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Representation Matters: No Child Should Appear in Immigration Proceedings Alone

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Each year, thousands of immigrant children are placed into court proceedings in which government prosecutors seek to deport them unless those children can prove they have a right to stay in the United States. Although some children participate in family immigration proceedings, many face immigration proceedings alone: they may be “unaccompanied” because they entered the United States without a parent or legal guardian or were separated from them at some point, or they may have different immigration claims from their parent or legal guardian.

Many children have legal options that establish their ability to remain in the United States, including Special Immigrant Juvenile Status (SIJS), a legal protection for children who

have been abused, abandoned, or neglected; asylum, for those fleeing persecution in their home country; and protections for survivors of crime or human trafficking. However, these options are nearly impossible to access without the assistance of trained attorneys who help children access the relief they are entitled to under the law, inform them about their rights, demystify immigration proceedings, and fight for consistent and reasonable standards in court.¹ Unfortunately, although the right to be represented by legal counsel is recognized in immigration proceedings, the right to appointed counsel is not.² Children who are unable to find free counsel or afford private counsel must navigate the immigration system alone.

Limitations of Immigration Court Data

It is difficult to provide information on children in immigration court because of a lack of data on child immigration cases. The statistics used in this brief come from the Executive Office of Immigration Review (EOIR), which operates United States immigration courts, and, from FY 2005–2017, released public data on unaccompanied children arriving to the United States. In FY 2018, EOIR began to

include accompanied children in this data as well. Unfortunately, the Transactional Records Access Clearinghouse (TRAC), an independent organization that uses the Freedom of Information Act (FOIA) to collect and publicize government data, recently determined that the post-2017 data is inconsistent and unreliable.^a Due to these limitations, Vera only shares data here from before FY 2018.

^a Transactional Records Access Clearinghouse (TRAC), “Immigration Court’s Data on Minors Facing Deportation is Too Faulty to Be Trusted,” database, December 2, 2021, accessed December 6, 2021, <https://trac.syr.edu/immigration/reports/669/>.

Children Cannot Navigate Complex Immigration Law on Their Own

Federal courts describe immigration law as labyrinthine, extraordinarily difficult to navigate without expert legal assistance—even for adults with formal education.³ To be successful in making their case, the person in removal proceedings must determine what kinds of legal options they can pursue (recognizing that eligibility can change over time and vary by jurisdiction and age), interact with multiple government agencies, collect and present evidence, testify and call witnesses, and make legal arguments against trained government attorneys. The way that immigration courts operate can be alienating and dehumanizing. Technical legal language makes it difficult for people to understand proceedings and fill out relevant forms, and limited English proficiency exacerbates those difficulties.⁴

What is extremely challenging for an adult is nearly impossible for a child. Several legal options commonly available to children to fight deportation involve processes outside of immigration court, making their cases more complex. For example, SIJS involves a separate proceeding in a state court that requires a child to file the case in the appropriate jurisdiction; send proper notice of the case to all necessary parties; and address legal principles regarding the care, custody, and best interest of the child before a state court judge.⁵ The child must then petition U.S. Citizenship and Immigration Services (USCIS), adhering to strict filing rules and sometimes tracking down or opposing decisions by USCIS officials. Asylum for unaccompanied children, as well as other humanitarian forms of relief, involves similar filings before USCIS. Children in family immigration proceedings face the additional complexity of assessing whether they have a claim for relief distinct from their parent, which may require severing the immigration case and pursuing that

relief alone. These processes require the child to continue to appear in person at court and government offices and monitor their case progress for years.

The developmental distinctions between adults and children—children’s relative difficulty in evaluating risks, regulating emotions, and understanding the consequences of decisions—make it even harder for children to navigate legal proceedings.⁶ As detention center staff, family members, or judges share information with children, they can feel pressured to take courses of action that are not in their best interests.⁷ Imbalances of power, the adversarial nature of immigration court, and limited experience with the legal system exacerbate these difficulties.⁸



Access to representation varies across geographic regions; some places have more resources and immigration attorneys available, some fewer.⁹ Over the past several years, government programs, nonprofit organizations, and pro bono attorneys have expanded their capacity to represent children, but, even with this expanded capacity, only 64 percent of

unaccompanied children in proceedings from FY 2005–2017 obtained counsel at some point during their cases.¹⁰ Because federal representation programs prioritize unaccompanied children, the rate of representation for accompanied children is likely lower. In addition to finding a legal service provider with available case capacity (and sometimes commuting for hours to meet with that provider), children must often overcome the suspicion of family members about the utility of contracting an attorney and attending court.¹¹

