



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

“Preserving Due Process and the Rule of Law:

Examining the Status of Our Nation’s Immigration Courts”

U.S. Senate Judiciary Committee, Subcommittee on Immigration, Citizenship, and Border Safety

October 18, 2023

Kids in Need of Defense (KIND) is the leading national organization working to ensure the safety and well-being of unaccompanied children at every phase of their migration journey. KIND was founded by the Microsoft Corporation and former United Nations Refugee Agency (UNHCR) Special Envoy Angelina Jolie. We have served more than 20,000 unaccompanied children in removal proceedings, trained over 57,000 attendees in pro bono representation of these children, and formed pro bono partnerships with over 700 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. Additionally, the organization’s programs in Mexico and Central America work to address the root causes of forced migration and help protect children who return to their country of origin.

Through our work, KIND attorneys witness areas where the immigration law and court structure has fallen short of achieving the standards of due process and rule of law that are vital to ensuring legal protection for unaccompanied children and seeking to navigate the immigration system. In order to improve due process for unaccompanied children in immigration proceedings, we recommend that Congress and the Executive branch work together to ensure the provision of lawyers to all unaccompanied children, create specialized children’s dockets in each immigration court for the adjudication of unaccompanied children’s cases, and work to insulate the immigration courts from inappropriate political interference.

Guaranteeing legal representation for unaccompanied children is essential to achieving due process and well-functioning immigration courts.

KIND was founded on the belief that no child should be forced to appear in immigration court alone. As our work has expanded across the United States and through the region, we have seen that legal counsel is essential to ensuring due process for unaccompanied children in their immigration proceedings. Indeed, it is virtually impossible for children to navigate protection systems without lawyers to assess their eligibility for humanitarian protection, assist with case preparation, and advocate for them during adversarial hearings. Attorneys have a dramatic impact on children’s cases; recent data show that immigration judges were almost 100 times more likely to grant legal relief to unaccompanied children with counsel than to those without.¹

This data demonstrates how much attorneys mean the difference between relief and deportation, and by extension, safety and danger for vulnerable children, but counsel for children is also essential for the immigration courts to function in an orderly and fair way. Attorneys help reduce waste of judicial resources by screening out inapplicable forms of protection, explaining the proceedings to children,

¹ Congressional Research Service, *Unaccompanied Alien Children: An Overview*, at 17, Sept. 2021.

presenting clear materials and arguments to the court, potentially conferring with opposing counsel ahead of hearings, and ensuring that children appear for their hearings. These essential functions reduce strain on the courts by avoiding using court time unnecessarily and reduce burdens on judges and court staff.

As a matter of both fairness and efficiency, therefore, the U.S. government should ensure that all unaccompanied children in U.S. immigration proceedings have attorneys. To realize this vision, the Executive branch and Congress must ensure greater appropriation of funding for children's counsel; allocation of a larger proportion of existing funding to the provision of counsel; postponement of children's immigration court hearings until they obtain lawyers; and ultimately the passage and enactment of legislation, such as the Fair Day in Court for Kids Act, mandating counsel for every unaccompanied child.

Counsel for children is widely supported by the American public. A 2021 national survey of registered voters commissioned by KIND found that 77 percent of the electorate, including 86 percent of liberals, 80 percent of moderates, and 68 percent of conservatives, believe that unaccompanied children in immigration proceedings should be provided an attorney if they cannot afford one.² At present, many if not most unaccompanied children lack representation. Far from a novel problem, though, underrepresentation of unaccompanied children is a chronic one. In Fiscal Year 2013, for example, only 46 percent of unaccompanied children in removal proceedings had attorneys—in the following fiscal year, just 14 percent. Given the dire consequences of unaccompanied children facing removal proceedings alone, one child without a lawyer is too many. The U.S. government must finally and fully confront this systemic due process failure.

Creating a Specialized Children's Docket for Unaccompanied Children's Cases

As part of a holistic vision to create a child-centered approach to the processing of children's cases, KIND supports the establishment of a children's court or children's division of an independent immigration court to adjudicate children's cases that would focus on the best interests of children, including prioritizing child safety, permanency, and well-being. Until such a court is established, KIND is calling upon the Executive Office for Immigration Review (EOIR) within the Department of Justice (DOJ) to renew and expand specialized children's dockets within each immigration court that would be dedicated to handling unaccompanied children's claims. Children's dockets should focus on ensuring due process, expanding child-friendly court practices, and streamlining applications for applicable legal relief for unaccompanied children's immigration cases.

