

Rep. Roybal-Allard's Immigration Oversight and Fairness Act (H.R. XX)

Section by Section Summary by the American Immigration Lawyers Association and Lutheran Immigration and Refugee Service

Although federal immigration authorities adopted generalized detention standards in 2000 and recently issued performance-based detention standards, the immigration detention standards have not been consistently implemented and they are not legally enforceable. As a result, conditions of confinement for immigration detainees vary drastically across detention facilities and have drawn harsh criticism by immigration advocates and human rights organizations. This bill would ensure that the Department of Homeland Security's own detention standards for the treatment of immigrant detainees are followed by: (a) imposing certain critical standards by statute and (b) requiring rulemaking that would improve the standards. The bill also creates and expands alternatives to detention programs and enhances release and parole options for vulnerable populations such as pregnant women and children. In addition, the bill includes provisions to ensure that Unaccompanied Alien Children (UAC) are treated fairly and humanely while in the custody of the Department of Homeland Security (DHS) and that they are transferred safely and in a timely manner to the Office of Refugee Resettlement (ORR).

The bill includes the following provisions:

Section 1. Short Title.

Section 2. Enhanced Protections for Vulnerable Unaccompanied Alien Children and Female Detainees.

This section outlines steps DHS must undertake to ensure that Unaccompanied Alien Children (UAC) are treated fairly and humanely while in the custody of DHS and that they are transferred safely and in a timely manner to the Office of Refugee Resettlement (ORR). The section also requires DHS to establish policies governing age determinations of children, safe repatriation to home countries, and protections for those at risk if returned.

(a) Mandatory Training: DHS, in consultation with ORR and independent experts, shall provide training of all personnel who come into contact with UACs on relevant laws, policy, and procedures pertaining to this vulnerable population.

(b) Care and Transportation: DHS shall transfer all UACs in immigration court proceedings to the care and legal and physical custody of ORR within 24 hours of apprehension, except in narrowly defined exceptional circumstances beyond DHS's or ORR's control such as a natural disaster or comparable emergency.

(c) Qualified Resources: At each major Port of Entry, DHS must provide adequately trained and qualified staff, including CBP agents charged primarily with safe and humane transportation of UACs to ORR custody. DHS must provide independent licensed social workers to ensure the proper care of children while in DHS custody, including provision of emergency medical care;

mental health care in case of trauma and access to psychosocial health services; a bed and sufficient bed linens; adequate nutrition; a safe and sanitary living environment; educational materials; and access to at least three hours per day of indoor and outdoor recreational programs and activities.

(d) Notification: To facilitate safe transfers of children to ORR custody, this section requires DHS to notify ORR immediately upon DHS taking custody of a UAC.

(e) Notice of Rights and Access to Counsel: DHS must ensure all UACs in its custody are provided with both a video and written and oral orientation of their basic rights, including the rights to relief from removal, their right to confer with counsel and family, and the availability of complaint mechanisms for them to report abuse or misconduct. The DHS Secretary shall ensure that the video orientation and written notice of rights is available in English and in the five most common native languages spoken by the unaccompanied children held in custody at that location during the preceding fiscal year, and that the oral notice of rights is available in English and in the most common native language spoken by the unaccompanied children held in custody at that location during the preceding fiscal year.

(f) Confidentiality: The Secretary of HHS shall maintain the privacy and confidentiality of all information gathered in the course of providing care, custody, placement and follow-up services to unaccompanied alien children, consistent with the best interest of an unaccompanied alien child, by not disclosing such information to other government agencies or nonparental third parties. HHS may share information when authorized to do so by the child and when consistent with the child's best interest. HHS may provide information to a duly recognized law enforcement entity, if such disclosure would prevent imminent and serious harm to another individual. All disclosures shall be duly recorded in writing and placed in the child's files.

