

New Guidance on Children’s Cases in Immigration Court

On December 21, 2023, the Executive Office for Immigration Review (EOIR) issued a Director’s Memorandum¹ containing new guidance to the immigration courts on children’s cases. As EOIR notes, cases involving children require “special consideration,” and the updated guidance significantly improves relevant immigration court policies. Properly implemented, those policies stand to strengthen the fairness and efficiency of unaccompanied children’s immigration proceedings while better safeguarding these children against labor exploitation and trafficking.

Background

The unique characteristics of unaccompanied children’s cases demand a unique system to adjudicate their claims. These children have traveled hundreds or thousands of miles to the United States, often on their own, to escape extreme violence, sexual abuse, human trafficking, and other dangers. Their age, developmental stage, communication and comprehension barriers, trauma history, frequent lack of legal representation, and other factors pose daunting obstacles to navigating complex, adversarial immigration proceedings and obtaining potentially life-saving humanitarian protection. Without procedural safeguards responsive to these vulnerabilities, it is virtually impossible for unaccompanied children—including children at risk of labor exploitation and trafficking—to receive a fair legal process.

The absence of such safeguards also produces widespread court inefficiencies. For example, dockets mixing unaccompanied child and adult cases often sacrifice economies of scale. In many instances unaccompanied children in immigration court proceedings have cases pending concurrently before U.S. Citizenship and Immigration Services (USCIS), such that failures by the court system to employ docket management tools that permit those USCIS cases to unfold result in duplicative adjudications and waste of court resources. And lack of legal representation for unaccompanied children in many instances necessitates prolonged judicial attempts to explain complex court procedures and/or delays in proceedings to afford those children an opportunity to secure counsel.

Other judicial settings, including juvenile and family courts, recognize that children’s cases are unique and must be approached differently than those of adults. The best practices learned in those courts should be applied in immigration court and doing so requires a formalized separate structure for children’s cases as a first step.

Prior EOIR guidance took limited measures toward recognizing and advancing child-appropriate immigration court procedures. For example, the Director’s Memorandum on *Encouraging and Facilitating Pro Bono Legal Services*,² the *Immigration Court Practice Manual*,³ and prior versions of the *Guidelines for Immigration Court Cases Involving Juveniles*,⁴ all reference the option for immigration courts to create distinct juvenile dockets. Many courts took an incremental step toward this approach by assigning unaccompanied children’s cases to particular judges, but practice varied among individual courts, and few courts structured their juvenile dockets to fully maximize fairness and efficiency. Making matters worse, the *Operating Policies and Procedures Memorandum* (OPPM) 17-03, issued in 2017,⁵ weakened previous guidance establishing child-friendly court practices and introduced a tone of suspicion of children and their vulnerabilities.

Over the course of its history, the immigration court system has fundamentally oriented itself to adults, not children. That system has failed systemically to properly account for unaccompanied children’s particular vulnerabilities, spurring widespread due process deprivations as well as procedural inefficiencies that sap limited court resources. The Administration has now taken steps to mitigate this failure by issuing much-needed guidance establishing more child-appropriate protocols.

Summary and Analysis of Guidance

The new Director’s Memorandum supersedes and rescinds the prior guidelines for children’s immigration court cases established in OPPM 17-03. It frames its guidance as a tool to help ensure that immigration courts have appropriate structures in place to handle the cases of this vulnerable population.

The Memorandum states that each immigration court will have a specialized juvenile docket for cases in which the respondent is under 21 years old and is not part of a family unit. These dockets will be held separate from adult cases and will be overseen by dedicated judges who will receive ongoing training. Moreover, the Department of Homeland Security (DHS) announced a commitment to create a cohort of specially trained attorneys within the Office of the Principal Legal Advisor (OPLA) to represent the government in the specialized juvenile dockets and developed a framework intended to improve the well-being of children in immigration court.⁶

KIND has long supported the consistent utilization of specialized children’s dockets. In order to maximize fairness for unaccompanied children—not least those children vulnerable to labor exploitation and trafficking—and efficiencies for the immigration courts, KIND has advocated for children’s dockets to consistently utilize several elements:

- **TRAINING:** Children’s dockets should be overseen by a specially trained corps of judges who have experience working with children. DHS attorneys representing the government in these cases should also be trained in child-sensitive practices and children’s unique claims for immigration relief.
- **CHILD-FOCUSED ADJUDICATIONS:** Specialized children’s dockets should employ a less adversarial approach than immigration court proceedings designed for adults. 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 and minimizing adjudication redundancies by enabling USCIS case processing to proceed as appropriate.
- **COORDINATION WITH LEGAL AND SOCIAL 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: consolidating children’s initial master calendar hearings on consistent days so that attorneys can regularly schedule attendance to meet unrepresented children while maximizing economies of scale for the court system; providing space for nonprofit organizations to meet with children; permitting Friend of the Court appearances by legal services providers at juvenile dockets; and granting ample continuances until children are able to secure a lawyer.

