

Non-Citizens with Mental Disabilities

The Need for Better Care in Detention and in Court

In 2009, Immigration and Customs Enforcement (ICE) detained approximately 380,000 people.

Roughly 15 percent of the non-citizen population in detention, or around 57,000 people, have a mental disability. Unfortunately, these mental disabilities often go unrecognized by law enforcement and immigration officials, resulting in less access to justice for the individual and greater confusion and complexity for the attorneys and judges handling the cases. The consequences of immigration enforcement for unauthorized immigrants, long-term permanent residents, asylum-seekers, and other non-citizens with mental disabilities can be severe. Even U.S. citizens have been unlawfully detained and deported because their mental disabilities made it impossible to effectively defend themselves in court.

Teasing out the complicated issues of fair treatment for people with mental disabilities caught up in our broken immigration system is not easy, particularly because it must be disentangled from the many challenges facing all immigrants who find themselves in immigration custody or in proceedings before the immigration court. As a report by Human Rights Watch and the American Civil Liberties Union aptly put it:

Not every non-citizen with a mental disability is entitled to remain in the United States; but everyone is entitled to a fair hearing and a chance to defend his or her rights. If the US government is going to detain and deport individuals with mental disabilities, it must do so in a way that respects their human rights, honors US human rights commitments, and ensures fair and accurate court decisions.

Faced with mounting criticism of its practices, ICE conducted its own intensive internal review of its procedures for processing and detaining non-citizens with mental disabilities in 2009, which revealed vast deficiencies in the system. In July 2010, ICE convened a workshop on the issue to bring together stakeholders and government officials to explore the development of a pilot project to provide greater access to counsel. In September 2010, ICE held a forum between stakeholders in the immigration and mental health communities to further explore the problems and solutions concerning non-citizens with mental disabilities.

While these new initiatives are promising and reflect the Obama administration's broad commitment to detention reform, the particular issues relating to the treatment of mental disabilities require immediate attention. This special report reviews and summarizes the key findings and recommendations of both non-governmental organizations and the Department of Homeland Security (DHS) with respect to arrest and detention of non-citizens with mental disabilities. It also highlights recommendations regarding access to counsel and the immigration courts made by the Legal Action Center of the American Immigration Council at the request of the Board of Immigration Appeals.

Medical Care for Non-Citizens with Mental Disabilities in Detention

Medical care for non-citizen detainees is provided by the ICE Health Services Corps (IHCS), in-house prison medical staffs, and private prison contractors. IHCS provides medical care to about 50 percent of the detainee population, and reviews and approves all offsite medical treatment. The medical care system, especially when applied to the mentally disabled, is lacking in a number of areas. Initial screening is inadequate, the quality of care suffers, and the lack of an electronic records system further exacerbates these problems.

In the abstract, these difficulties are troubling—in the specific, they are heartbreaking. Xiu Ping Jiang, a Chinese New Yorker, was held for a year and a half in a Florida immigration detention center despite having no criminal record and a history of mental health issues. Without a lawyer, she was unable to argue her asylum claim (she feared returning to China after being forcibly sterilized in 1990), and a judge ordered her to be deported to China.

After her deportation order, Xiu Ping Jiang was sent back to jail where she failed to receive proper treatment, despite her history of mental health issues. As a result, she was placed on suicide watch and periodically put in solitary confinement. Through a fluke, the *New York Times* heard about her case, and following an article describing her plight, an Immigration Judge reopened her case. Ms. Jiang was then released on bail to receive needed medical and psychiatric treatment. Later, after she was able to obtain a lawyer, Ms. Jiang was granted political asylum and is now living in the United States. However, better procedures for identifying mental disabilities at the outset of detention could have prevented much of the hardship endured by Ms. Jiang and her family.

The initial screening for mental disabilities is inadequate.

Non-citizens with mental disabilities cannot be properly treated until their disability has been identified. According to ICE's own self-analysis, "[t]he current mental health intake assessment is quite brief and does not lend itself to early identification and intervention." Current ICE standards require a screening within 12 hours of arrival to examine current and past medications, illnesses, addictions, and other factors.

Yet these standards, even if deemed adequate, are not routinely followed. Facilities often fail to conduct the screening within 12 hours and, once conducted, often fail to correctly identify mental health conditions. Some facilities give the examination in English even if the detainee does not understand the language. Detainees often do not receive proper medications for mental illnesses, and sometimes are involuntarily prescribed psychotropic medications. A successful initial screening policy would be sufficiently comprehensive to identify mental illnesses and prompt enough to prevent lapses in care.

