

**Standards For the Custody,
Placement and Care;
Legal Representation;
And Adjudication of
Unaccompanied Alien Children
In the United States**

August 2004



**American Bar Association
Commission on Immigration**

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Only the text of the black-letter rules contained herein has been formally approved by the American Bar Association House of Delegates as official Association policy. Although it does not express the formal position of the American Bar Association, the commentary serves as useful explanation of the black-letter rules. The text of the commentary published herein is the final version that was officially released by the ABA in August 2004. It supersedes all prior drafts that have been distributed for informational purposes.



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CONTENTS

I.	Definitions	6
II.	Preamble	8
III.	Rules of General Applicability	10
	A. Applicability of These Standards.....	10
	B. Treatment of Children with Dignity and Respect.....	10
	C. Full Rights of Children	10
	D. Best Interests of the Child.....	11
	E. Right to Non-Discrimination	12
	F. Right to Full Participation in Decision-making	12
	G. Right to Interpreter and Translation.....	12
	H. Right to Attorney	12
	I. Right to Advocate for Child Protection	13
	J. Presumption Against Detention and in Favor of Family Reunification	13
	K. Right to Privacy and Freedom of Expression	13
	L. Right to Personal Safety and Protection	14
	M. Right to Preservation of Culture and Identity.....	14
	N. Cooperation.....	14
	O. Consistent Treatment	15
IV.	Training for Attorneys and Others	15
	A. Initial and On-going Training	15
	B. Substance of Training	15
	C. Additional Training in Child-sensitive and Culturally Appropriate Interviewing Techniques.....	16
V.	Representation of Children	18
	A. The Attorney’s Role.....	18
	B. General Standards of Professional Conduct	23
	C. Establishing the Client Relationship.....	24
	D. Coordination with the Advocate for Child Protection	26
VI.	Standards for the Custody, Placement and Care of Unaccompanied Alien Children	27
	A. General Policy Favoring Release and Family Reunification.....	27
	B. Appropriate Placement and Custody	28
	C. Initial Apprehension and Expeditious Processing	29
	D. Parents’ and Others’ Rights to Custody of the Child.....	38

E.	Release of the Child: Home Studies and Notice of Rights and Responsibilities	42
F.	Child’s Right of Appeal of Placement	42
G.	Custodial Agency Custody Beyond Initial Apprehension and Before Release Is Accomplished	43
H.	Transfers of Children	45
VII.	Rights of Children in Custody	49
A.	Legal Rights	49
B.	Physical Conditions	51
C.	Services for Children	56
D.	Freedom of Expression	62
E.	Repatriation.....	66
VIII.	Adjudication of Claims of Children	66
A.	Rights of the Child	66
B.	EOIR Proceedings Involving Children	70
C.	Acceptance of a Remedy/Waiver of Rights.....	74
IX.	Bibliography and Glossary	77

I. Definitions

- “*Adult Family Member*” — Any person who is 18 years of age or older and with whom the Child has a familial bond through blood or a legal relationship, including, but not limited to, a Child’s parent, step-parent, grandparent (of any degree), sibling, aunt, uncle or cousin.
- “*Adjudicator*” —An Immigration Judge or a member of the Board of Immigration Appeals.
- “*Advocate for Child Protection*” — (ACP) An individual with appropriate expertise appointed to determine and advocate the best interests of the Child.
- “*Attorney*” —An individual who represents a Child in an Immigration Investigation, EOIR Proceedings or federal court.
- “*Child,*” “*Children,*” “*Unaccompanied Child(ren),*” “*Unaccompanied Alien Child(ren)*” — Every individual under the age of 18 without a lawful immigration status in the United States who does not have a parent, custodian, or legal guardian both living in the United States and available and willing to provide care and custody. Though these standards use masculine pronouns for convenience in some places, they are intended to be gender-neutral.
- “*Custodial Agency*” — Any entity that has the Custody of a Child or is responsible either in law or in fact for providing for the care or placement of a Child, but not including an Immigration Enforcement Agency.
- “*Custody*” — The holding of, care for, supervision of, or protection of a Child, as authorized by law. This includes actual, constructive or legal custody, except as noted otherwise.
- “*Detention Facility*”— A place, institution, building (or part thereof), set of buildings, or area (whether or not enclosing a building or set of buildings) that is used for the lawful Custody and/or treatment of a Child. Types of Detention Facilities include secure, non-secure, and shelter facilities and group homes; they do not, however, include Foster Care.
- “*Developmentally Appropriate*” — Suitable to the Child’s age, level of education, gender, cultural background, intellectual, social and emotional development, degree of language proficiency, Special Needs, and other individual circumstances in order to ensure the Child’s comprehension and meaningful participation.
- “*EOIR Proceedings*” — all hearings before the court/body designated to determine removal cases, presently the Executive Office of Immigration Review (*i.e.*, the Immigration Court or the Board of Immigration Appeals).
- “*Flores*” — The stipulated settlement agreement reached in *Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997) governing custody, placement and care of Unaccompanied Alien Children.
- “*Foster Care*” — A licensed or approved placement which meets the standards established by a state licensing or approval authority(ies) and which provides 24-hour substitute care for

children, including responsibility for the comfort, health, well-being, education and upbringing of the Child.

- “*Home Study*” — An assessment that includes investigation of living conditions in which the Child would be placed and the standard of care the Child would receive.
- “*Immigration Investigation*” — Any communication which is intended to, or does, obtain information from or about the Child relevant to his immigration status, excluding privileged communications by the Child.
- “*Immigration Enforcement Agency*” – Any entity with authority to enforce the immigration laws of the United States.
- “*Special Needs*” — Any condition or disability, such as mental retardation, hearing impairment, speech or language impairment, visual impairment, emotional disturbance, developmental disability, orthopedic impairment, autism, traumatic brain injury, specific learning disability, or other disabilities as further defined in the regulations implementing the Individuals with Disabilities Education Act (34 U.S.C. § 1400 *et seq.*) found at 34 C.F.R. § 300.7.
- “*Staff*” — any individual, including volunteers, who works at or for a Detention Facility.
- “*Temporary Placement Facility*” — A Detention Facility into which Children are placed upon apprehension by the Immigration Enforcement Agency and pending transfer to the Custodial Agency.

II. Preamble

Unaccompanied Alien Children who reach our shores have often come here fleeing violence, abuse and persecution in their native lands. Frequently, these Children, or those who have helped them flee, have chosen the United States as their destination in the belief that it promises and provides their last, best hope for compassion, fair treatment and refuge from all that they have left behind. These Standards seek nothing more – and nothing less – than to fulfill that promise to them.

Despite all the obstacles that these Children have overcome simply to reach America, their treatment here confronts them with a new set of hurdles. Approximately 5000 Unaccompanied Alien Children, ranging from infants to teenagers, are held in Custody each year. Some are apprehended at our borders as they seek to enter the country. Others are detained in the interior, sometimes having lived in this country undetected for years. Many of these Children have been held unnecessarily in secure Detention Facilities and forced to commingle with adults and/or adjudicated delinquents. In such circumstances, they have also been cut off from the love and support of parents, legal guardians, or other adult family members in this country who are willing, able, and fit to care for them. Finally, the level of care and services, such as educational, medical and cultural, available to these Children while in detention have often been inadequate or interrupted due to unnecessary transfers from one Detention Facility to another.

