



Unaccompanied Children Reunified with Family: *Ensuring Court Appearance, Fair Proceedings and Protecting Children's Safety* Updated November 29, 2015

Unaccompanied immigrant and refugee children are—first and foremost—children. Whenever possible they should be safely released to family who are able to care for them pending their immigration proceedings. They are entitled to due process of law, but also deserve the protection and care we would want extended to any child alone in a strange land. This is not only the humane response, but also improves court efficiency and is more cost effective than federal custody. This briefing document sets forth three principles that ensure fair proceedings and protect children's safety: 1) all children should have lawyers to assist them in accessing the legal protections for which they are eligible; 2) all decisions should be made with consideration for the child's best interests and child advocates must be appointed for the most vulnerable children; and 3) funding for post-release services is vital to ensure children's safety, security, and integration in their family setting and their local communities.

All children in adversarial proceedings should have an attorney. Upon release from U.S. Department of Health and Human Services Office of Refugee Resettlement (ORR) custody, the majority of unaccompanied children appear in immigration court without representation because, regardless of age, lawyers are not automatically provided to these children. Children as young as toddlers are often forced to present their legal case before an immigration judge in a formal court room. While the child is unrepresented, the government is represented by an attorney who has been trained specifically in the complex U.S. immigration law. The expedited hearings for unaccompanied children—the so-called “rocket dockets”—that began in fall of 2014 often do not allow children enough time to find an attorney and prepare for their case. This increases the number of children going through proceedings without an attorney, as well as those who receive removal orders in absentia. Every unaccompanied child should have legal representation in immigration proceedings – if necessary, at government expense.

Child advocates meet a vital need for vulnerable children. Federal law permits the appointment of child advocates—best interests guardians *ad litem*—for child trafficking victims and other vulnerable unaccompanied children.¹ Their role is to advocate for the best interests—safety and well-being, giving due weight to the child's expressed wishes—on issues including placement and permanency. Because immigration law does not require, but does not prohibit, every decision-maker from considering a child's best interests, child advocates play a necessary role. This is particularly true for infants and toddlers who are too young to communicate with an attorney, or for other children who may lack capacity to make a particular decision.

ORR should provide post-release case management to all children upon release or as the need arises. Post release case management services are services provided by a social worker who meets with the child individually and the family to develop an individualized service plan. These services allow children to successfully transition into their communities by assisting with school enrollment, acculturation, locating medical and therapeutic services, making referrals to area legal services, and

¹ 8 U.S.C. § 1232(c)(6)

navigate new family settings and other individual needs. Not all initial placements are successful or safe for the child (just as occurs in the domestic child welfare system). Thus, some entity must take responsibility for monitoring children’s safety post-release.

Appearance Rates of Children in Immigration Court

The majority of children do appear for their first immigration court hearing.² **In fact, the single, strongest indicator that a child will appear for an immigration court hearing is if an attorney represents that child.** Representation also improves the process for judges and government attorneys, who are able to communicate directly with another attorney, rather than a child.³

- In cases beginning in fiscal year 2015, **99.35% of represented children** (including unaccompanied children and other juveniles) appeared for their immigration court case.
- In cases beginning in fiscal year 2014, **98.84% of represented children** appeared for their immigration case.

Case Type	Cases That Began in Fiscal Year 2014	Cases That Began in Fiscal Year 2015
Children with Legal Representation 49% of cases that began in FY14 and FY15	29,916	9,447
Number Who Appeared	29,569	9,386
Percentage Overall	98.84%	99.35%
Children Pro Se 51% of cases that began in FY14 and FY15	26,036	14,986
Number Who Appeared	16,277	12,617
Percentage Overall	62.52%	84.19%

TRAC data only reference unaccompanied children in ORR custody and all released children. Data reflect current status (most recent proceeding status). Appearance rates may represent a snapshot in time.

Most Children Are Forced to Appear Without a Lawyer

In the past few years, representation rates of unaccompanied children reached all-time lows.

- Before 2012, most children going through immigration court proceedings were represented—an average of **62%** during the years of **2009 through 2011**.⁴
- The percentage of children represented in immigration court proceedings steadily decreased from 2012 through 2014, with all-time lows in representation in **March 2014 (16%)** and **April 2014 (15%)**, a period that coincided with a sharp increase in arrivals of unaccompanied children.⁵

² This fact runs contrary to a statement by Senator McCain at an April 29, 2015 DHS budget hearing in the Senate Homeland Security and Government Affairs Committee hearing that only 10-20 percent of unaccompanied minors appearing for scheduled immigration hearings.

³ Letter from National Association of Immigration Judges (March 22, 2013), <http://bit.ly/1KbTmtJ>.

⁴ Syracuse University’s Transactional Records Access Clearinghouse (TRAC) “Immigration Court Cases Involving Unaccompanied Juveniles, Filed by Month,” available at, <http://trac.syr.edu/immigration/reports/371/include/timeseriesG.html>.

⁵ Syracuse University’s Transactional Records Access Clearinghouse (TRAC) “Representation for Unaccompanied Children in Immigration Court,” 25 November 2014. <http://trac.syr.edu/immigration/reports/371/>.

- In the fall of 2014, representation rates gradually increased. However, in cases beginning in fiscal year **2015**, **61%** of children in immigration court **were unrepresented**.⁶

In other words, the vast majority of children now stand alone in immigration court, to respond to questions from judges and government attorneys, and to assert their defense to deportation.

