitted records within five days and inform the detainee and his or her counsel of the result.” P.17

3 “Only in rare cases should the determination take longer than a week.” P.17

4 “Defendants shall provide notice of the result of the custody determination to the Subclass member and his or her counsel. The notice shall mention the Risk Factor(s) identified, and in cases of non-release shall reference a basis for continued detention in the Docket Review Guidance.” P.17

Specific Protections for Individuals with Risk Factors

ICE must mandate/develop:

1. More widespread and regular COVID-19 testing
“Defendants shall mandate more widespread and regular testing of the Subclasses, consistent with CDC Guidelines and above the level provided by the BOP and state prisons.” P.10
2. Twice daily screening for COVID-19 symptoms and temperature checks
“Defendants shall mandate twice daily screening of the Subclass members for symptoms and temperature, consistent with CDC recommendations and utilizing a structured screening tool.” P.11
3. Minimum care and hospitalizations protocol
“Defendants shall develop minimum care and hospitalization protocols for Subclass Members who test positive.” P.10

Additional Mandates:

1. ICE must suspend transfers between facilities
“Defendants shall provide more protective, and more concrete, transfer protocols to protect the Subclasses, including a suspension of transfers with a narrow and well-defined list of exceptions consistent with CDC Guidance.” P.11
2. ICE may NOT use solitary/segregation or extended lockdown as “medical quarantine.”
“Defendants shall mandate that medical isolation and quarantine are distinct from solitary, segregated, or punitive housing, that extended lockdowns as a means of COVID-19 prevention are not allowed, and that access to diversion (books, television, recreation) and to telephones must be maintained to the fullest extent possible.” P.10
3. ICE may only use safe cleaning supplies in “safe quantities” and “in the manner intended for those products.”
“Defendants shall mandate that safe cleaning products be utilized in safe quantities and in the manner intended for those products. Defendants shall promptly investigate and redress reports of adverse reactions to harsh cleaning products or chemical sprays.” P.11 *citing* CDC Guidance on cleaning agents, cleaning, and disinfecting practices.