This policy brief reviews the Director’s Memorandum in light of the three elements discussed above and lays out recommendations to the Biden Administration and Congress on optimal guidance implementation as well as additional needed reforms. A comprehensive, side-by-side comparison of this Memorandum with prior guidance issued in 2017 and 2008 is available [here](#).

Training

The Director’s Memorandum states that all judges will receive training on children’s cases, and the DHS announcement specifies that there will be dedicated, specially trained government attorneys handling children’s proceedings in immigration court. In order to create the greatest impact, trainings for judges and attorneys should occur when these personnel are first assigned to the juvenile dockets and at least annually thereafter. Training should involve headquarters-level training in which nongovernmental experts in children’s cases and protection participate, and it should cover topics including children’s claims for immigration relief; child-sensitive questioning techniques; developmental- and trauma-informed practice; methods for explaining the proceedings to children; and the concept of the best interests of the child.

Child-focused Adjudications

The Director’s Memorandum and the DHS announcement contain guidance that will advance fairness and efficiency by creating more child-centered proceedings in a number of ways, including: (1) child-friendly courtroom procedures; (2) procedural safeguards, including providing additional information to children regarding their opportunities for immigration relief; and (3) screenings for trafficking, abuse, or neglect.

COURTROOM PROCEDURES

EOIR’s Memorandum includes courtroom procedures that should be utilized in juvenile dockets and certain other cases involving children. These include:

- efforts to explain the proceedings to children,
- encouraging judges to remove their judicial robe,
- allowing child respondents to visit an empty courtroom when practicable,
- encouraging judges to permit reasonable modifications that foster an atmosphere where children may be able to more fully participate, including allowing children to bring toys or other personal items to court and to testify sitting next to an adult companion,
- allowing time for the court interpreter to develop rapport with the child,
- ensuring that children are competent to testify, encouraging judges to explain the oath in a developmentally appropriate way, and noting that it may be appropriate to rely on a child’s written statement instead of requiring that they testify in court,
- encouraging the use of child-sensitive questioning,
- limiting the number and length of hearings a child must attend,
- and limiting the number of people in the courtroom.

Going to court can be stressful for anyone, but particularly children who may not fully understand what is happening or what to expect. These commonsense adjustments can help create a courtroom environment in which children are more at ease, better understand their own proceedings, and are more able to participate—all crucial elements to creating a fair process.

PROCEDURAL SAFEGUARDS

Relief from removal – The Director’s Memorandum states that an immigration judge, “should always inform a child of any relief from removal for which they may be eligible.” Further, when a child appears to be eligible for a form of relief that requires the filing of applications or petitions outside of immigration court, the Memorandum instructs judges to inform the child of where their application or petition must be filed. Relatedly, DHS announced that the OPLA attorneys who will manage cases on the juvenile docket will be expected to identify “any appropriate applications for protection or relief with USCIS for which the juvenile noncitizen may be eligible.” Although this information sharing is not a substitute for full legal representation for children, it is a valuable contribution to ensuring children are aware of the options available to them, creates a less adversarial adjudication in which both judges and government attorneys have an additional role to play in ensuring a fair outcome, and helps streamline resource allocation through improved recognition of USCIS adjudications.

In absentia processes – When children do not appear for their scheduled hearings in immigration court, the Director’s Memorandum states that the OPLA attorney will request a 30-day continuance to reverify the child’s address information. This process improves upon the status quo by requiring judges and government attorneys to take steps to inquire into whether notice of the hearing was sent to the child’s proper address. There are many factors outside children’s control that might prevent them from appearing for a hearing, including frequently not being properly informed of the hearing date and their need to rely on adults to transport or accompany them to court.

