

EXHIBIT 17

December 7, 2020

Bobak Talebian
Director of the Office of Information Policy
United States Department of Justice, Sixth Floor
441 G. St. NW
Washington, DC 20530-0001
(Submitted Via OIP's FOIA STAR Online
Portal)

Re: Freedom of Information Act Appeal, FOIA 2021-00127

Dear FOIA Officer:

This is an appeal under the federal Freedom of Information Act, 5 U.S.C. § 552.

On October 21, 2020, the Harvard Immigration and Refugee Clinical Program (“HIRC”) submitted a FOIA request to the Department of Justice (“DOJ”) for certain records pertaining to the implementation of the Nationwide Policy and National Qualified Representative Program (“NQRP”). *See* Attachment 1.

On October 30, 2020, HIRC received an acknowledgement receipt of our FOIA request, which extended DOJ's time period to respond by additional 10 working days and denied our request for expedited treatment of our FOIA request. *See* Attachment 2. HIRC has not received a substantive answer to the request nor any additional response from DOJ, and consider this a constructive denial of our request.

HIRC appeals DOJ's failure to comply with the statutory time limit for responding to initial requests, which included a ten (10) day extension to the initial twenty (20) day statutory time limit. 5 U.S.C. § 552(a)(6)(A)(i). HIRC also appeals DOJ's failure to release all non-exempt records responsive to the request. 5 U.S.C. § 552(a)(3).

In addition, HIRC appeals DOJ's denial of our request for expedited treatment. Where, as here, a requestor can show “exceptional need or urgency,” that request should be processed on an expedited basis.¹ As this request is being processed, many unrepresented ICE detainees with serious mental disorders have not been afforded the procedural protections that should be provided to them by the Nationwide Policy and NQRP. As a result, these vulnerable unrepresented detainees have been and will continue to be detained without due process and be placed into unfair immigration proceedings without necessary legal representation. *See* Attachment 1 at 9.

Further, because the primary purpose of this FOIA request is to obtain information to further the public's understanding of federal immigration policies and practices, and is not for any private

¹ *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976).

commercial interest, HIRC also appeals DOJ's constructive denial of our fee waiver request. 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k) (records must be furnished without charge if the information is in the public interest, and disclosure is not in the commercial interest of the institution); 6 C.F.R. § 5.11(d). *See* Attachment 1 at 9-10.

Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), HIRC expects a response within the twenty (20) day statutory time limit. If you have any questions in processing this appeal, I can be contacted by e-mail at sahmed@law.harvard.edu, telephone at (617) 384-0088, or by mail at: Sameer Ahmed, Harvard Immigration and Refugee Clinical Program, 6 Everett St., Cambridge, MA 02138.

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Ahmed'.

Sameer Ahmed, Esq.
Harvard Immigration and Refugee Clinical Program

ATTACHMENT 1

**HARVARD LAW SCHOOL
CAMBRIDGE · MASSACHUSETTS · 02138**

HARVARD IMMIGRATION AND REFUGEE CLINIC
Harvard Law School

Location: 6 Everett St.
E-mail Address: hirc@law.harvard.edu
Phone: 617-384-0088

October 21, 2020

SENT VIA EMAIL

U.S. Department of Justice
Executive Office for Immigration Review
Office of General Counsel – FOIA Service Center
5107 Leesburg Pike, Suite 2150
Falls Church, VA 22041
EOIR.FOIARequests@usdoj.gov

U.S. Department of Justice
Office of Information Policy
FOIA/PA Mail Referral Unit
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To Whom It May Concern:

This is a request for records made pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 et seq., and the relevant implementing agency regulations. The Request is submitted by the Harvard Immigration and Refugee Clinical Program (“HIRC”), Clinical Professor of Law Sabi Ardalán, and Clinical Instructor Sameer Ahmed (“Requestors”). Requestors seek the disclosure of records related to the implementation of the Nationwide Policy and National Qualified Representative Program (“NQRP”) by the U.S. Department of Justice (“DOJ”) (including the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, and other Senior Management Offices), and the Executive Office for Immigration Review (“EOIR”) to provide enhanced procedural protections to certain unrepresented and detained individuals in removal proceedings with serious mental disorders or conditions that may render them incompetent to represent themselves in immigration proceedings.¹

¹ U.S. DEP’T JUST., *National Qualified Representative Program* (Feb. 18, 2020), <https://www.justice.gov/eoir/national-qualified-representative-program-nqrp>.

Background

In April 2013, DOJ and EOIR collaborated with the U.S. Department of Homeland Security (“DHS”) and the U.S. Immigration and Customs Enforcement (“ICE”) to create the Nationwide Policy, which provides “enhanced procedural protections, including competency inquiries, mental health examinations, and bond hearings to certain unrepresented and detained respondents with serious mental disorders or conditions that may render them incompetent to represent themselves in immigration proceedings.”² At the same time, and as part of the Nationwide Policy’s enhanced procedural protections, EOIR also implemented the NQRP, “a nationwide program to provide Qualified Representatives (‘QRs’) to certain unrepresented and detained respondents who are found by an Immigration Judge or the BIA [(Board of Immigration Appeals)] to be mentally incompetent to represent themselves in immigration proceedings.”³

According to a joint press release issued by the DOJ and DHS in April 2013, the Nationwide Policy and NQRP require Immigration Judges to “convene a competency hearing to determine whether the detainee is competent to represent himself or herself in immigration proceedings. When an Immigration Judge is unable to make a determination of mental competency based upon evidence already presented, the Immigration Judge will be authorized to order an independent examination and psychiatric or psychological report. The competency examinations will be administered through a program run by the DOJ Executive Office for Immigration Review (EOIR) and performed by an independent medical professional.”⁴ For unrepresented detainees who are deemed mentally incompetent, “EOIR will make available a qualified representative.”⁵ Furthermore, “detainees who were identified as having a serious mental disorder or condition that may render them mentally incompetent to represent themselves and who have been held in immigration detention for at least six months will also be afforded a bond hearing.”⁶ DOJ and DHS “expect[ed] these new procedures to be fully operational on a national basis by the end of 2013.”⁷

On August 15, 2013, EOIR began Phase I of the Nationwide Policy “in order to test aspects of the plan,” and subsequently issued its final guidance for Phase I.⁸ The Phase I guidance “sets forth principles by which Immigration Judges should assess competency within

² *Id.*

³ *Id.* According to ICE, the Nationwide Policy “supplements all previous guidance distributed by ICE pursuant to the Board of Immigration Appeals’ decision in *Matter of M-A-M-*, 25 I. & N. Dec. 474 (BIA 2011).” JOHN MORTON, CIVIL IMMIGRATION DETENTION: GUIDANCE FOR NEW IDENTIFICATION AND INFORMATION-SHARING PROCEDURES RELATED TO UNREPRESENTED DETAINEES WITH SERIOUS MENTAL DISORDERS OR CONDITIONS 1 n.1 (Apr. 22, 2013), available at https://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainees_mental_disorders.pdf.

⁴ U.S. DEP’T JUST., *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions* 1 (Apr. 22, 2013), <https://www.justice.gov/eoir/pages/attachments/2015/04/21/safeguards-unrepresented-immigration-detainees.pdf>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Ex. A at 1 n.1 (EOIR, Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders (2013), available at <https://immigrationreports.files.wordpress.com/2014/01/eoir-phase-i-guidance.pdf>).

the context of EOIR’s nationwide plan to provide enhanced procedural protections to unrepresented, detained respondents with mental disorders.”⁹ While the Phase I guidance stated that EOIR “also intends to issue a Notice of Proposed Rulemaking on this subject and, upon receipt and review of public comment, a Final Rule,”¹⁰ to date EOIR has not issued a Notice of Proposed Rulemaking or a Final Rule regarding the Nationwide Policy or NQRP.