(g) Other Policies and Procedures: This section requires DHS to develop policies and procedures 1) to improve the age-determination process for children; 2) to ensure children are repatriated safely to their home countries through programs developed in consultation with the Department of State and ORR; 3) to utilize all legal authorities to defer removal for children at clear risk of life-threatening harm if returned and 4) to ensure that unaccompanied alien children are physically separated from any adult who is not an immediate family member and are separated by sight and sound from immigration detainees and inmates with criminal convictions, pretrial inmates facing criminal prosecution, children who have been adjudicated delinquents or convicted of adult offenses and/or are pending delinquency or criminal proceedings, and those inmates exhibiting violent behavior while in detention as is consistent with the Juvenile Justice and Delinquency Prevention Act.

Section 3. Detention Conditions.

This section would ensure that the Department of Homeland Security's own detention standards for the treatment of immigrant detainees are followed by: (a) imposing certain critical standards by statute and then (b) requiring rulemaking that would improve the standards. The rulemaking would be based on the report of a detention advisory committee composed of government and non-governmental experts.

(a) DETENTION REQUIREMENTS:

All detention facilities shall fully comply with the following minimum requirements:

(1) ACCESS TO TELEPHONES:

- Detention facilities shall provide reasonable and equitable access to working telephones during detention facility working hours and on an emergency basis and the ability to contact free of charge, legal representatives, foreign consulates, the immigration courts, the Board of Immigration Appeals, the Federal courts, and all others who are contacted for the purpose of obtaining legal representation.
- Detention facilities shall provide detainees with copies of rules governing phones access in appropriate languages and oral interpretation or written translation assistance so that detainees may read any relevant materials related to telephone access.
- Detention facilities shall ensure that telephone rates are reasonable and equitable and shall not significantly impair the detainees' access to telephones.
- Detention facilities shall make a reasonable number of working phones available to detainees and, at a minimum, one phone per each 25 users.
- Detention facilities shall place no restriction on number or frequency of calls to legal counsel.
- Detention facilities shall ensure detainee's telephone calls to a court, legal representative or consular official shall not be monitored or recorded without a court order and without prior notification to the detainee.
- Detention facilities shall take and deliver telephone messages to detainees no less than twice a day, and permit detainees to return calls confidentially within 8 hours of receipt of a message left by legal counsel or a consular official.

(2) QUALITY OF MEDICAL CARE:

- Detention facilities shall provide a continuum of high-quality medical care, including care for medical needs that existed prior to detention. Such medical care shall address all detainee health needs and shall include chronic care, dental care, eye care, mental health care, individual and group counseling, medical dietary needs, and other medically necessary specialized care.
- All detention facilities shall maintain current health care accreditations by the National Commission on Correctional Health Care and the Joint Commission on the Accreditation of Health Care Organizations. Detention facilities must be accredited within a specified timeframe or DHS shall cease use of the facility.
- All detention facilities shall have a designed on-site health authority to treat detainees and clinical decisions shall be made solely by a licensed health care provider.
- Each detainee shall receive a comprehensive medical and mental health intake screening by a qualified health care professional upon arrival and each detainee shall receive a comprehensive medical and mental health examination by a health care professional not later than 14 days after arrival.
- Any decision to deny requested medical care or treatment recommended by any outside physician or specialist shall be made within 72 hours or earlier if medically necessary and shall be accompanied by a written explanation of the reasons for the denial. DHS shall

communicate in writing to the detainee and DHS Secretary any denial of requested treatment. Detainees shall be afforded an opportunity to appeal any decisions denying a request for medical treatment. Such an appeal or request for reconsideration shall be resolved in writing within 7 days or earlier if medically necessary by an appeals board that shall be composed of independent health care professionals in the fields relevant to the request for medical or mental health care. The written decision shall be conveyed to the on-site medical provider and the immigration detainee within 24 hours of a decision by the appeals board.

