U.S. Protection of Immigrant Children: A system in Need of Improvement

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### Executive Summary:

The United States legal system affords strong opportunities for protection to children fleeing violence and to youth abandoned or harmed by family members. However, the procedures used to evaluate children’s claims for protection are bureaucratic and fear inducing. The obstacles to applying for protection negate the purpose of the law. This report details some of the systemic problems in both asylum adjudication and in other forms of protection. It ends with suggestions for reform.

I have prepared this report based on my ten years of experience directing the Safe Passage Project, a nonprofit that grew out of a law school clinic. Today the Safe Passage Project is both a law school clinic and a large mobilizing force that conducts screenings and provides assistance at the New York Immigration Court. Currently the Safe Passage Project has over 500 active cases and has recruited, trained, and mentored hundreds of individual attorneys and students. The Safe Passage Project covers the juvenile dockets at the New York Immigration Court approximately three times each month seeing on average 15 to 30 children who appear without private counsel. The staff and volunteers also serve as Friends of the Court assisting the children at the deportation (removal) hearings.

The Safe Passage Project is currently directly representing or mentoring attorneys who are seeking asylum protection for unaccompanied minors. In our active cases almost 100 children have filed for asylum in the past 18 months. Twenty-eight (28) asylum cases have been approved and the remainder are either pending before the Asylum Office or are being reheard before the Executive Office for Immigration Review (EOIR), the Immigration Court. Safe Passage Project attorneys have also helped hundreds of children seek protection from New York States’ family courts and aided the youth to file for a protective status known as Special Immigrant Juveniles Status (SIJS). In the last two weeks of April alone, we assisted 88 children to file for permanent residence based on this relief and we helped coordinated termination of removal cases for approximately 500 more youth in New York. Safe Passage Project has also assisted youth to secure protection from trafficking (T Visa status) and aided some children who have been victims of crimes within the United States (U visa status).

**Lost in the Bureaucratic Forest.**

Many children cannot complete their immigration cases due to excessive waiting periods and delays in adjudication. Depending on the type of protection sought, a child may have to petition two or three different federal agencies or potentially go forward in a state court proceeding as well. Navigating the jurisdictional boundaries is difficult in the best of times, but children have no guarantee of counsel unless they can afford to hire an attorney. And the volume of cases has extended processing times and created many forms of backlogs detrimental to the children’s lives.

For example, the Asylum Office prioritizes the initial interviews for unaccompanied minors. Interviews are usually scheduled within three to six weeks from the first filing, but not all cases are decided quickly. Our database reveals that children may wait months before receiving the first adjudication of their application for refugee protection. Further, the large number of children seeking SIJS protection have created delays both with the state family courts and before the relevant federal agencies. Confusing multiple agency jurisdictions and the added complexity of concurrent removal hearings make for a complex web of bureaucratic forests—as dark and frightening to children as the forests of fairy tale kingdoms.

Asylum adjudication for children should follow [guidelines](http://www.unhcr.org/en-us/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html) developed by the UNHCR in 2009. Unfortunately training for U.S. asylum adjudicators is insufficient or rushed and not sufficiently tailored to children’s cases. Children are different and their claims for protection must be measured through the social and political context of their juvenile status. Children, who are not provided counsel at government expense, are ill equipped to offer linear narratives detailing their persecution. It is unreasonable to expect a child to be able to explain why he or she cannot find safety in countries the UN and the U.S. State Department have designated as dangerous. Even when an attorney accompanies a child to an interview it is not uncommon to hear a question posed to a child such as “Can you explain the nexus of your fear and your basis of persecution?” Put more simply, it is a legal requirement that the child show he or she fears persecution because of a protected ground under the statutory definitions, but asking a child to explain why he or she is persecuted is asking too much. Children should not have to provide the sociological or empirical data to support their claims; particularly when the Asylum Office has the resources to understand the dangers these children are fleeing.

The Asylum Office reported receipt of around 14,000 juvenile cases last year and at a meeting in May stated that they expected a similar number of applications this year. However, the regional offices have widely disparate approval rates and there is little clear precedent or policy guidance to improve the basic quality of the assessment. The federal government can do more to recognize the need for children to have protection under the refugee convention or to declare a grant of Temporary Protected Status for those fleeing three of the five most dangerous nations in the world.

