

AMERICAN BAR ASSOCIATION  
COORDINATING COMMITTEE ON IMMIGRATION LAW  
CRIMINAL JUSTICE SECTION  
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES  
SECTION OF INTERNATIONAL LAW AND PRACTICE  
AMERICAN IMMIGRATION LAWYERS ASSOCIATION  
NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION  
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS  
THE BAR ASSOCIATION OF SAN FRANCISCO  
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- 1 RESOLVED, that the American Bar Association supports the appointment of counsel at  
2 government expense for unaccompanied children for all stages of immigration processes and  
3 proceedings;
- 4 FURTHER RESOLVED, that the American Bar Association favors the establishment within  
5 the Department of Justice of an independent office with child welfare expertise that would  
6 have an oversight role and ensure that children's interests are respected at all stages of  
7 immigration processes and while in immigration custody; and,
- 8 FURTHER RESOLVED, that children in immigration custody who cannot be released to  
9 family members, legal guardians or other appropriate adults should be housed in culturally-  
10 appropriate family-like settings and not detained in facilities with or for juvenile offenders.

**REPORT**

Elian Gonzalez riveted the nation and his situation raised numerous questions about the treatment of unaccompanied children under the U.S. immigration laws. Unlike Elian, most children do not have legions of lawyers rushing to defend their rights and family members fighting over their custody. These children are routinely shut away from the public eye and propelled in to immigrant court proceedings without legal representation. This is unacceptable. The needs of unaccompanied immigrant and refugee children must be addressed and their welfare and legal rights protected.

**Background**

Thousands of foreign-born children arrive in the United States each year unaccompanied by their parents or other legal guardians. Some are escaping political persecution, while others are fleeing civil war, famine, abusive families, or other dangerous conditions in their home countries. Some children have lost contact with or been abandoned by their families abroad, while others are sent here for safety by parents who remain behind. When they arrive in the United States, these children generally have no legal status and no support system.

What many of these children face when they arrive in the United States is a mire of immigration proceedings and the challenge of finding legal assistance. If apprehended by the border patrol, the children become wards of the INS and are held in custody while the INS prosecutes their deportation cases. This creates an inherent conflict of interest as the INS is the jailer, prosecutor and the caretaker of these children.

Although a child may face hunger and homelessness, torture, imprisonment, or human rights abuse if deported, U.S. immigration laws do not allow for the appointment of counsel at the government's expense. Detention, often in isolated areas, further diminishes a child's ability to find legal assistance. As a result, detained minors frequently have no choice but to represent themselves. This arrangement is an anomaly in our judicial system that must be corrected.

Unaccompanied children<sup>1</sup> in INS detention face a stressful and confusing ordeal. Most detained children speak little or no English and are rarely aware of their rights under U.S. law. They frequently are detained in secure facilities, sometimes commingled with juvenile offenders, and their only adult contact may be guards and immigration officers who give improper legal advice or discourage them from seeking legal representation. Although some of these children may have U.S. family members to whom they can be released, many will remain in INS custody while their cases proceed through the immigration court system. Over 4,600 unaccompanied

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<sup>1</sup> For purposes of this report, an unaccompanied immigrant child is defined as a noncitizen child under 18 who is in INS custody and/or facing immigration proceedings alone, without a parent, adult relative or legal guardian.

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children were detained in 1999 in over 90 different locations.<sup>2</sup> Thirty-five percent were held in secure facilities<sup>3</sup> that human rights monitors criticize for being punitive and jail-like.<sup>4</sup>

Lawsuits over the treatment of unaccompanied children in INS detention have been brought to the federal courts.<sup>5</sup> Prior to federal court intervention, many were pressured to leave the country "voluntarily" without advice of counsel and before appearing before an immigration judge to be informed of their rights and legal options.<sup>6</sup> The INS is now required to ensure that children under 14 have an opportunity to call a parent, close relative, friend, or nonprofit organization that provides legal advice prior to accepting voluntary departure to their home countries.<sup>7</sup> While an improvement, many children have no family to call and may never speak with a lawyer or secure legal representation.