Because a large percentage of these Children do not speak English and/or are of limited education, they require substantial assistance in understanding and asserting their rights. Indeed, the stakes are, in some instances, literally life and death. However, as many as half of these Children do not receive any legal representation at all. Alone, such Children must attempt to resolve their immigration status in adversarial proceedings against trained and experienced Department of Homeland Security (“DHS”) attorneys. Nor are these Children provided with guardians *ad litem* or Advocates for Child Protection (recommended below) to identify and promote their best interests. Finally, the interpreter services provided these Children often are inadequate, leaving them unable to communicate their most basic needs to their custodians and service providers.¹

In response to these circumstances, these Standards reject an approach that treats Children merely as “adults in miniature” in favor of one which recognizes the special needs of Children. The Standards promote an approach to the Custody, placement, care, legal representation and adjudication of Unaccompanied Alien Children which may best be characterized as holistic and child-centered. In particular, these Standards spring from certain fundamental principles that should guide the treatment of any Unaccompanied Alien Child in the United States in these respects. Each Standard in Sections III through VIII represents a particular application of these principles in a variety of contexts bearing upon the treatment of such Children. As such, the fundamental principles, outlined in brief immediately below and set forth in more detail in Section III, should inform and guide any interpretation of the Standards that follow them.

At all times, and in all regards, an Unaccompanied Alien Child should be treated with dignity, respect, and special concern for his particular vulnerability as a Child. All

Unaccompanied Children possess the full rights of children. Where they are also refugees, Children also possess the full rights of refugees.

To the maximum extent possible, the best interests of the Child shall be a primary concern of the Custodial Agency, Advocate for Child Protection, Adjudicator, and all other Immigration Enforcement Agency personnel responsible for the Child in the United States in all actions and decisions concerning the Child. A determination of the Child's best interests should be made with a consideration of a variety of factors discussed in greater detail below.

Every Child is entitled to non-discrimination, i.e., the enjoyment of the rights and freedoms guaranteed by law irrespective of the Child's race, ethnicity, color, gender, language, religion, political or other opinions, national and social origin, birth, disability, sexual orientation, or other status. In addition, all persons interacting with a Child should be sensitive to the impact of gender on the Child's trust, confidence, candor and well-being due to the Child's past experiences or cultural norms.

A Child should be permitted, to the extent possible given his intellectual, social and emotional development, to participate in all decision-making processes that affect his life. The custodian, Advocate for Child Protection, Adjudicator and Attorney for the Child should ensure for each Child the opportunity to express his views freely on all matters affecting him, and should give due weight to those views in accordance with the age, maturity, and intellectual, social and emotional development of the Child.

As necessary corollaries to participation, the Child must first be provided an Attorney, and should be timely informed of that right, to ensure his meaningful access to justice. Fortunately, hundreds of attorneys throughout the country already provide quality pro bono representation to Children in partnership with the American Bar Association and a nationwide network of nonprofit organizations dedicated to providing such legal services. Given the critical importance of legal representation, these Standards require that an Attorney be provided to all Children. Unfortunately, there have been rare instances in the past where attorneys associated with criminal operations for the trafficking or smuggling of children have claimed to represent Children in their proceedings when in fact they have only sought to further a criminal enterprise. These Standards place a duty on all parties with responsibility for these Children to report any such criminal conduct should this deplorable practice appear again in the future.

As a second corollary to participation, the Child must be able to understand others and express himself to the extent to which he is capable. A Child deficient in English should therefore be provided the assistance necessary, including an interpreter and translations, to ensure that he is able to participate in the decision-making process and enjoy all other rights and services available to him. Third, an Advocate for Child Protection should be appointed for each Child to assist him to participate fully in his case and to ensure that his best interests are identified, expressed and advocated. The services provided by these three individuals – the Attorney, the interpreter, and the Advocate for Child Protection – are essential to the administration of justice and to the fair and accurate resolution of the Child's case.

A Child must be afforded reasonable privacy with respect to phone calls, mail, communication with the press, and visits with guests. A Child also has the right to reasonable

freedom of expression. This right should include freedom to seek, receive and impart information and ideas through any media.

A Child's personal safety should be protected and he should be safeguarded from all forms of violence, injury, abuse, neglect, and exploitation.

Given the fundamental importance of the family to, and the potentially deleterious effects of placement in a Detention Facility on, Children, a Child is entitled to a presumption against detention and in favor of family reunification or release into the Custody of another appropriate individual or entity.

Anyone who has responsibilities pertaining to the Custody, placement, care, legal representation or adjudication of a Child should be required to uphold these Standards. Those individuals and entities working with a Child should cooperate and coordinate with each other to ensure that the welfare and rights of the Child are protected and enhanced. Notwithstanding different governmental jurisdictions, Unaccompanied Alien Children in all parts of the country should receive equal treatment.

It has been said that the quality of a society is best judged by how it treats its most vulnerable members. Few among us are more vulnerable than Unaccompanied Alien Children. With respect to their plight, the United States should not be found wanting.

III. Rules of General Applicability

The following are rules of general applicability that should guide the treatment of any Unaccompanied Alien Child in the United States in all respects and that inform the specific standards set forth below, even where not specifically referenced. Although these Standards are intended to apply to Unaccompanied Children in the United States, certain sections refer, and apply, to children who have parents or guardians in the United States and who therefore may not be, by definition, unaccompanied.

A. Applicability of These Standards

Rule: Any individual or entity who has Custody of an Unaccompanied Child, or otherwise has responsibilities pertaining to his placement, care, legal representation or adjudication of his immigration case, should be required to uphold these Standards. These Standards should be applied broadly and equally regardless of where the Child is in Custody.

B. Treatment of Children with Dignity and Respect

Rule: At all times, and in all respects, a Child shall be treated with dignity, respect and special concern for his particular vulnerability as a child.²

C. Full Rights of Children

Rule: Unaccompanied Children shall be accorded the full rights of children. Unaccompanied Children who are refugees shall also be accorded the full rights of refugees.

Comments: Pursuant to the United Nations Convention on the Rights of the Child (“CRC”), Children are no longer viewed only as having needs but also as having legal rights. The CRC addresses almost every aspect of a Child’s life from health and education to social and political rights. The CRC establishes three rights, sometimes called the “triangle of rights,” which are considered to be fundamental: the “best interests” rule, non-discrimination and the right to participate. CRC standards are considered universal and customary.³

D. Best Interests of the Child

Rule:

1. Except as otherwise required by law, the best interests of the Child shall be a primary concern of the Custodial Agency, Advocate for Child Protection, Adjudicator, and all Immigration Enforcement Agency personnel responsible for the Child in the United States in all actions and decisions concerning the Child.
2. A determination of the best interests of the Child shall take into account, at a minimum, the following factors:
 - a. the age, gender, and religious and cultural background of the Child;
 - b. the possible reunification with a parent, other Adult Family Members or legal guardians, with consideration given to any evidence that may indicate whether the custodial relationship is harmful to the Child;
 - c. the Child’s expressed interests;
 - d. the past experiences of the Child;
 - e. the social, emotional, mental, developmental and physical challenges the Child faces or will face; and
 - f. if the Child is detained, the impact on the Child of continued detention versus immediate release to a parent, other Adult Family Member, or legal guardian.

