

Questions raised by Hernandez arrest, case

Questions

How will disability affect charges, ICE?

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Earlier this month, police arrested 21-year-old Abigail Hernandez and charged her with making a terroristic threat after she allegedly made a Facebook post threatening a mass shooting at East High School in Rochester.

Rochester police announced the arrest a week later, only after Hernandez had been released on bail and detained by federal immigration officials. They say she is an undocumented immigrant and faces deportation proceedings.

On Monday, a judge ordered Hernandez to be returned to the Monroe County Jail while the charge is presented to a grand jury. However, the case raises a number of important questions.

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Hernandez

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What do we know about the extent of Hernandez's disability?

Her parents say that Hernandez, 21, was part of a special education program in the Rochester City School District. While they offered no specifics about her disability, they say she has special needs and is very dependent on her family. They said she doesn't leave the house on her own, and insist that Hernandez was not capable of carrying out the threat she is accused of making.

"She's not right mentally — she doesn't pick up what people say," her mother, who asked not to be identified by name, said in Spanish. "She's very dependent on me."

Her father, Eufrazio Torres, also said he did not believe his daughter was capable of giving meaningful answers to police during their interview.

"You can ask her a question like, 'Did you do that?' If you pressure her she'll say yeah, even if she didn't do it." he said.

Privacy laws prohibit school officials from sharing what they know about Hernandez. But RCSD school board member Beatriz Lebron raised questions about whether it was appropriate for police to question her, given her apparent disability.

“She should not have been questioned without her parents there or legal representation; she may not have known what her rights were,” Lebron said.

Torres said he attempted to visit his daughter when she was being held at the federal immigration detention center in Batavia but wasn’t able to see her. The guards there told him he could see her only if she put in writing that she wanted him as a visitor; he said she lacks the cognitive ability to do so.

It’s worth noting that the specific charge Hernandez faces does not take into account whether an individual is capable of carrying out a threat.

“Making a terroristic threat” is defined in Section 490.20 of the state penal code, and it includes this language: “It shall be no defense to a prosecution pursuant to this section that the defendant did not have the intent or capability of committing the specified offense or that the threat was not made to a person who was a subject thereof.”

What are the current policies for interviewing or obtaining confessions from suspects with cognitive disabilities?

Deputy Chief LaRon Singletary said the threshold RPD investigators consider is whether subjects understand their rights and are able to read and write and respond to questions. Beyond that, issues of mental competency are left to the courts.

The department policy on interrogations is outlined in General Order No. 411, and explains that the officer should note on the interview form whether a subject is able to read and write. If the suspect makes a voluntary oral statement, the officer should make a written transcript and allow the subject to make any changes he desires.

The interrogations policy contains guidance about conducting interviews with people who have limited English language skills. Singletary declined to comment on whether interpreters were present for any of the interviews with Abigail Hernandez or her family.

That policy does not contain any similar guidance for interrogating suspects with mental health issues or cognitive disabilities.

However, the department does have a lengthy policy on how it will comply with the Americans with Disabilities Act. RPD General Order #517 states that officers should recognize the nature and characteristics of various disabilities and respond accordingly.

“Employees should recognize that people who have an intellectual disability have varied degrees of limited intellectual functioning,” the policy states. “In response to the needs of persons with a severe or profound intellectual disability, the employee should seek the aid of the individual’s friends or family, or refer to other community agencies whose services are specifically directed at the needs of disabled individuals.”

Her father said that did not happen. Police took Hernandez from her home and questioned her for several hours. Court documents indicate she made a confession.

Will Hernandez’s disabilities allow her to avoid being deported?

Hernandez came to the United States from Mexico when she was 3 years old and qualifies for “Dreamer” status under Deferred Action for Childhood Arrivals rules.

Her father said he and his wife have green cards, and their two younger children are American citizens. But they did not obtain necessary documents for Abigail when she was brought to this country.

The DACA policy allows young people who were brought here unlawfully as minors to live, attend school and work without fear of deportation as long as they abide by the law and meet a range of guidelines.

If a so-called Dreamer is charged with a crime, judged a threat to public safety or found to have violated program rules, ICE can commence removal proceedings.

Even if the criminal charges were to be dropped, ICE could continue on with proceedings to remove her from the country, said Matthew L. Kolken, an immigration lawyer in Buffalo who has heard of Hernandez's case but does not represent her.