The detention of immigrant children was the subject of *Flores v. Reno*, a major class-action lawsuit brought in 1985.<sup>8</sup> The settlement in *Flores* established new nationwide policies and requires the INS to release children once it is established that detention is not required to ensure court appearances or for the child's safety.<sup>9</sup> The settlement agreement also restricts INS' use of juvenile correctional facilities and provides that detained children receive education, recreation, and counseling.<sup>10</sup>

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<sup>2</sup> "Juvenile Detention and Shelter Care Program," INS Fact Sheet (Sept. 7, 2000). This number includes children who have been separated from their parents or other adult relatives. The INS regularly uses approximately 25-30 different facilities, but has around 95 different locations where children are held.

<sup>3</sup> "Juvenile Detention and Shelter Care Program," INS Fact Sheet (Sept. 7, 2000).

<sup>4</sup> See Human Rights Watch, *SLIPPING THROUGH THE CRACKS: UNACCOMPANIED CHILDREN DETAINED BY THE U.S. IMMIGRATION AND NATURALIZATION SERVICE (1997)* (hereinafter *SLIPPING THROUGH THE CRACKS*); Human Rights Watch, *DETAINED AND DEPRIVED OF RIGHTS: CHILDREN IN THE CUSTODY OF THE U.S. IMMIGRATION AND NATURALIZATION SERVICE (1998)* (hereinafter *DETAINED AND DEPRIVED*).

<sup>5</sup> See *Reno v. Flores*, 507 U.S. 292 (1993); *Perez-Funez v. INS*, 619 F. Supp. 656 (C.D. Cal. 1985).

<sup>6</sup> See *Perez-Funez v. INS*, 619 F. Supp. 656 (C.D. Cal. 1985).

<sup>7</sup> 8 C.F.R. § 236.3(g) (2000).

<sup>8</sup> 507 U.S. 292 (1993). See *Flores v. Reno* Stipulated Settlement Agreement, Case No. CV-85-4544-RJK (Px) (hereinafter *Flores* Agreement). The parties in *Flores* settled after the U.S. Supreme Court rendered a decision in the case.

<sup>9</sup> These policies include a list of people to whom INS will release children in order of preference: (1) a parent; (2) a legal guardian; (3) an adult relative; (4) an adult individual or entity designated by the parent or legal guardian; (5) a licensed program willing to accept legal custody; or (6) another adult individual or entity seeking custody when family reunification is not an option. See *Flores* Agreement, at para. 14.

<sup>10</sup> See *Flores* Agreement, at para.s 19, 21 and exhibit 1.

Universally accepted juvenile justice standards, including those adopted by the ABA, recognize that incarceration in secure facilities undermines the interests of juveniles.<sup>11</sup> The detention of juvenile asylum seekers is contrary to the international standards set by the United Nations High Commissioner for Refugees.<sup>12</sup> The ABA also opposes the presumptive detention of juveniles and filed an *amicus curiae* brief with the Supreme Court in the *Flores* case arguing that presumptive detention does not serve any legitimate interest in the welfare of children and prevents immigrant children from securing vital legal representation.<sup>13</sup> The ABA further argued that detention diminishes the likelihood of children retaining counsel and, for those who do have lawyers, limits their ability to consult with counsel and prepare a defense to deportation.

### Meaningful Representation is Vital

#### A. Need for counsel

Children who assert their legal rights and seek to remain in the United States have a long and difficult road ahead of them. Immigration court is an adversarial setting, presided over by a Department of Justice immigration judge and prosecuted by an INS trial attorney. Defenses to being deported are limited and applications for deportation relief require the completion of lengthy forms, in English, supplemented by extensive evidentiary support and documentation. This is a difficult process for anyone who is unfamiliar with the English language and the American legal system. It is unrealistic to expect children to represent themselves.

For example, a child who fears persecution may be eligible to apply for asylum. However, an asylum application typically requires extensive documentation of human rights violations and political conditions in the child's home country, medical and psychological evaluations, and in-depth testimony from the child about what he or she fears and why.

Similarly, a child who has been "abused, abandoned or neglected" may be eligible for immigration relief known as "special immigrant juvenile status" but this relief is also complicated as it requires, among other things, obtaining an order from a juvenile court judge.<sup>14</sup> The other forms of deportation relief include applications for legal status under the Violence Against Women Act, the Nicaraguan Adjustment and Central American Relief Act, "cancellation of removal" and voluntary departure.