On a positive note, ICE is developing a "risk assessment tool" which will take a non-citizen's vulnerabilities into account when deciding whom to detain and determining the conditions under which they will be held. If implemented correctly, this tool would both start the process of screening for mental disabilities as well as keep non-citizens with mental disabilities out of detention when possible.

The quality of medical care for non-citizens with mental disabilities in detention is inconsistent.

In 2008, Hassiba Belbachir was detained by ICE after she entered the United States and asked to be granted asylum. While her initial screening revealed that she had a history of depression and panic attacks, and she was diagnosed as having a "major depressive disorder," Belbachir was not given an appointment with a psychiatrist to obtain medication for 10 days. Then, although she told a social worker that she wanted to die in the interim, the medical staff did not place her on suicide watch. Tragically, she committed suicide one day before her appointment with the psychiatrist.

Because IHCS provides medical care to only about 50 percent of the population, the types and quality of medical services "vary considerably" by detention center. Many non-citizens with mental disabilities are treated as if these disabilities are a behavioral problem. Mentally disabled detainees are often segregated and isolated, and few beds are available for psychiatric care in detention facilities. Some detainees refrain from seeking appropriate medical care for fear of retaliation from prison staff.

A report by the Florida Immigrant Advocacy Coalition (FIAC) found that "while the ratio of mentally ill inmates to staff was 1 to 10 in prisons for the mentally ill and 1 to 400 in the federal Bureau of Prisons, the ratio was 1 to 1,142 in immigration detention – a mind-boggling disparity." By ICE's own admission, non-citizens "with mental illness would benefit from improved staffing, appropriate housing, access to step down services, and specialized case management."

The severity of detention exacerbates the mental illnesses of some detainees.

Detention often exacerbates the mental health issues of non-citizens, separates them from medical services and their families, and interrupts continuity of care. Housing non-citizens with mental disabilities in detention, as opposed to releasing them on parole, bond, or secure alternatives to detention, means more expense for ICE to provide shelter and healthcare. Many immigrant advocates believe that non-citizens with mental disabilities should be detained in the least restrictive setting appropriate to their situation, including parole, bond, or secure alternatives to detention. These options would allow non-citizens with mental disabilities to continue receiving care and support from their community.

A recent memo from ICE Assistant Secretary John Morton clarified that “[a]bsent extraordinary circumstances or the requirements of mandatory detention, field office directors should not spend detention resources on aliens who are known to be suffering from serious...mental illness.” However, there was a lack of clarity on what to do with mentally disabled detainees subject to mandatory detention, with the memo stating simply that “field office directors are encouraged to contact their local Office of Chief Counsel for guidance.”

There is no comprehensive electronic medical record system for non-citizens in detention.

IHCS manages and maintains medical and mental health records for detained non-citizens, keeping health records in paper form. Each time a facility receives a transferred non-citizen, ICE opens a new medical record, subjecting the patient/detainee to a new examination and diagnosis, which can lead to lapses in treatment during this period. Often detainees, even those with serious mental or medical conditions, are accused of faking illness, and don’t have the medical records to prove their disabilities. ICE’s own self-evaluation stated a need for better record keeping, not only for the care of individual detainees, but to help evaluate healthcare needs for future populations.

There are no Safe Release Practices and Standards for non-citizens with mental disabilities.

ICE is working with non-governmental organizations on adopting and implementing new safe release practices and standards, but does not currently ensure that non-citizens with mental disabilities are safely released from detention or safely removed from the U.S. Current ICE standards allow detainees a phone call when leaving detention, but in practice, detainees are often afforded this right only just before they are released, if at all. In the past, some non-citizens have been left at bus stops thousands of miles from where they were initially apprehended.

Non-Citizens with Mental Disabilities in Court

As a Texas Appleseed report noted, non-citizens with mental disabilities not only face challenges in receiving medical care, but also face extraordinary hurdles in their legal proceedings:

Care in detention is critical; fair process in immigration court is equally vital. Immigration court decisions can affect a lifetime, or even a life: preserving citizenship or stripping it away, uniting or separating families, securing protection for refugees or sending them back to persecution. Given the weight of these decisions, it is particularly important that immigration courts identify and accommodate immigrants with mental disabilities to ensure that they receive fair treatment and due process.