Comments: This rule recognizes that current immigration laws and regulations do not require or provide for an evaluation of a Child’s best interests in the adjudication of immigration claims. However, in accordance with international

*standards, this rule provides that, wherever the Child's best interests may control, they shall be of prime concern.*⁴

E. Right to Non-Discrimination

Rule: Every Child is entitled to non-discrimination on the basis of the Child's race, ethnicity, color, gender, language, religion, political opinion, national and social origin, disability, or sexual orientation.⁵

F. Right to Full Participation in Decision-making

Rule: A Child has the right to express his own views freely in all matters affecting him.

Comments: Children have the right to participate in all decision-making processes that affect their lives. Specifically, allowing a Child meaningfully to participate in decision-making means ensuring that this process must (i) be free from pressure on and manipulation of the Child either to reach a certain decision or to make a decision at all; (ii) account for the Child's evolving ability to understand situations and respond to advice and guidance; and (iii) provide the Child with sufficient and understandable information to allow the Child to make an informed decision in a form that the Child can understand.⁶

G. Right to Interpreter and Translation

Rule: Children have the right to language access by means of an interpreter and translated documents throughout all stages of Custody and proceedings.

Comments: The right to an interpreter or translation services is necessary to ensure that the Child is able to enjoy all other rights and services. The entity providing the right or service in question, or otherwise engaged in the enforcement process, has the obligation to provide a trained, independent interpreter or translator. When choosing an interpreter or translator, it is important to choose one who speaks not only the Child's language, but his specific dialect, as dialects can differ substantially. All written materials relating to the Child's custody, placement, care, legal representation and adjudication shall be translated into the Child's preferred language and provided to him. Where the Child is illiterate, the materials shall also be read to him.⁷

H. Right to Attorney

Rule: Following the Immigration Enforcement Agency's initial apprehension, the Child shall receive a timely legal rights presentation that includes an opportunity for individual consultation with an Attorney. The Child has the right to have an Attorney represent him in any formal proceedings or other matter in which a decision will be made which will affect his immigration status. An Attorney shall be appointed for the Child, at public expense if necessary.

Comments: Every Child shall have access to an Attorney throughout the EOIR Proceedings and any other administrative or court proceedings related to his removal. The participation of an Attorney on behalf of a Child subject to EOIR Proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of EOIR Proceedings. However, an Attorney is not required for Children apprehended at the border who agree to voluntary repatriation.⁸

I. Right to Advocate for Child Protection

Rule: In order to ensure that the Child's best interests are identified, expressed and advocated at all times, an Advocate for Child Protection shall be appointed not later than 72 hours after the Custodial Agency assumes Custody of such Child. Whenever possible, the Advocate for Child Protection should be involved in all placement decisions, including the initial placement.

Comments: The right of a Child to participate meaningfully in proceedings regarding his immigration status as well as in decisions affecting other aspects of his life is universally recognized. To achieve that end, the appointment of an Advocate for Child Protection is necessary. However, a Child who, immediately upon apprehension, accepts voluntary repatriation is not entitled to an Advocate for Child Protection. The Advocate for Child Protection should have the qualifications, duties and obligations described in Rule VI.C.8. *infra*. The Advocate for Child Protection is distinct from the Attorney, and his role is to ensure that the Child's best interests are identified, expressed, and advocated, and that the Child's views are expressed.⁹

J. Presumption Against Detention and in Favor of Family Reunification

Rule: A Child is entitled to a presumption against detention and in favor of family reunification or release into the Custody of another appropriate individual or entity.

Comments: This Rule is prompted by the fundamental importance of the family to, and the potentially deleterious effects of Custody on, Children. See Rule VI.A. *infra*.

K. Right to Privacy and Freedom of Expression

Rule:

1. A Child is entitled to a reasonable right of privacy. This right should include the ability to talk privately on the phone without automatic monitoring; to receive and send uncensored mail; and to meet privately with attorneys and other visitors.
2. A Child is also entitled to the right of freedom of expression. This right should include freedom to seek, receive and impart information and ideas.

This right includes the right to speak in the Child's own language and to contact the news media, religious groups or community groups if the Child so desires.

Comments: A Child's freedom of expression should not be abridged even when a Child is in a Detention Facility, to the extent consistent with the safety of the Child and others.¹⁰

L. Right to Personal Safety and Protection

Rule:

1. The Custodial Agency and the Immigration Enforcement Agency shall take all appropriate preventative measures to protect a Child from all forms of physical, sexual or mental violence, injury or abuse, as well as neglect, abandonment, maltreatment and exploitation, while that Child is in its care.
2. The Custodial Agency shall have expertise in child welfare principles and shall not be the same agency charged with enforcing the immigration laws.
3. A Child shall never be released into an environment likely to lead to abuse.

Comments: Historically, the custody and care of Unaccompanied Children arriving in the United States was the responsibility of the Immigration and Naturalization Service ("INS"). The INS was an enforcement agency rather than an agency with child welfare expertise. As both custodian and prosecutor, the INS faced an inherent conflict of interest, and often placed Children in inappropriate settings and otherwise failed to consider Children's best interests.

M. Right to Preservation of Culture and Identity

Rule: The Custodial Agency shall take all appropriate measures to preserve a Child's essential identity, including such aspects of that identity as the Child's culture, religion, name, family relations, and sexual identity, and to protect the Child's physical, psychological, spiritual, moral and social development.

N. Cooperation

Rule: The Custodial Agency, the Immigration Enforcement Agency, and individuals working with the Child shall cooperate and coordinate with each other to ensure that the welfare and rights of the Child are protected, especially with respect to transfers of the Child.

Comments: When a Child is transferred or released, it is essential that the Custodial Agency and Staff maintain intact all records necessary to the Child's

welfare, including medical and educational records, and transfer them with the Child.

O. Consistent Treatment

Rule: Unaccompanied Alien Children shall receive equal treatment and services regardless of where in the United States they are held in Custody.

IV. Training for Attorneys and Others

A. Initial and On-going Training

Rule: Special training should include Attorneys, judges, government trial attorneys, custodial agency personnel and/or contractors, and Advocates for Child Protection working with Children subject to Immigration Investigations, EOIR Proceedings, and U.S. Court of Appeals proceedings. This training should take place both prior to beginning that work and on an ongoing basis.

B. Substance of Training

Rule: Training for these Attorneys, judges, government trial attorneys, custodial agency personnel and/or contractors, and Advocates for Child Protection should include:

- a. information about immigration law and policies, including those forms of relief specific to Children, the consequences to the Child for failure to appear at any scheduled proceeding, relevant federal statutes, federal and agency regulations, court decisions, and court rules;
- b. information about the evidentiary rules as they relate to Children in immigration proceedings;¹¹
- c. an overview of the court process and key personnel in Immigration Investigations, EOIR Proceedings, and U.S. Court of Appeals proceedings involving Children;
- d. a description of applicable guidelines and standards for representation, and of the roles of attorneys and Advocates for Child Protection in EOIR Proceedings;
- e. information on Child development and a Child's needs and abilities;
- f. information on the multidisciplinary input required in immigration cases involving Children, including information on local experts who can provide consultation and testimony on the reasonableness and appropriateness of efforts to repatriate such Children;

- g. information concerning family dynamics and dysfunctional behaviors that might impact a Child;
- h. information on the circumstances under which Children arrive alone in the United States, such as victimization by trafficking and smuggling operations; and
- i. information on accessible Child welfare, family preservation, medical, educational and mental health resources; Child evaluation, diagnostic and treatment services; and the provisions and constraints related to any available payment for services.

