November 1, 2023

Ms. Raechel Horowitz
Chief, Immigration Law Division
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

Submitted at www.regulations.gov

Re: Executive Office for Immigration Review, RIN 1125-AB18, EOIR Docket No. 021-0410, 88 Fed. Reg. 62242

Dear Ms. Horowitz:

Kids in Need of Defense (KIND) respectfully submits the following comments in response to the invitation for public comment on proposed regulations (the "Proposed Rule") published September 8, 2023 by the Department of Justice (DOJ), Executive Office for Immigration Review (EOIR) in a notice of proposed rulemaking ("Notice") titled Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 88 Fed. Reg. 62242.

Founded fifteen years ago, KIND is the leading national nonprofit organization providing free legal and social services to unaccompanied or separated children who face removal proceedings in immigration court. Since January 2009, KIND has received referrals for more than 30,000 unaccompanied children from 80 countries. With sixteen locations across the United States, KIND serves children through a combination of direct legal services and the training and mentorship of pro bono attorneys from over 800 law firms, law departments, law schools, and bar associations. KIND's social services program facilitates support including counseling, educational support, medical care, and other services. KIND also works to address the root causes of child migration from Central America, and advocates for laws, policies, and practices to improve the protection of immigrant children in the United States.

Many unaccompanied children seek relief from removal and protection from threats to their lives and safety that caused them to flee their countries of origin: gang violence, violence in the

home, gender-based violence, parental abandonment, human trafficking, persecution, and other forms of deprivation of rights. KIND's staff attorneys and pro bono attorneys regularly appear on behalf of their child clients before EOIR's immigration courts and the Board of Immigration Appeals (the "Board") while also pursuing forms of relief including special immigrant juvenile status (SIJS), asylum, T or U nonimmigrant status, and adjustment of status. This collective experience of advocating for thousands of young clients informs the comments we submit today, focusing primarily on the imperative of safeguarding the rights of children, particularly unaccompanied children, as they navigate proceedings before EOIR.

The Proposed Rule, if finalized, would replace regulations finalized in December 2020[1] (the "2020 Rule") but enjoined March 10, 2021.[2] In large part, the Proposed Rule would restore regulations and practices that were in place before promulgation of the enjoined 2020 Rule. Notice at 62242. For the reasons detailed in KIND's September 2020 comments on the proposal that led to the 2020 Rule,[3] KIND supports removing the enjoined 2020 Rule from the Code of Federal Regulations (CFR), and restoring procedures that better promote fairness, independent judgment, and flexibility in EOIR adjudications. KIND is providing the comments below to express support for several provisions of the Proposed Rule, and to recommend changes to other aspects of the Proposed Rule. The comments address the following main themes: terminology, briefing schedules, *sua sponte* reopening and reconsideration, administrative closure, dismissal and termination, and the need for recognition of the full scope of United States Citizenship and Immigration Services' (USCIS) initial jurisdiction over asylum claims.

A. Terminology

Taking a productive step, the Proposed Rule defines the term "unaccompanied child" to be synonymous with the statutory definition of "unaccompanied alien child" found at 6 U.S.C. § 279(g)(2). Proposed § 1001(hh). In addition, the Proposed Rule establishes "noncitizen" as a defined term. Proposed § 1001(gg). These two proposed definitions reflect advocates' longstanding practices as well as a 2021 EOIR policy memorandum that followed 2021 Executive Orders and Supreme Court decisions in directing agency employees to avoid the term "alien," except in quoting legal authority.[4] The same EOIR policy memo called for replacing the term "unaccompanied alien child" with terms such as "unaccompanied noncitizen child" or "UC."[5]

---

[1] Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 81588 (Dec. 16, 2020).
[2] *Centro Legal de la Raza* v. *Exec. Off. for Immigr. Rev.,* 524 F. Supp. 3d 919 (N.D. Cal. 2021).
[3] KIND comments on the 2020 Rule are available at: https://supportkind.org/resources/kind-comment-on-eoir-docket/.
[4] Exec. Ofc. for Imm. Rev., PM 21-27, *Terminology* (Jul. 26, 2021), available at: https://www.justice.gov/eoir/book/file/1415216/download.
[5] *Id.* at 2.

Establishing the two regulatory definitions will reduce usage, even in quoting legal authority, of an outmoded term that has become pejorative.[6] This simple innovation will also make written and spoken communications clearer and more concise by officially connecting the use of "unaccompanied child" to the statutory definition to which certain basic legal safeguards are keyed. KIND therefore supports the inclusion of these definitions in the final rule.