In 2008, a native-born U.S. citizen was deported after his learning disability and bipolar disorder made it impossible for him to communicate to ICE officials that he was a U.S. citizen. Mark Lyttle, born in North Carolina, was deported after he made conflicting statements to ICE officers about whether he was from Mexico or the United States. These conflicting statements were not raised at his hearing before an Immigration Judge, who then ordered Lyttle to be deported to Mexico. Upon arrival in Mexico, Lyttle was deported to Honduras, where he was detained before being sent to Guatemala. Finally, Lyttle found the U.S. Embassy in Guatemala, which facilitated his return to the United States. Mr. Lyttle’s case shows that even a U.S. citizen with mental disabilities can

experience difficulty navigating the immigration court process.

There is no formal mechanism to identify non-citizens with mental disabilities in immigration proceedings.

There is no standard for competency in immigration proceedings and no set procedure for requiring psychological or competency evaluations. Even if a non-citizen is deemed incompetent, ICE regulations provide that he may be represented by a “guardian, relative, or friend,” who is not required to be an attorney. Even worse, immigration regulations permit ICE officials to represent such non-citizens if a guardian, relative, friend, or attorney cannot be found.

Detainees are not appointed counsel in immigration court, even if diagnosed as mentally disabled.

Non-citizens facing removal proceedings have the right to representation by a lawyer at no expense to the government. DHS, however, is always represented by counsel in these proceedings. Only 39 percent of non-citizens are represented in immigration court proceedings. Detained non-citizens are much less likely to be represented; only 16% had a lawyer in 2006-2007.

Non-citizens with mental disabilities cannot effectively represent themselves in court.

The Immigration and Nationality Act and related regulations provide for a “reasonable opportunity” for non-citizens to present, examine, and object to evidence. However, some individuals, because of their mental disabilities, will have difficulty carrying out these tasks. Attorneys can often help non-citizens with mental disabilities participate effectively in court proceedings by presenting and examining evidence and explaining their clients’ mental health history. Without an attorney, it is difficult for non-citizens to collect and present the relevant evidence necessary to prove their claims, and even more difficult for non-citizens with mental disabilities. Such individuals also risk making statements against their interest without being able to understand or mitigate the consequences, which could ultimately include deportation.

Immigration Judges have too many cases to effectively address the needs of non-citizens with mental disabilities.

The 55 immigration courts in the United States have about 230 judges, who heard a record 391,829 cases in 2009. The shortage of Immigration Judges is a significant problem—if all the cases were evenly distributed amongst Immigration Judges, each would have to decide seven cases per day, five days per week, with no vacation.

Because of the staggering number of cases, Immigration Judges have limited contact with any individual respondent in proceedings, but this can be particularly detrimental where non-citizens with mental disabilities are concerned. The Immigration Judge first sees such non-citizens at master calendar hearings, which usually last only a few minutes each. Many of these hearings are conducted via televideo, often distorting communication between the court and the non-citizen. The additional time and attention that may be necessary to ascertain an individual’s circumstances—and whether mental disability issues may affect his or her case—is simply unavailable in many courts.

ICE’s own self-evaluation recommended the creation of separate caseloads for non-citizens with mental disabilities in order to improve case management, and expedite removal, release, or relief.

Establishing Enforceable Standards

Long before the creation of DHS, the Immigration and Naturalization Service and advocates for immigrants in detention routinely sparred over the appropriate way to create, enforce, and monitor treatment of detained immigrants. On January 25, 2007, advocates and former detainees filed a petition for administrative rulemaking (a request to draft judicially enforceable regulations) for detention standards. In July 2009, DHS rejected the petition, addressing it only after a federal judge ordered DHS to respond. DHS rationalized that “rule-making would be laborious, time-consuming and less flexible” than the performance-based standards currently used.

Despite the rejection of a regulatory framework, which carries with it the prospect of legally enforceable standards, DHS has engaged in more public dialogue on detention reform in recent years. DHS has announced plans to create a secure alternatives to detention program which would allow non-citizens with mental disabilities to be released into the community in order to receive health treatment and support. Other DHS initiatives include:

- Hosting a workshop on competency and mental health issues in collaboration with representatives from the Department of Justice (DOJ), Executive Office of Immigration Review (EOIR) and local stakeholders to explore the development of a pilot project to provide greater access to counsel and services.
- Launching an online detainee locator system, allowing attorneys, family, and friends to find a detainee in ICE custody and to access information about the facility, including address and visiting hours.
- Drafting, in collaboration with stakeholders, new performance-based national detention standards; a revised set of detention standards which detail the guidelines for the custody and care of ICE detainees. According to ICE, these standards will be implemented at detention facilities housing 55 percent of the detained population by the end of 2010, and at facilities housing 85 percent of the detained population by the end of 2011.

What remains to be seen, however, is whether these projects will result in clearly enforceable standards—something advocacy groups will be closely monitoring.