Among other things, the Phase I guidance requires EOIR to amend its database used to track cases pending before Immigration Courts to track the following events and dates:

- “Indicia – whether the judge found indicia resulting in a ‘bona fide doubt’ that respondent has a mental disorder impairing his or her ability to represent him- or herself in an immigration proceeding and the date of such finding.
- Judicial inquiry – the date the judicial inquiry was conducted and whether the judge found ‘reasonable cause’ to believe the respondent has a mental disorder impairing his or her ability to perform the functions listed in the definition of competence to represent him- or herself.
- Mental Health Examination – whether the respondent was referred for a mental health examination and, if so, the date of the referral.
- Competence Determination – whether the judge found the respondent competent or incompetent to represent him- or herself and the date of such finding.
- Qualified Representative – whether a qualified representative was provided and, if so, the date of the assignment.”¹¹

EOIR’s database was modified to include a “Mental Competence” or “MC” section. The MC section was designed to track and store certain data related to NQRP implementation. For example, the MC section was designed to track decisions and results during the competency determination process, from the initial identification of indicia of mental incompetence to the ultimate decision on competence.

In 2014, EOIR contracted with the Vera Institute of Justice to set up program services and to provide training, technical support, and program analysis for NQRP and the Nationwide Policy.¹² Vera contracts with legal services providers wherever NQRP services are needed.¹³ These legal service providers are typically non-profit organizations with significant experience advocating for detained immigrants.¹⁴ QRs have a diverse range of skills and experience that allow them to take a holistic approach to representing NQRP clients, including expertise in mental health law and practice; diverse language and cultural competence capacities; and expertise working with people with mental and developmental disabilities, women, LGBTQ immigrants, and other specific populations.¹⁵

⁹ *Id.* at 1 n.2.

¹⁰ *Id.*

¹¹ *Id.* at 16.

¹² VERA INST. JUST., *National Qualified Representative Program: Learn More* (2020), <https://www.vera.org/projects/national-qualified-representative-program/learn-more>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

The Nationwide Policy and NQRP provide important legal services to a specific vulnerable population facing deportation: detained, unrepresented individuals with serious mental disorders.¹⁶ Without the Nationwide Policy and NQRP, these individuals typically remain unrepresented by counsel and impaired by serious mental health conditions. This results in unfair immigration proceedings in which they are much more likely to be deported without due process or the capacity to represent themselves.¹⁷ These detained individuals are also at a higher risk for prolonged immigration proceedings and some have been detained for years without process.¹⁸ Additionally, these individuals are generally involved in high-stakes immigration proceedings, often facing persecution and torture in their home countries as a result of their mental illnesses.¹⁹

The Nationwide Policy and NQRP are carried out through federal staff and contracts. However, little is publicly known about the procedures and guidance that DHS, ICE, DOJ, and EOIR provide to detention facility personnel and Immigration Judges to implement the programs and ensure their essential procedural protections are being applied consistently and uniformly across the United States.

Definitions

As used herein, the term “records” includes all records or communications preserved in electronic or written form, including but not limited to: correspondence; documents; data; videotapes; audio tapes; emails (and their attachments); faxes; files; guidance; guidelines; evaluations; instructions; analysis; memoranda; agreements; notes; orders; policies; procedures; protocols; reports; rules; manuals; specifications; handouts; flyers; and studies.

As used herein, the term “Nationwide Policy” refers to DHS’s, ICE’s, DOJ’s, and EOIR’s Nationwide Policy to provide “enhanced procedural protections, including competency inquiries, mental health examinations, and bond hearings to certain unrepresented and detained respondents with serious mental disorders or conditions that may render them incompetent to represent themselves in immigration proceedings.”²⁰

As used herein, the terms “National Qualified Representative Program” or “NQRP” refer to DOJ’s and EOIR’s “nationwide program to provide Qualified Representatives (QRs) to certain

¹⁶ VERA INST. JUST., *National Qualified Representative Program Overview* (2020), <https://www.vera.org/projects/national-qualified-representative-program/overview>.

¹⁷ See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 9 (2015) (“Detained immigrants with counsel obtained a successful outcome (i.e., case termination or relief) in 21% of cases, ten-and-a-half times greater than the 2% rate for their pro se counterparts.”); See also VERA INST. JUST., *Why Does Representation Matter? The Impact of Legal Representation in Immigration Court* (2018), https://storage.googleapis.com/vera-web-assets/downloads/Publications/why-does-representation-matter/legacy_downloads/why-does-representation-matter.pdf (“95 percent of successful [deportation] cases were represented”).

¹⁸ Eagly & Shafer, *supra* note 17.

¹⁹ *Id.*

²⁰ U.S. DEP’T JUST., *National Qualified Representative Program* (Feb. 18, 2020), <https://www.justice.gov/eoir/national-qualified-representative-program-nqrp>.

unrepresented and detained respondents who are found by an Immigration Judge or the BIA to be mentally incompetent to represent themselves in immigration proceedings.”²¹

As used herein, the terms “detainee” or “ICE detainee” refer to any individual detained for the purposes of immigration proceedings, whether in a facility operated by ICE or a facility that ICE has a contract or agreement with to detain individuals for the purposes of immigration proceedings, and regardless of whether the facility is staffed by the ICE Health Service Corps or not.

As used herein, the term “Third Party Notification” is any information that “third parties (including family members, social service providers, and others) may submit to the Immigration Judge, and the Immigration Judge may consider ... related to a detainee’s mental competency or incompetency to represent him-or herself in immigration proceedings.”²²

Records Requested

For the period **beginning April 1, 2013 to the present**, Requestors seek disclosure of the following records in the custody or control of the DOJ and EOIR regarding the implementation of the Nationwide Policy and the NQRP:

- I. All records, directives, orders, training materials, memoranda, guidance, briefings, instructions, handouts, flyers, policies, procedures, rules, regulations, e-mail, other electronic communications and/or any other communications, whether issued verbally or in writing, regarding DOJ’s and EOIR’s implementation of the Nationwide Policy and the National Qualified Representative Program, including the following:
 - a. Implementation of procedures put into place by EOIR to provide “enhanced procedural protections, including competency inquiries, mental health examinations, and bond hearings to certain unrepresented and detained respondents with serious mental disorders or conditions that may render them incompetent to represent themselves in immigration proceedings.”²³
 - b. Implementation of procedures put into place by EOIR to provide “Qualified Representatives (QRs) to certain unrepresented and detained respondents who are found by an Immigration Judge or the BIA to be mentally incompetent to represent themselves in immigration proceedings.”²⁴
 - c. Implementation of procedures authorizing Immigration Judges “to order competency exams for detained aliens where there are indicia of mental incompetency and the immigration judge believes that he or she cannot render a competency determination in the absence of an exam.”²⁵

²¹ *Id.*

²² *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG DTBX, 2014 WL 5475097, at *9 (C.D. Cal. Oct. 29, 2014)

²³ *National Qualified Representative Program*, U.S. DEP’T JUST. (Feb. 18, 2020), <https://www.justice.gov/eoir/national-qualified-representative-program-nqrp>.