B. Briefing Schedules Before the Board

KIND supports the Proposed Rule provisions that would restore and retain consecutive briefing to the Board for non-detained respondents, with 21-day briefing deadlines and the rules on briefing extensions that predated the 2020 Rule. Proposed § 1003.3(c)(1). The complexity and novelty of many issues raised in unaccompanied children's cases, and the fuller development of the record permitted by consecutive briefing, supports the restoration of these measures.

C. *Sua Sponte* Reopening and Reconsideration

KIND supports the Proposed Rule's restoration of the authority of both the Board and immigration judges to *sua sponte* reopen or reconsider their orders. Proposed §§ 1003.2(a), 1003.23(b). KIND agrees that, as stated in the Notice, adjudicators' *sua sponte* authority serves as a "safety valve" that avoids unjust removal of noncitizens otherwise eligible for relief. Notice at 52266. This safety valve is particularly important for respondents who are children; they are generally dependent on others to ensure their attendance at removal proceedings, and are therefore particularly vulnerable to the risk of *in absentia* orders of removal. Because of the time and number limitations on motions to reopen and reconsider, a child who cannot secure the joinder of the Department of Homeland Security (DHS) to a motion may be dependent on the adjudicator's exercise of *sua sponte* reopening or reconsideration to obtain a just result.

D. Administrative Closure

KIND lauds EOIR for taking this opportunity to codify the availability of administrative closure -- a tool that, in KIND's experience, has been proven to enhance fairness and improve outcomes in children's removal proceedings. Administrative closure and subsequent recalendaring can be deployed to pause proceedings to afford children the necessary time to establish eligibility for relief, while reducing unnecessary and stressful court appearances. We believe that administrative closure also realizes efficiencies for EOIR and for DHS as a party to removal proceedings. The discussion that follows serves to reinforce some of the reasons in favor of adopting such regulations, and responds to the DOJ's request for comment on the specified factors for adjudicating motions to administratively close or recalendar, including "whether the proposed factors should be revised in any way," Notice at 62261-62.

[6] *See id.* at 1 n.1 ("The Library of Congress[] stopped using the term alien in headings in 2016, noting that 'the phrase illegal aliens has become pejorative.' See Library of Congress, *Library of Congress to Cancel the Subject Heading 'Illegal Aliens'* (Mar. 22, 2016).").

Affirming Administrative Closure Authority

The Proposed Rule expressly affirms the authority of immigration judges and the Board to temporarily suspend cases through administrative closure, and to recalendar administratively closed cases, in accordance with regulatory standards. Proposed § 1003.9(b)(5) (immigration judges' authority); Proposed § 1003.1(d)(1)(ii) (the Board's authority). EOIR regulations already conferred such authority, as three recent federal appellate decisions have recognized.[7] However, express codification of administrative closure authority is valuable in light of the 2020 Rule, which codified a now-vacated Attorney General decision finding no basis for general administrative closure authority in statute, regulation, or Attorney General delegation.[8]

Administrative closure is often warranted in children's removal proceedings, in part because USCIS, not EOIR, has exclusive or initial jurisdiction over most forms of humanitarian relief available to children in removal proceedings. *Compare* 6 U.S.C. § 271(b) and 8 U.S.C. § 1158 (b)(3)(C) *with* 8 C.F.R. § 1240.1(a)(1)(ii). As noted above, many children served through KIND have qualified for humanitarian relief from removal on the basis of violence and other harms that precipitated their flight – experiences likely to give rise to trauma. DOJ guidance recognizes that a history of trauma may "interfere with a child's ability or willingness to report information about violent incidents."[9] In addition, capacities for perception, memory, recall, and other cognitive skills may be limited and variable during a child's development, even in older children.[10] Accordingly, children need adequate time to develop trust in the professionals assisting them, to disclose facts underlying their claims, and to develop supporting evidence for their claims. Timelines for out-of-court processes may be unpredictable and dependent on factors beyond a child's control, such as adjudicators' scheduling and caregivers' availability to help children attend appointments with counsel and complete other necessary steps. By codifying the availability of administrative closure in proceedings before the immigration courts and the Board, the Proposed Rule provides flexibility for the variable timelines needed for children to establish their eligibility for relief.

Standards for Administrative Closure and Recalendaring

The Proposed Rule sets forth standards for deciding motions for administrative closure or recalendaring for both the Board and the immigration courts. Proposed §§ 1003.1(*l*)(3) (Board standards); 1003.18(c)(3) (immigration court standards). While some aspects of these proposed standards provide appropriate guidance for children's cases, other aspects need improvement.

