December 28, 2020

Ms. Lauren Alder Reid
Assistant Director, Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
Falls Church, Virginia 22041
Via federal eRulemaking portal, http://www.regulations.gov

RE: Executive Office for Immigration Review, RIN 1125-AB03; Public Comment Opposing Proposed Executive Office for Immigration Review Rule Titled "Good Cause for a Continuance in Immigration Proceedings"

Dear Ms. Alder Reid:

Kids in Need of Defense (KIND) submits the following comments on the Executive Office for Immigration Review's (EOIR) proposed rule titled Good Cause for a Continuance in Immigration Proceedings (the "Proposed Rule"), published on November 27, 2020, in a Notice of Proposed Rulemaking (NPRM), 85 Fed. Reg. 75925. As an organization devoted to serving unaccompanied children pursuing immigration relief in the United States, KIND believes the proposed changes to the standards for defining good cause will inevitably harm children whose cases often involve delays based on matters outside their control. We urge the government to withdraw the NPRM, as it imposes conditions and standards on all individuals in proceedings, including children, that will reduce the likelihood of receiving a fair day in court. The Proposed Rule would also hinder the ability of children and others to pursue critical forms of humanitarian protection determined by Congress to be within the jurisdiction of U.S. Citizenship and Immigration Services (USCIS).

KIND is a national nonprofit organization dedicated to providing free legal representation and protection to unaccompanied immigrant and refugee children in removal proceedings. Since January 2009, KIND has received referrals for more than 21,000 children from 77 countries. KIND has field offices in ten cities: Los Angeles, San Francisco, Atlanta, Baltimore, Boston, Houston, Newark, New York City, Seattle, and Washington, DC. Legal services professionals who serve children through KIND provide defense in removal proceedings and pursue immigration benefits, including asylum, withholding of removal, and protection under the Convention Against Torture on behalf of their child clients. KIND also employs social services coordinators throughout the country, providing unaccompanied children with the support they need outside of the courtroom. KIND promotes protection of children in countries of origin and transit countries and works to address the root causes of child migration from Central America. KIND also advocates for laws, policies, and practices to improve the protection of unaccompanied children.

I. The Proposed Rule Fails to Provide Sufficient Time for Adequate Public Review and Cannot Be Analyzed in Isolation

The Proposed Rule has been issued with only a 30-day comment period, in violation of Executive Order 12,866, and with no suggestion of a good reason for an abbreviated period. Executive Order 12,866, Regulatory Planning and Review, sec. 6(1)(a), 58 Fed. Reg. 51735, 51740 (Oct. 4, 1993) ("[E]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days."). Challenges posed by the COVID-19 pandemic as well as intervening federal holidays erect further barriers to meaningful engagement by the public and only underscore the inappropriateness of an accelerated comment timeline. Although we believe that EOIR should rescind the Proposed Rule in its entirety, at a minimum it should re-notice the rule with a proper comment period of at least 60 days.

II. The Proposed Definition of "Good Cause" Severely Restricts the Discretion of an Immigration Judge To Consider the Unique Circumstances Children Face in Pursuing Their Claims

Motions to continue a case upon a showing of good cause or for other specified reasons have long been a mainstay of successfully managing an immigration judge's docket. Because such decisions rely on a number of factors unique not only to the case, but to the court's schedule, competing government priorities, unexpected circumstances, and limited access to affordable or pro bono counsel, there can be a wide range of issues that merit a determination that good cause has been shown to continue the case. Rather than trust immigration judges to manage their own dockets and to assess the needs of a particular case at a particular time, the Proposed Rule seeks to micro-manage dockets. It creates a series of requirements that virtually eliminate the opportunity for continuing a meritorious case unless the respondent can meet strict and unrealistic time frames that are often outside his or her control. It also penalizes respondents who have already been found eligible for relief who must wait until the government determines that a visa is available.

For unaccompanied children, who must depend on both the government and other adults to help them pursue their cases, the Proposed Rule could easily deny them not only a fair day in court but access to relief for which they are eligible. EOIR itself has recognized that "[i]mmigration cases involving children are complicated and implicate sensitive issues beyond those encountered in adult cases."[1] In KIND's extensive experience serving thousands of unaccompanied children such sensitive issues may be presented by, among other things, a child's developmental or capacity limitations, psychological and physiological responses to trauma, limited experience with adversarial processes, and dependency on adults who may not be fully prepared to support a child's needs throughout removal proceedings. Children may be initially reluctant to share traumatic experiences, may be confused or overwhelmed by the immigration court process, and may have difficulty understanding what information is material to their case.

