



Statement for the Record by Kids in Need of Defense (KIND)

“The U.S. Immigration System: The Need for Bold Reforms”

House Judiciary Subcommittee on Immigration and Citizenship

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Kids in Need of Defense (KIND) is the leading national organization working to ensure that no child faces immigration court alone. KIND was founded by the Microsoft Corporation and the United Nations Refugee Agency (UNHCR) Special Envoy Angelina Jolie. We have served more than 20,000 unaccompanied children in removal proceedings, trained over 50,000 attendees in pro bono representation of these children, and formed pro bono partnerships with over 670 corporations, law firms, law schools, and bar associations. KIND’s social services program facilitates the coordinated provision to unaccompanied children of counseling, educational support, medical care, and other services. And the organization’s programs in Mexico and Central America work to address the root causes of forced migration and help protect the safety and well-being of migrant children at every phase of their migration journey.

From this on-the-ground vantage, KIND has observed the urgent need for bold reforms in the U.S. immigration system’s protection framework for unaccompanied migrant children, who are among the world’s most vulnerable individuals. Without a parent or legal guardian, they have traveled hundreds or thousands of miles to the United States to escape dangers that include extreme violence, sexual abuse, and human trafficking. Many of these children have fled northern Central America, a region gripped by humanitarian crisis. Upon arrival to the United States, they are thrust into a complex and adversarial legal system, in most cases without an attorney. These children face daunting obstacles in navigating that system and pursuing potentially life-saving humanitarian protection.

The unique vulnerabilities of unaccompanied children demand commensurate protections in law and policy—ones affording them enhanced procedural and substantive safeguards across their migration journey. The U.S. immigration system is no less in need of modifications that would substantially increase the efficiency and orderliness of its operations. KIND applauds important steps that the current Congress and the Biden administration have taken towards furnishing those protections and forging those efficiencies. Such actions include the imminent introduction of the U.S. Citizenship Act of 2021, which the White House indicates would ensure legal counsel for unaccompanied children and other vulnerable individuals.¹ KIND also commends President Biden’s Executive Orders impacting unaccompanied children, which, among other critical outcomes, establish a Task Force on Family Separation dedicated to reunifying families separated under the Trump administration, and advance the creation of in-country refugee processing pathways that would provide viable alternatives to children’s dangerous trek north to the United States.

¹ See “Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System” (Jan. 20, 2021); <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/>.

Congress and the Biden administration should build boldly on these promising advances. While sweeping changes are necessary to ensure appropriate protections for unaccompanied children and to achieve efficiency in the immigration system, the present statement focuses on two key priorities: (1) the passage of legislation that, like the provisions contained in the U.S. Citizenship Act, mandate attorneys for all unaccompanied children; (2) systemic changes ensuring the fair adjudication of children’s cases within the immigration courts. The safety, well-being, and in too many instances, lives of unaccompanied children hang in the balance of these reforms.

Congress must guarantee legal representation for all unaccompanied children

The time is long overdue for Congress to pass legislation ensuring that all unaccompanied children have attorneys. This is a nonpartisan, good government proposition rooted in fundamental fairness and government efficiency. Indeed, it is virtually impossible for unaccompanied children to successfully navigate the U.S. immigration system without legal representation. That system is both complex and adversarial, pitting children against federal prosecutors seeking their removal during high-stakes court hearings. Attorneys are essential to upholding children’s legal rights in those hearings, assessing their eligibility for humanitarian relief, and guiding case preparation. Government statistics bear out this necessity: the most recent available Executive Office for Immigration Review (EOIR) data, covering the period of FY 2018 and the first half of FY 2019, reveals that immigration judges were *70 times less likely* to grant relief to unaccompanied children without counsel than their represented counterparts.² Yet though legal representation is vital to ensure the fairness of unaccompanied children’s cases, there is no right to appointed counsel in their immigration proceedings. In fact, over half of unaccompanied children currently lack attorneys.³ Far from a novel problem, year after year many if not most unaccompanied children face immigration court and federal prosecutors alone⁴—including children as young as three or four.