---

[7] *Arcos Sanchez* v. *Att'y Gen.,* 997 F.3d 113, 122 (3d Cir. 2021); *Meza Morales* v. *Barr,* 973 F.3d 656, 667 n.6 (7th Cir. 2020); *Romero v. Barr*, 937 F.3d 282, 289 (4th Cir. 2019).
[8] *Matter of Castro Tum,* 27 I&N Dec. 271, 282-83 (A.G. 2018).
[9] U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Child Forensic Interviewing: Best Practices* at 5 (Sept. 2015), available at: https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/248749.pdf.
[10] *Id.* at 3-4.

The Proposed Rule specifies that, absent unusual identified and supported reasons, a unilateral motion for administrative closure should be granted where the nonmoving party has affirmatively indicated non-opposition. Proposed Rule §§ 1003.1(*l*)(3), 1003.18(c)(3). This provision would facilitate timely resolution of respondents' motions for administrative closure when attorneys representing DHS indicate non-opposition but choose to forego formal written responses, as is common practice. However, to extend this efficiency, the Proposed Rule should further provide that when DHS does not respond to a motion for administrative closure in a timely manner, or within a specified period, the motion should be granted absent unusual identified and supported reasons. This addition to the rule would help avoid indefinite pendency of an otherwise approvable motion for administrative closure, and thereby eliminate unnecessary immigration court hearings, which entail missed school for children and missed work for their caregivers, as well as expenditure of time for the court and DHS.

For administrative closure and recalendaring motions that are not joint or affirmatively non-opposed, the Proposed Rule calls for EOIR adjudicators to consider the totality of the circumstances, and enumerates seven non-exclusive, non-dispositive factors for each type of motion that may be weighed as appropriate in the circumstances of the case. Proposed §§ 1003.1(*l*)(3) (Board standards); 1003.18(c)(3) (immigration court standards). To highlight one provision that provides needed flexibility for children's cases, the Proposed Rule specifies that pendency of an application, petition, or other action outside of EOIR proceedings is not required for a grant of administrative closure. Proposed Rule §§ 1003.1(*l*)(3) (Board standards); 1003.18(c)(3) (immigration court standards).[11] This provision will facilitate appropriate use of administrative closure in circumstances where initiating an application or action is delayed by factors outside a child's control. Children encounter many such factors, including but not limited to the effect of trauma and/or capacity limitations on a child's ability to prepare their claim for relief, as discussed above;[12] wait times for free or reasonably priced medical or psychological evaluations sought for evidentiary purposes; and the requirement under the laws of many states for a period of in-state residency before initiating an action for appointment of a custodian. The Notice seeks comment on whether the rule "should set out specific scenarios in which administrative closure may be appropriate" absent a pending petition, application, or other action. Notice at 62622. Such scenarios could certainly include children's cases, but KIND does not believe limitation of this provision to specific scenarios is warranted.

In contrast, KIND takes issue with the framing of a factor based on "[t]he likelihood the noncitizen will succeed on any petition, application, or other action" pursued outside of proceedings. Proposed Rule § 1003.1(*l*)(3)(i)(D) (Board); 1003.18(c)(3)(i)(D) (immigration court). In the Notice, the DOJ also seeks public input on an alternative proposal: "whether the proposed rule should specify that a request for administrative closure to allow for the adjudication of a petition, application, or other action should generally be granted as long as

[11] *See also* Proposed Rule §§ 1003.1(*l*)(3)(i)(D); 1003.18(c)(3)(i)(D) (referring to a noncitizen's stated intent to pursue a petition, application, or other action outside of proceedings).
[12] See n.9 and accompanying text.

the noncitizen demonstrates a reasonable likelihood of success on the merits, and that the noncitizen has been reasonably diligent in pursuing such relief." Notice at 62262. While recognition of potential eligibility for relief could appropriately support a decision to grant administrative closure, regulations should not permit EOIR adjudicators to use this factor to support a denial of administrative closure. If a respondent is to have a *meaningful* opportunity to "establish[] that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion,"[13] that opportunity must entail a full and fair adjudication by the authority vested with jurisdiction to grant the benefit or privilege. Where USCIS has exclusive or initial jurisdiction over the application or petition for relief, due process requires that EOIR defer to USCIS' congressionally delegated authority and refrain from prejudging the outcome of the USCIS adjudication.[14]

