Young Center for Immigrant Children's Rights Statement for the House Committee on the Judiciary Hearing, Subcommittee on Immigration and Citizenship

The U.S. Immigration System: The Need for Bold Reforms
February 11, 2021

Unaccompanied immigrant children have been at the front lines of the comprehensive assault on immigrants for the last several years. Treating children as both scapegoats and guinea pigs, the Trump administration mounted a campaign to villainize immigrant children, keep them in government custody indefinitely, incarcerate their parents and sponsors and strip away procedures intended to provide them with a fair hearing. It is past time for the federal agencies that have responsibility over immigrant children in adversarial removal hearings to recognize and treat children as children; to consider their best interests in every decision; and to ensure their safety while in the United States and before ordering their return to home country.

The Young Center for Immigrant Children's Rights plays a unique and specific role among the many government and non-governmental actors who interact with and make decisions about unaccompanied and separated immigrant children in the United States. Since 2004, the Young Center has been appointed as the independent Child Advocate for thousands of unaccompanied and separated children from around the world. Our interdisciplinary staff of lawyers and social workers, supported by hundreds of bilingual volunteers, apply the "best interests of the child principle" enshrined in United States child protection law and the Convention on the Rights of the Child to advocate for each child's best interests. The Young Center also engages in policy initiatives to develop and promote standards for protecting the best interests of children while they are subject to decision-making by government officials.

Below are proposals for bold reforms to protect the rights of all immigrant children:

1. Ensure A Child's Best Interests Is a Primary Consideration in Every Decision
In every decision made about an immigrant child, the child's best interests shall be a primary consideration. Every state, the District of Columbia, and Puerto Rico has laws requiring courts to consider the best interests of children when making decisions about them. Most statutes, as well as international law, consider: a child's safety; a child's expressed interests; a child's right to family integrity; a child's right to liberty; a child's right to development; and a child's right to identity. A "best interests of the child" standard encompasses both a substantive right—the child's right to have their best interests considered in any decision about them—and procedural protections to ensure "an evaluation of the possible impact" of decisions on a child. This does not preclude other considerations, such as the child's stated interests, a parent's stated interests, or concerns for the safety of others. But the individual child's best interests must inform every decision, with decisionmakers held accountable for meeting this obligation. Congress and federal agencies should require consideration of children's best interests in every decision, and ensure that policies and procedures address children's unique status.[1]

[1] In 2016, the federal Interagency Working Group on Separated and Unaccompanied Children released a Framework for Considering the Best Interests of Children, which defines "best interests" for children in immigration proceedings and sets forth proposed changes to agency policy and practice that would ensure consideration of children's best interests in every decision. *See* Subcomm. on Best Interests, Interagency

2. Prioritize Children's Safety and Placement with Family

When a child is first identified by immigration authorities the sole focus should be finding a safe placement with family, minimizing time spent in institutional, government care. Children apprehended with parents or other family members shall not be separated unless the parent or family member poses an imminent danger to the child, a decision that would be promptly reviewed by a judge with family law expertise. A child's immigration case should not begin until the child is in safe family or community-based housing. Congress and federal agencies should ensure that children's release to family is prioritized, that immigrant children receive the same protections as children in other proceedings (e.g., those set forth in the Family First Prevention Services Act)[2], and that children are not subjected to adversarial immigration proceedings while in government custody, unless they affirmatively request a hearing.

3. Establish Community and Home-Based Care as the Norm, Not the Exception

Neither unlicensed nor secure settings conform with ORR's best interests mandate and the health needs of children. In the domestic U.S. child welfare system, there is a long trend towards the use of family- and community-based settings for children. The passage of laws like the Family First Prevention Services Act (2018)[3] establishes Congress's stance that family is the best setting for children. Congress and federal agencies should ensure that children in government custody are not separated from parents and legal guardians; are released expeditiously with adult (non-parent) family members to avoid harmful separations; and when placed in government custody, are reunified with family as quickly as possible. For children without family, the government must prioritize placement in small, community-based settings—the minimum standard for any child separated from a parent or family. HHS must end the use of congregate care facilities (which range from 50- to 100- to 400- to 1400-bed facilities) and also secure facilities; and it must reorient its programs so that children receive services in the community while they live with family.[4]

Working Grp. on Unaccompanied and Separated Children, *Framework for Considering the Best Interests of Unaccompanied Children* 5, 9-11 (2016).

[2] Family First Prevention Services Act, 42 U.S.C. § 622 (2018).

[3] *Id*.