Legal representation of unaccompanied children also increases government efficiency. As EOIR’s backlog nears 1.3 million cases,⁵ measures that protect due process while at the same time strengthening immigration court efficiency and conserving resources are more important than ever. Counsel for unaccompanied children serves all these ends. Specifically, attorneys help screen out inapplicable forms of protection for children and identify when those children are not eligible for relief in the U.S. immigration system. In fact, EOIR’s most recent available data shows that unaccompanied children with attorneys were *almost 4 times more likely* to voluntarily depart to their countries of origin than children without them.⁶ Ensuring counsel for unaccompanied children also helps prevent postponement of hearings to afford children an opportunity to find lawyers. And because attorneys play a critical role in explaining immigration court procedures to children, they make hearings more efficient and preserve judicial resources. Finally, children who are represented

² KIND calculated this figure based on Executive Office of Immigration Refugee (EOIR) data published by the Congressional Research Service in its report titled “Unaccompanied Alien Children: An Overview,” p. 15 (Oct. 9, 2019); <https://fas.org/sgp/crs/homesecc/R43599.pdf>.

³ See KIND Fact Sheet (Jan. 2020); <https://supportkind.org/wp-content/uploads/2019/12/KIND-Fact-Sheet-January-2020.pdf>.

⁴ See, e.g., TRAC Immigration, “Representation for Unaccompanied Children in Immigration Court” (<https://trac.syr.edu/immigration/reports/371/>).

⁵ TRAC Immigration, “Immigration Court Backlog Tool” (through Dec. 2020); https://trac.syr.edu/phptools/immigration/court_backlog/.

⁶ KIND calculated this figure based on Executive Office of Immigration Refugee (EOIR) data published by the Congressional Research Service in its report titled “Unaccompanied Alien Children: An Overview,” p. 15 (Oct. 9, 2019); <https://fas.org/sgp/crs/homesecc/R43599.pdf>.

by counsel have an extraordinarily high appearance rate in immigration court. From FY 2005 through FY 2019, 98% of children with attorneys appeared for court.⁷ By helping keep children in the system, the provision of counsel promotes orderly, efficient EOIR operations.

Importantly, legislation ensuring unaccompanied children’s legal representation would expand the existing federal program’s enlistment of private sector attorneys who represent cases pro bono. KIND, for example, leverages every dollar received in donations into seven dollars in pro bono services. Counsel for unaccompanied children therefore not only serves due process and government efficiency; it constitutes a model public-private partnership that demonstrates the power of the private sector to advance public objectives. Without delay, then, Congress should pass legislation ensuring that no unaccompanied child faces immigration court alone.

Through authorizing legislation, ongoing oversight, and the appropriations process where appropriate, Congress should ensure that immigration courts fairly adjudicate unaccompanied children’s cases.

Even when represented by legal counsel, unaccompanied children face unique obstacles—including incomplete cognitive development and the absence of a legally responsible adult upon their arrival to the United States—to navigating the U.S. immigration system. Only by adjudicating their cases in a way that ensures heightened procedural protections like those mandated under the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)⁸ can the government achieve due process and fundamental fairness for this vulnerable population. This adjudication responsibility falls in significant part to EOIR—into whose proceedings the Department of Homeland Security (DHS) is required to place all unaccompanied children from noncontiguous countries, as well as unaccompanied children from Mexico and Canada who meet TVPRA-mandated screening criteria. Any failure on EOIR’s part to properly discharge that duty can result in children’s return to grave danger in their countries of origin.

Unfortunately, structural defects in the current immigration court system frustrate due process and judicial independence for unaccompanied children and other noncitizens. EOIR and the immigration courts operate within the executive branch, leaving them subject to the political interference of the administration in power. The courts’ specific residence in the Department of Justice means that the Attorney General functions as both chief prosecutor and lead judge, an irreconcilable conflict of interest that risks the pursuit of policy priorities at the expense of fundamental fairness. Compounding these problems, immigration judges are in the Attorney General’s employ and classified as government attorneys, an arrangement giving DOJ far-reaching control over judges’ case management, court location, and employment status.