While cases are being evaluated in the United States’ Asylum Office and far too often rejected, part of its adjudication corps is in the field in Central America hearing requests for refugee protection or humanitarian parole into the United States. This extraordinary overseas processing was created to help prevent children taking the dangerous journey to the U.S. border. However, the [Central American Minor Program](http://www.state.gov/j/prm/releases/factsheets/2014/234067.htm) (CAM) is only open to children who have a parent residing in the U.S. with Temporary Protected Status or with another form of immigration status. The U.S. government can do better. If children with parents in the United States qualify for protection, so too should children reaching our borders or those struggling within the region who do not have a parent with lawful U.S. status. The very existence of the CAM program should bolster, not diminish the claims for relief within the United States made by children who struggled to reach the U.S. border. International law defines a “refugee” as someone *outside* their own country who cannot return due to a well-founded fear of persecution. Our government is taking steps to hear these cases but we have to provide sufficient resources and clear guidance to help the agency hear the requests for protection made within the United States.

Asylum is just one form of protection available. Since 1990 Congress has recognized the particular vulnerability of children who have been abused, neglected or abandoned by a parent and cannot safely return to their country of origin. Unfortunately, this category of protection is subject to a quota and counted in the Employment-based preferences. In late April the [State Department](https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-may-2016.html) announced that the country caps on permanent residence for SIJS children born in El Salvador, Guatemala or Honduras had been reached and posted a processing date of January 1, 2010 leading many, including the Immigration and Customs Enforcement, to erroneously direct its prosecutors that children would not be able to secure full status for six or more years. In June, the country quota for Mexico was similarly reached. These youth have begun a long process that should ultimately end in permanent residence but the lack of current visa numbers should not be a barrier to immediate protection. While in the past ICE facilitated the termination of children’s cases once state court protection orders issued finding that it is not in the child’s best interests of the child to return to the country of origin, ICE has now apparently taken the position that the federal prosecutor should insist that the removal hearing move forward.

Moving children’s deportation cases forward toward what end? The federal government must recognize and give deference to the findings of these state courts and respect statutory and treaty provisions that ensure children’s best interests are preserved regardless of their country of citizenship. The fractured agencies within the Department of Homeland Security (DHS) have not yet developed a coherent and official policy that would efficiently and effectively protect these vulnerable youth. While we wait for the agency to develop clear, directive, guidance recognizing the protected humanitarian status of these youth, advocates and experts in the field grown increasingly concerned about the inappropriate prioritization of deportation hearings and the lack of formal federally issued identity documents that will stabilize the life of the young person and allow them to begin fuller integration in U.S. educational systems and employment.

### About the Author:

Professor Lenni B. Benson has been working and writing in the field of immigration law since 1983. She has been a professor of law at [New York Law School](http://www.nyls.edu/faculty/faculty-profiles/faculty_profiles/lenni_b_benson/) for twenty-two years and practiced in the field for twelve before joining academia. She is coauthor on a book published by LexisNexis (now distributed by [Carolina Academic Press](http://www.cap-press.com/books/isbn/9781422422168/Immigration-and-Nationality-Law)). She is the co-editor of a volume with Dr. Mary Crock of the University of Sydney that gathers essays about the global treatment of children seeking protection (forthcoming from Elgar Press early 2017). She has served as a consultant to the Administrative Conference of the United States ([www.acus.gov](http://www.acus.gov)) and with Russell Wheeler of the Brookings Institution prepared a [2012 report](https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf) on improving the quality of adjudication before in the immigration courts (EOIR). She is a frequent participant in regional and national meetings exploring child protection under U.S. immigration law and state laws. She has served in multiple leadership positions with national and local bar and professional associations. Her work with the Safe Passage Project has been recognized by many organizations and she has been named as a Pro Bono leader.

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She stands in the hallway on the 14th floor of the enormous Federal Building in lower Manhattan.

“Can you help me?” the teenage girl approaches a young woman in the hall. She is a law student with a clipboard.

“Of course,” replies the student, “Do you have an attorney?”

Slowly the girl shakes her head and looks down.

“We can help you. We are here from the Safe Passage Project. You can meet with one of our attorneys. There is no charge. Come with me to the screening room.”

“But I have to go to the court.” the girl responds anxiously.

“Don’t worry. We will check you in and let the court know you are in the legal screening. We will stand with you in the court. We will help you understand what is happening there.”

Slowly the girl smiles and the girl’s head lifts.

## Unaccompanied Children: at the Border

The United States has placed thousands of children into deportation proceedings. It is a rough and expensive mechanism to exert control of the foreign national children who are seeking protection in the United States. In only a few of the immigration courts are nonprofits and volunteers able to offer assistance to children on a uniform basis. For while people have a right to counsel, the current government approach is to require people to hire their own counsel. While there are a few small programs offering some children support, for the vast majority they face a skilled government attorney and an immigration judge without formal, trained assistance. In 2014, several groups filed a suit arguing that children are entitled to counsel as a matter of fundamental fairness, but the [case](https://www.aclu.org/cases/jefm-v-lynch) has not yet been resolved. Even in New York where the New York City Council has funded an unaccompanied minor project, many of the children who live outside the city cannot find free or low cost representation. We estimate that the New York immigration court has nearly 12,000 juveniles on its docket of approximately 64,000 pending cases or nearly 19% of the entire docket.