The unique vulnerability of unaccompanied migrant children demands a unique system to adjudicate their claims. Often alone, these children face daunting obstacles in navigating the complex U.S. immigration system and obtaining potentially life-saving legal protection, and children's dockets could help ease part of this complexity. EOIR's Director David Neal recognized the value of children's dockets in a recent Policy Memorandum in which he writes: "Immigration Judges are reminded to employ the child-friendly practices described in other agency guidance, such as scheduling dedicated juvenile dockets, employing child-sensitive questioning, and allowing the use of a Friend of the Court, among other practices."³ In

² Kids in Need of Defense, Public Support for Legal Representation of Unaccompanied Children, Oct. 2021, available at <https://supportkind.org/resources/national-polling-finds-overwhelming-public-support-for-ensuring-legal-representation-of-unaccompanied-children/>.

³ EOIR, Policy Memorandum 21-08, Encouraging and Facilitating Pro Bono Legal Services, Nov. 2021, available at: <https://www.justice.gov/eoir/book/file/1446651/download>.

order to maximize fairness for unaccompanied children and efficiencies for the immigration courts, children's dockets should consistently utilize several elements:

- **Training**: Children's dockets should be overseen by a specially trained corps of judges who have experience working with children. Their training should include headquarters-level training in which non-governmental experts in children's cases and protection participate, and it should cover methods for explaining the proceeding to children; encouraging children to freely discuss the elements of their claims; child-sensitive questioning techniques, including trauma-informed interviewing and adjudication methods; and an understanding of the limits of a child's ability to provide testimony. Department of Homeland Security (DHS) attorneys representing the government in these cases should also be trained in child-sensitive practices and children's unique claims for immigration relief.

Specialized judges and attorneys steeped in considerations and procedures affecting the adjudications of children's cases would create new efficiencies that will streamline the court's operations in addition to strengthening due process. For example, personnel expert in children's issues would be better able to identify claims for relief and potential non-adversarial procedures that may be both less traumatic for children and less resource-intensive for courts, such as applications for relief that could be completed entirely through USCIS.

- **Child-focused Adjudications**: Specialized children's dockets should employ a less adversarial approach than immigration court proceedings designed for adults, and they should utilize a model that places children at the center of the proceedings. Judges, DHS attorneys representing the government, USCIS, and the child's representatives should operate with the goal of identifying options available to the child consistent with the law. This approach will reduce the burden on EOIR, DHS, and USCIS by limiting duplication of efforts. It will also increase the likelihood of a just result in the child's case.
- **Coordination with Legal Services Organizations**: Judges and administrators overseeing children's dockets should coordinate with the legal service providers and pro bono attorneys that serve unaccompanied children in their jurisdiction with the goal of ensuring that every unaccompanied child has representation. Opportunities for collaboration include calendaring children's cases on consistent days so that attorneys can be present at court to meet unrepresented children; providing space for nonprofit organizations and pro bono attorneys to meet with children; and closing children's cases until and unless they are able to secure a lawyer. Specialized children's dockets could also help ensure that children are connected to needed services that are responsive to the outcome of their immigration case, including education, health, or counseling services, and reintegration services for children who will be returning to their country of birth. By helping ensure legal counsel for children, these dockets would minimize unneeded court time and, in many cases, prevent delays in proceedings that would otherwise be necessary to afford children an opportunity to obtain counsel in the first place.

Insulating the immigration courts from the political branches.

The current structure of the immigration courts—housed within DOJ—leaves the courts too susceptible to political interference that reduces judicial independence and has been used to harm unaccompanied children and others with proceedings before the courts. This includes Attorney General authority to issue precedential decisions and changes to policy governing immigration judges and courts. KIND supports

the establishment of an independent, Article I immigration court in order to improve due process, reduce political influence, and increase judicial independence. This new court should include a separate children's division with specially trained judges and government attorneys to address the unique needs of children in immigration court.

Certification authority

Under current law, the Attorney General has "certification" authority to transfer cases before the Board of Immigration Appeals (BIA) to him or herself. The Attorney General can also reopen and self-refer cases that were previously decided by the BIA. The Attorney General's decisions in these cases have precedential and binding effect on immigration judges and the BIA. This broad authority has been misused to alter immigration law in the past, and it almost certainly will be misused in the future. Creating an independent court housed outside DOJ would remove this problematic authority.

