**Detained/Non-Detained[[1]](#footnote-1)**

[ENTER ATTORNEY INFO HERE]

UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

OFFICE OF THE IMMIGRATION JUDGE

NEW YORK, NEW YORK

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In the Matter of: )

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 ) A##########

CLIENT )

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In Removal Proceedings )

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**Immigration Judge: Hearing Date:**

**MOTION TO REQUEST SAFEGUARDS FOR CLIENT’s MENTAL HEALTH CONDITIONS AND TO ENSURE FUNDAMENTAL FAIRNESS OF THE REMOVAL PROCEEDING**

**TABLE OF CONTENTS**

INTRODUCTION

PROCEDURAL HISTORY AND BACKGROUND

ARGUMENT

1. The Court Must Adopt Appropriate Safeguards to Ensure that Immigration Court Proceedings Remain Fair for People with Cognitive Disabilities like CLIENT
2. Appropriate Safeguards Will Protect CLIENT’s Right to Testify, Rebut, and Present Evidence in Immigration.
	1. The Court Should Not Draw Any Adverse Inference if CLIENT Does Not Testify
	2. Appropriate Safeguards Should Include Granting Permission to Ask Leading Questions During Direct Examination
	3. Appropriate Safeguards Should Include Permitting Short Breaks Between Questioning and Closely Monitoring the Tone and Form of Questions During Cross-Examination
	4. Appropriate Safeguards Should Also Include Accommodations to the Courtroom Environment
	5. When Evaluating CLIENT’s Testimony as a Whole for Credibility and Other Discretionary Determinations, the Court Must Consider CLIENT’s Cognitive Limitations

CONCLUSION

**INTRODUCTION**

 CLIENT is a [age/gender/immigrant status] with cognitive and intellectual disabilities. Cognitive and intellectual disabilities affect how people process information, how they retrieve that information, and how they respond to the environment in which they are placed. Because of these disabilities, CLIENT cannot receive a fair hearing without accommodations. The Court can provide these accommodations without making a formal finding of incompetency. *See Matter of M-A-M,* 25 I. & N. Dec. 474 (“[T]here are many types of mental illness that . . . would not prevent a respondent from meaningfully participating in immigration proceedings . . . a diagnosis of mental illness does not automatically equate to a lack of competency.”); *see also Matter of J-R-R-A*, 26 I. & N. Dec. 609, 610–12 (BIA 2015) (requiring an accommodation for a respondent with mental health issues without a formal finding of incompetency). In light of this fact, CLIENT respectfully requests that the Court provide the accommodations requested to ensure that [his/her] proceedings remain fundamentally fair.

**PROCEDURAL HISTORY AND BACKGROUND**

**Background on Procedural Posture of Case**

[including general background information on CLIENT, including diagnosis and citations to record, evaluations, and any articles in the record]

  **Background on Cognitive Limitations**

  Approximately one to three percent of the global population has an intellectual or cognitive disability, or about 200 million people. *What is Intellectual Disability?*, Special Olympics, http://www.specialolympics.org/Sections/Who\_We\_Are/What\_Is\_Intellectual\_Disability.aspx (last visited Apr. 13, 2017). Cognitive disabilities are characterized by limitations in two major areas: 1) intellectual functioning and 2) adaptive behavior, which includes social and practical living skills. Administration on Intellectual and Developmental Disabilities (AIDD), *AIDD: The President's Committee for People with Intellectual Disabilities* (2016), https://acl.gov/Programs/AIDD/Programs/PCPID/index.aspx (last visited Apr 1, 2017). Cognitive disabilities vary, but all affect to some degree an individual’s awareness, perception, reasoning, judgment, memory, and communication capacity. People with intellectual or cognitive disabilities also have trouble with learning and processing information, abstract thinking, and using practical problem-solving skills. Nat’l Ctr. Crim. J. & Disability, *Shining a Light on Traditionally Hidden Disabilities* (2014), https://cops.usdoj.gov/html/dispatch/12-2014/shining\_a\_light\_on\_hidden\_disabilities.asp. Cognitive and intellectual disabilities are “hidden” disabilities, in that it may not always be readily apparent to an observer that a person has cognitive limitations. *Id*. Exacerbating this issue is the fact that many people with intellectual or cognitive disabilities may pretend to understand in a desire to please others, especially authority figures. *See id*. These characteristics can make immigration court especially challenging for these individuals. Despite these limitations, with appropriate accommodations, people with cognitive disabilities are still able to lead independent lives.