²⁴ *Id.*

²⁵ JOHN MORTON, CIVIL IMMIGRATION DETENTION: GUIDANCE FOR NEW IDENTIFICATION AND INFORMATION-SHARING PROCEDURES RELATED TO UNREPRESENTED DETAINEES WITH SERIOUS MENTAL DISORDERS OR

- d. Implementation of procedures authorizing Immigration Judges to provide “custody hearings to unrepresented detained aliens who were identified as having a serious mental disorder or condition that may render them incompetent to represent themselves and have been detained in ICE custody for six months or longer.”²⁶
- II. Records responsive to Section I that indicate whether they have been provided to personnel at each Immigration Court, including the Boston Immigration Court.
- III. Records responsive to Section I that indicate whether they have been provided to personnel at the Board of Immigration Appeals.
- IV. All documents provided to or completed by Immigration Judges when implementing any part of the NQRP or Nationwide Policy, including any and all Competency Worksheets completed by Immigration Judges at each Immigration Court, including the Boston Immigration Court.
- V. All information contained in the “Mental Competence” or “MC” section in EOIR’s database, including information that tracks decisions and results during the competency determination process, from the initial identification of indicia of mental incompetence to the ultimate decision on competence.
- VI. Records disclosing the number of ICE detainees who may be mentally incompetent to represent themselves in immigration proceedings, including records disclosing the requested information in the following enumerated categories. For each category, please provide records disclosing the requested information at each Immigration Court, including the Boston Immigration Court, and at the Board of Immigration Appeals. Please provide these records broken down by how many detainees have been in each category each year from 2013 to the present.
 - a. The total number of ICE detainees where the ICE Office of Chief Counsel provided relevant information in its possession to inform the Board of Immigration Appeals or the Immigration Court about the detainee’s mental competency.
 - b. The total number of ICE detainees where Third Party Notifications were submitted to the Immigration Judge.
 - c. The total number of ICE detainees where the Immigration Judge used Third Party Notifications to find indicia resulting in a “bona fide doubt” that the detainee has a mental disorder impairing his or her ability to represent him- or herself in an immigration proceeding
 - d. The total number of ICE detainees where the Immigration Judge used Third Party Notifications to find that the detainee was not competent to represent him- or herself in an immigration proceeding.

CONDITIONS 1 n.1 (APR. 22, 2013), *available at* https://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainees_mental_disorders.pdf.

²⁶ *Id.*

- e. The total number of ICE detainees where the Immigration Judge found indicia resulting in a “bona fide doubt” that the detainee has a mental disorder impairing his or her ability to represent him- or herself in an immigration proceeding and the date of such finding.
- f. The total number of ICE detainees who have any information included in “Mental Competence” section of EOIR’s database.
- g. The total number of ICE detainees where an Immigration Judge held a competency inquiry to determine whether the detainee has a serious mental disorder or condition that may render them incompetent to represent themselves in immigration proceedings, including the date the judicial inquiry was conducted and whether the Immigration Judge found “reasonable cause” to believe the detainee has a mental disorder impairing his or her ability to perform the functions listed in the definition of competence to represent him- or herself.
- h. The total number of ICE detainees where the Immigration Judge held a competency inquiry and determined that the detainee (1) was competent, (2) was not competent, or (3) there was insufficient evidence to decide if the detainee was competent, and the date of the competence determination.
- i. The total number of ICE detainees where an Immigration Judge referred the detainee for a mental health or competency examination to be conducted by an independent examiner, and the date of the referral.
- j. The total number of ICE detainees where the Language Services Unit of the Office of the Chief Immigration Judge was notified so that arrangements were made to secure the services of a qualified interpreter for a mental health or competency examination for the detainee.
- k. The total number of ICE detainees where an Immigration Judge ordered that the detainee be provided a custody hearing because the detainee was identified as having a serious mental disorder or condition that may render them incompetent to represent themselves and had been detained in ICE custody for six months or longer.
- l. The total number of ICE detainees where an Immigration Judge ordered that the detainee be provided bond after receiving a custody hearing because the detainee was identified as having a serious mental disorder or condition that may render them incompetent to represent themselves and had been detained in ICE custody for six months or longer, as well as the amount of the bond provided.
- m. The total number of ICE detainees where an Immigration Judge ordered that the detainee be provided a Qualified Representative because they were found incompetent to represent themselves.
- n. The total number of ICE detainees where the detainee received a Qualified Representative after the Immigration Judge ordered it, and the date when the Qualified Representative was assigned to the detainee.
- o. The total number of ICE detainees where the Immigration Judge ordered the detainee’s case to be administratively closed or terminated because the detainee had a serious mental disorder or condition.

- VII. All records indicating what training has been provided regarding the implementation of the Nationwide Policy and the NQRP and when such training has occurred, including training provided to:
- a. Personnel at all facilities holding ICE detainees, including medical staff that are privately contracted by the facilities
 - b. ICE personnel, including at all Enforcement and Removal Operations Field Offices, all IHSC personnel, and all Office of the Principal Legal Advisor Field Locations
 - c. EOIR personnel, including Immigration Judges, Appellate Immigration Judges of the Board of Immigration Appeals, and Immigration Court clerks and administrators, as well as the names of each Immigration Judge, Appellate Immigration Judge, clerk, and administrator that has received such training.
 - d. Mental health professionals required to be qualified to conduct mental health examinations in immigration proceedings.²⁷
- VIII. All training materials provided to Immigration Judges related to the implementation of the Nationwide Policy, NQRP, and the federal district court's orders in *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG DTBX (C.D. Cal.), including the required "on-board [Immigration Judge] training regarding Franco, including the pro se competency standard and how to apply the bona fide doubt standard for Class Membership" and the "full multi-hour Franco training."²⁸
- IX. All records disclosing the existence of specific "mental health dockets" at different Immigration Courts, the existence of a "mental health panel" at the Board of Immigration Appeals, the names of all Immigration Judges on such dockets and panels, and how Immigration Judges are selected for such dockets and panels.
- X. All Mental Health Examination Referral forms completed by Immigration Judges to refer an ICE detainee for a mental health examination. *See Ex. A* at 21.
- XI. Records disclosing the names and business addresses of all Qualified Representatives approved to take cases pursuant to the NQRP and Nationwide Policy.
- XII. All Third Party Notifications received by the Board of Immigration Appeals and all Immigration Judges at each Immigration Court, including the Boston Immigration Court.

Expedited Processing Request

²⁷ *See Ex. A* at 9 (discussing the "EOIR-approved training program required to be qualified to conduct mental health examinations in immigration proceedings").

²⁸ *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG DTBX (C.D. Cal. Dec. 15, 2017), Dkt. 973 at 2.

The D.C. Circuit in *Open America v. Watergate Special Prosecution Force* recognized that some FOIA requests involve a greater degree of urgency than others.²⁹ Accordingly, where, as here, a requestor can show “exceptional need or urgency,” that request should be processed on an expedited basis.³⁰

The above request should be expedited because, as this request is being processed, many unrepresented ICE detainees have serious mental disorders or conditions that impact their ability to participate in their removal proceedings. Many of these unrepresented ICE detainees have not been afforded the procedural protections that should be provided to them by the Nationwide Policy and NQRP. As a result, these vulnerable unrepresented detainees have been and will continue to be detained without due process and be placed into unfair immigration proceedings without necessary legal representation.³¹ These vulnerable unrepresented ICE detainees are seriously harmed because they have and will continue to be deported without receiving crucial procedural protections that should be provided to them by DHS, ICE, DOJ, and EOIR. This request will shed light on DOJ’s, EOIR’s, DHS’s and ICE’s implementation of the Nationwide Policy and NQRP in the hopes that these detainees may soon receive the protections afforded to them by the Nationwide Policy and NQRP to ensure their immigration proceedings are fair. Therefore, this request requires immediate attention. Furthermore, the information requested in this FOIA request cannot be obtained elsewhere, as it is only in the custody and control of DOJ, EOIR, DHS, and ICE.

Fee Waiver Request

Requestors are entitled to a waiver or reduction of all fees and costs because the information sought “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the [Requestors’] commercial interest.” 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k) (records must be furnished without charge if the information is in the public interest, and disclosure is not in the commercial interest of the institution); 6 C.F.R. § 5.11(d).

