



Unaccompanied Children: Ensuring Court Appearance & Fair Proceedings

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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 courtroom. While the child is unrepresented, the government is represented by an attorney who has been trained specifically in 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, whether in ORR custody or released¹. 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 release, placement, legal relief, repatriation, 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.

¹ 8 U.S.C. § 1232(c)(6)

Appearance Rates of Children in Immigration Court

The majority of unaccompanied 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

Cases beginning in fiscal year 2016, **99.7% of represented kids** appeared for their immigration court case. For fiscal years 2015 and 2014 represented kids appeared, respectively, **98.9% and 98.2%** of the time.

The Impact of Legal Representation on Unaccompanied Children’s’ Cases*			
Case Type	Cases That Began in Fiscal Year 2014	Cases That Began in Fiscal Year 2015	Cases That Began in Fiscal Year 2016**
Children with Legal Representation	36,088 (64%)	20,773 (67%)	14,960 (39%)
Children’s Compliance with Court Appearance	35,461 (98.2%)	20,561 (98.9%)	14,918 (99.7%)
Total Case Outcomes	21,632 (59.9%)	9,351 (45%)	2,918 (19.5%)
<i>Able to Stay in the U.S.</i>	19,174 (88.6%)	8,263 (88.4%)	2,524 (86%)
<i>Removal Order/Voluntary Departure</i>	2,458 (11.3%)	1,088 (11.6%)	394 (13.5%)
Children Pro Se	20,412 (36%)	10,214 (33%)	23,350 (61%)
Children’s Compliance with Court Appearance	8,468 (41.4%)	4,814 (47.1%)	20,883 (89.4%)
Total Case Outcomes	15,241 (74.6%)	6,490 (63.5%)	3,005 (12.8%)
<i>Able to Stay in the U.S.</i>	2,080 (13.6%)	654 (10%)	273 (9.1%)
<i>Removal Order/Voluntary Departure</i>	13,161 (86.3%)	5,836 (89.9%)	2,732 (90.9%)

*TRAC data on juveniles refers to the priority designation of unaccompanied children (as of 2014). Data reflect “current status” (most recent proceeding status). Therefore, appearance rates and representation rates represent a snapshot in time. Case outcomes do not capture pending cases. Case data from TRAC: <http://trac.syr.edu/phptools/immigration/juvenile/> (Current through November 2016, accessed January 5, 2017).

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>

**The vast majority of the cases filed in FY 2015 and FY2016 are still pending. The low relief outcome may be an indicator that legal representation also facilitates children's understanding of what their potential for relief is. Thus, kids are more likely to accept removal earlier on in the process if they have legal representation.

Children Are Often 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
- In the fall of 2014, representation rates gradually increased. In cases beginning in **fiscal year 2015, 33%** of children in immigration court **were unrepresented**.⁶
- For cases filed in fiscal years 2014 through fiscal year 2016—**57% of kids were represented in their most recent court appearance**.
- **However for cases filed in Fiscal Year 2016—so far 39% of kids have lawyers.**

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 fiscal year 2015, **90% of completed cases for unrepresented children resulted in removal. Whereas represented kids received relief in 88%** of completed cases in fiscal year 2015.
- 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

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/>.

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.*

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 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. Throughout the duration of the child’s case, 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.

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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>.