**ARGUMENT**

1. **The Court Must Adopt Appropriate Safeguards to Ensure that Immigration Court Proceedings Remain Fair for People With Cognitive Disabilities Like CLIENT**

Pursuant to the INA, Second Circuit and BIA caselaw, immigration judges have a responsibility to ensure that immigration proceedings are fundamentally fair. *See* INA § 240(b)(4)(B) (requiring that respondents have a “reasonable opportunity” to examine and rebut evidence against them); *Matter of Tomas*, 19 I. & N. Dec. 464, 465 (BIA 1987) (describing importance of fundamental fairness of immigration proceedings); *Matter of Exame*, 18 I. & N. Dec. 303 (BIA 1982) (same); *United States v. Fernandez-Antonia*, 278 F.3d 150, 156 (2d Cir. 2002) (“Although the Supreme Court has not specifically delineated the procedural safeguards to be accorded to aliens in deportation or removal hearings, it is well settled that the procedures employed must satisfy due process.”).

In pursuit of fundamental fairness, accommodations may sometimes be necessary to ensure that all respondents have a full and fair opportunity to be heard in immigration court. For example, the BIA requires noncitizens who do not speak English to have access to a “competent interpreter,” so that respondents and immigration judges alike may understand each other. *Matter of Tomas*, 19 I. & N. Dec. 464 (BIA 1987). Accommodations for people with mental health issues function in a similar way. Absent safeguards, a person with a mental disability may testify in a way that confuses rather than clarifies the record. *See Matter of J-R-R-A*, 26 I. & N. Dec. 609, 611–12 (BIA 2015) (describing importance of safeguards for person with cognitive issues).

Federal law and regulations require IJs to prescribe safeguards when necessary to ensure that each respondent has an “adequate opportunity to present his or her case during a hearing.” *Matter of M-A-M*, 25 I. & N. Dec. 474, 477–78 (BIA 2011) (“The Act’s invocation of safeguards presumes that proceedings can go forward, . . . provided the proceeding is conducted fairly.”); INA § 240(b)(3); 8 C.F.R. §§ 1240.4, 1240.43 (2016). The BIA requires immigration courts to make these accommodations for people with mental health conditions regardless of whether the disability rises to the level of incompetency. *See* *Matter of J-R-R-A*, 26 I. & N. Dec. 609, 610–12 (BIA 2015); *Matter of M-A-M*, 25 I. & N. Dec. 474, 480 (BIA 2011).

 Federal regulations guarantee to every noncitizen in removal proceedings a reasonable opportunity to examine and present evidence, including in the form of testimony from the respondent. 8 C.F.R. § 1240.10. Such accommodations are also required by federal laws that require public entities to accommodate people with cognitive disabilities. Section 504 of the Rehabilitation Act compels all executive agencies to provide “reasonable accommodations” for individuals with disabilities. *See* 29 U.S.C. § 794(a); 28 C.F.R. § 39.130 (applying the Act requirements to the Department of Justice). Under the Act, this Court has an affirmative obligation to make reasonable modifications in “policies, practices, and procedures” to ensure people with disabilities have meaningful access to services or programs. *See, e.g.,* *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1051 (C.D. Cal. 2010) (granting safeguards for mentally ill detainees in immigration court under the Rehabilitation Act). The Supreme Court also recognized this duty in *Tennessee v. Lane*, a case where the Court emphasized that accommodations may be required for disabled individuals in courts as a guarantee of their fundamental right of access to the court under due process protections. 541 U.S. 509 (2014).[[2]](#footnote-2)