Requestors are members of the Harvard Immigration and Refugee Clinical Program (“HIRC”), an academic program focused on direct representation of individuals applying for U.S. asylum and related protections, as well as representation of individuals who have survived domestic violence and other crimes and/or who seek avoidance of forced removal in immigration proceedings pursuant to various forms of relief (i.e., VAWA, U-visas, Cancellation of Removal, Temporary Protected Status, etc.). HIRC is also involved in appellate and policy advocacy at the local, national, and international levels on a broad range of immigrants’ rights issues. One primary goal of HIRC is to disseminate information about and make the public aware of procedural protections guaranteed to vulnerable individuals in immigration proceedings, including unrepresented ICE detainees with serious mental disorders and conditions, and to ensure the protections guaranteed to them by the Nationwide Policy and NQRP are being

²⁹ *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976).

³⁰ *Id.*

³¹ VERA INST. JUST., *National Qualified Representative Program: Learn More* (2020), <https://www.vera.org/projects/national-qualified-representative-program/learn-more>.

properly implemented. For these reasons, Requestors will make any information that they receive as a result of this FOIA request available to the public, including the press, at no cost.

The issues of the treatment of vulnerable ICE detainees, including those without attorneys and with serious mental disorders and conditions, are of significant public interest. Requestors have undertaken this work in the public interest and not for any private commercial interest. The primary purpose of this FOIA request is to obtain information to further the public's understanding of federal immigration policies and practices. Access to this information is necessary for the public to meaningfully evaluate the consequences of federal immigration policies, including policies with regard to the treatment of unrepresented ICE detainees with serious mental disorders and conditions.

Disclosure in this case therefore meets the statutory criteria, and a fee waiver would fulfill Congress's legislative intent. *See, e.g., Judicial Wrath, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers of noncommercial requestors.'"). Furthermore, because the documents subject to this request are not sought for any commercial use, we understand that no fee may be charged at least for the first two hours of search time and for the first 100 pages of duplication. 5 U.S.C. §552(a)(4)(A)(iv)(II).

Certification

Requestors certify that the above information is true and correct to the best of their knowledge. *See* 6 C.F.R. § 5.5(d)(3).

Please reply to this request within twenty working days as required by statute. *See* 5 U.S.C. §552(a)(6)(A)(i). Please furnish records as soon as they are identified to the following individual and address:

Sameer Ahmed
Harvard Immigration and Refugee Clinical Program
6 Everett Street
Cambridge, MA 02138
sahmed@law.harvard.edu

If you have any questions regarding this request, please contact me at sahmed@law.harvard.edu or via phone at (617) 384-0088.

Sincerely,



Sameer Ahmed
Harvard Immigration and
Refugee Clinical Program
(617) 384-0088

EXHIBIT A

**Phase I of Plan to Provide Enhanced Procedural Protections
to Unrepresented Detained Respondents with Mental Disorders**¹

I. Foundational Principles

Commitment to Screen and Provide Protections

The Executive Office for Immigration Review (“EOIR”) is committed to identifying detained unrepresented respondents in immigration custody who are not competent to represent themselves in removal and custody redetermination proceedings.

EOIR will not proceed in the case of any detained unrepresented respondent determined to be incompetent to represent him- or herself in a removal or custody redetermination proceeding until appropriate procedural protections and safeguards are in place.

II. Determinations to Be Made by Immigration Judges²

A. Background

In *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), the Board of Immigration Appeals held that for an alien to be competent to participate in an immigration proceeding, he or she must have a rational and factual understanding of the nature and object of the proceeding and a reasonable opportunity to exercise the core rights and privileges afforded by law. *Id.* at 479.

On April 22, 2013, the Office of the Chief Immigration Judge announced a “Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions.” This policy makes a qualified legal representative available in removal and custody redetermination proceedings if it is determined that a respondent with a serious mental disorder or condition is detained, unrepresented, and incompetent to represent him- or herself.

Accordingly, for a detained, unrepresented respondent with a serious mental disorder or condition to be considered competent to represent him- or herself in a removal or custody redetermination proceeding, he or she must be able to meaningfully

¹ EOIR announced its nationwide plan to provide enhanced procedural protections to unrepresented, detained respondents on April 22, 2013. On August 15, 2013, EOIR began Phase I of its nationwide plan, in order to test aspects of the plan. This document constitutes EOIR’s final guidance for Phase I of its nationwide plan. Based on observations made during Phase I, EOIR may issue revised guidance in conjunction with further roll-out of the plan.

² This guidance sets forth principles by which Immigration Judges should assess competency within the context of EOIR’s nationwide plan to provide enhanced procedural protections to unrepresented, detained respondents with mental disorders. As part of its ongoing commitment to provide such protections, EOIR also intends to issue a Notice of Proposed Rulemaking on this subject and, upon receipt and review of public comment, a Final Rule.

participate in the proceeding and perform the functions necessary for self-representation.

B. Competence to Represent Oneself

Immigration Judges should utilize the following guidance to determine if a respondent is competent to represent him- or herself:

A respondent is competent to represent him- or herself in a removal or custody redetermination proceeding if he or she has a:

1. rational and factual understanding of:
 - a. the nature and object of the proceeding;
 - b. the privilege of representation, including but not limited to, the ability to consult with a representative if one is present;
 - c. the right to present, examine, and object to evidence;
 - d. the right to cross-examine witnesses; and
 - e. the right to appeal.
2. reasonable ability to:
 - a. make decisions about asserting and waiving rights;
 - b. respond to the allegations and charges in the proceeding; and
 - c. present information and respond to questions relevant to eligibility for relief.

A respondent is incompetent to represent him- or herself in a removal or custody redetermination proceeding if he or she is unable because of a mental disorder to perform any of the functions listed in the definition of competence to represent oneself. “Mental disorder” (including Intellectual Disability) is defined as a significant impairment of the cognitive, emotional, or behavioral functioning of a person that substantially interferes with the ability to meet the ordinary demands of living.

C. Presumption of Competence

A respondent is presumed to be competent to represent him- or herself in a removal and custody redetermination proceeding. *See, e.g., M-A-M-*, 25 I&N Dec. at 479.

The presumption of competence to represent oneself is rebutted if an Immigration Judge finds, by a preponderance of the evidence, that the respondent is unable because of a mental disorder to perform any of the functions listed in the definition of competence to represent oneself.

D. Provision of a Qualified Legal Representative

EOIR will provide a qualified legal representative to any detained, unrepresented alien in a removal or custody redetermination proceeding found to be incompetent to represent him- or herself.

III. Process to Identify & Determine Issues of Competence

There are three stages to screen for and decide issues of competence:

1. Detecting indicia – The judge remains attentive to any behaviors or other indicators that the respondent may have a mental disorder limiting his or her ability to represent him- or herself. Where there is a “bona fide doubt” about respondent’s competence to represent him- or herself, the judge should move to stage 2 and conduct a judicial inquiry.
2. Conducting a judicial inquiry – The judge asks a series of questions to determine whether there is “reasonable cause” to believe that the respondent may be incompetent to represent him- or herself. At the conclusion of the judicial inquiry, the judge may find that the respondent is competent or incompetent to represent him- or herself. Alternatively, if there is reasonable cause to believe the respondent may be incompetent to represent him- or herself, but the evidence is not sufficient to rebut the presumption of competence, the judge should move to stage 3 and conduct a more in-depth hearing on the issue of competence.
3. Conducting a competency review – The judge conducts an evidentiary hearing to determine whether the presumption of competence has been rebutted.

IV. Detection of Indicia

Competence is the ability to perform a function demanded in a particular situation at the defined level. Competence is neither a status nor a state. Competence cannot be observed. Rather, one may observe behavioral signs or indicia that a person may lack the ability to perform a task or function required in a particular situation.

Immigration Judges must be vigilant at all times for indicia of a mental disorder that significantly impairs the respondent’s ability to perform the functions listed in the definition of competence.