Status as an unaccompanied child – Prior guidelines on children’s cases suggested that an unaccompanied child’s status as such could change based on turning 18 years old or by reuniting with a parent. Such an interpretation is inconsistent with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)⁷ and is inconsistent with the position of USCIS. USCIS policy continues to treat a child as an unaccompanied child if they were previously determined to be so by DHS, even if he or she has turned 18 or has been reunified with a parent or legal guardian. The new Director’s Memorandum improves upon its predecessors by omitting suggestion that an unaccompanied child’s status does not remain static throughout their immigration proceedings.

Credibility assessments – The Director’s Memorandum notes that children will “generally not be able to testify with the precision and clarity of an adult” and encourages judges to avoid drawing negative conclusions about a child’s credibility in the same way one would for an adult.

Best interests determinations – The Director’s Memorandum states that immigration judges have a duty to consider the best interests determinations that are prepared by child advocates. Although best interests determinations do not currently provide a legal basis for eligibility for immigration relief, it is important that judges presiding over children’s cases are consistently considering these determinations and utilizing them as a factor in their discretionary decisions.

Case dismissal – The Director’s Memorandum states that immigration judges should anticipate receiving a motion to dismiss a case in situations where the child respondent has filed an asylum application with USCIS, and it notes that efficiency and fairness are served by such dismissals where there is no dispute between the parties. The DHS announcement calls for a streamlined review of prosecutorial discretion requests on the juvenile docket and directs OPLA attorneys to collaborate with those who represent child respondents on joint motions and other discretionary requests. These actions will reduce burdens on children and conserve government resources by reducing situations where two government agencies are simultaneously reviewing the same application for relief.

TRAFFICKING, ABUSE, NEGLECT

The Director’s Memorandum directs immigration judges to “inquire who accompanied the child to court in order to determine if additional questioning is necessary to confirm the child is not being trafficked.” It also states that judges may inquire about potential abuse and neglect. The DHS announcement states that, “The juvenile docket will help identify and support children and teenagers who may be victims of human trafficking or child exploitation. Juvenile points of contact will be trained to recognize common indicators of these crimes in order to seek engagement by our ICE colleagues to provide protection and support to these children when needed, while ensuring fair adjudication of their cases before the court.”

It is commendable that EOIR and DHS are taking steps to improve identification of child trafficking, but more could be done to successfully identify children in vulnerable situations. In many cases, the best way to identify these situations at court is to provide an opportunity for children to have a confidential conversation with a lawyer and social worker. A child is more likely to disclose sensitive information in such a conversation, as opposed to in open court, where a child might fear that it is not safe to speak freely. As discussed further below, immigration courts should seek to engage providers of legal and social services to be present at court during juvenile dockets in order to create opportunity for the providers to support children in pursuing their legal claims for relief, receiving the support they need to thrive, and identifying those who are in situations of exploitation. Connecting children with legal representation can further protect them from trafficking and exploitation because it could lead to legal relief that can help ensure children’s stability and security.

Coordination with Legal Services Organizations

The Director’s Memorandum notes the particular importance of legal representation for children and encourages immigration judges to facilitate pro bono representation for children who do not have lawyers. The Memorandum also encourages the participation of Friends of the Court in proceedings where respondents are not represented by legal counsel. The DHS announcement notes that the juvenile dockets will “maximize opportunities for children and teenagers appearing in immigration courts to access outside legal advice and counsel.” These provisions should be read in conjunction with EOIR’s Director’s Memorandum on *Encouraging and Facilitating Pro Bono Legal Services*,⁸ which directs each court to create a pro bono committee through which the court engages with outside entities regarding increasing legal representation.

Engaging the community of organizations that provide legal services to children will be an essential component of implementing successful juvenile dockets. In the past, New York City’s immigration court offered a model for how the immigration courts can coordinate with providers of legal services.⁹ The court consolidated the cases of unaccompanied children on a juvenile docket and partnered with nonprofit and pro bono attorneys to ensure that attorneys were present on juvenile docket days to provide legal screenings and, wherever possible, representation at no cost to the child. The court also provided a space for such screenings to take place, along with advance notice to the charitable agencies staffing the docket of the number of new children who would need screening. Thanks to the juvenile docket, hundreds of vulnerable, low-income children received the legal representation they—and the court—needed to properly evaluate their eligibility for immigration relief under federal law. Unfortunately, in 2017, New York City’s immigration court stopped consolidating cases of unaccompanied children on a juvenile docket and ceased to partner with legal services providers in connecting unrepresented children to legal screenings at court. As a result, children and their caregivers had to navigate court on their own and find legal representation independently.