- Except in emergency situations where informed consent cannot be obtained, medical care shall only be provided with the informed consent of the detainee.
- Involuntary psychotropic medication may only be used in certain emergency situations, and must be disclosed to the detainee's counsel. If a detainee is not represented by counsel, the administration of any psychotropic drug to the detainee shall be disclosed to the Immigration Court prior to any hearing in which the detainee will appear subject to confidentiality provisions. Any detainee who receives medication must be afforded a hearing before receiving medication again.
- Drugs shall not be administered to detainees without informed consent for the purpose of sedation or controlling the detainee's behavior during transport or removal or for punishment.
- Detention facilities shall maintain complete, confidential medical records for every detainee which shall be made available within 72 hours to any detention facility where the individual is transferred. Medical records shall be made available within 72 hours to the detainee or his or her representative. All records shall be treated confidentially as required by HIPPA.
- The DHS Secretary must report information on any in-custody detainee deaths to Congress semi-annually, and to the DHS Inspector General within 48 hours of any in-custody death. The report shall include basic information regarding the detainee; the date and location of the death; a brief description of the circumstances surrounding the death; the status and results of any investigation that has been conducted; the locations where the detainee had been held; and the medical records of the deceased.
- All detainee transfers shall take into consideration detainee health during transfer and ensure continuity of care without interruption including the provision of prescription medicines during and after transfer.

(3) SEXUAL ABUSE REGULATIONS CONCERNING CARE AND CUSTODY OF DETAINEES:

- Detention facilities shall take all necessary measures to prevent sexual abuse of detainees including sexual assaults and shall observe the minimum standards under the Prison Rape Elimination Act.
- Where sexual abuse occurs, detention facilities shall ensure that prompt and appropriate medical intervention is taken to minimize the medical and psychological trauma; a medical history is taken and a physical examination is conducted to determine the extent of injury and whether a transfer to a medical facility is required; prophylactic treatment, emergency contraception and follow-up for STDs is provided; the case is evaluated by a qualified mental health professional; victims are separated from their abusers and considered for parole or an alternatives to detention program; and any and all medical records are treated as confidential
- A detention facility shall not subject any person to punishment or retaliation for reporting incidences of sexual abuse.

- The facility shall conduct a thorough and timely investigation of all cases of alleged sexual abuse, and provide the DHS Secretary with a report of the circumstances and response of the facility. The report shall include a determination of whether the sexual abuse occurred; an analysis of the relevant facts and whether the abuse indicates a policy failure, lack of training or other factors; a description of the actions that the facility will take to prevent the occurrence of similar incidents; and a plan for monitoring implementation.

(4) TRANSFER:

- The DHS Secretary shall adopt procedures governing transfer of detainees giving primary consideration to the detainee's access to legal representation; ability to prepare a legal defense in immigration proceedings; legal venue of proceedings; and the impact on the detainee's health and medical fitness. The procedures shall give secondary consideration to the detainee's residence and the location of family members.
- Unless exigent circumstances dictate an immediate transfer is required, the DHS Secretary shall provide not less than 72 hours notice to any detainee prior to transferring the detainee to another detention facility. Detainees shall be afforded at least one toll-free call following any transfer. Within 24 hours after the detainee's arrival at the new facility, the DHS Secretary shall notify the detainee's legal representative or if unrepresented, an adult family member or other person designated by the detainee, of the transfer and the detainee's new location. If removal proceedings are pending, the DHS Secretary shall also promptly notify the relevant court of the transfer and the detainee's new address and DHS shall not transfer any detainee who has already requested, and is awaiting, a bond hearing.
- If the Secretary determines that a transfer is necessary due to a highly unusual emergency, the Secretary shall ensure that the detainee's legal rights are not prejudiced and the existing attorney-client relationship is not impaired, including evaluating the location of the detention facility based on its proximity to the detainee's counsel or non-governmental or pro bono organizations providing free or low cost immigration legal services.
- Detainees shall be afforded at least one toll-free call following any transfer. Within 24 hours after the detainee's arrival at the new facility, DHS shall notify the detainee's legal representative of the transfer and the detainee's new location. DHS shall notify the courts as appropriate regarding the transfer.

(5) NOTICE:

- The DHS Secretary must file and serve a Notice to Appear on the detainee and with the Immigration Court within 48 hours of detaining an alien and provide a custody determination hearing within 72 hours. The requirements of the provision may be tolled for no more than 30 days upon a written request from an alien who demonstrates eligibility for immigration relief. DHS shall document when the notice to appear is served on the detainee and submit to Congress a report regarding compliance with the requirement.