A. Examples of Indicia

Indicia of a mental disorder that can impair competence or reflect impaired competence include, but are not limited to:

Past or current evidence of interventions related to mental disorder—for example:

- Outpatient mental health treatment
- Psychiatric hospitalization
- Interventions for self-injurious behavior or suicide attempts
- Limited academic achievement
- Currently receiving mental health treatment

Current manifestations of behavior suggesting mental disorder—for example:

- Poor memory
- Poor attention/concentration
- Confused or disorganized thinking
- Paranoid thinking (unreasonable fears)
- Grandiose thinking (overestimating own ability)
- Seeing or hearing things not present
- Serious depression or anxiety
- Poor intellectual functioning
- Irrational behavior or speech in court
- Lack of responsiveness in court

B. Sources of Indicia

Indicia of the respondent's cognitive, emotional, or behavioral functioning may come from any reliable source including, but not limited to: family members, friends, legal service providers, health care providers, social service providers, caseworkers, clergy, detention personnel, or other collateral informants or third parties knowledgeable about the respondent.

C. Form of Indicia

Indicia of incompetence may appear in any form including, but not limited to, observed behaviors; letters; government, legal, educational, employment, or health care records; or other verbal or written accounts.

D. Timing of Indicia

Because competence is fluid and may change over time, indicia of incompetence may appear and must be considered throughout all stages of the proceeding.

E. Communication by the Department of Homeland Security (DHS) of Indicia to the Court

Role of DHS v. EOIR Examinations

DHS serves a custodial and prosecutorial role in immigration proceedings. EOIR serves as an impartial adjudicator in immigration proceedings.

In its custodial role, the Department of Homeland Security may, upon taking an individual into custody, perform a physical and mental health examination of the individual. The purpose of this examination is, in part, to ensure that the detained individual does not pose a danger to self or others and to address appropriate treatment during detention. The purpose of this examination is not to determine whether the detained individual is competent to represent him- or herself in an immigration proceeding. In fact, not all individuals detained by DHS are detained for the purpose of instituting an immigration proceeding.

The DHS intake examination may nonetheless reveal information relevant to understanding the respondent's cognitive, emotional, and behavioral functioning. DHS has an obligation to provide the court with relevant materials in its possession that would inform the court about the respondent's mental competency. *M-A-M-*, 25 I&N Dec. at 480.

The examination to inform the court's determination of the competence of the respondent will be prepared at the request of the court rather than during the custodial intake by DHS. This is because the judge is in a better position to inform the mental health professional in the referral for examination about the nature and object of the proceeding and the reasons why the court questions the competence of the respondent. Additionally, a competence examination prepared by an agent of the court is likely to have greater evidentiary weight and avoid potential conflicts of interest than a report prepared by an agent of the prosecuting component of the government. The process for an Immigration Judge to refer the respondent for a competency examination is set forth below.

V. Judicial Inquiry

A. When to Conduct a Judicial Inquiry

Where the evidence of record results in a "bona fide doubt" about the respondent's competency to represent him- or herself, the judge should conduct a judicial inquiry. A "bona fide doubt" exists if there is "substantial evidence of incompetence." Evidence suggestive of a "bona fide doubt" includes, but is not limited to, respondent's demeanor before the court, irrational behavior, and available health evaluations. *See, e.g., Amaya-Ruiz v. Stewart*, 121 F.3d 486 (9th Cir. 1997) (internal citations omitted).

B. Purpose of the Judicial Inquiry

The purpose of the judicial inquiry is to gather information so the judge can make an informed decision whether the respondent's competency is at issue and a more in-depth competency review is necessary.

C. Process for Conducting a Judicial Inquiry

The judge begins the judicial inquiry by explaining to the respondent the purpose and process for conducting the judicial inquiry. The judge then proceeds to ask the respondent questions designed to shed light on the respondent's ability to represent him- or herself and his or her cognitive, emotional, and behavioral functioning. An explanation of the process for conducting a judicial inquiry with a sample advisal and suggested questions is contained in Appendix A. When performing the judicial inquiry, it is important that the judge note for the record any relevant non-verbal as well as verbal response to the questions.

D. Possible Outcomes of the Judicial Inquiry

There are three possible outcomes of the judicial inquiry:

- Respondent is competent - There is no reasonable cause to believe that the respondent is suffering from a mental disorder that impairs his or her ability to perform the functions listed in the definition of competence to represent him- or herself. In such case, the presumption that the respondent is competent is not rebutted and the court can proceed without any additional safeguards or protections.
- Respondent is incompetent - A preponderance of the evidence establishes that the respondent is not competent to represent him- or herself in the proceeding. In such case, the judge will find the presumption of competence has been rebutted, request provision of a qualified representative, and ensure appropriate safeguards and protections are put in place.
- Insufficient evidence to decide if respondent is competent - The evidence is not sufficient to rebut the presumption of competence but the judge has "reasonable cause" to believe that the respondent is suffering from a mental disorder that impairs his or her ability to represent him- or herself. In such cases, the judge should conduct a hearing to gather additional evidence needed to determine whether the respondent is competent.

VI. Competency Review

A. When to Conduct a More In-Depth Competency Review

Where, at the conclusion of the judicial inquiry, the judge has “reasonable cause” to believe that the respondent is suffering from a mental disorder but needs additional evidence to determine whether the presumption of competence is rebutted, the judge will schedule a hearing to collect and review evidence of competency. It is at this stage that the judge will consider whether to refer the respondent for a mental health examination to inform the court’s decision on competency.

B. Procedural Rules

A determination of competence to represent oneself encompasses issues of law and fact that are addressed, along with all other issues of law and fact, in the context of the immigration proceeding. No additional hearing type or separate record of proceeding will be generated.

VII. System of Referral for a Mental Health Examination

A. When to Refer a Respondent for a Mental Health Examination

The Immigration Judge is not required to refer the respondent for a mental health examination. However, the judge is required to consider whether a referral is necessary.

A referral for a mental health examination is appropriate where the judge is unable to determine, based upon existing evidence of record, whether the respondent is competent to represent him- or herself.

B. Process to Refer Respondent for a Mental Health Examination

To refer the respondent for a mental health examination, the judge should complete the mental health examination referral found in Appendix B.

The referral provides the mental health professional with information, if available, about the nature and object of the proceeding, including the type of proceeding, the projected length of the hearings, the anticipated complexity of issues, the allegations and charges against the respondent, and potential forms of relief. The referral provides the mental health professional with information relating to respondent’s current cognitive, emotional, and behavioral functioning such as the behavioral observations, statements, or other information that caused the judge to question the ability of the respondent to perform as required in the proceeding.

The referral also provides background and administrative information to the mental health professional, including the name of the respondent, alien registration number, language spoken, apparent country of origin, place of detention, next court date or other deadline for the examination or report, and the name of the judge.

The referral should also include the name of a contact the mental health professional can speak with, if any, who may be knowledgeable about the respondent's past or current cognitive, emotional, and behavioral functioning.

The referral should also be accompanied by other documents, records, or information relevant to the competence of the respondent.

C. Use of an Interpreter in the Mental Health Examination

Where it is indicated in the mental health examination referral that the language the respondent speaks and understands best is a language other than English and the mental health professional is not fluent in the respondent's language, the Language Services Unit of the Office of the Chief Immigration Judge should be notified so that arrangements can be made to secure the services of a qualified interpreter for the mental health examination.

D. Qualifications of Examining Professionals

Upon receipt of the mental health examination referral, EOIR will procure the services of a qualified mental health professional.

At a minimum, mental health professionals assigned to serve as examiners for purposes of immigration proceedings must:

- be licensed to practice psychology or medicine in the jurisdiction where the examination will be conducted;
- have specialty training in psychiatry, clinical psychology, or counseling psychology;
- have completed an EOIR-approved training in conducting mental health examinations of respondents in immigration proceedings; and
- be able to document successful completion of a minimum of 100 hours of approved continuing education in conducting forensic examinations.