Moving forward

For the recent announcements by EOIR and DHS to be successful, the agencies need to utilize the structure of the juvenile dockets to make children’s proceedings meaningfully different than those of adults. Congress also has a vital role to play in further advancing improvements to children’s proceedings. In addition to the recommendations offered in the previous section, KIND urges the Administration and Congress to take the below actions:

Administrative Actions

- **EOIR and DHS should maintain regular engagement** with legal services providers, child advocates, and other stakeholders and should implement juvenile dockets in ways that maximize the number of children receiving legal and social services assistance at court, including by:
 - **scheduling initial master calendar hearings on select days** to limit the number of days providers need to be at court in order to meet with all unrepresented children;
 - **providing space in the court building** for unrepresented children to have confidential legal consultations and screenings;
 - **identifying additional financial resources** that could be directed toward increasing the number of providers with capacity to provide this assistance;
 - **granting ample continuances** until children are able to secure a lawyer;
 - **coordinating with community organizations** to provide services during juvenile dockets to help ensure that children are connected to needed services, including education, health, or counseling services, and reintegration services for children who will be returning to their country of origin.
- **EOIR, in coordination with DHS, should issue an annual report** on the status of implementation of the guidance, including the name and number of immigration courts implementing juvenile dockets; training that has been provided to juvenile docket judges; protocols for assessing individual court compliance with the Memorandum as well as corrective actions taken in the event of noncompliance; methods courts are using to facilitate legal representation for children; and any immigration

court resources conserved by utilization of juvenile dockets;

- **EOIR and DHS should coordinate with the Office of Refugee Resettlement (ORR)** within the Department of Health and Human Services, which is tasked with ensuring legal representation for unaccompanied children to the greatest extent practicable, so that ORR can identify opportunities to support and improve juvenile dockets with its resources.

Congressional Actions

- **Congress should exercise ongoing oversight** to support appropriate implementation of juvenile dockets;
- **Congress should pass the Immigration Court Efficiency and Children's Court Act.**¹⁰ This bipartisan, bicameral legislation draws on best practices for children's proceedings employed in other judicial settings to establish a Children's Court within EOIR. The Children's Court would include specialized judges, child-appropriate adjudications, coordination with legal services providers, and a dedicated cohort of attorneys within DHS. The bill would improve due process in children's proceedings while also introducing efficiencies that could help ease the immigration court backlog.
- **Congress should robustly fund legal services** for unaccompanied children through ORR.

Endnotes

- 1 Executive Office for Immigration Review, Director's Memorandum 24-01: *Children's Cases in Immigration Court*, Dec. 21, 2023, <https://www.justice.gov/d9/2023-12/dm-24-01.pdf>.
- 2 Executive Office for Immigration Review, *Encouraging and Facilitating Pro Bono Legal Services*, at 6, Nov. 5, 2021, <https://www.justice.gov/eoir/book/file/1446651/download>.
- 3 Executive Office for Immigration Review, *Immigration Court Practice Manual*, Sec. 4.22, <https://www.justice.gov/eoir/reference-materials/ic/chapter-4/22>.
- 4 Executive Office for Immigration Review, Operating Policies and Procedures Memorandum 17-03: *Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children*, at 5, Dec. 20, 2017, <https://www.justice.gov/eoir/file/oppm17-03/download>.
- 5 *Id.*
- 6 U.S. Immigration and Customs Enforcement, ICE, EOIR establish 'juvenile docket' for children and teenagers, Dec. 21, 2023, <https://www.ice.gov/news/releases/ice-eoir-establish-juvenile-docket-children-and-teenagers>.
- 7 Pub. L. No. 110-457, 122 Stat. 5044 (2008).
- 8 Executive Office for Immigration Review, *Encouraging and Facilitating Pro Bono Legal Services*, Nov. 5, 2021, <https://www.justice.gov/eoir/book/file/1446651/download>.
- 9 During this time, the court also allowed for city agencies, including the departments of education and health, to meet with children while they were at the court. The presence of these agencies helped ensure that children were enrolled in school and health programs for which they were eligible, furthering child well-being and safety.
- 10 S.3178; H.R.6145.