Providing accommodations will also ensure efficient development of the record. Immigration judges have an “affirmative obligation to help establish and develop the record” grounded in their capacity to develop evidence during the case. *United States v.* Secaida-Rosales, 331 F.3d 297, 306 (2d Cir.2003). Many of the safeguards requested in this motion originated in civil or criminal courts, where there has long been recognition of the usefulness of such safeguards in promoting more efficient and fair development of the record. *See, e.g.*, *United States v. Salameh*, 152 F.3d 88, 127 (2d. Cir. 1998) (allowing accommodations to develop testimony); *United States v. Callahan*, 801 F.3d 606, 623 (6th Cir. 2015) (permitting accommodations for cognitively impaired victim to “facilitate the progression of the trial and avoid wasting time” and to “make . . . testimony effective for determining the truth”). Prescribing these safeguards will enhance, rather than detract, from the Court’s aim of ensuring sufficient development of the record in a fundamentally fair proceeding.

1. **[*this section is to be included ONLY if you conclude that your client should not testify. It is* OPTIONAL] Because of CLIENT’s Mental Health Conditions The Court Should Allow the Case to Proceed Without CLIENT’s Testimony and Allow CLIENT’s [Social Worker/Friend/Family Member] to Testify in [His/Her] Stead**

Federal law guarantees to immigrant respondents a reasonable opportunity to examine the evidence against them, present evidence on their own behalf, and cross-examine witnesses presented by the government. INA § 240 (b)(4). This reasonable opportunity may include, but does not require the respondent to testify on his or her own behalf. This is the case particularly when the respondent may have other people available to testify in his or her stead, or when relevant evidence can be procured in a way that is not contingent on the respondent’s oral testimony. *See Matter of Carillo*, 17 I. & N. Dec. 30 (BIA 1979) (respondents not required to testify); *Matter of M-A-M*, 25 I. & N. Dec. 474, 483 (BIA 2011) (suggesting use of close friend or family member to testify and provide court with information as a safeguard).

People with cognitive or intellectual disabilities vary in their ability to communicate effectively in the courtroom environment. If, upon counsel’s advice, CLIENT does not testify, the Court should not draw any adverse inference from this decision. In light of CLIENT’s cognitive limitations, CLIENT’s inability to testify reflects only the complexity of developing evidence in light of CLIENT’s cognitive impairments, rather than an invocation of the privilege against self-incrimination. Silence alone is never enough to establish removability. *See* *Matter of Guevara*, 20 I. & N. Dec. 238, 243 (BIA 1990) (respondent’s silence not enough to establish deportability); *Matter of J-*, 8 I. & N. Dec. 568, 572 (BIA 1960) (“Suspicion cannot be solidified into proof by the mere silence of respondent.”). Instead, the Court should allow CLIENT’s social worker/relative/friend to testify on behalf of CLIENT instead. The BIA already recognizes that such an accommodation may be appropriate in *Matter of M-A-M*. 25 I. & N. Dec. 474, 482 (BIA 2011).

1. ***[Include “alternatively” only if your client is not testifying]* Alternatively, The Court Should Impose the Following Safeguards To Ensure that CLIENT Has a Fair Proceeding**

As explained *supra*, people with intellectual and cognitive disabilities such as CLIENT have difficulty processing information in a way that can infringe on their right to a fundamentally fair proceeding. Granting permission to ask leading questions on direct examination, closely monitoring the tone and form of questioning during cross-examination, and making changes to the courtroom environment can all play an integral role in protecting CLIENT’s right to make [HIS/HER] case in immigration court.