Whenever feasible, psychologists and psychiatrists appointed to conduct mental health examinations shall:

- be certified by the American Board of Psychiatry and Neurology (with added qualifications in forensic psychiatry) or the American Board of Forensic Psychology or other comparable organization; or

- have experience and completed training on conducting competence examinations.

Other relevant considerations when assigning a mental health professional in immigration proceedings include the quantity and level of training completed by the mental health professional, experience conducting competency examinations (especially experience conducting examinations of respondents in immigration proceedings), the complexity of examination required, the mental health professional's familiarity with and knowledge of the respondent's language, culture and possible disorder(s), and other factors relevant to the case at hand.

Mental health professionals should use structured and standardized assessment tools and methods whenever possible. Any tools or methods used must be reliable and valid, taking into consideration the respondent's background and culture.

Mental health professionals meeting the above qualifications presumptively qualify as having expertise in conducting an examination of a respondent's competence to represent him- or herself in an immigration proceeding.

E. EOIR-Approved Training of Mental Health Professionals

The EOIR-approved training program required to be qualified to conduct mental health examinations in immigration proceedings will cover:

- introduction to immigration law and procedure;
- determinations of competence in immigration proceedings;
- conducting mental health evaluations for immigration proceedings;
- report writing for the immigration court;
- ethics and professionalism;
- working with a foreign language interpreter; and
- cultural competence in forensic examinations.

Any mental health professional conducting an examination by tele-health or other electronic technology shall also have completed training in conducting an examination via that modality.

F. Role of the Mental Health Professional v. Role of the Judge

The role of the mental health professional is to identify and describe for the court any cognitive, emotional, or behavioral impairments the respondent has and their effects, if any, on the respondent's ability to perform the functions required to be competent to represent him- or herself in an immigration proceeding.

The role of the Immigration Judge is to determine whether any limitations on the respondent to perform the functions as reported by the mental health professional and established by any other relevant evidence of record fall with the defined range of ability (*i.e.*, rationally able to... , factually able to..., or reasonably able to...) necessary to represent him- or herself.

G. Fiduciary Duty and Notification of the Mental Health Professional

The purpose of the mental health examination ordered by the immigration court is to provide information to the court about the mental health of the respondent so the court can make an informed decision about the respondent's competence to represent him- or herself. The purpose of the mental health professional is not to treat or assist the respondent. Although the examining mental health professional may owe the respondent some legal duties, the fiduciary duty of the mental health professional is owed to the court. No relationship or privilege exists or is created between the respondent and the examining mental health professional assigned to conduct the examination by the immigration court.

There is no requirement that the examining mental health professional obtain informed consent from the respondent when the examination has been ordered by the court. The mental health professional, however, must notify the respondent of the purpose of the mental health examination, the examination procedure to be utilized, the lack of privilege and confidentiality between the mental health professional and the respondent, possible uses of the examination report, how information obtained during the examination and the report may be shared, and any other matter required by professional or ethical rules of behavior.

Any record, report, or work product prepared by the examining mental health professional belongs to the immigration court. There is no right or privilege of privacy or confidentiality between the examining mental health professional and the respondent. A mental health professional assigned by the court shall be deemed a court witness whether called by the court or either party, and may be examined as such by either party.

H. Refusal of the Respondent to Cooperate in the Mental Health Examination

Where the respondent refuses to cooperate in or attend the mental health examination ordered by the court, the examining mental health professional shall use any available data or information to assess the competency of the respondent to represent him- or herself and, to the extent possible, prepare the report ordered by the court. The examining mental health professional can rely on information such as personal observation of the respondent, health care records, information provided by family, friends, or others familiar with the respondent, information from detention personnel, educational records, court records, records of law enforcement agencies, or any other information relevant to the respondent's ability to represent him- or herself and assist a qualified representative if one is provided.

I. Format of the Examination

The mental health examination should be conducted in person in the facility where the respondent is detained unless there is a medical, administrative, or security justification for not doing so.

Subject to reasonable security and administrative considerations, the mental health examination must be conducted in a location such as a pro bono room or room designated for detainees to meet with legal counsel that provides, as determined by the mental health professional, a sufficient degree of uninterrupted quiet and privacy to conduct the examination. The examining mental health professional and respondent should have access to a table and two chairs. Where possible, common visitation and consultation areas and areas with glass or other dividers separating the respondent from the mental health professional should be avoided.

In rare circumstances, for instance where no qualified mental health professional can be located near the place of respondent's detention, an immediate examination is needed, or a distant examining mental health professional with special skill or knowledge is required, the examination may be conducted using tele-health technology. In the event that tele-health technologies are employed, the resolution of electronic images must be medically appropriate as determined by the mental health professional performing the examination.

Examining mental health professionals must comply with the laws regulating his or her profession in the jurisdiction in which the examination is performed and any other professional or ethical obligations that apply.

J. Scope of the Examination

Upon assignment by the court, the mental health professional shall examine the respondent's cognitive, emotional, and behavioral functioning and competence to represent him- or herself, as specified by the court in its order appointing the mental health professional to evaluate the respondent.

1. Assessment of Respondent's Cognitive, Emotional, and Behavioral Functioning

When conducting the evaluation the mental health professional shall assess:

- a. relevant aspects of the respondent's social, educational, vocational, medical, and mental health histories, and other histories if necessary; and
- b. the respondent's presentation and behavior during the evaluation, including reported or observed signs or symptoms of a mental disorder and the respondent's response style (*i.e.*, approach to the evaluation).

2. Assessment of Respondent's Competence

When conducting the evaluation, the mental health professional shall consider factors related to the issue of whether the respondent meets the criteria for competence in an immigration proceeding (*i.e.*, whether the respondent has present ability to represent him- or herself).

In considering the issue of competence, the mental health professional shall assess all of the following:

a. Respondent's rational and factual understanding of:

- 1) the nature and object of the proceeding, including its adversarial nature;
- 2) the allegations and charge(s);
- 3) possible outcomes of the proceeding; and
- 4) the roles of participants in the proceeding.

b. Respondent's rational and factual understanding of:

- 1) the privilege of representation, including but not limited to, the ability to consult with a representative if one is present;
- 2) the right to present, examine, and object to evidence;
- 3) the right to cross-examine witnesses; and
- 4) the right to appeal.

c. Respondent's ability to:

- 1) make decisions about asserting and waiving rights;
- 2) respond to the allegations and charges in the proceeding; and
- 3) present information and respond to questions relevant to eligibility for relief.

d. Any other factors the mental health professional deems relevant to the respondent's competence to represent him- or herself.

If the mental health professional will recommend that the respondent be adjudicated incompetent to represent him- or herself, the mental health professional shall:

- 1) identify the impairments and mental disorder that are the cause of the incompetence; and
- 2) assess the respondent's ability to:
 - a) make a rational decision about being represented by counsel; and
 - b) assist counsel.

K. Payment for Services Rendered

The examining mental health professional will receive a flat rate to conduct the mental health examination and prepare a report of the examination for submission to the immigration court.

No other fees, costs or expenses will be reimbursed, including but not limited to: costs incurred for travel, parking, or testimony; fees associated with administration of tests; or costs of instruments.

L. Report Standards

The examining mental health professional must file with the court a written report summarizing the evaluation with copies for the respondent and the attorney for the Government.

In the written report, the mental health professional must:

1. identify the specific matters referred for evaluation;
2. list any evaluation procedures, techniques, and tests used in the examination;
3. list all sources of information considered by the mental health professional;
4. describe relevant aspects of the respondent's social, educational, vocational, medical, and mental health histories, and other factors as necessary;
5. describe the respondent's presentation and behavior during the evaluation (including reports or exhibition of signs or symptoms of mental disorder) and response style;
6. provide opinions on each issue referred for evaluation and identify any issues about which the mental health professional could not give an opinion;
7. provide a factual basis for any opinions offered in the report; and

8. identify the mental disorder that is the cause of the incompetence (if indicated).