(b) REGULATIONS CONCERNING CARE AND CUSTODY OF DETAINEES

(1) RULE MAKING/DETENTION

- The DHS Secretary shall promulgate new rules or modify existing rules based on the report of a detention advisory committee to ensure detainees are treated humanely and held in the

least restrictive setting necessary for their safety and to ensure compliance with the general minimum requirements set forth in this bill including the standards regarding classification of detainees and the special standards regarding the treatment of vulnerable populations. The rules must be promulgated within 1 year of receiving the report from the Detention Advisory Committee or within 1 year after the report is due, whichever date is earlier.

(2) DETENTION ADVISORY COMMITTEE

- The DHS Secretary shall convene and receive a report from a detention advisory committee composed of an equal number of government and agency officials and independent experts from nongovernmental and intergovernmental organizations with expertise in working on behalf of detainees and vulnerable populations. The committee shall include representatives from the American Bar Association and UNHCR. The committee shall review and revise all the guidelines found in the DHS Detention Operations Manual based on identifiable deficiencies and best practices that treat detainees both safely and humanely. The committee shall submit a report to the Secretary within 12 months after the date of enactment of this Act which may be extended for 6 months for good cause.

(3) TRAINING: The DHS Secretary shall develop and implement a training protocol for all personnel in all facilities in which noncitizens are detained. The training protocol shall include periodic updates to initial comprehensive training. The agency shall monitor the implementation of the protocol annually and shall ensure that all personnel who are required to be trained under the protocol have received the necessary training. The protocol shall include-(i) an overview of immigration detention and the characteristics of the noncitizen detainee population; (ii) an overview of the detention standards; (iii) specific guidance on each of the detention standards; (iv) a description of the agency's quality assurance procedures.

(4) GENERAL MINIMUM REQUIREMENTS: The Secretary's rules shall ensure that the following minimum requirements are met:

- Fair and Humane Treatment: Detainees shall not be subjected to cruel, degrading or inhumane treatment.
- Use of Force and Restraints: Detainees shall not be subjected to shackling, handcuffing, solitary confinement, Tasers, electric shields, restraint chairs, or strip searches unless and to the extent that such techniques are necessary to ensure the security of detainees, staff or the public and where no less coercive and degrading measures are available.
- Investigation of Grievances: Detainees have the right to prompt, effective, transparent and impartial grievance procedures. Such procedures shall include review of grievances by DHS officials who do not work at the same facility. An otherwise valid grievance shall not be denied for non-compliance with procedural requirements due to ignorance, fear, excusable neglect or other reasonable cause. Detainees shall be given the opportunity to complain to ICE directly and confidentially. Detainees shall not be subject to retaliation for making use of the grievance procedures. Detention facilities shall orally and in writing inform detainees about the grievance procedure and provide translation and interpretation assistance. Detention centers shall make an annual report to the DHS Secretary regarding the grievances. All grievances shall be investigated.