<sup>11</sup> See ABA/Institute of Judicial Administration Juvenile Justice Standards, *Standards Relating to Interim Status: the Release, Control, and Detention of Accused Juvenile Offenders between Arrest and Disposition* (1980) (hereinafter ABA Standards) § 3.1 "Policy Favoring Release. Restraints on the freedom of accused juveniles pending trial and disposition are generally contrary to public policy. The preferred course in each case should be unconditional release." See also *infra* note 51.

<sup>12</sup> UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers* (1999), Guideline 6 <<http://www.unhcr.ch/issues/asylum/guidasyl.htm>>.

<sup>13</sup> ABA Amicus Brief, *Reno v. Flores*, 507 U.S. 292 (1993).

<sup>14</sup> For children in INS custody, the Attorney General must consent to juvenile court jurisdiction over dependency proceedings. INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (1999).

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All of these claims involve meeting high standards of proof for which legal assistance is vital. A lawyer helps an applicant articulate the basis for his or her claim, gather the required evidence, complete and file the forms pursuant to the regulations, present the case in court and rebut evidence and legal arguments presented by the government. Studies have found that asylum seekers in deportation proceedings are four times more likely to be granted asylum if represented.<sup>15</sup>

Because immigration proceedings are considered to be civil, children are not entitled to appointed counsel under the Sixth Amendment, which guarantees counsel for criminal defendants.<sup>16</sup> On the contrary, children, as adults in deportation proceedings, have only the "privilege" of representation by counsel "at no expense to the Government."<sup>17</sup>

The immigration regulations reflect an awareness that children have limited cognitive abilities and understanding of the legal processes but the regulations do not go far enough. For example, under current regulation an immigration judge may not accept an admission of deportability from a child who is under 16 and not accompanied by a guardian, relative or friend.<sup>18</sup> However, this rule does not preclude an immigration judge from accepting a child's admissions to factual allegations that, in turn, can be used as a basis for finding the child deportable and issuing a deportation order.<sup>19</sup>

Organizations funded through the Legal Services Corporation that traditionally provide civil legal services to indigent individuals cannot represent most of these children due to "alien restrictions" enacted by the Congress. As a result, the responsibility has fallen on the private bar and nonprofit organizations to offer free legal assistance to many of the unaccompanied minors. The nonprofit community cannot match the INS' detention and deportation resources and faces innumerable barriers to representing children even when *pro bono* assistance is available.

### B. Due process considerations

The courts have long recognized that individuals in deportation proceedings are entitled to due process protections.<sup>20</sup> One of the most important elements of due process is the right to be represented by counsel. This right has also long been recognized in the field of immigration

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<sup>15</sup> *Asylum Representation in Immigration Court FY 1999*, Statistics from the Executive Office for Immigration Review (Apr. 14, 2000); *Background Paper on the State of Asylum Representation and Ideas for Change*, Institute for the Study of International Migration, Georgetown University (May 2000), p.3.

<sup>16</sup> See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (deportation proceedings are purely civil and various protections that apply in the context of criminal hearings do not apply in deportation proceedings). See also *United States v. Campos-Ascencio*, 822 F.2d 506, 509 (5<sup>th</sup> Cir. 1987); *Ramirez v. INS*, 550 F.2d 560, 563 (9<sup>th</sup> Cir. 1977).

<sup>17</sup> INA § 240(b)(4)(a), 8 U.S.C. § 1229a(b)(4)(A) (2000).

<sup>18</sup> 8 C.F.R. § 240.48(b) (2000).

<sup>19</sup> See *Matter of Amaya*, Int. Dec. 3293 (BIA 1996).