1. **Appropriate Safeguards Should Include Granting Permission to Ask Leading Questions During Direct Examination**

To allow CLIENT the opportunity to provide testimony despite [his/her]

disability, the Court should permit CLIENT’S counsel to ask leading questions during direct examination. Courts have long recognized an exception to the bar on use of leading questions during direct-examination when such questions are “necessary to develop the witness’s testimony,”Fed. R. Evid. 611(c). People with cognitive disabilities frequently struggle to remember things like dates, places and times. *See* Thomas Leyhe et al., *Impairment of Episodic and Semantic Autobiographical Memory in Patients With Mild Cognitive Impairment and Early Alzheimer’s Disease*, 47 Neuropyschologia 2464 (2009) (describing and comparing the memory problems of people with mild cognitive impairment to those with Alzheimer’s disease).

Direct examination allows respondent’s counsel to present the legal elements of a claim in an orderly fashion, and to build a case narrative through testimony for the court. Although a familiar figure does the direct examination, the formalized style of questioning, conducted in an unfamiliar and high-pressure setting, may be jarring even for witnesses without the cognitive limitations of CLIENT. Most attorneys address this by spending extensive time preparing their client for direct-examination. However, for an individual with cognitive impairments, even substantial preparation may not fully prepare the person for questioning. Allowing respondent’s counsel to ask foundational/leading questions regarding certain uncontested facts (e.g., “Did you arrive in the United States on April 3?” or “Is it true that you worked at the post office for fifteen years?”) could help alleviate this problem.

Permitting leading questions on direct expedites the proceedings and leads to more efficient development of the record. Courts frequently employ this exception for adults with communication difficulties, children, witnesses with disabilities, non-English speakers, and witnesses who are “nervous” or “confused.” *See United States v. Salameh*, 152 F.3d 88, 128 (2d Cir. 1998) (permitting use of leading questions for nervous witness during direct examination); *United States v. Vazquez-Larrauri*, 778 F.3d 276, 290 (1st Cir. 2015) (allowing use of leading questions to develop foundational testimony); *United States v. Cisneros-Gutierrez*, 517 F.3d 751 (5th Cir. 2008) (permitting leading questions on direct for witness with extensive “memory problems”); *Jordan v. Hurley*, 397 F.3d 360, 363 (6th Cir. 2005) (leading questions on direct examination permissible for person with cognitive limitations); *People v. Cuttler*, 270 A.D.2d 654, 655 (N.Y. App. 3d 2000) (trial court judge did not abuse discretion when he permitted use of leading questions on direct examination for child witness).

Use of leading questions in CLIENT’s case merely reaffirms this longstanding principle and helps to ensure the fundamental fairness of CLIENT’s immigration proceedings. An additional and related safeguard would require the Court to defer to the established documentary record when there is an inconsistency between that record and the respondent’s hearing testimony. If the respondent has previously submitted documentary evidence that clearly establishes a particular fact, but on the day of the hearing respondent omits or forget that foundational fact (for example [his/her] address or last place of employment), the Court should not penalize the respondent for the discrepancy, and defer to the documentary evidence instead.

1. **Appropriate Safeguards Should Include Permitting Short Breaks Between Questioning and Closely Monitoring the Tone and Form During Cross-Examination**

 The default structure of cross-examination is currently not conducive to yielding cogent and accurate testimony from people with intellectual or cognitive disabilities. Two aspects of cross-examination questioning pose particular difficulties for respondents with cognitive or intellectual disabilities. The first troubling aspect of cross-examination is the *tone* with which questions are asked or perceived to be asked. The brusque manner of many cross-examiners and the time-pressured environment may increase anxiety in people with cognitive or intellectual disabilities and is more likely to elicit inconsistent or inaccurate answers. The second troubling aspect of cross-examination is in the *form* of the questions. Complex questions are more likely to elicit inconsistent or inaccurate answers from people with cognitive or intellectual disabilities such as CLIENT. Such results detract from, rather than enhance, the ability of the Court to discern the validity of the testimony at issue.