M. Quality Control of Reports

The first time that a mental health professional is assigned by EOIR to conduct a competency evaluation, he or she must submit a copy of his or her report of examination to the point of contact designated by EOIR. The report will be reviewed to ensure that the examination and report comply with the directives of the agency.

Payment for services rendered by a mental health professional will not be released until the report of the mental health professional is received by the immigration court and deemed acceptable by the Immigration Judge.

Where the report of the examination fails to address matters required by the order of the court, payment for services rendered by the mental health professional may be withheld and the mental health professional may be ordered to supplement the report as necessary or appear in court without additional remuneration to provide information missing from the report.

N. Use of the Report of the Mental Health Examination

Upon receipt of the mental health examination report, the Immigration Judge will schedule a hearing to address the contents of the report, resolve the issue of competency, and determine whether additional safeguards or protections are necessary.

The Immigration Judge shall weigh the totality of the evidence including, but not limited to, the report summarizing the mental health evaluation, and the Immigration Judge shall determine whether the presumption that the respondent is competent to represent him- or herself has been rebutted by a preponderance of the evidence.

O. Protection of Mental Health Information

“Mental Health Information” includes any information expressly contained in or directly obtained from a request for a mental competence review, an Immigration Court’s administrative inquiry into mental competence, a portion of a hearing in which mental competence is addressed, a mental health examination of an alien, and a report of such examination.

Except as otherwise noted below, Mental Health Information shall only be used to determine an alien’s mental competency to participate or represent oneself in an immigration proceeding, and may not be used to establish the truth of allegations or charges against the alien, or to establish ineligibility for relief.

The paragraph above shall not apply to DHS' use of Mental Health Information if such information is independently submitted by, obtained by, or in the possession of DHS. If a respondent uses Mental Health Information in any proceeding for any purpose other than to inform his or her mental competency to participate in an immigration proceeding, the paragraph above shall not apply, and disclosure and use of the Mental Health Information shall be governed by rules of evidence and procedures applicable in immigration proceedings. If the alien uses a part of a document or report, DHS may request the production of any other portion of that document or report. Such request shall be granted at the Immigration Judge's discretion upon consideration of all relevant factors.

VIII. Procedural Protections & Safeguards

A. Obligation to Prescribe Appropriate Safeguards and Protections

Where the Immigration Judge finds the respondent is not competent to represent him- or herself in an immigration proceeding, the Immigration Judge shall consider the totality of the facts and circumstances and prescribe appropriate safeguards and protections to ensure the fundamental fairness of the immigration proceeding.

B. Provision of a Qualified Representative

EOIR will provide a qualified representative to an unrepresented, detained respondent where the judge has found the respondent incompetent to represent him- or herself.

The court should consider the examining mental health professional's assessment of the respondent's ability to consult with and assist counsel when deciding whether provision of a qualified representative is an effective safeguard and protection in a case.

C. Waiver of Counsel

As the provision of a qualified representative is a safeguard or protection deemed necessary by the court to guarantee the fairness of the proceeding rather than pursuant to a legal right owed to the respondent, the respondent does not have the right to waive the presence of the qualified representative.

D. Refusal to Cooperate with the Qualified Representative

The refusal of a respondent who has been determined by the mental health professional to be able to consult with and assist counsel, to cooperate with the qualified representative provided by the court, does not negate the efforts of the government to provide an appropriate safeguard or protection.

IX. Format of IJ Decision

A. On the Record

All portions of an immigration proceeding addressing the issue of competence must be on the record.

B. Decision of the Judge

The Immigration Judge must articulate the rationale for his or her decision regarding the competency of the respondent to represent him- or herself. The decision should set forth all findings of fact and conclusions of law, and give the reasoning and analyses therefor. Specifically, the decision should discuss the presence of indicia of incompetence, the results of the judicial inquiry and the basis for any finding that there was or was not reasonable cause to believe competence was in issue, and the evidence offered in the competency review hearing, and ultimately whether the evidence was or was not sufficient to rebut the presumption of competence.

Where the Immigration Judge determines that the respondent is not competent to represent him- or herself, the decision should discuss the function required in the definition of competence that the respondent was found unable to perform, the safeguards and protections considered, the appropriateness and adequacy of any safeguards provided, and articulate the reasoning.

X. Tracking Cases

Data Entry

As soon as is reasonably practicable, the database used to track cases pending before the immigration court shall be amended to track the following events and dates:

- Indicia – whether the judge found indicia resulting in a “bona fide doubt” that respondent has a mental disorder impairing his or her ability to represent him- or herself in an immigration proceeding and the date of such finding.
- Judicial inquiry – the date the judicial inquiry was conducted and whether the judge found “reasonable cause” to believe the respondent has a mental disorder impairing his or her ability to perform the functions listed in the definition of competence to represent him- or herself.
- Mental Health Examination – whether the respondent was referred for a mental health examination and, if so, the date of the referral.
- Competence Determination – whether the judge found the respondent competent or incompetent to represent him- or herself and the date of such finding.
- Qualified Representative – whether a qualified representative was provided and, if so, the date of the assignment.

XI. Impact on Franco v. Holder

Nothing in this document is intended to negate or alter the obligations of EOIR under the orders of the Court in *Franco v. Holder*.

Process for Conducting a Judicial Inquiry

I. Purpose of the Judicial Inquiry - The purpose of the judicial inquiry is to determine whether respondent's competence is in issue and a more in-depth competency review is warranted.

II. Mandatory Advisals – The judicial inquiry should generally occur after explaining to the respondent the nature and purpose of the proceeding and providing the advisals required in 8 C.F.R. § 1240.10(a).

III. Suggested Advisal - The judicial inquiry should begin by explaining to the respondent the purpose and process for conducting the judicial inquiry. A sample advisal follows:

I am an Immigration Judge. My job is to decide whether you will be allowed to stay in the United States. I am going to hold a hearing to gather information from you and the representative of the Government to help me decide whether you will be allowed to stay in the United States.

It is important that you understand what is happening in court. It is important that you understand what is being said about you. It is also important that you are able to tell your side of the story.

To make sure that you are able to understand and tell your story, I am going to ask some questions about you and your case. I will use this information to decide whether you will need any special help in the hearing.

Can you explain to me what I just said in your own words?

Do you have any questions before we begin today?

IV. Suggested Questions

A. **Areas of Inquiry** - When conducting the judicial inquiry, the Immigration Judge must ask questions to assess respondent's:

1. understanding of the nature and object of the proceeding,
2. understanding of and ability to exercise core rights and privileges,
3. ability to respond to the allegations and charges,
4. ability to present information and respond to questions relevant to eligibility for relief, and
5. cognitive, emotional, and behavioral functioning.

- B. **Suggested Questions** – The following list of questions is designed to shed light on the respondent's: 1) cognitive, emotional, and behavioral functioning; and 2) ability to represent him- or herself. This list is not exhaustive. The judge may ask other questions relevant to the respondent's mental health and ability to function as required in the hearing (*e.g.*, ability to communicate, subjective reality, memory, and interest in self). It is important for a judge to observe respondent's non-verbal as well as verbal responses to questions posed.

1. Cognitive, Emotional, and Behavioral Functioning

- a. How are you today?
- b. What is your name?
- c. What is today's date (including year)?
- d. What state and country are we in today?
- e. How did you get to the United States?
- f. When did you come to the United States? About how long have you been in the United States?
- g. Do you want to stay in the United States?
- h. Where do you live?
- i. What is the highest level of school that you completed?
- j. Are you seeing a doctor or taking any medications?
 - 1) If yes, what condition or problems are you being treated for?
 - 2) If yes, what medications are you taking?
- k. Are you currently being treated for a mental health (psychological/psychiatric) or emotional problem?
 - 1) If yes, what is the problem for which you are being treated?
 - 2) If yes, how often do you see the doctor?
 - 3) If yes, what medications, if any, are you receiving for this problem?
- l. Have you been treated for a mental health (psychological/psychiatric) or emotional problem in the past?
 - 1) If yes, when and for what problem?