Children are apprehended or turn themselves into the Customs and Border Protection officers. Most of the young people are seeking entry at the border with Texas in the Rio Grande Valley. The vast majority are from four countries: El Salvador, Guatemala, Honduras or Mexico.

Our treaties with Mexico allow the border patrol to summarily return a child to the Mexican authorities. Officially the border inspector is supposed to inquire whether the child would be free from the control of traffickers and has no fear of persecution or torture. Unofficially, most border advocates do not believe the Mexican children are carefully and appropriately interviewed. Some in Congress would like a similarly streamlined return policy for Central American youth.

**Unaccompanied Alien Children Encountered by Fiscal Year**

Numbers below reflect Fiscal Years 2009-2015, FY 2016 (October 1, 2015 - May 31, 2016)

| **Country** | **FY  2009** | **FY 2010** | **FY 2011** | **FY 2012** | **FY 2013** | **FY 2014** | **FY 2015** | **FY 2016** |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| El Salvador | 1,221 | 1,910 | 1,394 | 3,314 | 5,990 | 16,404 | 9,389 | 11,404 |
| Guatemala | 1,115 | 1,517 | 1,565 | 3,835 | 8,068 | 17,057 | 13,589 | 12,337 |
| Honduras | 968 | 1,017 | 974 | 2,997 | 6,747 | 18,244 | 5,409 | 6.152 |
| Mexico | 16,114 | 13,724 | 11,768 | 13,974 | 17,240 | 15,634 | 11,012 | 8,052 |

**Totals by author:**

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | 19,418 | 18,168 | 15,701 | 24,120 | 38,045 | 67,339 | 39,399 | 31,799 |

**Family Unit Apprehensions Encountered by Fiscal Year\***

Numbers below reflect Fiscal Year 2015, FY 2016 (October 1, 2015 - May 31, 2016)

| **Country** | **FY 2015** | **FY 2016** |
| --- | --- | --- |
| El Salvador | 10,872 | 15,878 |
| Guatemala | 12,820 | 12,848 |
| Honduras | 10,671 | 11,267 |
| Mexico | 4,276 | 2,236 |

**\*Note:** (Family Unit represents the number of individuals (either a child under 18 years old, parent or legal guardian) apprehended with a family member by the U.S. Border Patrol.)

**United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016 - By Month**

<https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> last visited 6/19/2016

The numbers of children arriving are daunting, yet international and domestic law requires careful, individualized assessment of each person’s right to seek protection and children are guaranteed greater process than adults who arrive at the borders and airports. The numbers cannot be allowed to dominate or eviscerate the procedures. Congress does authorize expedited removal for adults, people over 18 who present themselves at the border without documents or with false documents. For people who can express a credible fear of persecution, the expedited process is slowed to allow great consideration of the claim for protection. Today for thousands of young women who arrived from Central American with infant children, the expedited removal procedures control their access to counsel, to be free from detention, and to have an opportunity to present their claims for asylum protection. This report focuses on the needs of unaccompanied minors, but there are many concerns about our treatment of women and children who are fleeing systemic violence and countries where the government affords no protection. In a [report](https://cliniclegal.org/sites/default/files/advocacy/CARA-Raids-Update-Public-Document-FINAL.pdf) released last week, CARA, a Family Detention Pro Bono Project supported by a coalition of nonprofits and individuals, described the many procedural and substantive obstacles that prevent people from obtaining a fair and full consideration of their claims for protection.

### How Do Children Reach New York?

For the children from Central America, the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) guarantees that the children cannot be summarily excluded and requires that the children have an opportunity to make claims for asylum and other forms of protection. After processing by the Customs and Border Protection children are turned over to the federal Health and Human Services Agency and its Office of Refugee Resettlement (ORR). While this agency does a great deal of good work, it is misnamed for this particular program for it is not processing the children for immediate refugee protection but instead holding the children in “shelters” throughout the United States. ORR interviews the children and tries to release them as quickly as possible to an immediate relative who may be residing in the United States. At times children are released to friends or placed in longer term detention facilities. The ORR regularly updates its release data and lists the states and counties where children are released to “sponsors.” For New York this year’s data reports the following counties, each of which received more than 50 children. [Releases of less than 50 children are not reported to preserve the privacy of the youth.]

Fiscal Year 2016 through May 26, 2016.

|  |  |  |
| --- | --- | --- |
| NY | Bronx County | 133 |
| NY | Kings County | 253 |
| NY | Nassau County | 625 |
| NY | Queens County | 447 |
| NY | Rockland County | 86 |
| NY | Suffolk County | 738 |
| NY | Westchester County | 155 |

Total: 2,149

<http://www.acf.hhs.gov/programs/orr/unaccompanied-children-released-to-sponsors-by-county>

last visit 6/19/2016

Children released to NY sponsors: Fiscal Year 2015 2,429 and in Fiscal Year 2014 5,737.