C. Additional Training in Child-sensitive and Culturally Appropriate Interviewing Techniques

Rule: Attorneys, judges, government trial attorneys, and Advocates for Child Protection should receive training in child-sensitive interviewing techniques to assist them in communicating with Children, to create a nonjudgmental, supportive and sympathetic environment that puts the Children at ease to the extent possible and that also facilitates self-expression by Children. Attorneys, judges, government trial attorneys, and Advocates for Child Protection should also receive training in interviewing Children in a culturally appropriate manner.

Comments: Some specialized training is a necessity for judges, government trial attorneys, Attorneys, and Advocates for Child Protection working with Children in Immigration Investigations, EOIR Proceedings, and U.S. Court of Appeals proceedings, given the unique and vulnerable attributes of Unaccompanied Children. The term “interviewer” is used throughout this comment for ease of reference and is meant to include Attorneys, judges, government attorneys, and Advocates for Child Protection.

Interviewers should be trained to take a friendly, relaxed approach when interviewing Children, use Developmentally Appropriate language, avoid legal terms and abstract concepts, to the extent possible, and favor open-ended questions over leading ones; be mindful that Children who have had distressing experiences may find it very difficult to trust unfamiliar adults and be prepared to be patient to tolerate expressions of distress or aggression from them; interpret Children’s answers in light of their age and stage of development; be patient if Children are initially reluctant to talk and avoid pressuring Children to talk before they are ready; and be attentive to Children’s potentially limited attention spans and need for snack or bathroom breaks. Attorneys and Advocates for Child Protection should also be trained to avoid giving Children false assurances, as such assurances may damage their trust towards them and adults in general, but instead to present Children with a realistic picture of their circumstances, in an atmosphere of trust and support;

The interviewer should be trained to expect and address a variety of reactions that a Child may have to him. For example, the Child may find it extremely difficult to talk about what he has experienced. The Child may be afraid of being overwhelmed by emotions if he expresses them to someone else. He may also use particular behaviors to test whether the interviewer will react critically or sympathetically. Because the Child may feel guilty or ashamed about past experiences, such as service as a child soldier or sexual abuse, conveying respect for the Child and not judging his behavior, is important. In particular, if the Child is a female who has suffered sexual abuse in the past and the interviewer is a male, it may be helpful to have a female adult present during interviews to make the Child feel secure.

To put the Child at ease, the interviewer should be trained to consider, where possible, a variety of approaches: sitting on the ground, engaging in play while talking, wearing casual clothes, or allowing the Child to hold a familiar toy. In attempting to negate the power dynamics inherent in adult-child relationships and avoid suggestibility, the interviewer should demonstrate respect and empathy by not interrupting the Child and by affirming his responses when appropriate, but should also take care not to influence the Child's statements by providing overly positive feedback. Listening in an attentive and supportive way can also help the Child come to his own conclusions or solutions, particularly if the Child is older or an adolescent. Because children have limited attention spans, a series of shorter meetings may prove more effective than a few longer ones.

The interviewer should also be trained to seek to understand the norms particular to the Child's culture and should use language and concepts appropriate to those norms. For example, the norms of interpersonal communication, such as those governing the expression of emotions, physical touch, eye contact and formality between adults and Children, vary from culture to culture. The interviewer should also be trained to look for culturally appropriate ways for the Child to express herself. These may include singing, dancing, drawing, or playing. These may also entail giving the Child quiet time for reflection during the interview, or letting the Child set the pace for portions of the interview.

An Attorney should further prepare himself for the representation of Children through formal training and ongoing mentoring by experienced juvenile and immigration attorneys. That training should cover a variety of topics necessary for effective representation. For example, an Attorney should be trained that Children often express perceptions of events in a different manner than adults. For example, it is natural for Children to fantasize, invent explanations for unfamiliar or frightening events, express themselves in symbolic ways, regress, or emphasize issues which may seem unimportant to adults.¹²

The Attorney should be trained to inquire about the Child's life history, especially how he came to be in the United States; other information necessary for family tracing, and other information geared towards understanding the Child's social, economic and cultural background. The Attorney should not view finding

*discrepancies as the primary purpose of his interviews of the Child. The Attorney should be aware that the Child may not know the specific circumstances that led to his flight or the particular details of his flight. The more the Child is able to express his personal circumstances and emotions, the more effective the case that the Attorney can make on his behalf. Thus, even where an Advocate for Child Protection is able to provide a detailed account of the Child's circumstances, the Attorney should still make every effort to hear the Child's story in his own voice.*¹³

V. Representation of Children

A. The Attorney's Role

1. The Attorney's Duty to the Child

Rule:

- a. The Attorney shall ensure that the Child participates in the Immigration Investigation and EOIR Proceedings to the greatest extent possible, taking into account the Child's age, intellectual, social and emotional development, maturity, level of education, ability to communicate, and personal circumstances.
- b. The Attorney shall provide the Child with legal advice and zealously advocate the Child's legal interests, as directed by the Child's expressed wishes.
- c. When hired by a parent or other adult to represent the Child, the Attorney's obligation is to represent the Child's expressed wishes, even if they conflict with those of the parent or other adult.
- d. If the Child does not express the objectives of representation, or is found incompetent pursuant to the procedure set forth in Rule VIII.C.1., the Child's Attorney shall advocate his legal interests, preserving to the greatest extent possible any immigration remedies available to the Child.
- e. The Attorney, at his first meeting with the Child and throughout his representation, shall determine and monitor whether these Standards are being complied with, and, if not, seek compliance on behalf of the Child. Also at this first meeting, the Attorney shall clearly inform the Child that the Child's conversations with the Advocate for Child Protection are not confidential.
- f. The Attorney shall not reveal otherwise confidential communications of the Child to the Advocate for Child Protection, even when doing so would better inform the Advocate for Child Protection's best interest assessment.

- g. The Attorney shall ensure that any interpreter or translator used in his communications with the Child understands his confidentiality obligation. *See* Rule V.C.3.d *infra*.
- h. The Attorney shall respond promptly to all questions and requests for documents and information from the Child.
- i. The Attorney shall investigate all forms of relief available to the Child and the impact of each on the Child.
- j. The Attorney should advise the Child of the consequences for failure to appear at any scheduled proceeding.

Comments:

The Attorney's Role. *The Attorney's role initially is to advise the Child of all his legal options and their potential consequences in a Developmentally Appropriate manner, even where some options may not be in the Child's best or legal interests. Ultimately, the Attorney must advocate for the Child's expressed wishes, or for his legal interests where the Child expresses no wish or has been found to lack competence pursuant to the procedure set forth in Rule VIII.C.1. The Attorney must take care to advise the Child of his legal options and the likely consequences of those options, without imposing the Attorney's own views as to what the Child should do.*

The Attorney shall zealously advocate for the Child's wishes, placing that goal above all other concerns. Even where a Child may possess a legitimate claim for relief from removal from the United States, an Attorney may not pursue that claim if the Child's expressed wishes are to the contrary. For example, a Child with an excellent case for asylum may learn that his father is dying in the country that he has fled. That Child's expressed wish may be to forego his asylum claim in order to return to be with his father. While his Attorney has an obligation to present to him the strength of his asylum case and the ramifications of his leaving the United States, if the Child's expressed wish is to return to his father, the Attorney should assist the Child in doing so. (However, as will be discussed further below in this Comment, if he expresses no wish or the Adjudicator determines that he lacks the competence to do so, the Attorney can and must pursue his legal interest, i.e., to seek asylum despite his father's condition.) Relatedly, in cases of abuse, neglect or abandonment, given the difficulties for the Child inherent in an evidentiary hearing where the painful facts of such issues must be retold and considered, the Attorney should consider and discuss with the Child whether to seek Special Immigrant Juvenile Status, or other relevant remedies such as the T and U visas, before subjecting the Child to adversarial proceedings, even where his claim for otherwise preferable relief is strong.