For example, in some certification decisions in the past, the Attorney General limited immigration judges' authority to administratively close cases, grant continuances, or terminate proceedings. These precedents forced judges to proceed with cases even where the individual was likely to receive legal relief from USCIS if given enough time, an especially important avenue of relief for unaccompanied children who have a right to seek asylum in the first instance from USCIS and many of whom qualify for Special Immigrant Juvenile status (SIJS), which is a form of relief that requires children to appear before USCIS and/or state family courts. Continuances are also a valuable tool to delay a case while an unaccompanied child tries to obtain a lawyer.

Other certification decisions in the past limited those who could qualify for asylum in ways that were particularly harmful to unaccompanied children, by for example, limiting claims pertaining to domestic violence or gang violence perpetrated by non-governmental actors and those based on membership in a family unit.

Certification authority also highlights an inherent conflict of interest in the current structure of the immigration courts. Although trial-level immigration prosecutors are housed at DHS, DOJ's Office of Immigration Litigation defends immigration cases on behalf of the government when the cases go to federal court. When decisions rendered under certification authority are reviewed in circuit courts of appeals, the Attorney General, who acted as judge in the decisions, supervises the government attorneys who are then playing the role of prosecutor.

Policy Changes

EOIR can alter their agency policies and practices in ways that have beneficial or detrimental impact on unaccompanied children's cases. In the past, EOIR's General Counsel issued a memorandum that stripped the status of "unaccompanied alien child" from some children and the corresponding legal protections that are owed to children with that status.⁴ The memorandum advised that immigration judges are not bound by DHS's prior determinations that children meet the statutory definition of an "unaccompanied alien child" and may terminate their unaccompanied status. When children are stripped of this status, they lose the protections afforded to unaccompanied children by Congress under the Trafficking Victims Protection

⁴ Memorandum from Jean King, General Counsel of Executive Office for Immigration Review, to James R. McHenry III, Acting Director of EOIR, Legal Opinion re: EOIR's Authority to Interpret the Term Unaccompanied Alien Child for Purposes of Applying Certain Provisions of TVPRA (Sept. 19, 2017), <https://cliniclegal.org/file/download/download/public/4778>.

Reauthorization Act of 2008 (TVPRA),⁵ which codified heightened legal procedures designed to uphold fairness for unaccompanied children in the U.S. immigration system and to prevent their return to danger.

Another EOIR memorandum titled “Guidelines for Immigration Court Cases Involving Juveniles” further impairs due process protections for unaccompanied children.⁶ This memorandum replaced and weakened longstanding guidelines that directed the use of child-friendly practices, such as child-sensitive questioning techniques, to improve the ability of children to attend and meaningfully participate in immigration proceedings that may determine their safety and future. Specifically, the guidance, while referencing the potentially complicated and sensitive nature of children’s cases, restricts judges’ discretion to consider children’s best interests in creating child-appropriate courtroom environments and advances a skeptical tone toward claims by unaccompanied children. The guidelines also dilute measures designed to address the unique developmental needs of children, including by narrowing children’s opportunities to gain familiarity with hearing environments before they are required to deliver often painful and difficult testimony in support of their legal claims.

As noted above, immigration judges have at times been stripped of their ability to control their dockets, but other agency policy changes further eroded immigration judges’ independence and discretion. In the past, the agency worked to rush cases by implementing case completion quotas as part of immigration judges’ performance reviews. This change, which has since been revised, compelled judges to decide cases under strict deadlines or face potential discipline. The resulting pressure to rush through cases often deprived unaccompanied children of opportunities to secure essential legal representation and to obtain humanitarian protection. At times, it also led to nonsensical outcomes in which USCIS approved children’s applications for humanitarian protection, yet as those children waited for the visas associated with that relief to become available, judges knowingly ordered them removed from the United States. Immigration judges should have roles that prioritize their independence and recognize the significance of their duties. They should be evaluated on their ability to fairly administer the law, not simply the speed with which they can rush through cases.

These policy changes made at the agency level have significant legal and due process consequences for children. An independent immigration court would be insulated from the political agenda of the President and could not be as easily manipulated to remove such protections.

Conclusion

The changes outlined above are part of the solution to greatly advancing due process and rule of law in unaccompanied children’s proceedings. KIND stands ready to work with Congress and federal agencies to implement these and other recommendations that move the courts toward fairer and more orderly operations.

⁵ William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

⁶ Memorandum from MaryBeth Keller, Chief Immigration Judge, EOIR, Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children, Dec. 20, 2017, <https://www.justice.gov/eoir/file/oppm17-03/download>.