<sup>20</sup> See *Bridges v. Wixon*, 326 U.S. 135, 147 (1945).

law.<sup>21</sup> The Immigration and Nationality Act provides that individuals in removal proceedings “shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing.”<sup>22</sup> Federal regulations recognize an individual’s right to counsel in multiple places.<sup>23</sup> The courts have also recognized the importance of counsel. In discussing the important role of counsel in deportation proceedings, one federal appeals panel noted that “[a] lawyer is often the only person who could thread the labyrinth.”<sup>24</sup>

Two U.S. courts of appeals have suggested that where a noncitizen’s rights would be substantially impaired in the absence of counsel, the government may be constitutionally required to pay for an attorney in immigration proceedings. The U.S. Court of Appeals for the Sixth Circuit dismissed previous case law on this point as relying on an “outmoded distinction between criminal cases and civil proceedings.”<sup>25</sup> The court then found that “[w]here an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided a lawyer at the Government’s expense. Otherwise ‘fundamental fairness’ would be violated.”<sup>26</sup> The Ninth Circuit has observed that due process rights may include providing an indigent alien with government appointed counsel.<sup>27</sup> This argument is only strengthened when considering the needs of children who lack the capacity to represent themselves.

The Supreme Court has recognized that children need special protections. “[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State’s duty toward children.”<sup>28</sup> The Court went on to point out that “although children generally are protected by the same guarantees against government deprivations as are adults, the State is entitled to adjust its legal system to account for children’s vulnerability.”<sup>29</sup>

<sup>21</sup> See *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9<sup>th</sup> Cir. 1990); *Castaneda-Delgado v. INS*, 525 F.2d 1295 (7<sup>th</sup> Cir. 1975).

<sup>22</sup> INA § 240(b)(4)(a), 8 U.S.C. § 1229a(b)(4)(A) (2000). See also INA § 292, 8 U.S.C. § 1362 (2000).

<sup>23</sup> See 8 C.F.R. §§ 3.15(b)(5), 240.10(a)(1), 240.48(a), 292.5(b) (2000).

<sup>24</sup> *Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9<sup>th</sup> Cir. 1988).

<sup>25</sup> *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 n.3 (6<sup>th</sup> Cir. 1975) (holding that the absence of counsel in the case at hand was not a denial of due process because the petitioner had no arguable defense against being deported so counsel would not have served any meaningful role).

<sup>26</sup> *Id.*

<sup>27</sup> See *Escobar-Ruiz v. INS*, 787 F.2d 1294, n.3 (9<sup>th</sup> Cir. 1986), *aff’d en banc*, 838 F.2d 1020 (1988).

<sup>28</sup> See *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (quoting *May v. Anderson*, 345 U.S. 528 (1953) (Frankfurter, J., concurring)).

<sup>29</sup> See *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

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The INS and Executive Office for Immigration Review agree that the involvement of counsel allows the immigration process to run more smoothly and efficiently, and certainly more humanely.<sup>30</sup> The Board of Immigration Appeals has found that under current law there is no statutory authority to appoint counsel for unrepresented children.<sup>31</sup>

In a recent unpublished decision involving a mentally incompetent adult, an immigration judge recognized that INS regulations have not kept pace with the legal needs of immigrants. The immigration judge called on the Attorney General to address the legal needs of juveniles and individuals with mental incapacities until Congress provides for government-paid legal representation.<sup>32</sup> The Chief Judge of the Executive Office for Immigration Review has forcefully expressed his views that children should have representation appointed for them, and the General Counsel of the INS has concurred.<sup>33</sup> The Department of Justice, however, has not taken any further steps towards securing funds or changing the law to provide for appointment of counsel.

### C. Counsel provided in comparable settings

Juvenile delinquency proceedings are considered to be civil and not criminal in nature. Nevertheless, in a landmark decision, *In Re Gault*, the Supreme Court held that under the Due Process Clause of the Fourteenth Amendment juveniles in delinquency proceedings have the right to be represented by counsel, including counsel appointed at government expense if necessary.<sup>34</sup> The Court pointed out that “[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court.”<sup>35</sup> The Court reasoned that as a matter of due process children need “the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.”<sup>36</sup> The Court also acknowledged that the child requires the guiding hand of counsel at every step in the proceedings against him. The pivotal question was not

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<sup>30</sup> Anna Hicken, U.S. Department of Justice Executive Office for Immigration Review, *Evaluation of Rights Presentation* (1999).

<sup>31</sup> See *In Re O-S*, unpublished BIA decision (Sept. 1990); *In Re S-*, unpublished BIA decision (May 1989).

<sup>32</sup> Decision of Immigration Judge Walt Durling in York, Pennsylvania (September 2000) (on file with the Coordinating Committee staff).