[1] EOIR, Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children, OPPM 17-03 (Dec. 20, 2017), at 2.

Children who lack prior experience of the adversarial system need time to develop an understanding of the process and trust in the professionals who advocate for them. As a principal drafter of the Trafficking Victim's Protection Reauthorization Act explained, a child "usually knows nothing about US courts or immigration policies and frequently does not speak English . . . . The majority of these children have been forced to struggle through an immigration system designed for adults."[2] The American Bar Association (ABA) calls for children's "full participation at all stages of the Immigration Adjudication,"[3] and notes that participation is possible only if children are afforded adequate preparation time in keeping with their developmental stage, capacities, and well-being. Trauma and a history of violence exacerbate the gap that a child must bridge to participate in preparing a legal defense, and forcing the confrontation of traumatic facts is likely to be counterproductive.[4] Consequently, children's cases may not be able to proceed on the expedited schedule the Proposed Rule envisions, and continuances may be necessary to ensure that all the relevant details of a child's case have been explored.

Moreover, the Proposed Rule limits or prohibits continuances under circumstances that directly affect the outcome of a child's case. First, the Proposed Rule limits the timing and number of continuances that may be granted for a respondent to obtain counsel. While most respondents find it difficult or impossible to find affordable or pro bono counsel quickly, children are particularly disadvantaged by the requirement that a continuance to obtain counsel may only be granted if no more than 30 days have elapsed between the time the child was served the Notice to Appear and the first appearance in immigration court. Unaccompanied children are initially housed in the custody of the Office of Refugee Resettlement, which is responsible for finding a suitable sponsor or other placement for each child. Because the timing of this placement varies significantly, some children's cases may begin in one jurisdiction and be completed in another. They may or may not have counsel at the time of the first appearance and are likely to need new counsel upon release from ORR custody. Unaccompanied children generally cannot afford counsel and must rely upon pro bono assistance, such as that provided by KIND and its network of pro bono volunteers. But the number of children in need of an attorney far exceeds the capacity of KIND and other pro bono legal providers, which can result in delays in placing a child's case or the prospect of a child appearing without counsel. Rigid requirements that penalize children for failing to obtain counsel immediately present an impediment to obtaining counsel that may easily compromise the outcome of the child's case.

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[2] 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008).

[3] American Bar Association, Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States (2018) (hereinafter ABA UAC Standards) at 56.

[4] *See, e.g.*, H. Comm. on the Judiciary, 109th Cong., Dep't of Justice Appropriation Authorization Act, Fiscal Years 2006-2009, H.R. Rep. No. 109-233, at 116-117 (discussing provision enacted and codified at 8 U.S.C. § 1154) (provision "allows child abuse victims time to escape their abusive homes, secure their safety, access services and support that they may need and address the trauma of their abuse").

Finally, the Proposed Rule dictates that good cause cannot be shown in numerous circumstances in which a respondent is pursuing some form of relief or other permanent or temporary resolution to his or her case outside the immigration court's jurisdiction. But many of the forms of relief most often pursued by unaccompanied children, such as asylum,[5] Special Immigrant Juvenile Status, or T and U visas, are forms of humanitarian protection that Congress specifically intended to be adjudicated by USCIS, and frequently require multi-step processes for completion, which can take significant time. Special Immigrant Juvenile Status, for instance, requires a determination by a state court that the child's reunification with a parent is not viable due to abuse, abandonment or neglect and that it is not in the child's best interests to return to his or her country of origin before the child can even apply for SIJS with USCIS. T and U visas include several interim steps before a final visa can be issued. When a child does become eligible to adjust status under these provisions, or as the result of an approved I-130 visa petition, most categories are oversubscribed, leading to lengthy delays in visa availability. While the Proposed Rule characterizes all of these adjudications as "collateral" to the removal proceedings, they are actually integral to the outcome of a child's case. The Proposed Rule ignores the practical reality of delays outside a child's control, strictly limiting continuances to pursue relief—most notably prohibiting continuances if a visa is unavailable within six months or if the form of relief sought is temporary or interim in nature. Failing to recognize the importance of these protections can have devastating consequences, leading to the removal of children who have been found to face danger or abuse in their home country, and blocking them from eventual adjustment of status in the United States, all because their cases could not be completed within an arbitrary and unrealistic time frame. It defies logic that Congress would create specific humanitarian protections for vulnerable populations under the jurisdiction of one agency only to allow another agency to routinely block access to these forms of relief and turn a blind eye to known harm for purposes of administrative efficiency.