Released to NY sponsors; total FY 2014 to date: 10,315.

## Immigration Court: The Wrong Forum?

All of the children are placed into deportation or removal proceedings. The vast majority have nearly identical charging documents called a Notice to Appear. This document which begins the removal proceeding against the child states that he or she was apprehended at the U.S. border and is not in possession of a visa or document entitling the child to enter and reside in the United States; therefore he or she is subject to removal. But that simple charging document isn’t the entire story. For our immigration statutes guarantee a right to hearing and to seek an opportunity for “relief from removal.” Children can qualify for more forms of protection than most adults. In this report we will examine several of the protections for children but we note that almost all of these are decided *outside* the immigration courtroom. Congress and the agencies charged with assessing these forms of protection have directed that the adjudications be made in State Courts or before the agencies such as the Asylum Office of the US Citizenship and Immigration Services, the benefits side of DHS. In almost all situations, the immigration judge is not empowered to make the initial determination for relief. The government has tried to adapt the removal hearing system to an ad hoc mechanism of keeping track of the children released to sponsors. But the system is not designed nor adequately resourced to serve as a child dependency system. The immigration court lacks social workers, investigators, and training essential to court system that making critical decisions about child safety and well-being. In New York, the immigration judges and prosecutors often try to do the best they can, making inquiries of the children before them about attending school and emphasizing that the child must return to the immigration court throughout his or her applications before the various other agencies and courts. The court personnel hope that children attending school will at least be free from labor trafficking or have trusted adults who can observe their physical and emotional well-being. And despite many good people within the court system, it is simply not designed to be a sophisticated child protection court.

In New York, as in many parts of the country, the Immigration Court has separated juvenile cases from those of adults and new cases, arriving after May 1, 2014 (approximately) were placed on special priority dockets. The Chief Judge of the immigration court mandated that all children’s first hearings be scheduled within 21 days of the receipt of the charging documents. The goal of the court may have been to help these children move on toward finding help and applying for relief, but the expedited nature of the hearings required many organizations and private firms to spend hours a week on initial appearances. Further, the first hearings frequently arrived at the court ahead of adequate notice to the children and his or her sponsors. In New York, the policy has been fairly uniform to continue a case to allow for re-sending the notice of hearing. But in other parts of the country to rush to hearing resulted in high in absentia rates where children were ordered removed without ever appearing in court. The Chief Judge has now modified the scheduling to allow up to 90 days for scheduling the first hearing and the more organized pace allows advocates to arrange to cover the first dockets and provide no cost screenings for unrepresented youth. But even this pace of setting first hearings does not address the essential question of why use the immigration court at all. Most of the petitions and applications that will aid a young person seeking protection must be adjudicated in alternative fora. Is the Immigration Court’s expensive resources essential to fair adjudication and protection of these youth or is it simply a place where Immigration and Customs Enforcement (ICE), a division of DHS, can report that all recent arrivals will see tough enforcement of the laws? Certainly, the message of a threat of deportation is frightening. The facts that in many parts of the country children are not appearing at their hearings may indicate the depth of that fear. But putting children into deportation proceedings as the main method of control and adjudication is unnecessary. Even without statutory change, the DHS could find better ways to evaluate the protection needs of unaccompanied youth and ultimately, the component agencies with DHS all know how to refer or initiate removal proceedings if relief is not available. Unfortunately at the current time we are starting with a presumption of deportation and not recognizing that limits of a system never designed to hear children’s claims for protection.

Moreover, as is detailed below, the jumping between jurisdictions not only causes delay and confusion for the youth, it requires counsel for the child to master the procedures and keep track of filings made in multiple jurisdictions. Few attorneys have already acquired all the skills necessary to aid children in their claims for protections and at first blush the complex navigation intimidates attorneys and not just the children and sponsors. At the end of this report we offer a few suggestions. First, let’s take a look at the most common forms of relief and problems inherent in the current adjudication models.

## Special Immigrant Juvenile Status – Steps Forward onto the Bridge to Status but Delays on the Path To permanent protection

Congress has long offered special protection to vulnerable children. One of the most important forms of protection is found in the statutory creation of “Special Immigrant Juvenile Status” (SIJS). SIJS is a form of status that can lead to permanent residency if a child is under 21, unmarried, a state court with jurisdiction over care and custody decisions has found that it is not in the best interests of the child to return to his or her country due to abuse, neglect, abandonment or another similar basis under state law. The design of the statute clearly contemplates a bifurcated adjudication: first a best interests determination in the appropriate state court where the child is residing and second an adjudication of eligibility by the USCIS. The child who secures an approval for SIJS is one his or her way to permanent residence and is subject to background and medical examinations similar to other immigrants. The status was not originally contemplated as a form of relief from removal but a careful path to protect some of the most vulnerable children residing in the United States, especially those children who had nowhere to turn but state foster care. However, it is a path to legal status through special immigrant status or other forms of visa petitions such as the U status for victims of crime or the T status for victims of trafficking is also a form of relief that almost always precludes a deportation order.