"DACA is purely discretionary," he said.

However, a hearing could be ordered in immigration court to weigh Hernandez' mental status, and that "could result in the termination of removal proceedings if she's not competent to participate in her own hearings," Kolken said.

According to the American Civil Liberties Union, an estimated 15 percent of individuals in immigration detention have a mental disability.

"Unlike the criminal justice system, the immigration system has no standard procedures to resolve cases against detainees with mental disabilities," an ACLU report says. "Such individuals are forced to navigate the daunting maze of removal proceedings alone, with no right to appointed counsel or other procedural protections."

Local advocacy groups Metro Justice, ROCitizen and Rochester Democratic Socialists of America issued a joint statement criticizing law enforcement's handling of the Hernandez case.

"Abigail, like all members of our community, has rights and deserves to be treated with fairness and dignity," the statement said. "As a person whose intellectual capacity is in question, it is even more important that we ensure she understands her civil rights as she is being pushed through an unsympathetic system."

They called for a halt to the deportation proceedings and "an end to the violence and abuses of ICE."

What does the Hernandez case say about the efficacy of Rochester's sanctuary city policy?

Last February, the Rochester City Council unanimously reaffirmed Rochester's status as a sanctuary city. The council resolution, which restated one passed in 1986, directed the city administration to adopt policies that protect "all who come within its borders" and says the city is not required to collect information or "engage in immigration enforcement."

It also directed city employees not to inquire or request proof of immigration status or citizenship when providing services or benefits, unless specifically required to do so by law.

What's unclear is whether the city's sanctuary policy has any practical effect for local immigrants, particularly those who are arrested by the Rochester Police Department and processed at the county jail.

Anytime people are arrested and fingerprinted at the jail, their information is entered into statewide criminal justice databases, which are apparently monitored by officials with U.S. Immigration and Customs Enforcement.

In this case, the jail received a faxed immigration detainer (DHS form I-247) on Hernandez from ICE about eight hours after she was processed. When she posted bond later that day, the jail contacted ICE, and agents were waiting to pick her up when she was released.

Kolken said it was unusual for ICE to take custody of Hernandez and begin removal proceedings immediately after she posted bail. Normally, the criminal process proceeds and, if convicted, the immigrant serves his or her prison term before ICE begins deportation action.

Asked why ICE began removal proceedings so quickly in this case, Kolken speculated it was because Hernandez had been the focus of national media attention. "It's a big story. They don't have to wait," he said.

The Metro Justice joint statement said the Hernandez case "exposes serious weaknesses in the sanctuary resolution."

They also called on RPD to provide more details on how Hernandez was processed and the extent to which the department is coordinating with ICE.

Has there been an increase in the number of threats against schools? What's the threshold for determining whether threats are "credible"?

Opinions differ on whether there are more actual threats against local schools following the Parkland shooting, but late Tuesday, Randy Ross, 23, of Greece was also charged with making a terroristic threat and remanded to the Monroe County Jail over a Youtube video allegedly filmed on school properties in the Greece School District that police allege contained terroristic threats.

Ogden Police Chief Christopher Mears said an uptick in reports may be attributable to hyperawareness and nobody wanting to "be the person who has information that could have saved a life and not have come forward."

Meanwhile, Gates Police Chief James VanBrederode said the ease with which kids can "sit behind a keyboard and talk trash" due to social media means there are, in general, more threats.

But determining the credibility of threats is paramount. Police were posted at Spencerport schools on Feb. 16 after a student comment, overheard by another pupil who Mears said "took that comment out of context," blossomed on social media into a significant scare. The district's Threat Assessment Team of administrators, social workers and mental health professionals was able to determine that it was unlikely whatever happened there did not put any students in actual danger.

But those situations still merit follow-up.

"If they think there's an actual threat, the team notifies police and we investigate," said Mears. "We spent the better part of last week following up on postings, and more postings and there was nothing concrete. We stand by the district's assessment that there was never a credible threat."

Even with the East High School incident, a robocall sent by school Principal Shaun Nelms said, "At no point did we believe there was a credible threat nor did we believe that anyone was in imminent danger." Nonetheless, the district referred the matter to law enforcement for further investigation.

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Eufracio Torres, father of Abigail Hernandez, leaves court with his daughter's attorney, on the right, Emily Rosmus. TINA MACINTYRE-YEE/@TYEE23/STAFF PHOTOGRAPHER