<sup>33</sup> Chief Immigration Judge Michael Creppy and INS General Counsel Owen “Bo” Cooper were members of a panel discussion at the ABA Annual Meeting in New York City entitled “Elián Gonzalez and The Forgotten Children in Immigration Proceedings” during which they both agreed that unaccompanied immigrant children should have appointed counsel in immigration proceedings.

<sup>34</sup> See *In Re Gault*, 387 U.S. 1, 41 (1967).

<sup>35</sup> *Id.* at 28.

<sup>36</sup> *Id.* at 35.

whether it was a civil or criminal proceeding but what is the seriousness of the proceedings and the interest at stake.<sup>37</sup>

Congress has since passed the Juvenile Delinquency Act, codifying the principle that juveniles in delinquency proceedings “shall be assisted by counsel during transfer hearings and at every critical stage of the proceeding.”<sup>38</sup> Federal law also provides for the appointment of counsel for juveniles in neglect and dependency cases as well as in state court proceedings in which the state receives funds under the Child Abuse Prevention and Treatment Act (CAPTA). Under CAPTA, a state does need a plan to provide legal representation and many states do require or provide for the appointment of counsel in neglect and dependency cases.<sup>39</sup> In addition, states that receive CAPTA funds must provide either a Court Appointed Special Advocate (CASA) or a guardian *ad litem*, however these advocates need not be lawyers.<sup>40</sup>

Many states also have provided for the appointment of counsel in certain civil proceeding such as in contested custody proceedings and petitions to the court to bypass parental consent requirements for abortions.<sup>41</sup> Some states have created a right to counsel in a broader category of civil proceedings such as Massachusetts which requires counsel be appointed for children in need of certain services.<sup>42</sup>

International law also acknowledges the importance of counsel for children. The United Nations Convention on the Rights of the Child requires that every child being detained or deprived of his or her liberty have prompt access to legal assistance,<sup>43</sup> but while the United States has signed the Convention, it is one of only two countries that has not ratified it. The UNHCR Guidelines also require that detained asylum seekers under 18 should be appointed a legal guardian or adviser.<sup>44</sup>

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<sup>37</sup> *Id.* at 49.

<sup>38</sup> 18 U.S.C. § 5032 (2000).

<sup>39</sup> 42 U.S.C. § 5106a(c)(2)(E) (2000). While not required under CAPTA, many states do provide for the appointment of counsel in child protective proceedings. Utah appoints an attorney in addition to assigning a CASA volunteer to assist the attorney. In Washington, D.C., a guardian *ad litem* attorney is appointed by the Counsel for Child Abuse and Neglect Program. Cook County Chicago has one of the largest child advocacy programs where the Office of Public Guardian employs over 125 attorneys. Kathi Grasso, ed. *A Judge's Guide to Improving Legal Representation of Children*, American Bar Association (1998), at 72, 81, 83.

<sup>40</sup> 42 U.S.C. § 5106a (2000).

<sup>41</sup> Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 *Fordham L. Rev.* 1571, 1574 (1996).

<sup>42</sup> *Id.* at 1575.

<sup>43</sup> Convention on the Rights of the Child, Nov. 20, 1989, Art. (3)(1), G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (entered into force Sept. 2, 1990). See also DETAINED AND DEPRIVED, *supra* note 4.

<sup>44</sup> UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers (1999), Guideline 6 <<http://www.unhcr.ch/issues/asylum/guidasyl1.htm>>.



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For adults the guidelines support the principle that detained asylum seekers should be provided free legal assistance where possible.<sup>45</sup>

Time has come to extend the reasoning of *In Re Gault* and international standards to the U.S. immigration context. Certainly the stakes are high enough to warrant the appointment of legal counsel to indigent children who are facing deportation alone. As with juvenile delinquency proceedings, the right to representation should extend to all critical phases of immigration processes. No child should be interrogated by INS officers, appear before an immigration judge, or be asked to sign legal documents without advice and assistance of counsel.

### **Need for Dedicated Personnel to Protect Children's Interests**

The INS has particular responsibility for the welfare of unaccompanied children in its custody. Responsibilities include sheltering children in appropriate settings, administering to their emotional and physical needs, providing education and recreational opportunities, ensuring that they secure meaningful legal representation and are not pressured to make legal decisions without counsel, facilitating opportunities to avail themselves of legal options and immigration benefits, establishing child-friendly legal processes and ensuring that guidelines are followed.