 Generally, cross-examination proves especially difficult for individuals with cognitive disabilities. *See* Adrian Keane, *Cross-Examination of Vulnerable Witnesses—Towards A Blueprint for Re-Professionalisation*, 16 Int’l J. Evidence & Proof 175, 176 (2012) (“There is an abundance of research . . . across a range of jurisdictions, to indicate that the deployment of cross-examination techniques of the traditional kind described, promoted and sometimes glorified in advocacy texts. . . can confuse vulnerable witnesses, reduce their ability to comprehend the questions and diminish the cogency and accuracy of their testimony.”); Phoebe Bowden, Terese Henning & David Plater, *Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?*, 37 Melbourne U. L. Rev. 539, 541 (2014) [hereinafter *Balancing Fairness*] (“It is well-established that the cross-examination of children and persons with intellectual disabilities can cause them to give unreliable evidence.”).

Difficulties with cross-examination for individuals with cognitive disabilities occur for several reasons. Such individuals are typically more prone to anxiety than other witnesses, which can adversely affect their recall. *Id*. at 556. People with cognitive disabilities also tend to be more suggestible when questioned by an unfamiliar or authoritative figure. *See* *id*.; Nat’l Ctr. Crim. J. & Disability, *Shining a Light on Traditionally Hidden Disabilities Part Two* Community Policing Dispatch(2014), https://cops.usdoj.gov/html/dispatch/12-2014/shining\_a\_light\_on\_hidden\_disabilities.asp. For these reasons, careful monitoring of the tone of cross-examination can be vital to ensuring that respondents answer truthfully.

Proper accommodation during cross-examination also requires attention to the form and context of questions. Questions with double negatives, multipart questions, and questions with complex vocabulary and sentence structure are all examples of types of questions that people with intellectual or cognitive disabilities struggle to answer accurately. Mark R. Kebbell et al., *Witnesses with Intellectual Disabilities in Court: What Questions are Asked and What Influence Do They Have?* 9Legal & Criminological Psych. 25 (2004). A person with a cognitive or intellectual disability usually faces some difficulty with processing language. Rebecca Milne & Ray Bull, *Interviewing Witnesses With Learning Disabilities for Legal Purposes*, 29 British J. Learning Disabilities 93­, 94 (2001). Complicated questions only exacerbate these difficulties. People with cognitive disabilities are also accustomed to hiding difficulties with comprehension in order to blend in with others, and so may not always seek clarification of confusing or complex questions. *See Balancing Fairness* at 541(making this point).To minimize the risk that CLIENT will become confused or nonresponsive during cross-examination, we ask that the Court limit the scope of cross-examination questions, permit short breaks, and closely monitor the nature of the questioning of the government’s attorney. This would include ensuring that the government attorney uses simple language, and speaks in a respectful tone that does not threaten or intimidate CLIENT, ensuring that all questions “focus the language and demeanor to a range that the client best understands.” Exec. Off. Immigr. Rev., *Immigration Judge Benchbook*: *Mental Health Issues*, DOJ, https://www.justice.gov/eoir/immigration-judge-benchbook-mental-health-issues (last updated Feb. 6, 2015).

 Counsel also requests that the court allow CLIENT to take breaks after questioning if [HE/SHE] appears agitated or hesitant.

1. **Courtroom Environment Accommodations**

 As the Executive Office of Immigration Review (EOIR) has acknowledged in the context of unaccompanied minors, members of vulnerable populations such as CLIENT benefit greatly from accommodations to the courtroom environment. In its guidelines for accommodations for unaccompanied minors, EOIR noted that such modifications “need not alter the serious nature of the proceedings,” but can actually help foster an atmosphere in which a person is better able to present a claim and participate more fully in the proceedings. *See* Memorandum to All Immigration Judges et al., from David L. Neal, Chief Immigration Judge, *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, May 22, 2007, at 5. Many of the recommendations for unaccompanied minors are readily applicable to adults with cognitive or intellectual disabilities. These accommodations include: closing courtrooms, scheduling hearings consonant with medication schedules or first on the docket, removing robes and conducting hearings in separate rooms, and/or unshackling CLIENT in the courtroom.