The problem with placing thousands of children into removal proceedings first, meant that attorneys and advocates for children had to enter the state court process and put the child forward for SIJS. State courts soon were seeing doubling and tripling of applications for appointments of guardians or custodians and requests for the best interests determinations. Delays began to mount in these state courts and some state judges casually referred to the burden being shifted to them from the immigration court as “unfunded mandates.”[[1]](#footnote-1) Certainly, the state courts have statutory and constitutional obligations to make care and custody decisions for unaccompanied youth and in the vast majority of cases, the young people and children needed these family court determinations for their long term care as well as planning for their stability. Still, the pace of the filings has created stress on the state systems and may be unfairly accelerated by pressures from the Immigration Court because the judges there are not empowered to independently make these best interests determinations.

Surprisingly, these “special findings” in state courts are the only forum where our immigration laws contemplate a best interest determination. Under international law and many treaties that address the care and custody of children, courts routinely examine the entire context of a child’s life to assess whether it is in the best interest of the child to be returned abroad. It is a serious limit of U.S. immigration law that Congress has not adequately addressed the special needs of children. But all federal agencies are also bound by the Constitutional requirements of deference to the sovereignty of state determinations.

In a typical SIJS case, the child appears in immigration court and his or her representative (if the child has secured one) reports that the state court is considering his or her application for SIJ special findings. The immigration court will continue the removal hearing to allow the state court to complete its adjudication. In New York in some of the counties this process is fairly expeditious but in others, where many of the children are not represented, the process can require months. If and when the state court appoints a guardian or custodian and makes the special findings order, the child must then file a visa petition before the USCIS. This application is sent to a remote “lockbox” in Chicago and the USCIS has up to six months to complete its adjudication of the eligibility for special immigrant characterization for the young person. If the youth is still in removal proceedings, he or she could not file the last step in the adjudication known as an adjustment of status application. Adjustment of status moves the young person from undocumented to full permanent residence but jurisdiction over the application is controlled by whether removal proceedings are still pending. In New York most of the time, the government would agree to a termination of the removal proceedings once the youth filed for the special immigrant classification. This cleared the jurisdictional barriers to allow the next phase of the case to be decided by the USCIS. If a young person didn’t ultimately qualify for adjustment of status, the USCIS has the discretion to refile a Notice to Appear and once again the youth would be before an immigration judge with a possibility of facing a deportation order.

**Suddenly a Pause: A Queue is Formed Due to Quotas**

Adjustment of status is not available and individuals cannot generally even file to seek adjustment of status, if there are quota delays for the last stage of the process. And in April of 2016, the State Department announced that all the visa numbers had been allocated for children born in El Salvador, Guatemala or Honduras. This single announcement on April 12 created a whirlwind of activity. The announcement meant that children from these countries had to file for adjustment of status before May 1. But children could only make such a filing before the USCIS if the removal proceedings were terminated and if the state courts had issued the orders. In less than two weeks over 500 cases moved through the system quickly requiring heroic efforts by all the adjudicating bodies and the advocates. The government agencies were motivated to move forward to allow the youth to secure the next stage in their multiple hops, skips and jumps toward stability. All the governmental parties recognized that where a state court had made the special best interests findings, that youth was on the path to status and protection in the United States and did not need to have his or her case “stuck” in the immigration court or in a limbo where the child could not move forward. Everyone wanted to avoid the exact chaotic limbo children, who are just receiving their state court orders, now face. These children are stuck on the bridge between living without status and full permanent residence. Because federal statutes do not allow the last stage filing when there are no more visa numbers for the year, the children’s cases sit frozen unable to move forward until DHS policy determines a better path.

As of the writing of this report, senior DHS officials have indicated that they are exploring options to help stabilize the children who have met the threshold requirements of SIJS but cannot complete their cases due to quota delays. We urge the federal government to recognize that Congress has long recognized that certain victims of domestic violence and children who are in need of protection should be able to remain in the U.S. and receive identification and employment documents while they wait for quota allocations to complete the final stages toward permanent residence. SIJS status has express language in the Immigration and Nationality Act that recognizes a changed character of the child’s case once qualified as a special immigrant. This legal change is referred to as “parole” in the statue and traditionally that safe harbor would include work authorization and the end of removal proceedings. But even if the government determines that the parole characterization does not essentially end the removal proceeding, both international and domestic law would limit the power of the government to removal a child who has a state court placement and best interests finding.