Where a Child states an objective of representation, the Attorney must also remain aware of the power dynamics inherent in adult/child relationships. Before

accepting the Child's statement at face value, where necessary the Attorney should explore whether the statement reflects the Child's own wishes or is an attempt to please various adults in his life, including those with whom he may have come into contact during the immigration process.¹⁴

To the extent that the Child may be having difficulties expressing a preference because of linguistic difficulties, the Attorney should ensure that the interpreter recognizes the importance of understanding the Child's wishes, conveying them in an accurate manner, and setting aside prejudices and misconceptions about the Child.¹⁵

Competence. The Rule does not presume that Children below a certain age lack competence to determine their wishes in litigation. Competence is contextual and incremental, and may also be intermittent. The Child's ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time that the position must be determined. Therefore, a Child may be able to determine some positions in the case but not others. Similarly, a Child may be able to direct the lawyer with respect to a particular issue at one time but not at another. Moreover, although an Attorney may be tempted to use the substance of a decision as a test of a Child's competence, he must strive to separate the evaluation of the Child's ability to make a decision from the Attorney's evaluation of the decision itself.¹⁶

In determining competence, the Attorney should also consider that a Child may seem more mature for his age than he is as the result of experiencing great trauma at an early age. An Attorney should also be aware that the Child may be under the influence of traffickers or others who seek to victimize the Child or otherwise engage him in criminal, harmful or exploitive activity, and thus may be afraid to state his wishes freely.¹⁷

Attorney's Duty to Pursue Legal Interests. Where the Child does not or will not express objectives regarding a particular issue or issues, the Child's Attorney shall determine the Child's legal interests and pursue them. The Child's "legal interests" are distinct from his "best interests" and from his "objectives." Legal interests are those interests that are specifically recognized in law and that can be protected through the courts, for example, a release from Custody pending determination of his case or a grant of asylum.

Child's Failure to State Wishes. The Attorney should also be mindful that the Child's failure to express a position is different both from an inability to do so and from directing the lawyer not to take a position on a certain issue. The Child may have no opinion with respect to a particular issue. The Child may also wish to delegate the decision-making authority because of loyalty conflicts or the desire not to hurt a parent or Adult Family Member. In that case, the Attorney is free to pursue the objective that appears to be in the Child's legal interests based on information that the Attorney has and positions that the Child has already expressed. A position chosen by the Attorney should not contradict or undermine

other issues about which the Child has expressed a viewpoint. However, before reaching that point, the Attorney should clarify with the Child whether the Child wants the Attorney to take a position, or to remain silent with respect to that issue. The Attorney is then bound by the Child's directive.

Investigation of Available Relief. The Attorney must carefully investigate and consider the Child's immigration alternatives in the context of what impact each might have on his ability to receive public benefits and/or a green card, as well as the effect of those alternatives on delinquency proceedings. The Attorney must then advise the Child accordingly. For example, at present, an Immigrant's status as a Lawful Permanent Resident (LPR), Refugee, Asylee, Asylum Applicant, Parolee, Conditional Entrant, recipient of Withholding of Deportation, or any other category of Immigrant will determine whether or not the Immigrant is a "Qualified Alien" as defined under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"). PRWORA, along with several other statutes (including the Illegal Immigration Reform and Immigrant Responsibility Act of 1997, the 1997 Balanced Budget Act, the Agriculture Research Extension and Education Reform Act of 1998, among others), determines whether an Immigrant is eligible for public benefits such as Social Security. Unfortunately, little uniformity exists among the programs and each benefit has different regulations regarding eligibility. The Attorney should also consider the fact that the receipt of public benefits can affect an Immigrant's ability to obtain a "green card" under the "public charge" provisions of the immigration laws. While the statutory framework may well change over time, the principle will remain that the Attorney should consider the ramifications of all the Child's legal options in advising him.¹⁸

2. Attorney's Scope of Representation

Rule:

- a. The Attorney's scope of representation should be explained to the Child at the outset of the representation.
- b. The explanation of the Attorney's scope of representation should be put in terms that the Child will understand given the Child's age, intellectual, social and emotional development, education and maturity.
- c. If necessary, the explanation should be translated into the Child's preferred language.

***Comments:** It is important for both the Attorney and the Child to establish the scope of their relationship at the outset of the representation. As a matter of best practices, the Attorney's explanation about his scope of representation should contain at a minimum the following information: The Attorney(s) providing the representation; the duration of the*

representation; the matter(s) for which the Attorney(s) will provide representation; the names of and contact information for the Attorney(s) who will be working on the Child's case; the fees and charges for all services (if the representation is on a pro bono basis, the explanation should explicitly so state); the Child's rights regarding the possession of the Child's files compiled by the Attorney(s); the Attorney(s)'s professional responsibilities to the Child, including the duty of confidentiality; and the Child's right to terminate the Attorney(s)'s representation at any time.

While the explanation need not be written, a writing provides a record of the scope of representation. The explanation, where translated, should also be read to the Child to ensure comprehension even where the Child is illiterate, and the Child should be asked at reasonable intervals whether he understands the explanation.¹⁹

3. Responsibilities to the Child-Client Following a Decision

Rule:

- a. A Child shall have the right to appeal a final decision in any Immigration Investigation or EOIR Proceeding to an independent judicial authority.
- b. The Attorney shall promptly inform the Child of his appellate rights and take all steps necessary to protect those rights, at least until an appellate Attorney is substituted or a decision is made not to appeal. Nothing herein requires an Attorney to represent the Child on appeal.
- c. The Attorney shall advise the Child of the date, nature, issues and potential consequences of any pending post-decision hearing or proceeding. The Attorney should urge, and if necessary seek to facilitate, the attendance at any such hearing of the Child and of any material witnesses who may be called.
- d. The Attorney's responsibility to the Child does not necessarily end if the Attorney is no longer retained for an appeal. The Attorney shall timely forward all documents to appellate counsel. The Attorney should continue to counsel the Child and assist in securing appropriate legal services for the Child in matters arising from the original proceeding and should seek to ensure the continued representation of the Child at all further Immigration Investigations, EOIR Proceedings or U.S. Court of Appeals proceedings that may result in changes to the Child's placement, services, or immigration benefits.