1. **Closed Courtrooms**

People with intellectual or cognitive disabilities can be very sensitive to their environments. *See, e.g.*, James H. Rimmer & Jennifer L. Rowland, *Health Promotion for People With Disabilities: Implications for Empowering the Person and Promoting Disability-Friendly Environments*, 2 Am. J. Lifestyle Medicine 409, 410 (2008) (discussing the importance of eliminating environmental barriers for people with mental or physical impairments). Closing the courtroom will not only protect CLIENT’s privacy as sensitive issues may be discussed, but will reduce distractions from having other people in the courtroom that could further inhibit CLIENT’s ability to testify. Such accommodations are also consistent with what immigration courts already do with unaccompanied minors. *See* Memorandum to All Immigration Judges et al., from David L. Neal, Chief Immigration Judge, *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, May 22, 2007, at 8.

1. **Scheduling of CLIENT’s case [if CLIENT takes medication]**

CLIENT takes medication that causes side effects that vary over the course of the day. In light of this fact, the Court should ensure that scheduling of CLIENT’s case is consistent with any medication schedule and might also consider scheduling CLIENT first on the docket so as to reduce the degree of agitation. [*add more information here based on needs of CLIENT*]

1. **Removing robes**

Clothing has the power to shape and influence our perceptions and behavior. *See* Hajo Adam & Adam D. Galinksy, *Enclothed Cognition*, 48 J. Experimental Soc. Pscyhol. 918 (2012) (describing results of experiments where people wearing a lab coat that they were told was a doctor’s coat performed better on tasks requiring attention to detail). A judge’s robe is a symbol of independence and authority. *See Jenevein v. Willing*, 439 F.3d 551, 560 (5th Cir. 2007) (describing judge’s robe as setting aside the “judge’s individuality and passions.”). But a judge’s robe can also be intimidating and retraumatizing for a person with a mental health disability. When working with children, many courts, including immigration courts, are cognizant of the dual nature of the judge’s robe, and recommend removing the robe, and if possible, operating in a separate room in order to make respondent more comfortable. *See, e.g.,* Memorandum to All Immigration Judges et al., from David L. Neal, Chief Immigration Judge, *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, May 22, 2007, at 8. The same justifications for removing robes when working with children also apply to adults with cognitive limitations. A simple gesture like removing one’s robe could play an important role in reducing CLIENT’s agitation.

1. **Unshackling CLIENT (if detained)**

Shackling of parties in civil or criminal trials is disfavored absent a specific finding that such restraints are necessary. *See Deck v. Missouri*, 544 U.S. 622 (2005); *Davidson v. Riley*, 44 F.3d 1118 (2d Cir. 1995). This rule has longstanding roots in common law. *See* *Deck*, 544 U.S. at 626–27. There are two primary justifications for the rule. The first justification is so that the defendant’s mental and cognitive faculties will not diminish in light of the pain or discomfort they may feel while in restraints. *Id*. (internal citations omitted) (explaining that defendants should not be constrainted “ so that their pain shall not take away any manner of reason” and allow them to testify with “free will”). There is abundant social science literature demonstrating the deleterious effects of physical restraints in other contexts. *See, e.g.,* Nicholas G. Castle, *Mental Health Outcomes and Physical Restraint Use in Nursing Homes*, 33 Admin. Pol’y Mental Health & Mental Health Servs. Res. 696 (2004) (showing that nursing home residents subject to physical restraints are more likely to suffer from cognitive impairment and depression). This is no less true in the immigration context. *See* Complaint at 5 , *Abado-Peixoto v. Dep’t of Homeland Security*, No. CV-11-1001, (N.D. Cal. 2011) (describing swollen legs and mental retraumatization of a domestic violence survivor who was shackled during her immigration proceedings).