The UNHCR has issued guidelines stating that "children seeking asylum, particularly if they are unaccompanied, are entitled to special care and protection."<sup>46</sup> These guidelines require that children be provided education, health care and a special guardian trained to care for children.<sup>47</sup> The INS has issued guidelines designed to help officers evaluate the asylum claims of children.<sup>48</sup> The INS guidelines recognize that children may experience persecution differently from adults and discuss procedural considerations for asylum officers in dealing with children, such as creating a "child-friendly" asylum interview environment that allows children to discuss freely the elements and details of their claims.<sup>49</sup>

A number of countries have recognized their responsibilities to unaccompanied immigrant and refugee children. Some countries recognize that the agency charged with immigration law enforcement is not the most suitable agency to care for these children and fulfill their needs. In Britain, Canada, Denmark and the Netherlands, unaccompanied children are cared for and placed in the custody of appropriate child welfare agencies while their immigration status is resolved.<sup>50</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, Guidelines on Policies and Procedures Dealing with Unaccompanied Children Seeking Asylum (1997).

<sup>47</sup> *Id.* at para. 5.7.

<sup>48</sup> Guidelines for Children's Asylum Claims, Memorandum from Jeff Weiss, Acting Director, Office of International Affairs, Immigration and Naturalization Service, U.S. Department of Justice, to Immigration Officers and Headquarters Coordinators (Asylum and Refugees) (Dec. 10, 1998). (Hereinafter "INS Guidelines.")

<sup>49</sup> See INS Guidelines at 5.

<sup>50</sup> See SLIPPING THROUGH THE CRACKS, *supra* note 4.

The United States should also have an independent entity with child welfare expertise to protect the interests of this exceptionally vulnerable population. As an advocate for immigrant children within the Department of Justice, such an office's responsibilities would include oversight of detention conditions, the development of child-friendly procedures and monitoring the treatment of children at all stages of immigration processes. In addition to being a watchdog, this unit could evaluate whether a system of guardian *ad litem* or a similar type of child advocate is necessary and coordinate such appointments.<sup>51</sup> If a guardian *ad litem* system were established, protections would be needed to ensure that a child's communications with the guardian are protected by confidentiality and in no case should a guardian be appointed in lieu of counsel.

#### Current Legislative Proposals

Many members of Congress also are concerned about the growing numbers of unaccompanied immigrant children and have proposed a variety of new protections.

Senator Diane Feinstein (D-CA) introduced the *Unaccompanied Alien Child Protection Act of 2000*, S. 3117, in the closing weeks of the 106<sup>th</sup> Congress. This legislation would establish an "Office of Children's Services" within the Department of Justice to ensure "that the best interests of the child are held paramount in an immigration proceeding or action involving an unaccompanied alien child." The legislation would require the appointment of guardian *ad litem*s and counsel if deemed necessary by the Director of the Office of Children's Services. In addition, this legislation would codify standards regarding when children should be released, where they should be detained and the services they should receive.

Senator Bob Graham (D-FL) introduced the *Alien Children Protection Act of 2000* in April 2000, S. 2383.<sup>52</sup> Under this bill, the INS would be required either to release or place all children in appropriate facilities within 72 hours of apprehension unless the child has engaged in delinquent behavior, is an escape risk or needs greater security. The bill would also require that an unaccompanied child be assigned a guardian *ad litem* who shall not be an employee of the INS and who shall ensure that the child's best interests are promoted during immigration proceedings.

In the House, Representative Alcee Hastings (D-FL) introduced the *Alien Unaccompanied Minor Adjustment and Protection Act of 2000*, H.R. 4354, to create a panel of advisors for unaccompanied alien children with the panel being housed outside the INS but within the Department of Justice. There would be a minimum of 200 advisors skilled in social services,

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<sup>51</sup> While the appointed counsel is ultimately responsible for the immigration case, these children may need someone to assist them to reach family. An advocate may also be necessary to help the child access medical and psychological assistance, especially for children fleeing persecution or civil wars.

<sup>52</sup> S. 2383 has been incorporated into S. 2668, *Family, Work and Immigration Integration Amendments of 2000* which was introduced in May 2000.