The Trump administration aggressively exploited these infirmities by driving new policies and rulings that advanced its anti-immigrant agenda while weakening due process for unaccompanied children and limiting the ability of judges to reach fair and impartial decisions in these children’s cases. For example, in September 2017, DOJ’s General Counsel Office issued a memorandum to the EOIR Director concluding that EOIR is not bound by DHS’s determination that a child meets the legal definition of an “unaccompanied alien child.”⁹ The Attorney General issued decisions in *Matter of*

⁷ American Immigration Council, “Fact Sheet—Immigrants and Families Appear in Court: Setting the Record Straight” (Jul. 19, 2019); [Immigrants and Families Appear in Court | American Immigration Council](#).

⁸ William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (“TVPRA”).

⁹ P.L. 107-296.

*Castro-Tum, Matter of L-A-B-R-, and Matter of S-O-G- & F-D-B-*¹⁰ that limited those judges' use of administrative closure, continuances, and termination of proceedings, respectively—key docket management tools that help ensure children have adequate time to acquire legal counsel and prepare their cases, as well as complete out-of-court processes essential to establishing eligibility for relief. Those processes include the pursuit of humanitarian protection benefits available only through U.S. Citizenship and Immigration Services (USCIS), an agency that often takes months, if not years, to adjudicate applications and petitions. And EOIR imposed a 60-day case completion deadline in detained unaccompanied children's cases, further discouraging scheduling accommodations and restricting the ability to obtain relief through USCIS.¹¹ Together, these changes placed children at risk of losing essential protections guaranteed them under the TVPRA while prompting hasty decision-making at the expense of due process.

Congress should address such systemic due process barriers in at least two critical ways. First, to ensure full observance in removal proceedings of the legal rights of unaccompanied children and others, and to foster independence, fairness, and impartiality in judicial decision-making, Congress should pass authorizing legislation creating an independent immigration court system under Article I of the Constitution—a system free from the political interference of any administration. This legislation would dramatically advance due process and access to justice, helping guarantee that all unaccompanied children receive a fair day in court.

Second, Congress should engage in continuing oversight, and use appropriations channels where appropriate, to ensure that EOIR adopts all necessary measures to fairly adjudicate children's cases. Among other actions, EOIR, together with DHS, must ensure that the legal safeguards guaranteed such children under the TVPRA and other laws attach for the full duration of their cases. EOIR USCIS should establish special corps of immigration judges and adjudicators guided by unaccompanied children's best interests, steeped in trauma-informed interviewing and adjudication techniques, and who have undergone in-person trainings in which child welfare and protection experts participate. That immigration judge corps should preside over EOIR dockets dedicated to unaccompanied children, which would not only help ensure fairness in decision-making, but also increase legal service providers' efficiency in identifying and meeting children's representation needs, and by extension, government efficiency in case processing. EOIR must also provide unaccompanied children the time and scheduling accommodations necessary to obtain counsel and prepare their cases, and end the use of due process-deficient video-conferencing technology in unaccompanied children's court hearings unless requested by the child's attorney or child advocate because it is in the child's best interests.

Conclusion

In their first weeks, the 116th Congress and the Biden administration have already made appreciable progress toward advancing a humanitarian protection framework equal to unaccompanied children's unique vulnerabilities. But much work remains. By passing legislation mandating legal counsel for unaccompanied children, and ensuring through legislation and oversight that the immigration courts fairly adjudicate their cases, Congress would bring about essential reforms that would not only

¹⁰ 27 I&N Dec. 271 (A.G. 2018); <https://www.justice.gov/eoir/page/file/1064086/download>; 45 27 I&N Dec. 405 (A.G. 2018); <https://www.justice.gov/eoir/page/file/1087781/download>; 46 27 I&N Dec. 462 (A.G. 2018); <https://www.justice.gov/eoir/page/file/1095046/download>.

¹¹ See KIND, "A Timeline: How the Trump Administration is Rolling Back Protections for Children" (updated Jul. 2020); <https://supportkind.org/wpcontent/uploads/2020/07/A-Timeline-Updated-July-2020-1.pdf>.

enhance the immigration system's efficiency and safeguard due process for these children, but in many cases save their lives.