The second justification for the rule against physical restraints is the prejudicial effect use of visible restraints has on the factfinder, the judge. Both the Supreme Court and the Second Circuit recognize that visible schackles can have a prejudicial effect on the proceedings. *See Holbrook v. Flynn*, 475 U.S. 560, 569 (1986) (describing shackles as as “inherently prejudicial”); *Davidson v. Riley*, 44 F.3d 1118, 1122 (2d Cir. 1995) (“Forcing a party to appear at jury trial in manacles and others shcakles may well deprive him of due process . . . ). In both civil and criminal courts, judges permit the use of restraints on a witness or litigant after an *individualized* determination that the witness or litigant requires the use of such restraints. *See Davidson*, 44 F.3d at 1122. Immigration courts are also beginning to recognize the importance of an individualized determination as a matter of due process. In 2014, the Department of Homeland Security signed a settlement agreement agreeing not to shackle immigration respondents during bond and merits hearings absent specific findings of danger, and to allow for respondents to be unrestrained during master calendar hearings if they indicate that they suffer from a health condition (including mental health conditions) that would make use of restraints inhuman. *See* Notice of Proposed Class Action Settlement, *Abadia-Peixoto v. U.S. Dep’t Homeland Sec’y*, No. 3:11-cv-4001 RS, 3­–4 (N. D. Cal. 2014).

For people such as CLIENT, shackling only exacerabates [his/her] anxiety and may further debilitate their limited cogntive functioning. The Court should follow the protocol already used in both civil and criminal court and not permit shackling in courts absent a particularized, individualized determination that such restraints are necessary.

1. **When Evaluating CLIENT’s Testimony as a Whole for Credibility and Other Discretionary Determinations, the Court Must Consider CLIENT’s Mental Health Limitations**

When assessing CLIENT’s testimony, the Court must consider CLIENT’s cognitive or intellectual disabilities in its assessments. This includes factoring CLIENT’s mental health conditions in the Court’s “totality of the circumstances” analysis, and taking into account CLIENT’s mental health conditions when assessing discretionary factors like CLIENT’s rehabilitation or expressions of remorse.

The Immigration & Nationality Act requires the Court to consider the “totality of the circumstances” when evaluating a petitioner’s credibility. INA § 208(b)(1)(B)(iii) (“Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on [list of factors].”). When evaluating CLIENT’S credibility, the Court must include CLIENT’s mental health conditions in its “totality of the circumstances” analysis.

The BIA requires this in *Matter of J-R-R-A*. 26 I. & N. Dec. 609, 612 (BIA 2015). In *J-R-R-A*, the Board remanded an IJ for failing to consider the respondent’s cognitive limitations in his finding that the respondent’s testimony regarding his asylum claim was not credible. *Id*. at 609. The respondent’s attorney had mentioned his suspicions that his client may have had cognitive limitations, and the IJ had noted during the hearing that the respondent often appeared confused during the proceedings and was at times nonresponsive. Yet in his decision the IJ did not mention these concerns.

The BIA, in ordering the remand, recognized that there may be instances where, “inconsistenceies, implausibilty, inaccuracy of details, inappropriate deameanor, and nonresponsiveness—may be reflective of a mental illness or disabiilty, rather than an attempt to deceive the Immigration Judge.” *Id*. at 611. In the case, the respondent had incorrectly stated that 2006 was “last year’ when it was actually seven years ago, confused the year in which he first arrive in the United States, and laughed inappropriately. In response to these indiciations of cognitive limitations, the Board established an accommodation appropriate for the respondent, stating that “where a mental health concern may be affecting the reliability of the applicant’s testimony, the Immigration Judge should, as a safeguard, generally accept that the applicant belives what he has presented.” *Id*.

In *Matter of J-R-R-A*, the Board recognized that inconsistencies can be products of cognitive disabilities rather than deliberate attempts to lie. Similarly, the Second Circuit and other federal courts have cautioned that any inconsistencies in testimony must be considered in light of the wtitness’s disabilties. *See Kasongo v. Gonzales*, 161 Fed. Appx. 147, 148–49 (2d Cir. 2006) (remanding case where IJ used minor inconsistencies in testimony as unwarranted given respondent’s extremely emotionally fragile” state and his “classic presentation of posttraumatic stress disorder.”); *see also Cordova-Manzanarez v. Holder*, 429 Fed. Appx. 659 (9th Cir. 2011) (remanding case in which IJ failed to take into account expert testimony regarding petitioner’s cognitive impairments that affected memory and ability to answer questions without promitping or redirection); *Zubeda v. Ashcroft*, 333 F.3d 463, 476–77 (3d Cir. 2003) (cautioning against placing too much weight on inconsistencies in testimony in light of petitioner’s mental health conditions).