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psychology, education and other relevant areas who would serve as guardian *ad litem* for unaccompanied children who are in immigration proceedings.

There was no action on any of these bills in the 106<sup>th</sup> Congress but expectations are that they will be revived in the 107<sup>th</sup> Congress.

### ABA Interests

The ABA is concerned about, and has played an active role in promoting, the welfare of children, child protection, juvenile justice, and immigration. The ABA has numerous policies in support of a wide range of issues designed to protect children and ensure they are treated fairly including a resolution adopted in August 1981 stating that attorneys and bar associations should work to assure quality legal representation for children, to calling for the establishment of guardian ad litem programs in 1984 to the issuing of juvenile justice standards in 1979.

The ABA has recognized the pivotal role that lawyers play in deportation proceedings and asylum adjudications, especially for detained individuals. A recommendation passed by the House of Delegates in February 1983 supports the rights of people in deportation or asylum proceedings to retain counsel and to enjoy full representation. A subsequent recommendation, passed in February 1990, urges the INS to facilitate asylum seekers access to counsel and opposing the detention of asylum seekers except in extraordinary circumstances.

The ABA in cooperation with the Institute of Judicial Administration has established standards relating to the administration of juvenile justice. These standards acknowledge to importance of counsel stating that “[t]he participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.”<sup>53</sup> The ABA has long been on record that detention is inappropriate for children who do not pose a threat to society nor a danger of fleeing the court’s jurisdiction.<sup>54</sup> The ABA juvenile justice standards identify the pre-trial detention of juveniles to be “one of the most serious problems in the administration of juvenile justice.”<sup>55</sup>

The ABA filed an *amicus curiae* brief to the Supreme Court in *Reno v. Flores* opposing the presumptive detention of immigrant children and arguing that detention diminishes the ability of children to secure representation and to defend themselves in immigration court.<sup>56</sup> The ABA has also endorsed the United Nations Convention on the Rights of the Child which prohibits the

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<sup>53</sup> ABA Standards Relating to Counsel for Private Parties § 1.1.

<sup>54</sup> See ABA Standards Relating to Interim Status § 6.6A. See also ABA Standards Relating to Corrections Administration, § 1.2B (“Least possible restriction of liberty. The liberty of a juvenile should be restricted only to the degree necessary to carry out the purpose of the court’s order.”) and Standards Relating to Dispositions, § 2.1 (“Least restrictive alternative. In choosing among statutorily permissible dispositions, the court should employ the least restrictive category and duration of disposition that is appropriate”)

<sup>55</sup> ABA Standards Relating to Interim Status, p. 1.

<sup>56</sup> See ABA Amicus Brief, *Reno v. Flores*, 507 U.S. 292 (1993).

detention of children except as a measure of last resort and includes a provision requiring that every detained child have prompt access to legal assistance.<sup>57</sup>

In addition, the ABA operates the South Texas Pro Bono Asylum Representation Project (ProBAR) in Harlingen, Texas, in conjunction with the State Bar of Texas and American Immigration Lawyers Association. Supervised by the Coordinating Committee on Immigration Law, ProBAR works with volunteer lawyers to provide representation for indigent men, women and children who are detained by the INS in South Texas, which is one of the nation's largest detention areas for children, as well as for adults. For eleven years, ProBAR has put special emphasis on assisting unaccompanied immigrant children. Working with the local immigration court and other nonprofit organizations, ProBAR staff provides regular legal rights presentations to juveniles facing deportation proceedings and is working with the immigration judges to increase *pro bono* representation. While this project serves as a national model, *pro bono* efforts alone cannot meet the growing demands of children who need representation and cannot fill the gap in communities where programs such as ProBAR do not exist.

The Board of Governors recently acknowledged that the legal needs of immigrant children in detention nationwide are not currently being met and awarded the ABA Immigration Pro Bono Development and Bar Activation Project \$40,000 in emergency funds. The project is using the funds to support efforts to serve the growing numbers of these children.

#### **Conclusion**

Thousands of foreign-born children arrive in the United States each year without parents or other legal guardians. They are put into legal proceedings where they are prosecuted by government attorneys. Many, if not most, of these children currently are compelled to represent themselves. This is unacceptable and out of step with the way juveniles are treated in other segments of the justice system. We recommend they receive appointed counsel and other protections.