*Comments: Once a Child's immigration status has been permanently decided, the Attorney should discuss with the Child the end of the representation and determine what contacts, if any, he and the Child will continue to have.*²⁰

B. General Standards of Professional Conduct

1. Standards of Professional Conduct

Rule: An Attorney representing a Child in Immigration Investigations, EOIR Proceedings and U.S. Court of Appeals proceedings is required to know, and is subject to, the standards of professional conduct set forth in statutes, rules, decisions of courts and codes of professional conduct. An Attorney has no duty to execute any directive of the Child that is inconsistent with the law or these Standards.²¹

2. Privacy and Publicity

Rule:

- a. The Attorney shall inform the Child of his right to privacy.
- b. At all times, the Attorney shall respect the Child's right to privacy. That privacy should be protected not only by conforming to the duty of confidentiality, but also by actively assuring that the Child is protected from unwanted publicity and outside influence, and is afforded personal privacy.
- c. The Attorney, in consultation with the Advocate for Child Protection, social worker, and, as appropriate and available, his parent or legal guardian, and mindful of the Child's age and intellectual, social and emotional development, should discuss with the Child his right to communicate with the media individually or through a representative and to otherwise seek publicity about his case. The Attorney should then follow the Child's express wishes as set forth in Rule V.1.b-d.

Comments: The ability to access the media is often critical in ensuring that the Child's legal rights are protected. Although the argument is sometimes made that restrictions on access to the media protect Children, the Child and his Attorney, in consultation with the Advocate for Child Protection and, as appropriate and available, his parent or legal guardian and mindful of the Child's age, and intellectual, social and emotional development, can best judge on an individualized basis the advisability of speaking to the media. Consequently, the decision whether and how to seek media attention where such attention might help the Child's legal position should be finalized only after careful analysis. As set forth supra in Rule V.A.1., the expressed wishes of a competent Child should be

followed. In every case, the Attorney should be mindful of any applicable limitations on using the media to prejudice a judicial proceeding.²²

C. Establishing the Client Relationship

1. Interviewing the Child

Rule: The Attorney shall meet with the Child as soon as possible after appointment and maintain frequent contact with him thereafter. Whenever possible, the Attorney shall communicate with the Child in person, as opposed to over the telephone or via videoconference.

Comments: *Irrespective of the Child's age, the Attorney should meet frequently with him. It is strongly recommended that the Attorney meet with the Child no later than one week after appointment. A prompt meeting with counsel after the Child is informed that counsel has been appointed is often essential to establishing and maintaining a trusting relationship, which in turn is the foundation of representation. In-person communication is therefore usually necessary to satisfy the Attorney's ethical obligations to provide competent representation to the Child, negotiate the scope of representation with the Child, and generally ensure effective communication with the Child. Interviewing the Child over the telephone or via videoconference may hinder the establishment of a trusting relationship.*

The Attorney should use the first meeting to gain the trust of the Child. The following approaches should be considered: The Attorney should explain the scope and purpose of his representation, distinguish his role from other individuals within the system, and advise the Child of his rights vis-à-vis the Attorney. The Attorney should also explain to the Child the basis for the representation, the circumstances of the Child and his detention, and the nature of the Immigration Investigation and any EOIR Proceedings. The Attorney should also explain why the Child may be questioned repeatedly about the same matter by different individuals and that third parties who may interview him do not necessarily represent or seek to advance the Child's best interests or wishes, and that, indeed, the interests of such third parties might be contrary to those of the Child. Accordingly, the Attorney should ensure that the Child understands whose interests any third party interviewer represents and the scope and purpose of that third-party's inquiry in order that his communications with the Child are informed, fair and clear to the Child. If an interpreter is present, the Attorney should explain to the Child the purpose, role and confidentiality obligations of the interpreter. As note-taking may distract the Child and raise questions about confidentiality, if it is necessary to take notes, the Attorney should explain why he is doing so.²³

Any Attorney representing a Child must consult with the Child prior to any court proceeding. The Attorney shall ensure that the Child understands his rights and the nature of the proceeding, and shall promote the Child's participation in the process. The consultation should also provide the Attorney with a full understanding of the Child's background and the circumstances of his arrival in the United States, such that the Attorney can present a full picture of the Child's circumstances to the court. Certain smugglers, known as "Snakeheads" often recruit attorneys outside the courtroom door to represent clients seeking asylum. See Rule VIII.A.2 Comments infra. These attorneys often know nothing about their client's particular circumstances and have not even met with him prior to representing him in court. Such representation is not permitted by this Rule.

2. **Child-appropriate Setting**

Rule: The Attorney should interview the Child in a private, quiet, non-distracting, Developmentally Appropriate setting in which the Child feels comfortable.

Comments: *Choice of interview location can have a great impact on the effectiveness of the interview. If possible, the same location should be used for each meeting as children value consistency. For most Children, a quiet, non-distracting space with a comfortable and culturally appropriate seating arrangement provides the best setting. The Attorney should be aware that different cultures have different norms about the appropriate distance and level in seating arrangements, but in general, sitting on the same level without barriers such as desks is appropriate. For other Children, going for a walk, or playing or working with the Attorney while talking may better facilitate communication. Privacy is another factor to consider when choosing the setting for the interview – for some Children, a private setting may be best, while others may prefer to have a trusted friend or adult with them. See Rule VIII.B.3.b. Comments infra.²⁴*

3. **Interpreter/Translator**

Rule:

- a. When the Attorney does not fluently speak the Child's preferred language and dialect, whenever practical, a trained, independent interpreter or translator should be used to facilitate oral and written communication. If the Child is in Custody, the Attorney shall request the Custodial Agency to provide such an interpreter/translator.
- b. The Attorney should ascertain the interpreter/translator's background to ensure impartiality.

- c. The Attorney shall ensure, to the extent he is able, the following: that the interpreter/translator is fluent in both English and the Child's preferred language and dialect; and that he understands any legal or other specialized terminology. In the case of an interpreter (*i.e.*, one who translates oral communications as opposed to one who translates documents), the Attorney shall also ensure, to the extent he is able, that the interpreter employs words appropriate to the Child's age and abilities; that the interpreter is, and appears to the Child to be, impartial; and that the interpreter communicates well with Children in general, and, where applicable, with traumatized Children.
- d. As noted, upon determination that an interpreter/translator is necessary, the Attorney should explain to the Child the purpose and role of the interpreter/translator. The Attorney should also ensure that the interpreter/translator and the Child understand the ethical duty of the interpreter/translator to maintain confidentiality of the information. See Rules V.A.1.g. and V.C.1. Comments *supra*.

Comments: An individual used as an interpreter/translator should be trained as such and should speak the Child's dialect. While a trained interpreter/translator is always preferable, the Rule recognizes that sometimes it will be more practical to have another individual interpret/translate. In conversation, the Attorney should speak directly to the Child, avoiding the common tendency to address his remarks to the interpreter. The Attorney should guard against the interpreter influencing the conversation by mistranslating, summarizing, or omitting selected sections of what is said, or employing a tone different than that used by either the Child or the Attorney. The Attorney should be mindful that, in some circumstances, an interpreter of the Child's gender may be preferable.²⁵

D. Coordination with the Advocate for Child Protection

Rule:

1. The Attorney should keep the Advocate for Child Protection informed and advised as to the Child's progress throughout the immigration process and the possible consequences of different legal strategies, so long as such communication is not inconsistent with the protection of the Child's legal interests and does not violate the Attorney's ethical duties toward the Child. The Attorney should also provide the Advocate for Child Protection with timely notice of all proceedings.
2. The Attorney should utilize the expertise of the Advocate for Child Protection in ascertaining those facts relevant to the Child's presence in

the United States. Such information may include, but is not limited to, the facts pertaining to the country of the Child's nationality and/or last habitual residence, as well as facts concerning the Child's departure from such country, his journey to the United States, and his time in the United States, if any, prior to apprehension. *See* Rule VI.C.8.e.iii. *infra*.