Limited resources for representation have led some funders, nongovernmental organizations, and pro bono attorneys to implement selection criteria or conduct “case triaging,” in which they decline to represent children perceived as less sympathetic or whose cases may be more complex. This triage system systematically denies defense to children who are most traumatized and uncomfortable sharing their experiences with unfamiliar adults; Indigenous children and those who speak rare languages; and children and youth viewed as less “deserving,” such those who have had contact with the criminal and juvenile justice systems.¹²

Children Need a Universal Representation System

The training and expertise of an immigration attorney—ideally an attorney with a trauma-informed practice and access to integrated social services—is critically important for children in immigration proceedings. In addition to understanding the nuances of immigration law, immigration attorneys who work with children should be trained to understand the way trauma manifests in youth, account for competing interests in children’s lives, and incorporate integrated social services for their clients. With assistance of counsel, the odds of being ordered to leave the country decrease substantially. From FY 2005–2017, unaccompanied children with legal representation at some point during their cases were more than seven times more likely than unrepresented unaccompanied children to receive an outcome that allowed them to remain in the United States.¹³ It is so difficult to prove a case without a lawyer that, regardless of the strength

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of their immigration claims, more than 90 percent of unrepresented unaccompanied children were ultimately issued an order of removal or voluntary departure.¹⁴

Representation is also a key factor in ensuring that children appear in court. Regardless of representation status, children have fairly high court appearance rates—76 percent of unaccompanied children whose cases began from FY 2005–2017 continued to appear at their court hearings. Among represented unaccompanied children, 97 percent appeared at their court hearings.¹⁵ Representation can also have positive spillover effects in clients’ lives outside of their legal cases, as attorneys connect children with social services that assist them with registering for and attending school, accessing health care, and securing other benefits.¹⁶

Federal and state governments have already acknowledged that children require special accommodations in legal proceedings, including the right to appointed counsel in at least some cases involving delinquency, status offenses, dependency, termination of parental rights, and judicial bypass proceedings.¹⁷ In immigration court, judges are encouraged to make certain modifications for child respondents, including permitting the child to visit the courtroom before the hearing, scheduling a separate docket for children’s cases, explaining the proceedings at the outset of the hearing, and questioning children in age-appropriate language and tone.¹⁸

These accommodations in immigration court are critical, but they cannot overcome the imbalance of power a child faces when they are alone in the courtroom. Despite the complexity and high stakes of immigration proceedings, they remain a setting where children lack the most critical guarantee of their rights: court-appointed counsel.