Respectfully submitted,

Neal R. Sonnett, Chair  
Coordinating Committee on Immigration Law

February 2001

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<sup>57</sup> See ABA policy passed February 1994.

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GENERAL INFORMATION FORM

Submitting Entity: **Coordinating Committee on Immigration Law**

Submitted By: **Neal R. Sonnett, Chair**

1. Summary of Recommendation(s).

The recommendation supports the appointment of counsel at government expense for unaccompanied children for all stages of immigration processes and proceedings. The recommendation also supports the establishment of an independent office within the Department of Justice with child welfare expertise that would have an oversight role and ensure that children's interests are respected at all stages of immigration processes and while in immigration custody. Finally, the recommendation proposes that children in immigration custody who cannot be released to family members, legal guardians or other appropriate adults should be housed in culturally-appropriate family-like settings and not detained in facilities with or for juvenile offenders.

2. Approval by Submitting Entity.

The Coordinating Committee on Immigration Law approved this recommendation by written ballot on November 14, 2000.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The ABA has numerous policies in support of a wide range of issues designed to protect children and ensure they are treated fairly including a resolution adopted in August 1981 stating that attorneys and bar associations should work to assure quality legal representation for children, to calling for the establishment of guardian ad litem programs in 1984 to the issuing of juvenile justice standards in 1979 which include references to the importance of counsel for children.

In addition, the ABA has recognized the pivotal role that lawyers play in deportation proceedings and asylum adjudications, especially for detained individuals. A recommendation passed by the House of Delegates in February 1983 supports the rights of people in deportation or asylum proceedings to retain counsel and to enjoy full representation. A subsequent recommendation, passed in February 1990, urges the INS to facilitate asylum seekers access to counsel and opposing the detention of asylum seekers except in extraordinary circumstances. The ABA filed an *amicus curiae* brief to the Supreme Court in *Reno v. Flores* opposing the presumptive detention of immigrant children and arguing that detention diminishes the ability of children to secure representation and to defend themselves in immigration court.

This recommendation combines these principles of looking out for children's welfare and the need for counsel in deportation proceedings and takes the logical next step in addressing the needs of a population of children that is often overlooked, those who are unaccompanied and in immigration custody.

5. What urgency exists which requires action at this meeting of the House?  
This is an ongoing problem as children are representing themselves in immigration proceedings every day. Legislation was introduced in the 106<sup>th</sup> Congress that addresses some of these issues and is expected to be re-introduced in the 107<sup>th</sup> Congress.
6. Status of Legislation. (If applicable.)  
Legislation was introduced in the House and Senate in the 106<sup>th</sup> Congress to address some of these issues. The bills were referred to the respective Judiciary immigration subcommittees but no further action was taken. There will be a renewed effort to enact legislation in the next Congress.
7. Cost to the Association. (Both direct and indirect costs.)  
None
8. Disclosure of Interest. (If applicable.)  
Not applicable
9. Referrals.  
This report and recommendation was referred to the ABA sections which are the constituent members of the Coordinating Committee on Immigration Law through their committee representatives. These sections, namely, the Sections of Administrative Law, Criminal Justice, General Practice, Solo and Small Firm, Individual Rights and Responsibilities, International Law and Practice, Labor and Employment Law, and Litigation, the Young Lawyers Division, and the American Immigration Lawyers Association (an ABA-affiliated organization), are, by definition, the ABA entities with any interest in immigration law. All were initially notified through their designated representatives at the Committee business meeting during the Annual Meeting, and through a subsequent mailing to representatives who did not attend the meeting.

This recommendation was also sent to the chairs and staff of the ABA Family Law Section, Commission on Homelessness and Poverty, Steering Committee on the Unmet Legal Needs of Children, Standing Committee on Pro Bono and Public Service and Standing Committee on Legal Aid and Indigent Defendants, as well as the presidents and executive directors of the National Association of Criminal Defense Lawyers, National Legal Aid and Defender Association, Hispanic National Bar Association, National Asian Pacific American Bar Association, National Lesbian and Gay Law Association as well as certain state and local bar associations.

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10. Contact Person. (Prior to the meeting.)  
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11. Contact Person. (Who will present the report to the House)  
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