Like the respondent in *Matter of J-R-R-A*, individuals with cognitive and intellectual impairments are often unable to remember peripheral details of events, including dates and names. Such memory impairments are common in people suffering from intellectual or cognitive disabilities such as client. *See* Hefzba Lifshitz, *Working Memory Studies Among Individuals With Intellectual Disability, An Integrated Research Review*, 59 Res. Developmental Disabilities 147 (2016); T. P. Alloway, *Working Memory and Executive Function Profiles of Individuals with Borderline Intellectual Functioning*, 59 J. Intellectual Disability Res. (2010). As the BIA itself acknowledges, such lapses are not indicative of malevolent intent, but rather reflect the reality of [his/her] symptoms. *Matter of J-R-RA*, at 611 (“factors that would otherwise point to a lack of honesty in a witness—maybe be reflective of an illness or disability, rather than an attempt to deceive the Immigration Judge.”). Because failure to consider CLIENT’S disability may unduly prejudice the Court’s credibility determination and undermine the fundamental fairness of the proceeding, counsel respectfully requests that the Court include consideration of CLIENT’s cognitive impairments when evaluating CLIENT’s testimony.

 Similarly, the Court must also consider CLIENT’s cognitive functioning when evaluating discretionary factors such as the extent of rehabilitation and remorse. An immigration judge’s evaluation of CLIENT’s demeanor and responsiveness factors into the “totality of the circumstances” analysis the Court must adopt when assessing credibility. *See* INA § 208(b)(1)(B)(iii) (listing demeanor and responsiveness as two of many factors immigration judges can consider when assessing credibility). Demeanor and responsiveness are also factors the IJ considers when determining whether someone has genuine rehabilitation or remorse. *See, e.g.*, *In Re Mendez-Morales*, 21 I. & N. Dec. 296 (BIA 1996). To comply with procedural fairness, the Court must take into account CLIENT’s cognitive functioning when using demeanor and responsiveness to evaluate discretionary determinations like rehabilitation and remorse.

**CONCLUSION**

Accommodating CLIENT’s mental health conditions is an important part of ensuring that CLIENT’s proceedings are fundamentally fair. Such accommodations will also assist in the further development of the record, and are simply good practice given the circumstances.

**Detained/Non-Detained**

[ENTER ATTORNEY INFO HERE]

UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

OFFICE OF THE IMMIGRATION JUDGE

NEW YORK, NEW YORK

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In the Matter of: )

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CLIENT )

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In Removal Proceedings )

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**Immigration Judge: Hearing Date:**

**[PROPOSED] ORDER FOR THE MOTION TO REQUEST SAFEGUARDS**

Respondent’s Motion to Continue is HEREBY

GRANTED DENIED .

* DHS does not oppose the motion.
* The Respondent does not oppose the motion.
* A Response to the motion has not been filed with the court.
* Good Cause has been established for the motion.
* The Court agrees with the reasons stated in the opposition to the motion.
* The motion is untimely.
* Other\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

**DEADLINES**

* The application(s) for relief must be filed by\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.
* Other\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

DATED: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Immigration Judge

1. Created by Nora E Kirk and Oluwadamilola Obaro through the NYU Immigrant Rights Clinic. [↑](#footnote-ref-1)
2. In *Lane*, the Court considered court-provided accommodations under Title II of the Americans with Disabilities Act (ADA). Although the ADA does not apply to federal entities, both Acts prescribe the exact same obligations and courts generally consider both provisions interchangeably. *See Harris v. Mills*, 572 F.3d 66, 73 (2d Cir. 2009) (“[I]n most cases, the standards are the same for actions under both statutes.”) [↑](#footnote-ref-2)