Confusingly and perhaps because the prosecutors were largely unfamiliar with all of the state court aspects of special immigration adjudication, shortly after the May 1 cut off, ICE prosecutors began to oppose terminating or administratively closing removal hearings. In part ICE representatives argued it was the uncertainty of when a child might complete the full adjustment of status procedure and when new visa allocations would allow case completion. Given the possibility of many months of delay, the government insisted on moving immigration cases forward. But why? The government does not take this position in other cases where humanitarian relief has been adjudicated by the USCIS such as U visa status for victims of crimes or T visa status for trafficking victims. One of the closest analogies would be for the spouses of permanent residents who have been found to qualify for protection under the provisions of the Violence Against Women Act (VAWA). In those cases, where this is also a quota delay, the ICE usually agrees to termination of the case and the government moves forward with the issuance of Identity and Employment authorization. Documents essential for the victim’s transition to a stable live. Children, even very young children, need similar documents to manage school enrollment, health care enrollment, eligibility for some federal and state benefits programs and simply complying with requests for I.D. to travel or enter buildings. The DHS has the authority to protect these vulnerable youth and it needs to act quickly to clarify their immediate eligibility and to provide guidance to ICE to stop wholesale opposition to termination of unnecessary removal hearings.

Today a child seeking SIJS in New York unless born in a country other than Mexico, El Salvador, Honduras or Guatemala is facing months of process in to state court, a visa petition before the to USCIS and then an indefinite pause where the child may be increasingly anxious about when and how the process will ever end. …. These children deserve our best protection not to be warehoused in a deportation court system that is already overburdened. The federal government has the authority to terminate the proceedings for these youth and to issue parole or deferred action status.

Alternatively, DHS could consider designating children who have special findings orders concluding it is against their best interests to be sent home to have Temporary Protected Status. We have offered this protection before due to a variety of health and safety reasons. Keeping children safe after specific findings in State Courts should be a simple assessment. Further, many organizations have asked for TPS designation for the region due to the dangers in the country and current environmental and health considerations such as the growing Zika virus crisis.

## Asylum: Refugee Protection for Children

When unaccompanied children apply for asylum, the EOIR and the Asylum Office allow the youth to first have the application heard in a non-adversarial interview made before a trained Asylum Officer. This simple and worthy decision is an excellent realization that children need a safe and calm environment to speak about their fears and difficult experiences. The government is to be commended for creating and supporting this accommodation.

Similarly, the government decided to prioritize hearing children’s case and that is a welcome step if adjudications can move quickly while still being fair and accurate. Yet, prioritizing children’s cases, alone is insufficient to make the opportunity to seek refugee protection within the United States meaningful. There are several key problems in the current system.

There is insufficient guidance to the Asylum Office about conducting interviews of children. The adjudicators have had to learn on the job. Formal training on child appropriate interviewing technique while part of the full training of asylum officers is by itself not enough. A few hours discussing how to ask children questions or to itemize special procedures for child applicants is not sufficient to ensure fair and accurate interviews. Asylum advocates have reported officers who ask very young children questions that can be impossible for a child to answer. Asking a child to give an assessment of the danger they faced or to comment on whether they might be able to safely relocate to another part of the country maybe standard questions but how is a young child to really develop a satisfactory answer? Children are not usually able to contextualize their experiences without help from trained and skilled attorneys. But the attorney’s role in the Asylum Interview is diminished usually to submitting materials, taking notes, and hopefully being afforded an opportunity to ask the child additional questions or to make a short statement on the child’s behalf explain the legal theory of why the child’s situation qualifies for refugee protection. While this diminished role may be appropriate with adults in some cases, child are particularly vulnerable when questioned by strangers.

In our experience, it may take a child a long time, hours of meetings and careful preparation to begin to trust the attorney helping the child. Most of these young people have never been represented by a professional before and many stopped formal education between sixth and eighth grade. The process of preparing the affidavits and forms necessary to complete an asylum application can re-traumatize the child.

In the New York area there are two asylum offices. The state of New York is served by both offices and the jurisdiction depends on the child’s county of residence. One office is located now in Bethpage, Long Island. Children must arrive for their interviews before 7:45 a.m. This often means the child has traveled from Brooklyn or Queens on a 6 a.m. train heading to Bethpage to reach the LIRR station by 7. But this office also hears the applications of youth who live in Dutchess, Nassau, Orange, Putnam, Richmond, Rockland, Suffolk, Sullivan, Ulster and Westchester counties. Reaching the office on time may mean staying overnight in the region, a difficult arrangement if the child does not have a legal guardian or adult able to travel with them. And if the applicant needs to take public transportation to the office, the young person is facing more challenges. Asylum Office is located 1.4 miles from the train station and the agency website does not provide public transportation instructions.