III. Specific Provisions of the Rule Will Deny Children Due Process and Block Their Ability to Obtain Relief for Which They Qualify.

While KIND objects to the rule as a whole and urges that it be withdrawn, we draw particular attention to the following sections, which are so rigid that they are likely to undermine meritorious claims, deny access to counsel, and result in unnecessary and cruel orders of removal. We urge that these provisions be deleted or, at a minimum, contain an exception for unaccompanied children.

Proposed 1003.29(b)(i) mandates that good cause cannot be found where the continuance will not materially affect the outcome of the case or where the respondent has not demonstrated by clear and convincing evidence that he or she is likely to be granted the relief sought in a collateral matter. This

[5] Since publication of the NPRM, a federal court has made clear that USCIS's adjudication of unaccompanied children's asylum claims cannot be displaced by an immigration judge's attempt to find that a child has ceased to qualify as unaccompanied, and has enjoined U.S. Immigration and Customs Enforcement (ICE) prosecutors from arguing for such determinations in immigration court. Mem. Op. and Order (Dkt. #143, 144), *J.O.P. v. U.S. Dep't of Homeland Sec.*, No. 19-cv-1944 (D. Md. Dec. 21, 2020) (expanding preliminary injunction). The expanded *J.O.P.* injunction reinforces the need for EOIR to stay its hand when a respondent is pursuing relief over which USCIS has jurisdiction.

provision is overly broad, allowing an immigration judge to deny a request for a continuance when a respondent seeks new evidence, requires additional time to prepare, or is waiting for documentation or corroboration of statements, if the judge believes it will not make a difference in the case. This encourages immigration judges to pre-determine outcomes. Similarly, requiring respondents to establish by clear and convincing evidence that they are likely to obtain relief in a collateral matter essentially requires the immigration judge to conduct a pre-adjudication of the collateral matter—which could include, in a SIJ case for example, a pre-adjudication of facts that must be found by a state court applying state law outside the immigration court's knowledge or jurisdiction. In both cases, this is an inefficient and potentially prejudicial exercise in which the respondents must submit their claims multiple times to have a right to pursue evidence or alternate relief.

***Proposed 1003.29(b)(2)(ii) mandates that good cause cannot be found based on a request to continue a case in order to seek parole, deferred action, or an exercise of prosecutorial discretion*.** This clause is also overly broad, failing to consider unique circumstances that may be present in a given case that may make it more efficient for all parties to continue the case.

***Proposed 1003.29(b)(2)(iii) mandates that good cause cannot be found where a continuance would cause the case to exceed statutorily required completion deadlines*.** KIND has specifically objected to other rules recently promulgated by EOIR that would force the completion of any asylum case within 180 days; we note here that this provision is simply another way to reduce the likelihood that an asylum applicant has adequate time to prepare their case. Given the additional complexity we have described in children's cases, a blanket denial of continuances is especially short-sighted and counterproductive.

Proposed 1003.29(b)(3) mandates that good cause cannot be found where the basis of the motion to continue is the existence of a collateral form of relief unless the applicant demonstrates numerous conditions. Of greatest concern is a requirement that any adjustment of status application will not form the basis for good cause unless a visa is immediately available or is no more than 6 months from availability. Many unaccompanied children ultimately qualify for Special Immigrant Juvenile Status, which allows them to apply for adjustment of status. Since 2015, the SIJS visa category has been oversubscribed for children from El Salvador, Guatemala, and Honduras, leading to significant delays in the completion of these cases. Current visa availability exists only for cases filed on or before February 1, 2018.[6] In the past, Immigration Judges used administrative closure or special calendars to ensure that children's cases were held over until a visa was available, but EOIR has eliminated these options in the name of efficiency. We have recently seen numerous notices to our clients re-calendering cases where the child is merely waiting for visa availability. Without the ability to receive a continuance, children will likely be ordered removed even though they are entitled to relief under the statute. This is an inefficient use of government resources, overlooks congressional intent behind SIJS protection, and also imposes unnecessary hardship, stress and trauma on children who have already suffered significant harm.

