

For Jeremy McKinney, Attorney & Immediate Past President, American Immigration Lawyers Association (AILA)

In your testimony, you mentioned that many children would be eligible for special relief in this country, but they would have no way of knowing about it without legal representation. You also relayed that studies have shown that those who are represented are five times more likely to get relief and shared the story of two children you personally worked with.

- Can you speak to the unique challenges that children, and especially young children, face in the U.S. immigration system without an attorney?
- Can you describe ways in which providing a right to counsel for children might also improve the efficiency of the immigration system broadly?

Can you speak to the unique challenges that children, and especially young children, face in the U.S. immigration system without an attorney?

Young children face exceptionally difficult circumstances in immigration court; children under the age of 12 make up about one third of all new cases in immigration court, as of February 2022.¹ Many of these children face a common language barrier issue, which is a basic necessity for anyone to understand the U.S. immigration system. Furthermore, many of these children faced and escaped inexplicable abuse, violence, and trauma, which further affects their ability to process and understand their environment.² This trauma shapes their ability to understand, think clearly, and process new information.³ Simply put, they cannot comprehend what is happening to them and the consequences of their case in removal proceedings.

All these issues are compounded by the complexity of immigration law. This makes it all the more urgent that all children have access to counsel, provided by the government, as a right. Because children do not have the capacity to understand immigration proceedings, they cannot understand the implications of their decisions or lack of decisions. Some children cannot even read yet, let alone in English. Abused and neglected children will not share key details about their experiences, which can help their immigration case, out of guilt, shame, or fear of further mistreatment by a family member or abuser.⁴ They also are not likely to remember dates, addresses, understand the concept of time, or the names of people – all of which can be instrumental in building their cases and are required by USCIS and EOIR adjudicators.⁵

Children, especially young children, are not able to help themselves in key aspects of their case preparation, such as: drafting affidavits, preparing for testimony, gathering evidence and even understanding the consequences of failing to appear for their immigration court hearings, without the guidance of an attorney. In many of my cases involving children, I rely on the expertise of psychologists and counselors who use professional and child sensitive methods to interview my child clients about what they suffered. Asylum Officers and EOIR adjudicators rely on and give weight to these expert witness testimonies to understand how a child respondent was harmed in the past. Young children are highly likely to be triggered and distracted by their trauma reminders, which happens often while preparing for an Asylum Office interview or an individual merits hearing in court; without an attorney they will likely not even present a case.⁶

Our legal systems, including the immigration system, strive to ensure due process, both procedurally and substantively. A significant aspect of due process protection involves subjective consideration for the respondent. Though a child under the age of five will not understand why they are in immigration court, what it means to be removed from the United States, and what

¹ TRAC Immigration, *One-Third of New Immigration Court Cases Are Children; One in Eight are 0-4 years of Age*, Mar. 17, 2022, <https://trac.syr.edu/immigration/reports/681/>.

² The National Child Traumatic Stress Network, *Effects*, <https://www.nctsn.org/what-is-child-trauma/trauma-types/complex-trauma/effects> (last visited Nov. 2, 2023).

³ *Id.*

⁴ Kids In Need of Defense, *Representing Children In Immigration Matters*, <https://supportkind.org/wp-content/uploads/2015/04/Representing-Children-In-Immigration-Matters-FULL-VERSION.pdf> (last visited Nov. 2, 2023).

⁵ *Id.*

⁶ The National Child Traumatic Stress Network, *supra* note 2.

asylum entails - their chances of obtaining safety and security in the United States are greater if they are represented by an attorney. Without an attorney, they will suffer long lasting consequences, even death, without ever knowing the stakes.

Can you describe ways in which providing a right to counsel for children might also improve the efficiency of the immigration system broadly?

Children with attorneys improve the efficiency of the immigration system in several ways: there is better communication between all parties, children have higher rates of appearing for their court dates, and cases are adjudicated timely and in the appropriate venue.

To start, all parties will have better communication including USCIS and EOIR. The child's attorney will be able to communicate with Asylum Offices, EOIR adjudicators, and Government attorneys on behalf of the child. Immediately, this improves the efficiency of the proceedings between all parties. Furthermore, having counsel in the immigration system ensures that the child can meet all of the strict filing rules required throughout the life of an immigration case. It is wholly unrealistic to expect a child to file applications timely, communicate with multiple government parties, and present legal arguments and evidence against trained immigration professionals, including lawyers, on their own.⁷

Next, children's attorneys can appear on their behalf for immigration court appearances, which prevents children from being ordered removed *in absentia* or resulting in a continuance of the case, further delaying the final hearing.⁸ Understanding how to appear at immigration court or at an Asylum Office can be particularly difficult for young children, who depend on other adults to provide transportation for them. It is not uncommon that, in immigration court, if a child appears for their first hearing before a judge with counsel, the judge may waive the child's presence at future hearings (apart from the final hearing, where it is required) and allow counsel to appear on their behalf. This can ensure that the child continues to stay in school while being represented in court.

Children's attorneys will also present other legal pathways for their clients if they are eligible. This can include SIJS, U-Visa, or VAWA relief. A child can apply for these types of relief with an application and pursue this benefit before USCIS – removing their case from immigration court proceedings altogether. This greatly improves the efficiency of the immigration court system as it specifically does not add to the already swollen immigration court case backlog. Children have no way of knowing that they are eligible for these other forms of relief unless they consult with an attorney. Furthermore, it reduces the government's costs in court proceedings because cases will not be continued or delayed as they may be if children are unprepared to proceed.

⁷ Erica Bryant, et al., VERA (Jan. 28, 2020), <https://www.vera.org/news/no-child-should-appear-in-immigration-court-alone>.

⁸ Ingrid Eagly and Steven Shafer, Measuring In Absentia Removal In Immigration Court, Vol 168, U. Pa. L. Rev. 817 (2020), https://www.pennlawreview.com/wp-content/uploads/2020/06/Eagly-Shafer_Final.pdf.

In all other aspects of our legal system, the government extends its interest in protecting children through the process.⁹ The immigration system should be no different. Like it does in other legal systems, having counsel ensures that processes are practiced more efficiently and with consideration for fairness to the child in proceedings.

⁹ Dept. of Justice, *Children's Rights in the Juvenile Justice System*, <https://www.justice.gov/crt/rights-juveniles> (updated July 22, 2016).