The children living in Manhattan, the Bronx, and the remaining New York counties, their cases are heard in Lyndhurst, New Jersey, and while there are buses and trains that come close the facility it can still be difficult for children to reach the offices.

This not just a problem in the New York region. There are only 8 asylum offices nationwide and in many parts of the country children may be traveling across several status to apply for asylum. The costs and anxiety of the journey add to the stress of making the application.

The Asylum Office does provide officers who visit other locations and the agency has tried to bring Asylum Officers to locations closer to the children’s residence in many situations; but the situation remains that the physical interview process, the timing of the interview and the manner in which the interviews are conducted can add up to make a productive interview difficult for all the parties involved.

Another challenge in the system is that the government does not generally provide interpreters for the asylum applicant. He or she must provide an interpreter and the Asylum Office monitors the interpretation using phone auditors. Central to a good interview is allowing the child to build a relationship not only with his attorney but to also know and understand the person providing interpretation. The Asylum Office is perhaps too used to people arriving with interpreters who have not worked previously with the applicant. But in children’s cases, skilled interpretation is critical. The Asylum Office should make an inquiry as to whether the child has met the interpreter and that the child is comfortable with that person, as well as with the “auditing” interpreter on the phone. We have had young children tell us they wondered if people from home were listening to them as they spoke in the asylum office and they were fearful of retribution for family still in the home country or of consequences for the child for speaking out. The children come from a culture where the police rarely prosecute criminals targeting children and where youth who speak out risk injury or death.

Underdeveloped Guidelines and Inappropriate Application of Adult Standards

One of the greatest challenges in representing children seeking asylum is the lack of published case law or tailored regulations that provided guidance to the Asylum Officers. While there are general statements such as the standards for finding persecution should be seen in the context of childhood and less evidence of discrimination or threat may be required to establish persecution for a child, there is insufficient development of the law. The Asylum Office is guided both by agency policy memoranda and case law. But there are few, if any reported decisions or published memoranda to guide the adjudicators or the advocates.

The Asylum Office has tried to centralize some of the decisions to avoid inconsistent results and careful development of policy interpretations but these efforts at centralization lead to excessive delays with children’s cases taking over a year to decide. The prioritization of the unaccompanied minors interviews also resulted in greater autonomy in the field offices but there are still lengthy delays in adjudications without much explanation to the public of why.

And while delay can be devastating and difficult to vulnerable youth, inconsistent adjudication is also distressing and raises greater questions about internal policy guidance. In a recent report prepared by the Associated Press after securing outcome data from all of the Asylum Offices, Amy Taxin [reported](http://www.bigstory.ap.org/article/b140ad95d4a646e9aff67b8c80708e57/ap-exclusive-childrens-asylum-approvals-vary-us-region) very disparate results. The highest approvals were in San Francisco with an approval rate of 86% and a low of 15% in the Chicago office. New York’s two offices were between 29% for Bethpage and 36% for Lyndhurst.

Although Ms. Taxin and other reporters tried to identify the reasons for the disparities when the children are coming from the same three or four countries, there is no real way to know why the cases are decided so differently. Most advocates believe it is the lack of clear guidance and varying views among the regional supervisors that may account for most of the discrepancies. This problem of erratic adjudication is troubling for adults as well and has been well critiqued and studied in books such as Refugee Roulette and [Lives in the Balance](http://nyupress.org/books/9780814708767/). Given the agency prioritization of children’s cases and the need for greater consistency overall, changes are essential.

### Referred Back to the Immigration Court

If the Asylum Office does not grant asylum to a child, the case is returned to the EOIR or Immigration Court and scheduled for a hearing. The child is allowed to supplement the original application and the Immigration Judge can decide the case “de novo” or without being limited by any finding made by the Asylum Officer. In many of these cases, the attorneys prepare expert affidavits, supplement the application with country conditions research and prepare affidavits with the child. Unfortunately, it is a rare case where the ICE attorney meets and discusses the case with the counsel for the child. Frequently at the stage of scheduling the asylum case for a merits or evidentiary hearing, the government will inquire as to whether the child would prefer to accept prosecutorial discretion and termination of the case in lieu of the trial or pursuing asylum. While the government should consider each case and the current dangerous conditions in the region and offering prosecutorial discretion is a welcome offer removing the immediate threat of deportation, the offer places a great deal of stress on the young client and his or her counsel. Should they go forward with the claim? If successful a grant of asylum can one year later lead to adjustment of status to full permanent resident status. But if denied, the young person is facing many months of an administrative appeal and even longer if federal judicial review is pursued. For children and poor families, many private counsel will not agree to prepare the appeals without payment and even pro bono counsel may have limited their representation to the initial application or removal hearing proceeding. If ICE counsel took the time to read the particular application and to meet with the child and the child’s representative, the legal issues and factual concerns might be developed outside of the courtroom. If children are not represented, of course, the trial attorney is unable to approach the child directly but the immigration court might provide court hearings to allow informal discussions before forcing a child to present his claim for protection in a contested adversarial hearing.