A fortiori, where the process in question is a state court process relating to SIJS, EOIR adjudicators are not recognized authorities in state family law or child welfare law, and should therefore refrain from inferring from limited available information that a state court process is unlikely to succeed. As an example, a state trial court's denial of one or more SIJS predicate findings could, under the rule as proposed, prompt an EOIR adjudicator to opine that state court action is unlikely to be successful, only to have the state trial court's denial overturned on appeal, as is a common occurrence.[15] We therefore recommend modifying the fourth administrative closure factor to specify that EOIR adjudicators may consider potential eligibility for relief in granting a motion for administrative closure, but may not consider potential ineligibility in denying such a motion. This formulation recognizes the distinct authorities of EOIR and USCIS, and aids due process by facilitating access to, but preventing undue intrusion on, USCIS' jurisdiction and full and fair adjudication of each relief application on its merits.

Through the Notice, the DOJ "seeks comments regarding whether the proposed rule should include any further protections for noncitizens who wish to have their cases adjudicated despite DHS's desire to seek administrative closure," Notice at 62261. For reasons related to those in the preceding paragraph, KIND believes that the Proposed Rule should clarify that where relief is pending before EOIR, DHS's desire to conserve resources must not be permitted to displace a noncitizen's opportunity to receive a full and fair adjudication of a request for relief.

For evaluating motions to recalendar, one of the nonexclusive factors encompasses "the length of time that elapsed between when the case was administratively closed and when the noncitizen filed the petition, application, or other action." Proposed Rule §§ 1003.1(l)(3)(ii)(D); 1003.18(c)(3)(ii)(D). Even though the Notice states that "the length of time is not, on its face,

[13] 8 C.F.R. § 1240.8(d).

[14] An exception to such a rule could exist in cases where a respondent is undisputedly facially ineligible for the relief to be sought (e.g., where it is undisputed that a respondent is 22 years of age and the respondent intends to begin the process for establishing eligibility for SIJS, which requires petitioning USCIS before age 21).

[15] *See, e.g., In re Domingo C.L.,* No. M201602383COAR3JV, 2017 WL 3769419, at *6 (Tenn. Ct. App. Aug. 30, 2017) (collecting cases).

determinative," Notice at 62621-22, this factor leaves open the possibility that the unavoidably time-consuming processes for children's relief applications may be misinterpreted as dilatory conduct on the child's part and lead to premature recalendaring of cases. The Proposed Rule should be amended to specify that this factor must not be applied to support recalendaring over the respondent's objection, absent express consideration of the circumstances contributing to the interval between administrative closure and filing of a petition, application, or other action. This recommendation is made for the same reasons spelled out in the above discussions supporting the Proposed Rule's affirmation of administrative closure authority and the specification that a pending application is not a requirement for administrative closure. Specifically, as detailed above, multiple factors beyond a child's control may contribute to the timing of any petition, application, or other steps taken in the process of establishing eligibility for relief.

In addition, this rulemaking presents an opportunity for EOIR to provide clarity to adjudicators and the public on EOIR's ability to process motions relating to counsel appearances while a case remains administratively closed. Currently, in the absence of express public-facing guidance on point, legal representatives may be hesitant to proceed with motions for substitution or withdrawal out of concern that those motions could require, or result in, premature recalendaring of an administratively closed case. The forthcoming regulations could meet the need for clear public guidance by providing that where a change in representation occurs while a case is administratively closed, a motion to substitute counsel or motion to withdraw as counsel may be filed and served without an accompanying motion to recalendar the case; and that recalendaring shall not be required for the processing or disposition of such motions. Such clear guidance will also help to achieve EOIR's goal of increasing pro bono representation of respondents by reducing uncertainty over the ability to seek a change in representation irrespective of the posture of the case.

E. Dismissal and Termination

The Notice seeks comment on the Proposed Rule's distinction between dismissal authority and termination authority. Notice at 62622. The Proposed Rule helpfully reduces semantic confusion perpetuated by an overruled 2018 precedent decision,[16] by specifying that motions to dismiss based on reasons outside the regulatory grounds for dismissal shall be deemed motions to terminate. Proposed Rule §§ 1003.1(m)(1); 1003.18(d)(1). This clarification restores focus to the substantive bases for disposition of a case instead of diverting attention to semantic or formal distinctions.