3. The Attorney should also seek the Advocate for Child Protection's recommendations on whether it is in the Child's best interests to voluntarily depart from the United States or to apply for relief from removal. *See* Rule VI.C.8.e.iv *infra*.²⁶

VI. Standards for the Custody, Placement and Care of Unaccompanied Alien Children

A. General Policy Favoring Release and Family Reunification

Rule:

1. There is a presumption that release from a Detention Facility and family reunification are in the best interests of the Child and that a Child should be so reunified and/or so released.
2. The Custodial Agency shall work expeditiously toward the release of the Child to an individual or entity as set forth at Rule VI.D. *infra*.
3. The Custodial Agency shall continue efforts to effect family reunification and/or release for as long as the Child is in Custody.

Comments: Except in unusual circumstances, neither separation from family nor detention is in the best interests of a Child who is in EOIR Proceedings, particularly if he has committed no criminal offense and is not a danger to others. Periodic review of any decision not to release a Child should be undertaken by the Custodial Agency. The following reasons are not an adequate basis for the continued detention of the Child: (1) to punish, treat, or rehabilitate the Child; (2) to encourage the Child's acceptance of voluntary repatriation or removal; (3) to encourage the Child to forego any legal rights; (4) to facilitate interrogation of the Child; or (5) for administrative convenience.²⁷

*Often a Child who is apprehended and/or taken into Custody has Adult Family Members residing in the United States who are willing to take custody of the Child, but who face considerable obstacles in coming forward and/or proving their relationship to him, not the least of which is potentially subjecting themselves to the immigration and/or removal process. In order to facilitate the fundamental goal of family reunification, no Custodial Agency should use the custody or placement of a Child as a means to bring into federal Custody, or to initiate removal proceedings against, an undocumented parent or any other person. Further, the undocumented status of a parent, other Adult Family Member, or legal guardian shall not be a bar to the Custodial Agency releasing the Child into that individual's custody.*²⁸

B. Appropriate Placement and Custody

Rule:

When release is not possible, for any period during which the Child must remain in a Detention Facility, placement decisions should be made in the best interests of the Child and in accordance with the following rules:

1. The Child should be placed in the least restrictive setting appropriate to his age and Special Needs.
2. No Child shall be housed in a secure facility, or criminal detention center except as set forth at Rule VI.G.2.
3. No Child shall be placed in an adult jail, secure facility, or criminal detention center, or any other setting in which they are held with adults.
4. No Child shall be placed in a jail, secure facility or criminal detention center for children who have been charged or adjudicated delinquent.
5. In extremely limited circumstances, defined for the purposes of this Rule as a natural disaster, Detention Facility fire, or civil or medical emergency, Children may be placed with adults for a short period of time; however, under no circumstances shall a Child ever be placed with an adult with a history of violent, sexually abusive, or criminal behavior.

***Comments:** Unaccompanied Alien Children are uniquely vulnerable given their often traumatic displacement from their home countries. It is therefore vital that they be placed in a safe, home-like environment. At a minimum, the Detention Facility selected must be the least restrictive alternative appropriate to the needs of the Child. The Custodial Agency bears the burden of proving with clear and convincing evidence that restraints on an accused Child's liberty are necessary and that no less intrusive alternative is viable. Alternative measures are always preferable and they include, without limitation, placement with a family, placement in an educational setting or home, close supervision, or intensive care.*

Consistent with both the best interests of the Child and the need to minimize the number of transfers of the Child, the following factors should be considered in selecting a Child's placement: (1) proximity to family and community; (2) reasonable proximity to the Advocate for Child Protection; (3) reasonable proximity to concentrations of immigration lawyers to facilitate attorney-client meetings; (4) reasonable proximity to immigration courts; (5) accessibility of mass transit systems to facilitate visits by family; (6) reasonable access to, and consistency of, appropriate educational, recreational, medical, psychiatric and/or other services; (7) reasonable access to other community resources; (8) reasonable access to interpreters in the Child's preferred language; and (9) reasonable proximity to communities of the Child's language and cultural background. The placement should be made in the best interests of the Child to

promote the full and fair resolution of his immigration case. All placement determinations should be individualized rather than based on broad policies affecting classes of Children.

The vast majority of these Children pose no threat to the safety of the community; rather, they are merely in Custody awaiting the resolution of their immigration status. Placements should not be made on any ground (such as convenience of the Custodial Agency) other than the best interests of the Child. The Custodial Agency shall not uproot and transfer the Child to a remote area under the guise of safety concerns about smugglers, traffickers or others who might seek to victimize or otherwise engage the Child in criminal, harmful or exploitive activity, nor shall a Child be placed in a secure facility to protect him against such potential threats. Rather, where the Child's safety is threatened, enhanced security measures on the grounds and perimeter of the Detention Facility should adequately address the situation.²⁹

For their safety, Children shall not be housed in Detention Facilities which also house adults. Studies demonstrate that children so housed are more likely to commit suicide and to be physically or sexually assaulted. Similarly, children should not be housed in Detention Facilities which also house juveniles accused of being or adjudicated delinquent. Given this heightened risk of serious harm, mere inconvenience will not suffice as a justification for failing to separate a Child from adults and such juveniles. This Rule modifies the Flores standard which has been interpreted to allow extended commingling of Children with adults, children who have been charged with or convicted of crimes, and juveniles who have been adjudicated delinquent.³⁰

C. Initial Apprehension and Expeditious Processing

1. Notice of Rights

Rule: Upon apprehension, the Immigration Enforcement Agency shall immediately inform the Child, both orally and in writing, in the Child's preferred language and, where applicable, dialect, that he has the right to contact his parents and his consulate, return home at no expense by accepting voluntary repatriation, or stay in the United States to pursue his immigration remedies. If he chooses to stay, he has the right, without limitation, to the following: (a) an Attorney; (b) immediate contact with a parent, or any relative, friend or social service organization within or without the United States; (c) judicial review of his immigration and detention status, including his right to seek asylum; (d) consular notification and access, as required by the U.S. Department of State; (e) to remain silent and notification that any statements he does make can be used against him; (f) information concerning the basis for his initial apprehension and his temporary detention; (g) if applicable, information on the alternatives to detention available to him; and (h) information on his rights while in detention and before transfer, including the basic

necessities described *supra* at Rule VI.C.3. Children shall also be informed that an Advocate for Child Protection will be appointed for them if they choose to stay. If a Child expresses the desire not to talk, any interview shall cease.

Comments: Upon apprehension, many Children, especially young Children and Children who come from countries without rights similar to those to which they are entitled in the United States, do not understand what is happening to them or what rights they possess. The apprehending or initial processing officer should therefore determine whether the particular Child in question comprehends the scope, content and exercise of his rights. The apprehending or initial processing officer should facilitate the exercise of these rights, for example by providing free phone service to the Child to contact a lawyer or parent. The right to an Attorney shall be explained so that, even if the Child is unfamiliar with the U.S. legal system in general and/or the immigration system in particular, he can appreciate the importance of legal representation.³¹

2. **Expeditious Processing**

Rule: The Custody of any Child due to his immigration status should be limited to the shortest period of time necessary. Immediately upon determination that a newly apprehended individual is a Child and that further Custody is necessary, the Immigration Enforcement Agency shall notify the Custodial Agency. The Immigration Enforcement Agency shall either release the Child or transfer him out of the Temporary Placement Facility and into the Custody of the Custodial Agency within 72 hours, except in the event of an emergency, defined for the purposes of this Rule as a natural disaster, Detention Facility fire, or civil or medical emergency.