Asylum applicants may also seek similar protection from removal under separate provisions of the immigration law such as the convention against torture or withholding of removal. At times ICE counsel will extend an offer of a stipulation to withholding of removal rather than to the grant of asylum. In essence, withholding gives the child protection from removal but unlike asylum, the person who receives withholding does not secure full permanent resident status later and also cannot sponsor other members of his or her family. While children do not in general have the ability to sponsor relatives for asylum, the offer of withholding seems particular troubling for children because it leaves them in an indeterminate state that may impact their future ability to secure higher education or to travel internationally. And it likely means a permanent separation from family.

Ironically, people seeking withholding of removal have a high burden of proof. They must establish that future persecution is more probably than not unlike the well-founded fear of persecution for asylum. It is unclear why Ice policy would agree to a grant of this relief but not a grant of asylum for a child.

## Recommendations for Improving Asylum Adjudication

**For the Asylum Office (DHS- USCIS)**We recommend that the guidelines already utilized in the training of Asylum Officers, found in the Asylum Officer Basic Training Course on Guidelines for Children’s Asylum Claims, available at <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs>, be integrated into **formally published guidelines** for Asylum Officers to utilize in their adjudications. These important guidelines include such items as the ability of unaccompanied children to bring a “trusted adult” with them to the Asylum Office; for the Asylum Officer to recognize that children’s development will influence their ability to participate in their asylum interview, and that this development is influenced by a variety of factors; and that children have a unique set of preconceptions impacting their understanding of the world.

Currently, interview times for asylum interviews at both Asylum Offices serving the New York area are very early in the morning and both offices are difficult to reach by public transportation. We recommend that the Asylum Office **move interview locations for children to accessible locations** and schedule interviews at times of the day which coincide with public transportation schedules.

We recognize that children present unique vulnerabilities and challenges for interviewers. We recommend **specialized asylum officers**, dedicated to interviewing and adjudicating children’s claims, who receive **additional in-depth training**, be assigned to children’s cases.

Finally, we recommend that the Asylum Office make the **asylum process more transparent** for child applicants, including wait times to receive a decision, and that this data, including the number of pending applications, be published more frequently.

**For ICE Attorneys (DHS-ICE)**We recommend dedicated ICE Attorneys **be assigned to children’s dockets** at the Immigration Court and that these attorneys receive **substantial training in adjudicating children’s cases**. This training should include a detailed analysis of the forms of immigration relief specific to children, and the impact of a child’s development on all aspects of her immigration case, determining credibility in children as distinct from adults, and on evidentiary standards applicable in children’s cases.

Additionally, we recommend that ICE attorneys be required **to meet with or confer with children’s attorneys,** whenever possible, so as to narrow issues for the hearing and streamline the adjudication process. We firmly recommend that ICE attorneys review the submissions of counsel in advance of Immigration Court hearings in order to identify concerns of evidence or law so that counsel for children can appropriately address these legal issues.

Finally, we strongly suggest that prosecutorial discretion and the administrative closure of a child’s immigration removal proceedings be preserved as an option based on humanitarian concerns.

## Conclusion

Much more could be written on the needs of children seeking protection under U.S. law. This report only touches on some of the main concerns Safe Passage Project has identified. Our work continues at the New York Immigration Court and we will do our best to recruit and mentor attorneys aiding these vulnerable youth. Systemically, the system needs to be redesigned and shaped to protect the children. We believe this is best accomplished by providing access to experienced counsel, by adapting bureaucratic procedures to be child centered and by greater training and transparency in the law to guide the adjudicators of these important claims.

Overtime, the U.S. asylum process has edged toward a system that too often develops an adversarial tone. At its heart, children who seek asylum and other protections should be heard in an environment that recognizes the trauma and dangers these children have faced. We can design systems that emphasize empathy rather than using a one-size-fits all adult adjudication model.

We hope this report will inform policy makers. Safe Passage Project stands ready to do our best to ensure that no child faces deportation alone.

1. There are also problems with adjudication in the state courts and while the Office of Court Administration is trying to provide guidance and support to the court system, far too many children face unusual extra procedural burdens and lack access to the state courts because no counsel is appointed until they have found a way into the system. This blocking of the front door has been a major obstacle for many families and dramatically increased a need for pro bono counsel and retraining of family law counsel to help vulnerable children. This report is focused on problems within the federal agencies. [↑](#footnote-ref-1)