KIND is in favor of the proposed provisions establishing grounds for mandatory termination of removal proceedings, insofar as those grounds apply in children's cases. Proposed Rule §§ 1003.1(m)(1); 1003.18(d)(1). The Department seeks public comment on whether the proposed termination standards are warranted and whether these standards should be

[16] *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018), overruled by *Matter of Coronado-Acevedo,* 28 I&N Dec. 648 (A.G. 2022).

broadened, narrowed, or altered. Notice at 62622. In KIND's view, at least two of the factors supporting termination should be broadened.

First, under the Proposed Rule, one basis for mandatory termination is a joint or affirmatively non-opposed motion, absent "unusual, clearly identified, and supported reasons" for denial. Proposed §§ 1003.1(m)(1)(i)(G); 1003.18(d)(1)(i)(G). The Proposed Rule should further provide that when DHS does not respond to a motion for termination in a timely manner, or within a specified period, the motion should be granted absent unusual, clearly identified, and supported reasons. As with unopposed motions for administrative closure, discussed above, this expansion of the Proposed Rule would help avoid indefinite pendency of an otherwise approvable motion. It would further avoid problematic scenarios, such as prolonged obstruction of USCIS' jurisdiction to adjudicate an adjustment of status application due solely to the pendency of removal proceedings.

Second, one proposed basis for discretionary termination is where "[a]n unaccompanied child, as defined in 8 CFR 1001.1(hh), states an intent in writing or on the record at a hearing to seek asylum with USCIS, and USCIS has initial jurisdiction over the application pursuant to section 208(b)(3)(C) of the Act." Proposed §§ 1003.1(m)(1)(ii)(A); 1003.18(d)(1)(ii)(A). Pursuant to longstanding USCIS policy,[17] supported by a nationwide preliminary injunction,[18] USCIS' initial asylum jurisdiction extends not only to an unaccompanied child as defined in Proposed § 1001.1(hh), but also to individuals previously determined to be unaccompanied children, absent an affirmative act by Immigration and Customs Enforcement, U.S. Customs and Border Protection, or the Office of Refugee Resettlement to terminate such a determination prior to the filing of the individual's asylum application.[19] The Proposed Rule should expressly include in this enumerated basis for discretionary termination the full scope of cases that are amenable to USCIS' initial asylum jurisdiction, and not just a subset thereof. There are several reasons for this. First, the expansion of this basis for discretionary termination would likely result in permanently removing from EOIR's docket additional cases that may be resolved through USCIS adjudication. Second, to differentiate among similarly situated asylum applicants, as the current Proposed Rule does, raises fairness concerns. Third, EOIR does not have a mandate to exercise asylum jurisdiction over asylum applicants who were previously determined to be UC but no longer meet the definition found at Proposed § 1001.1(hh). The Board's decision in *Matter of M-A-C-O-*[20] does not require that result, nor does any statute, regulation, or federal court precedent. *Matter of M-A-C-O-* held only that immigration judges *may* determine that

[17] USCIS Asylum Division, *Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (May 28, 2013)("2013 Memo").

[18] *J.O.P. v. U.S. Dept. of Homeland Security,* No. 8:19-cv-01944 (D.Md. Dec. 21, 2020), available at: https://www.uscis.gov/sites/default/files/document/memos/Order_Granting_Class_Certification_Granting_in_Part_Plaintiffs_Mtn_to_Amend_PI.12.21.2020_for_website.pdf. KIND is part of the counsel team appointed to represent the class in the *J.O.P.* litigation.

[19] In such cases, USCIS will exercise its initial jurisdiction even if the individual has turned 18 or reunified with a parent or legal guardian. 2013 Memo at 2.

[20] 27 I&N Dec. 477 (BIA 2018).

they have jurisdiction over an asylum application filed by an applicant who was previously determined to be an unaccompanied child but turned 18 years of age before filing the application; the decision is silent on EOIR's exercise of jurisdiction over cases involving children who are under age 18 but have reunified with a parent or legal guardian.[21] Finally, and most important, termination will allow children amenable to USCIS' initial jurisdiction to focus on pursuing their claims for asylum in the non-adversarial setting that Congress prescribed for this vulnerable population. Moreover, for all of these reasons, the Proposed Rule should categorize this population as entitled to mandatory termination, rather than making termination discretionary.

KIND appreciates the opportunity to share the above recommendations. Please feel free to reach out to us at wwylegala@supportkind.org if we may be of assistance in these efforts.

Sincerely,

/s/

Jennifer Podkul
Vice President for Policy and Advocacy
Kids in Need of Defense

[21] *Id.* at 479-80, 480 n.3.