- Location of Facilities: Whenever practical, detention centers are to be located within 50 miles of a city where there is a demonstrated capacity to provide competent legal representation by non-profit organizations or pro bono organizations. Sets a compliance goal of 2012.
- Access to Legal Materials: Detainees shall have access to an on-site law library including up-to-date copies of legal materials. The law library shall include equipment for legal research including computers, printers, typewriters and copiers. Information regarding use of the library shall be provided to detainees at the time of admission. DHS shall provide assistance to detainees who are not literate in English. Library services shall be provided free of charge.
- Legal Visits: Legal visits shall not be restricted absent narrowly defined exceptional circumstances, including a natural disaster or comparable emergency beyond the control of the DHS. Detainees are entitled to private meetings with their current or prospective legal representatives. Interpreters shall be permitted to accompany legal representatives during visits. Legal visits may be conducted during the work day including a minimum of 8 hours per day on regular business days and 4 hours per day on weekends and holidays. Detention facilities shall maintain a procedure allowing legal representatives to call ahead to determine if a detainee is held by the facility. Messengers shall be permitted to deliver documents to and from the facility. Detainees shall post the most current list of pro bono legal organizations and their contact information. Detention facilities may not retaliate in any way for complaints made by legal representatives regarding conditions of detention.
- Special correspondence: Special correspondence shall not be read by detention facility staff nor opened outside the presence of the detainee. Special correspondence includes written communications to private attorneys; officers of the court; consular officials; members of Congress; DOJ, DHS or public health personnel; the media; nongovernmental organizations (NGOs); intergovernmental organizations; and others. Special correspondence shall be promptly delivered and posted.
- Access to Detention Facilities: Detention facilities shall afford reasonable access to NGOs; community service organizations; consular officials; DOJ, DHS or public health personnel; members of Congress and their staff, intergovernmental organizations; the media, and others subject to reasonable conditions to protect the security of the facility. Independent observers, including nongovernmental organizations shall be permitted to conduct site visits, meet privately with detainees, test telephones and pro bono calling platforms, and take other reasonable steps to monitor compliance with regulations regarding conditions of detention. Such observers and organizations shall not be prohibited from issuing public reports on the findings of monitoring visits. Detention facilities shall accommodate requests for facility tours within a reasonable time not to exceed one week. Access by media representatives may only be restricted to preserve the privacy of detainees, the security and good order of the facility, safety of the interviewer, national security or other obligation imposed by law or court order. Access may not be restricted based on the media representative's reporting. Retaliation for content of speech is prohibited. Detention facilities may not retaliate against any visitor for complaints or statements regarding the conditions of detention.
- Translation Capabilities: Detention facilities shall employ staff that is qualified in the languages represented in the detainee population and shall provide alternative translation services where necessary.
- Recreational Programs and Activities: Detainees must be afforded daily access to recreational programs and activities.

- Safe and Sanitary Living Environment: Detention facilities may house no more individuals than is permitted by the rated bed capacity for the facility. Detainees must receive appropriate clothing and bedding.
- Legal Orientation to Ensure Effective Legal Proceedings: All alien detainees shall receive the legal orientation program including, for unaccompanied alien children, a child-centered model from an independent non-governmental organization as implemented by the Executive Office for Immigration Review in order to both maximize the efficiency and effectiveness of immigration proceedings and to reduce detention costs.

(5) Classification: DHS shall ensure that detainees with no history of criminal conviction are separated by sight and sound from detainees with criminal convictions, pretrial inmates facing criminal prosecution, and those inmates exhibiting violent behavior in detention.

(6) Vulnerable Populations: DHS's rules regarding conditions of detention for vulnerable populations shall recognize the unique needs of asylum seekers; victims of torture and trafficking; families with children; detainees who do not speak English; detainees with special religious needs; and other vulnerable populations listed in this bill. DHS shall ensure that procedures and conditions of detention are appropriate for vulnerable populations.

(7) Staffing: The DHS Secretary shall appoint at least three individuals to the Director of Policy with expertise in working with vulnerable populations who shall be responsible for setting, implementing and overseeing policy and regulatory development concerning vulnerable populations.

Section 4. Secure Alternatives to Detention.

This section requires DHS to implement a secure alternatives to detention program that releases eligible alien detainees into programs of supervision and monitoring and ensures their appearance at immigration court hearings. The program requires DHS to release vulnerable aliens on recognizance, parole or bond, and alternatively in secure alternatives to detention programs. This section also requires DHS to implement less restrictive custodial detention, such as ankle bracelets, for those not found eligible for release in the above categories. Finally, DHS is required to develop facilities that offer the least restrictive setting for aliens in detention.

(a) In General: DHS shall implement secure alternative to detention programs.

(b) Secure Alternatives to Detention Programs:

Secure alternatives to detention are programs under which aliens are released under supervision, assistance and monitoring to ensure they appear at all immigration proceedings. The programs will be designed in consultation with a broad array of experts and will employ a continuum of levels of supervision. Non-governmental organizations and state and local social service agencies will provide group and individual screenings and services to participants. All participation by aliens will be voluntary. All participants in these programs will participate in a legal orientation program administered by the Executive Office for Immigration Review.