Appearing Without Lawyers Denies Children Protection for Which They Are Eligible

A majority of recently-arrived unaccompanied children are eligible for legal protection that would allow them to lawfully remain in the United States.⁷ Yet they cannot access these protections without an attorney to represent them in court or even to ensure they receive proper notice of their hearings. While there has been new federal funding and pro bono efforts to address the lack of representation, significant gaps remain in representation based on geographic areas as well as government restrictions.

- In the last six months of 2014, **94% of the unaccompanied ordered removed** did not have an attorney.⁸
- Out of 62,363 pending children's cases (October 2013 through January 2015), **7,706 children** were **ordered removed** after they **failed to show up** in court.⁹
- In fiscal year 2014, advocates documented an increase in **problems with children's notices to appear** in immigration court hearings. Children received **no notice** of their hearing prior to their hearing or were required to appear at a court far from where they lived. This may have resulted in higher in absentia removal orders.¹⁰ Without attorneys to address these issues, children are at high risk of losing their opportunity to seek protection, and may be returned to harm.

Providing Pro Bono Attorneys for Unaccompanied Children

For many years, nonprofit organizations, law school clinics, pro bono and "low bono" attorneys have stepped up to represent unaccompanied children for free or at a very low cost. But they cannot meet the needs of all children. Through Justice AmeriCorps, the Department of Justice has increased the number of lawyers available to represent unaccompanied children. The facilitation of pro bono representation through public-private partnerships has also been successful, providing many children nationwide attorneys to represent them in immigration court, leveraging the resources of the private sector.

A robust mix of government-funded and pro bono representation by the private sector is needed to fill the enormous representation gap that currently exists.

Child Advocates Bring the "Best Interests of the Child" Standard to Unaccompanied Children's Cases

Unaccompanied children face complex decisions. They may have experienced traumatic events that they have not yet disclosed to anyone. They may want to attend school, but face tremendous pressure to work. ORR appoints child advocates—experienced attorneys or social workers, supported by bilingual volunteers who meet regularly with the children—to particularly vulnerable children including pregnant or parenting teens, children with physical disabilities or mental health concerns, children who face permanent separation from family. Child Advocates help the children to understand and think through high-stakes decisions; they also advocate with

⁶ Current as of October 2015, available at: <http://trac.syr.edu/phptools/immigration/juvenile/>.

⁷ United Nations High Commissioner for Refugees (UNHCR), *Children on the Run* (March 2014). (UNHCR reports 712% increase in asylum applications in the countries neighboring Honduras, El Salvador and Guatemala, namely Mexico, Panama, Costa Rica, Belize and Nicaragua, from 2008-2013).

⁸ Kate, Linthicum, "7,000 Ordered Deported Without Going to Court," *L.A. TIMES*, 6 March 2015.

<http://www.latimes.com/local/california/la-me-children-deported-20150306-story.html#page=2>.

⁹ *Ibid.*

¹⁰ See a February 9, 2015 sign-on letter detailing this issue, available at: <http://lirs.org/wp-content/uploads/2015/06/20150127Advocacyletterreinabsentiachildren-FINAL-2-w-names.pdf>.

decision makers at HHS, DOJ and DHS on behalf of the children’s best interests. Child advocates also make recommendations on the best interests of children who are extremely young (toddlers and infants), children who lack capacity to make a particular decision, or who consider a decision that puts their safety in jeopardy. The Child Advocate’s role is to ensure that decision-makers consider the child’s best interests—their safety, expressed interests, family integrity, and developmental and liberty interests—when making decisions about them.

Providing Case Management/Post-Release Services

There are currently 10 post-release and home study organizational providers to ORR (not all providers do both). Only at-risk children with specific child protection detailed under federal law are required to have a home study and receive post-release services.¹¹ These children receive services for the duration of the court case or until they turn 18. For children who receive post-release services without a home study, they are eligible for services for up to 6 months, which may be extended for exceptional cases. Most children are not provided with post-release services. Additionally, not every service provider employs a model of in-person, case management support within the family’s community.

- Research shows that children who receive case-management style post-release services are more likely to comply with the requirement to appear at all immigration court hearings.¹²
- With post-release services, children benefit from additional information about what to expect in immigration court proceedings, as well as referrals for local legal service providers.
- Post-release services also help connect children to schools, mental health services, medical providers, and other supports, as well as provide cultural orientation to both the child and the parent.

Recommendations

Congress can ensure children’s access to due process and protection, while increasing efficiency by:

- Expanding government funding for pro bono legal services and direct representation for children.
- Ensuring that the child’s best interests is a primary consideration in all custody and removal proceedings and continue providing Child Advocates to submit best interests recommendations for the most vulnerable children.
- Providing adequate funding to ORR to provide necessary post-release case management services to assist with child protection, community integration, and immigration court appearance after children’s release from federal custody.

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¹¹ See 8 U.S.C. 1232(c)(3)(B)(children with a disability, children who are victims of trafficking or child abuse and neglect, or are at risk thereof upon release to a sponsor).

¹² Benjamin J. Roth and Breanne L. Grace, “Post-Release: Study Summary and Policy Recommendations,” *University of South Carolina College of Social Work*, available at: <http://bit.ly/1cpMtvZ>.