[4] Our recommendation for the appropriate care of children with behavioral, developmental, or mental health symptoms is safe reunification with family and support for the family to access community-based services. Children without sponsors, and children who cannot be quickly released to sponsors, should be placed with a family or in a facility of 25 children or fewer which would provide extensive support, including case management and psychological/psychiatric services overseen by qualified, pediatric experts. In contrast, the current ORR system often places children in secure settings that further traumatize them and exacerbate existing problems, leading to indefinite detention. Community and family-based settings are in line with mental health experts' and child welfare recommendations, as well as the United Nations Convention on the Rights of Persons with Disabilities, which requires an absolute ban on deprivation of liberty on the basis of disability. *See* Human Rights Watch, *Children with disabilities: Deprivation of liberty in the name of care and treatment* (Mar. 7, 2017), *available at* https://www.hrw.org/news/2017/03/07/children-disabilities-deprivation-liberty-name-care-and-treatment#; Bazelon Center for Mental Health Law, *Diversion to What? Evidence-Based Mental Health Services That Prevent Needless Incarceration* (Sept. 2019), *available at* www.bazelon.org/wp-content/uploads/2019/09/Bazelon-Diversion-to-WhatEssential-Services-Publication_September-2019.pdf.

4. Strengthen and Safeguard Due Process
Universal legal representation and access to independent Child Advocates are basic guardrails for unaccompanied children in adversarial proceedings. Congress and federal agencies must expand representation to all unaccompanied children in removal proceedings. HHS must expand access to independent Child Advocates wherever children are detained or appear in immigration court. DOJ must end the use of "video-telephonic hearings" or VTCs for any child in government custody, unless the child requests an emergency hearing; it must provide full and simultaneous interpretation for children in their best language; and it must develop separate spaces and separate procedures for the adjudication of children's claims, so that children have a fair opportunity to be heard and understood. Providing those threshold protections is not only possible, but overdue.

5. Require Specialization
Every decisionmaker in a child's case must have specialized training in child development, the impact of trauma on a child, and experience working with children from different cultural backgrounds. Without such training, adults risk misunderstanding children or missing critical information, which undermines children's right to a fair process. To the extent possible, decisionmakers in children's cases should work exclusively on children's cases, to minimize the possibility that children are seen or treated as adults, or that adult standards are applied to children's cases. Congress and federal agencies should quickly establish programs to ensure adequate and ongoing training for all decisionmakers in children's cases.

6. Prevent Repatriation to Unsafe Situations
A system designed to "do no harm" to children must consider the consequences of decisions, including the decision to repatriate a child who is not yet an adult and not yet able to fend for herself, protect herself, and meet all of her needs without the care of family members or the assistance of others. For these reasons, the principle of "safe repatriation" must have teeth. This principle imposes upon the government the burden to prove that a child will be safe upon return before the child is repatriated. Absent that determination of safety, the child will have the opportunity to seek protected status that lasts until adulthood. Congress should enact laws explicitly prohibiting the return of children to unsafe situations, and DOJ and DHS should collaborate to establish a procedure through which children who are denied relief but who have provided evidence of unsafe repatriation will be provided safety and protection—for example, following the model proposed in *Reimagining Children's Immigration Proceedings*.[5]

7. Extend Childhood to Age 21
There is consensus in the scientific community that children continue to develop and mature well into their 20s. Federal and state law recognize the importance of treating youth or young adults between the ages of 18 and 21 differently than adults. The Federal Fostering Connections to Success and Increasing Adoptions Act[6] provides federal funding to states that allow youth to remain in foster care after they turn 18 years old. U.S. immigration law itself is inconsistent in how it defines childhood. The Immigration and Nationality Act defines a "child" as someone who is under the age of 21 (and unmarried). It also includes provisions to protect children from

[5] Young Ctr. for Immigrant Children's Rights, *Reimagining Children's Immigration Proceedings: A Roadmap for an Entirely New System Centered around Children* (2020).
[6] Fostering Connections to Success and Increasing Adoptions Act, 42 U.S.C. § 675 (2008).

"aging out" of that status due to backlogs in processing applications for benefits. Congress should work to reform immigration law so that all immigrant youth are recognized as children until they reach at least the age of 21.

8. All Children Share the Same Rights and Protections

All immigrant children in immigration proceedings, whether just arriving at the border or encountered within the United States should hold the same rights. These include the right to express their wishes, to safety, liberty, family unity, identity, and their right to have their best interests considered in all decisions. In 2015, a federal court held that the protections of the Flores agreement apply equally to unaccompanied and accompanied children. As recognized in that decision, there is little justification for treating immigrant children in fundamentally different ways simply because of when they arrived or where they were apprehended in the United States, particularly when those circumstances may be beyond the child's control. To prevent the disparate treatment of immigrant children, Congress and federal agencies ensure that protections for immigrant children—both procedural and substantive—apply to all immigrant children, regardless of the location, time, or manner in which they are apprehended or present themselves to immigration authorities. If extending these protections to children will impact the immigration case of a parent or other accompanying family member, any distinctions in treatment should be resolved in the child's favor, taking all steps necessary to preserve the child's right to family integrity.

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