2. Ability to Respond to the Allegations and Charges

- a. Why were you arrested? (Why did the immigration officers pick you up?)
- b. Where were you arrested?
- c. When were you arrested? (What was the date and time of your arrest?)
- d. Can you explain to me the immigration charges against you? (Can you explain to me what the government says you did wrong?)
- e. Is there anything important that you think I should know about what they say you did wrong? (Do you agree with what the government is saying about you?)

- f. What does _____ (e.g., alien smuggling, controlled substance, conviction, firearm) mean?
- g. How do you plan to proceed in court? (What do you plan to do next?)
- h. What do you want me to know about you and/or why you are here?
- i. What do you hope happens in court?

3. Understanding and Ability to Exercise Rights and Privileges

- a. What are your rights in immigration proceedings?
- b. What is a legal representative? What does a legal representative do in court?
- c. How do you find an attorney or legal representative?
- d. Is there anyone who can help you with your case?
- e. What is “evidence”?
- f. Can you give me an example of “evidence” that may be offered in your proceeding?
- g. What is an “appeal”?
- h. Why and how would you file an appeal?

4. Ability to Present Information and Respond to Questions Relevant to Relief

- a. What does “relief from removal” mean?
- b. What forms of relief from removal may be available in these proceedings?
- c. How long have you been in the United States?
- d. Do you have any family in the United States?
- e. Have you or your family ever had papers or permission to be in the United States?
- f. Has someone hurt you or tried to hurt you in your country?
- g. Are you afraid to go back to your country? Why?
- h. What does _____ (e.g., asylum, cancellation of removal, withholding of removal) mean?
- i. I am going to show you a relief application. Please take a moment to review the application. Can you explain to me how you would fill the application out or bring it back to me completed?
- j. Who do you know who might be able to help you with your case?

5. Other appropriate questions

- a. Is there anything else you would like to tell me?
- b. Are there any other questions you would like to ask?

U.S. Department of Justice
Executive Office for Immigration Review

Mental Health Examination Referral

Respondent: _____ Date: _____

Case No.: _____ Best Language: _____

Apparent Country of Origin: _____ Ethnicity (if known): _____

Judge: _____ Hearing Location: _____

Place of Detention: _____

Next Scheduled Hearing Date or Requested Due Date: _____

Type of Proceeding: _____ Estimated Length of Hearing: _____

Likely Forms of Relief:

- Asylum
- Withholding of removal
- Convention Against Torture
- Other: _____
- Adjustment of status
- Cancellation of removal (LPR)
- Cancellation of removal (non-LPR)
- Temporary Protected Status
- Waiver(s)
- Voluntary Departure

Estimated Complexity of Issues (Circle one: 1 is least and 10 is most complex): 1 2 3 4 5 6 7 8 9 10

Indicia of a mental disorder:

- History of outpatient mental health treatment
- History of psychiatric hospitalization
- History of self-injurious behavior
- History of suicide attempts
- History of limited academic achievement
- Currently receiving mental health treatment
- Poor memory
- Poor attention/concentration
- Confused or disorganized thinking
- Paranoid thinking
- Grandiose thinking
- Seeing or hearing things not present
- Severe depression or anxiety
- Poor intellectual functioning
- Irrational behavior or speech in court
- Lack of responsiveness in court
- Other: _____

Other Relevant Documents or Health Information: _____

Other Relevant Information: _____

Contact with Information about Respondent's Health: _____

Attachments:

- Notice to Appear (Form I-862) or other charging document
- Additional Charges of Deportability/Inadmissibility (Form I-261)
- Record of Deportable/Inadmissible Alien (Form I-213)
- Other: _____

ATTACHMENT 2



U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

October 30, 2020

Sameer Ahmed
Harvard Immigration and Refugee Clinic
6 Everett Street
Cambridge, MA 02138
sahmed@law.harvard.edu

Re: FOIA-2021-00127
DRH:GMG

Dear Sameer Ahmed:

This is to acknowledge receipt of your Freedom of Information Act (FOIA) request dated and received in this Office on October 21, 2020, in which you requested records of the Office of the Attorney General, Office of the Deputy Attorney General, and Office of the Associate Attorney General concerning the Nationwide Policy and the National Qualified Representative Program since April 1, 2013.

You have requested expedited processing of your request pursuant to the Department's standard permitting expedition for requests based on circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. See 28 C.F.R. § 16.5(e)(1)(i) (2018). Based on the information you have provided, I have determined that your request for expedited processing under this standard should be denied. Your letter fails to explain how access to the requested records would alleviate a specific threat to the life or physical safety of an individual.

You have also requested expedited processing of your request pursuant to the Department's standard permitting expedition for requests involving "[a]n urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information." See id. § 16.5(e)(1)(ii). Based on the information you have provided, I have determined that your request for expedited processing under this standard should be denied. This Office cannot identify a particular urgency to inform the public about an actual or alleged federal government activity beyond the public's right to know about government activities generally.

You have also requested expedited processing of your request pursuant to the Department's standard involving the "loss of substantial due process rights." See id. § 16.5(e)(1)(iii). Based on the information you have provided, I have determined that your request for expedited processing under this standard should be denied. Courts are reluctant to grant expedited processing unless a requester can show (1) "that [he] is facing grave punishment [in a criminal proceeding], and (2) that there is reason to believe information will be produced to aid the individual's defense." Freeman v. United States Department of Justice,

No. 92-0557, slip op. at 4 (D.D.C. Oct. 2, 1992). Neither of these circumstances is present here.

Lastly, you have requested expedited processing of your request pursuant to the Department's standard involving "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." See id. § 16.5(e)(1)(iv). Pursuant to Department policy, we directed your request to the Director of Public Affairs, who makes the decision whether to grant or deny expedited processing under this standard. See id. § 16.5(e)(2). The Director has determined that your request for expedited processing should be denied. Please be advised that, although your request for expedited processing has been denied, it has been assigned to an analyst in this Office and our processing of it has been initiated.

To the extent that your request requires a search in another Office, consultations with other Department components or another agency, and/or involves a voluminous amount of material, your request falls within "unusual circumstances." See 5 U.S.C. 552 § (a)(6)(B)(i)-(iii) (2018). Accordingly, we will need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. For your information, we use multiple tracks to process requests, but within those tracks we work in an agile manner, and the time needed to complete our work on your request will necessarily depend on a variety of factors, including the complexity of our records search, the volume and complexity of any material located, and the order of receipt of your request. At this time we have assigned your request to the complex track. In an effort to speed up our process, you may wish to narrow the scope of your request to limit the number of potentially responsive records so that it can be placed in a different processing track. You can also agree to an alternative time frame for processing, should records be located, or you may wish to await the completion of our records search to discuss either of these options. Any decision with regard to the application of fees will be made only after we determine whether fees will be implicated for this request.

If you have any questions or wish to discuss reformulation or an alternative time frame for the processing of your request, you may contact the analyst handing your request, Georgianna Gilbeaux, by telephone at the above number or you may write to them at the above address. You may contact our FOIA Public Liaison, Valeree Villanueva, for any further assistance and to discuss any aspect of your request at: Office of Information Policy, United States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530-0001; telephone at 202-514-3642.

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with my response to this request for expedited processing, you may administratively appeal by writing to the Director, Office of Information Policy, United

States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: <https://www.justice.gov/oip/submit-and-track-request-or-appeal>. Your appeal must be postmarked or electronically submitted within ninety days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in blue ink, appearing to read "Douglas R. Hibbard", with a small "DR" monogram at the end.

Douglas R. Hibbard
Chief, Initial Request Staff