There are also signals that the Board of Immigration Appeals (BIA), which hears all appeals from immigration courts, may also be growing impatient with the lack of clear and enforceable standards, particularly regarding the treatment of non-citizens with mental disabilities. In *Matter of L-T*, a pending BIA case, the BIA invited the parties and *amicus curiae*, including the American Immigration Council's Legal Action Center, to submit supplemental briefing on a number of issues. In this case, DHS refused to hand over a mental competency report evaluation of the non-citizen despite an Immigration Judge's request. The BIA's request addresses a many of the concerns described in recent reports, including:

- What circumstances trigger the need for an Immigration Judge to make a competency assessment, and how should such an assessment be conducted?
- Who has the authority to appoint a legal representative, guardian, or custodian; and who may that individual be?
- If a defendant is found to be incompetent and refuses representation, what safeguards can the Immigration Judge prescribe?
- Are termination of proceedings or administrative closure appropriate safeguards for non-immigrants with mental disabilities?
- If a non-citizen is found to be incompetent and proceedings do not move forward, what happens to a non-citizen who is in custody and without care?
- Can incompetent non-citizens effectively represent themselves?

The lack of clear standards has also generated Congressional interest. Several legislative proposals introduced in 2009 and 2010 included provisions to help improve conditions for detained immigrants with mental disabilities. These bills, including Rep. Luis Gutierrez's (D-IL) and Sen. Robert Menendez's (D-NJ) comprehensive immigration reform proposals, would improve intake mechanisms in detention facilities to help identify immigrants with mental disabilities at the earliest possible time. The bills also provide for temporary release of certain immigrants with mental disabilities while they await a hearing in immigration court.

Recommendations

Clearly, DHS needs to implement better rules across the board that address the particular problems faced by non-citizens with mental disabilities, especially with respect to custody decisions, medical

care, and detention standards. In addition, DOJ/EOIR needs to establish procedures to ensure fair adjudication of removal cases for individuals with mental disabilities. The following recommendations are gathered from the many reports surveyed for this paper, but with particular attention to recommendations made by the Legal Action Center in its brief to the BIA:

In response to the questions posed by the BIA, the Legal Action Center recommends that:

- The BIA should institute a formal rulemaking process regarding appropriate case adjudication procedures for respondents with mental disabilities. A rulemaking process would allow the construction of a comprehensive system that is responsive to a variety of fact-specific variables, as well as consultation of experts from outside the legal community.
- Mentally incompetent respondents have a range of capabilities and needs, and even legal representation may not be sufficient to ensure a fair hearing. The appointment of a guardian, next friend, or relative may be required in this case, and if the requisite procedural safeguards are unavailable, termination of proceedings is the only appropriate course of action.
- All non-citizens, including those with mental disabilities, have a right to a full and fair hearing. Without counsel, these individuals will be deprived of a meaningful opportunity to be heard. The INA prescribes safeguards for mentally incompetent respondents, which must include counsel.
- To protect the interests of respondents who lack the mental capacity to consent or object to the appearance of third parties on their behalf, Immigration Judges should follow the example of federal court judges by examining the qualifications and motivations of individuals appearing as guardians, next friends, or relatives in immigration proceedings.
- If no alternate guardian is available other than a DHS custodian, termination of proceedings is the only course of action that would comport with the requirements of due process.

More broadly, many of the reports surveyed for this analysis make the following recommendations:

Immigration and Customs Enforcement should:

- Require that upon admission to a detention facility, non-citizens immediately be screened for mental disabilities by a healthcare professional.
- Whenever feasible, release non-citizens with mental disabilities while their immigration cases are pending in court. If not feasible, detain them in settings appropriate to their needs and ensure that they receive appropriate and timely treatment and medication.
- Improve the quality of mental health treatment in immigration detention facilities, ensuring that such facilities maintain appropriate staffing levels and training.
- Develop and maintain a comprehensive electronic medical records system so that detainees receive proper care and have proper documentation for court records.
- Develop safe release guidelines requiring that detainees be released to a family member, friend, guardian, or mental health facility.

The Executive Office for Immigration Review should:

- Establish procedures and standards for determining if a non-citizen is mentally competent to stand trial.
- Require that all non-citizens deemed mentally incompetent receive representation in immigration court proceedings.
- Hire more Immigration Judges to enable them to devote adequate time to cases.
- Evaluate with appropriate stakeholders, the pros and cons of creating a separate Immigration Court docket for non-citizens with mental disabilities.
- Mandate that Immigration Judges receive annual training on how to safeguard the rights of non-citizens with mental disabilities in court.

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