(c) Protection of Vulnerable Populations:

Within 72 hours, DHS must screen each detainee to determine if the individual belongs to a vulnerable population group. Any individual described as a vulnerable population who meets the criteria set forth under section 236(b) shall be released on parole, a reasonable bond, or the alien's own recognizance.

Vulnerable populations include individuals who: have serious medical or mental health needs; are pregnant or nursing; are detained with their children; are under 18 or over 65 years of age; are the victims of abuse or human trafficking; individuals who have demonstrated a credible fear of persecution or a reasonable fear of torture; torture survivors; individuals who have non-frivolous claims to U.S. citizenship; and individuals who are eligible for relief under the Immigration and Nationality Act.

(d) Options Regarding Detention Decisions for Vulnerable Populations:

INA Section 236 is amended by inserting a new paragraph providing that DHS may enroll aliens in secure alternatives to detention programs. This section creates a new paragraph within INA Section 236 regarding custody decisions for vulnerable populations. Not later than 72 hours after an individual is detained under this section, if the individual is a member of a vulnerable population, the individual shall be released from DHS custody and shall not be subject to electronic monitoring unless the Department demonstrates that the individual is subject to mandatory detention; poses a flight risk, or the individual is a risk to others or a risk to the national security of the U.S. An individual shall be released under this section on the individual's own recognizance, by posting a minimum bond, or on parole in accordance with INA 212(d)(5)(A).

Participation in Alternatives to Detention. An alien who is denied release on recognizance, parole or bond or is unable to pay the bond shall be selected for participation in a secure alternatives to detention program unless DHS demonstrates by substantial evidence that the alien is subject to mandatory detention or the alien is a flight risk or the alien's participation in the program would create a risk to others or national security. In the case of a decision under this section, the decision shall be made in writing and shall be served upon the individual in the language spoken by the individual. A decision to continue detention without bond or parole shall specify in writing the reasons for that decision. The decision shall be served upon the alien within 72 hours after the commencement of the alien's detention or not later than 72 hours after a positive credible fear or reasonable fear of torture determination.

Any alien detained under this section may request a redetermination of the decision by an immigration judge. All custody decisions by the Secretary shall be subject to redetermination by an immigration judge. Nothing in the section shall be construed to prevent an individual from requesting a bond redetermination. The Attorney General or an immigration judge may at any time redetermine an alien's classification, the bond of someone released or the custody status of someone placed in an alternatives to detention program.

(e) Eligibility and Operations: Nothing in this section shall be construed to modify the care and custody of unaccompanied alien children who shall be considered to be in the care and custody of the Department of Health and Human Services.

(f) Less Restrictive Custodial Detention: Aliens who are determined not to meet the requirements for release on recognizance, parole, or bond, and subsequently do not meet the requirements for secure alternatives to detention shall be considered for placement in less restrictive forms of custodial detention, which consist of ankle bracelets, electronic monitoring and similar devices. Any use of electronic monitoring for an alien shall be made on an individual basis. Aliens subject to mandatory detention pursuant to INA §236 may be placed in less restrictive custodial detention. DHS shall develop facilities that offer the least restrictive custodial setting for aliens in detention.

Section 5. Program Oversight and Review

(a) Relationships of Application to Certain Orders: Aliens present in the United States who have been ordered excluded, removed, deported or ordered to depart voluntarily may nonetheless be selected for secure alternatives to detention and shall not be required to file a separate motion to reopen, reconsider, or vacate such orders.

(b) Implementing Regulations: Requires DHS to issue regulations within 6 months of enactment.

(c) Reporting Requirements: Requires DHS to submit a report one year after enactment and annually thereafter to the House Committees on Homeland Security and on the Judiciary and the Senate Committees on Homeland Security and Governmental Affairs and on the Judiciary. The reports shall detail all policies, regulations, and actions DHS has taken to comply with this Act, specifically efforts to increase use of secure alternatives to detention and to improve conditions of detention.

(d) Authorization of Appropriation: This section authorizes appropriations to DHS to implement this Act.

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