[6] Department of State, Visa Bulletin for December 2020, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2021/visa-bulletin-for-december-2020.html.

Proposed 1003.29(b)(3)(ii)(A) further mandates that collateral relief does not include interim forms of relief such as those granted during the T or U visa adjudication process. For unaccompanied children who have been victims of crime or trafficking, this will make it far more difficult for them to successfully pursue these claims.

Proposed 1003.29(b)(4)(ii) permits an immigration judge to grant only one continuance to a respondent in order to obtain counsel, provided that no more than 30 days have elapsed between the initial hearing date and the service of the Notice to Appear. The government argues without any evidence that 30 days is more than adequate for obtaining counsel, yet the dearth of representation in immigration court is well documented. In KIND's experience, many unaccompanied children have already been served with a Notice to Appear far more than 30 days before their first appearance in court and many more do not have counsel at that first appearance. While Congress tasked the Secretary of Health and Human Services (HHS) with ensuring to the greatest extent practicable that unaccompanied children are represented by counsel,[7] many children will be unable to retain counsel quickly enough to prepare for a merits hearing within six months, if ever. This is partly because, outside of a limited HHS program, immigration representation is available only at no expense to the government,[8] and few children will be able to afford to pay for counsel where demand for pro bono services outpaces supply. The American Bar Association (ABA) has recommended that a child's immigration adjudication not take place until a child is represented,[9] and having representation dramatically increases the odds of a successful outcome in immigration court, yet representation rates for children are often alarmingly low.[10] The arbitrary imposition of a 30-day, single continuance, especially for children, appears to be nothing more than a deliberate attempt to limit access to counsel, in violation of individual due process.

***Proposed 1003.29(b)(4)(iii), (iv), and (v) relate to the management of a case, mandating that a representative's workload (ii) or known schedule conflicts (v) do not constitute good cause and limiting continuances for preparation time to one, but only before the pleading has been entered*.** These provisions embed within the rule a distrust of immigration practitioners, suggesting that counsel frequently seek continuances to cover their own failings in managing their workload and schedules or in allowing sufficient time for preparation for a case. Rather than trust an immigration judge's ability to assess the particular situation, including taking measures to address problems that may arise with a particular practitioner, the rule creates blanket provisions and assumptions that harm all respondents

[7] 8 U.S.C. § 1232(c)(5).

[8] 8 U.S.C. § 1362.

[9] ABA UAC Standards at 56.

[10] *See, e.g.*, Misyrlena Egkolfopoulou, The Thousands of Children Who Go to Immigration Court Alone, *The Atlantic* (Aug. 2018) at 3, available at: https://www.theatlantic.com/politics/archive/2018/08/children-immigration-court/

and impose additional burdens on their counsel. These provisions seem particularly designed to penalize pro bono counsel who may be juggling a full caseload while taking the time to volunteer to assist an unaccompanied child. Rather than assume good will on the part of practitioners, these provisions impose a humiliating and petty set of expectations that could make it more difficult for unaccompanied children and others to obtain representation.

IV. Conclusion

The effect of the Proposed Rule is clear: in the name of efficiency, EOIR seeks to reduce the operation of a case to a cold temporal calculation. No matter how complex or sensitive the matters involved, no matter how much trauma a child has experienced, and no matter whether relief is available to the child, the immigration court will not wait. Rather than address the lack of resources available to address growing case backlogs, the Proposed Rule attributes systemic delays and burdens to respondents and penalizes them for circumstances completely outside their control. The Proposed Rule should be withdrawn in its entirety, leaving the discretion with the immigration judge to manage dockets consistent with the needs of each case.

Sincerely,

/s/

Maria Odom
Vice President for Legal Programs
Kids in Need of Defense