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For more information

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Endnotes

- 1 Jennifer Stave, Peter Markowitz, Karen Berberich, et al., *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity* (New York: Vera Institute of Justice, 2017), 9, 35, 41, <https://perma.cc/7E2A-WKRP>; and Jennifer Huynh, “La Charla: Documenting the Experience of Unaccompanied Minors in Immigration Court,” *Journal of Ethnic and Migration Studies* 47, no. 3 (2019), 627.
- 2 8 U.S.C. § 1229a(b)(4)(A) (2012), <https://perma.cc/EA7H-WKV5>. Note that since 2010, a Ninth Circuit court decision created an exception to this rule by mandating that certain immigrants detained by the U.S. Department of Homeland Security (DHS) who are found mentally incompetent to represent themselves must be provided with counsel at government expense. See *Franco-Gonzalez v. Holder*, 10 CV 02211 DMG (C.D. CA August 2, 2010), <https://perma.cc/J543-JL5R>.
- 3 See *Tim Lok v. INS*, 548 F.2d 37 (2d Cir. 1977), <https://perma.cc/A89W-Y5C2>, in which the Second Circuit likened the Immigration and Nationality Act to King Minos’s labyrinth. See also *Drax v. Reno*, 338 F.3d 98, 99-100 (2d Cir. 2003), <https://perma.cc/336P-WYG9>.
- 4 Huynh, “La Charla,” 2019, 8-9; and Stave, Markowitz, Berberich, et al., *Evaluation of the New York Immigrant Family Unity Project*, 2017.
- 5 See generally U.S. Citizenship and Immigration Services, “Special Immigrant Juveniles,” <https://perma.cc/2SCE-TBNB>.
- 6 Wendy Shea, “Almost There: Unaccompanied Alien Children, Immigration Reform, and a Meaningful Opportunity to Participate in the Immigration Process,” *U.C. Davis Journal of Juvenile Law and Policy* 18, no. 1 (2014), 148-171, 167; Hillary Farber and Donna Bishop, “Joining the Legal Significance of Adolescent Development Capacities with the Legal Rights Provided by *In Re Gault*,” *Rutgers Law Review*, 60, no. 1 (2008), 125-173, https://www.researchgate.net/publication/228186842_Joining_the_Legal_Significance_of_Adolescent_Developmental_Capacities_with_the_Legal_Rights_Provided_by_In_Re_Gault; and Kevin Lapp, “A Child Litigant’s Right to Counsel,” *Loyola of Los Angeles Law Review* 52, no. 4 (2019), 463-500, <https://perma.cc/Y7SB-97D6>.
- 7 Shea, “Almost There,” 2014, 168; and Huynh, “La Charla,” The City University of New York, 2019, 7-8.
- 8 Linda Kelly Hill, “The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children,” *Boston College Third World Law Journal* 31, no. 1 (2011), 41-69, 64, <https://perma.cc/M23W-PPJK>; Farber and Bishop, “Joining the Legal Significance of Adolescent Development Capacities with the Legal Rights Provided by *In Re Gault*” 2008; and Marielos G. Ramos, “Due Process and the Right to Legal Counsel for Unaccompanied Minors” (MA diss., City University of New York, 2018), <https://perma.cc/7QCT-FFXK>.
- 9 Kelly Hill, “The Right to Be Heard,” 2011, 49-50.
- 10 From October 2005 to September 2017, 293,485 unaccompanied children had cases initiated in immigration court. Of those, 186,528 (64 percent) were represented, including both completed cases and cases that are still pending. Transactional Records Access Clearinghouse (TRAC), “Juveniles — Immigration Court Deportation Proceedings,” database (Syracuse, NY: Syracuse University, accessed November 12, 2021), <https://trac.syr.edu/phptools/immigration/juvenile/>. This information is refreshed monthly and may change as new data is added.
- 11 See for example American Bar Association, “*Tu Futuro, Tu Voz*: Your Future, Your Voice: Advice About the Immigration Legal Process for Youth,” video, undated, https://www.americanbar.org/groups/public_interest/immigration/resources/tu-futuro-tu-voz/.
- 12 Shani M. King, “Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors,” *Harvard Journal on Legislation* 50, no. 2 (2013), 331-384, 342, 381, <https://perma.cc/BL4W-EARR>.
- 13 From FY 2005-2017, only 9 percent of unaccompanied children’s cases without representation resulted in a positive outcome, compared with 69 percent of those with representation. This includes only those cases that began from FY 2005-2017 and are completed as of September 2021. Twenty-eight percent of cases from that period are still pending. TRAC, “Juveniles — Immigration Court Deportation Proceedings,” database, accessed November 12, 2021. This information is refreshed monthly and may change as new data is added.
- 14 Of the 89,381 unaccompanied children’s cases without representation from FY 2005-2017 that have been completed, 80,937 (91 percent) resulted in a removal order or voluntary departure. TRAC, “Juveniles — Immigration Court Deportation Proceedings,” database, accessed November 12, 2021. This information is refreshed monthly and may change as new data is added.
- 15 Of the 293,485 unaccompanied children whose cases began from FY 2005-2017, 69,711 (24 percent) were ordered removed *in absentia*. Of the 186,528 unaccompanied children with representation, only 5,969 (3 percent) have received a removal order *in absentia*. TRAC, “Juveniles — Immigra-

tion Court Deportation Proceedings,” database, accessed November 12, 2021. This information is refreshed monthly and may change as new data is added.

The figures presented above with respect to *in absentia* removal orders include both completed and still-pending cases as of the end of September 2021. Statistics around appearance in court are sometimes presented in misleading ways by calculating rates of removal *in absentia* as a portion of those cases that have already been completed, thus omitting the large number of pending cases with children continuing to appear in court. For example, 24 percent of all unaccompanied children with cases begun from FY 2005–2017 have been removed *in absentia*, meaning that 76 percent have come to their court hearings. However, of those children who already completed their cases in that time period, 33 percent were removed *in absentia*; yet, this 33 percent leaves out the more than 80,000 unaccompanied children whose cases are still pending and who thus far have appeared and continue to appear at their court hearings. The difference in these rates demonstrates that immigration courts often take many years to complete children’s cases and that those cases that complete most quickly tend to involve children who lack counsel and receive orders of removal *in absentia*.

- 16 Stave, Markowitz, Berberich, et al., *Evaluation of the New York Immigrant Family Unity Project*, 2017, 44.
- 17 Lapp, “A Child Litigant’s Right to Counsel,” 2019, 479, 482, 484, 486-488.
- 18 Memorandum from MaryBeth Keller, Chief Immigration Judge, to All Immigration Judges, et al., re: “Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children,” U.S. Department of Justice Executive Office for Immigration Review, December 20, 2017, 4-7, <https://perma.cc/8FRX-ZG55>.