Comments: The procedures to be used, and the conditions to be provided, during transfer are set forth at Rule VI.H.4 *infra*.³²

3. **Right to Basic Necessities**

Rule: Commencing with his initial apprehension, a Child has the right to basic necessities such as food, water, bedding, sanitation facilities, and necessary medical attention, as well as to treatment with dignity and respect.

Comments: This Rule is necessitated by frequent reports of apprehended Children being denied such basic necessities, e.g., forced to sleep on floors, denied adequate access to restrooms, and provided with only one meal a day. These circumstances have frequently occurred between the time of their initial apprehension by the Immigration Enforcement Agency and transfer to Custodial Agencies. This inadequate care is generally due to the poor training of officials and/or inadequate facilities.

4. Age of Child

Rule:

- a. If an individual claims to be under 18 years of age, he shall be treated as a Child for all purposes, including the appointment of an Attorney as provided by Rule VI.A.1. If the Custodial Agency has a reasonable belief that the individual is 18 years of age or older, it may conduct an age determination inquiry within one week of apprehension by the Immigration Enforcement Agency, except in extraordinary circumstances or where the individual requests additional time to present evidence.
- b. Any age determination inquiry should be independent and objective, taking into account all forms of evidence, including testimony of the Child, testimony of family members, psychological and developmental assessments and all available documentary evidence, including local birth certificates, baptismal records and other such records, to determine the Child's age. No scientific test or procedure for age determination should be treated as conclusive, and the decision whether to even consider the evidence of such a test or procedure should be guided by the principles set forth by the Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 469, 113 S.Ct. 2786 (1993). No document which falsely indicates that the Child is 18 or over should be considered for any purpose. The Custodial Agency should resolve all doubts about age in favor of a finding that the individual is under 18.
- c. During the age determination process, the individual in question should be treated as a Child in all respects addressed by these Standards.

Comments: *An individual's age has a fundamental impact on his custodial arrangement, right to an Attorney, and need for an Advocate for Child Protection. Thus, an accurate determination of whether an individual is a Child is crucial. However, many Children find it difficult to prove that they are under 18 years of age due to the difficult circumstances under which they came to the United States. A presumption in favor of a finding that the individual is under 18 is therefore appropriate and necessary to ensure that no Child is deprived of his rights.*

Where the Immigration Enforcement or Custodial Agency disputes the individual's assertion, the age determination process should be completed expeditiously. Because a Child is to be released from Custody or placed in Foster Care before his 18th birthday, any question concerning the

Child's age should be resolved, whenever possible, before any party asserts that the Child would turn 18. See Rule VI.G.3., infra. The Custodial Agency should always conduct this inquiry because such Agencies have expertise in this area. Individualized age determinations in which a variety of forms of evidence are considered are essential to protect Children from erroneous placements in adult Detention Facilities. The physical appearance of an individual, together with an informal assessment of the individual's psychological maturity by a qualified professional, may be considered. A Child's testimony, as well as the testimony of other persons, if applicable, concerning the individual's age, shall be considered competent evidence of age. When a scientific procedure is used to determine an individual's age, margins of error shall be considered as well as any developmental, cultural or dietary differences that may affect the validity or outcome of the procedure. Because age assessments based on both dental and wrist bone x-rays have considerable margins of error (up to several years), conclusive weight shall never be given to their results, and the weight each receives shall be significantly lessened in instances in which the Child's alleged age is within the applicable margin of error. Indeed, such test results should not even be considered unless the procedures and methodology yielding them satisfies the principles of Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 469, 113 S.Ct. 2786 (1993).

A document found to be false, which indicates that the individual is not a child, should not be used or considered for any purpose in the age determination process, or in the underlying immigration proceeding (e.g., to establish that the individual is 18 or over, or that he is not credible). It is generally recognized that individuals are often compelled by great danger or abuse to flee to the United States, that children often do not control what documents are in their possession, and that refugees often have to travel with false documents in order to flee their countries of origin.³³

5. **Appeal of Adverse Age Determination**

Rule: An individual claiming to be a Child shall have the right to an appeal of any adverse age determination to an independent reviewer.

Comments: *The Custodial Agency should bear the burden of proof on appeal. The Custodial Agency should maintain complete records of all efforts to determine the age of an individual claiming to be a Child and promptly provide that individual with a copy of any age determination report that the Agency receives.*

6. **Notice Requirements – Notice to Parent, Legal Guardian and/or Adult Family Member Residing in the United States and Their Right to Access to Information about the Child**

Rule:

- a. During the period between the Child's initial apprehension and his transfer to the Custodial Agency, the Immigration Enforcement Agency should make a good faith effort to contact a parent or legal guardian of the Child solely for the purpose of notifying the parents of the Child's apprehension, unless the Child requests that no such notice be given.
- b. If no contact can be made with a Child's parent or legal guardian, the Immigration Enforcement Agency should make a good faith effort to contact an Adult Family Member residing in the United States solely for the purpose of notifying him of the Child's apprehension, unless the Child requests that no such notice be given.
- c. As soon as practicable, the Custodial Agency should immediately inform the parties provided notice under subsections a. and b. of the results of the individualized age determination, the determination of appropriate detention, if applicable, and the Child's rights set forth in Rule VI.C.1., *supra*. If the Custodial Agency is unable to make contact with one of the above-listed individuals, other Agency personnel should continue to make every effort to establish contact with and provide the requisite notice to these individuals for the duration of the Child's detention.
- d. If the Child's physical or mental health declines in any way while in Custodial Agency Custody, the parent, legal guardian, or Adult Family Member should be informed as soon as possible. In the case of death, a serious illness threatening death, an illness or condition requiring the transfer of the Child to an outside medical facility, or an illness or condition requiring clinical care for more than 48 hours, the Custodial Agency must contact the parent or legal guardian and the consular officer immediately.

Comments: *As noted, often a Child who is apprehended and/or taken into Custody has parents, legal guardians, or Adult Family Members residing in the United States who are willing to take custody of the Child. While a real risk exists that an individual claiming relationship to a Child presents a threat to the Child's health or welfare (e.g., if he is a smuggler), providing him with notice of the Child's apprehension and rights would not be likely to assist him in harming the Child. On the other hand, an adult who is legitimately concerned for the Child could be greatly assisted in helping the Child navigate the legal process if he were made aware of the rights to which the Child is entitled. Thus, if the parent of the Child attests in writing to the fact that an individual residing in the United States*

is an Adult Family Member of the Child, notice should be given to that individual.³⁴

7. **Monitoring and Reporting**

Rule: The apprehending Immigration Enforcement Agency shall complete and maintain documentation with respect to the Child, his apprehension, temporary placement, processing, and all instances of transfers to a Custodial Agency responsible for care and custody that will continue beyond 72 hours after apprehension. Such documentation should be available to the Child, his Attorney, his Advocate for Child Protection, the entity or individual with whom the Child is placed, and the Custodial Agency. The documentation should also be available to the public, but only in the form of systemic reports redacted so as not to reveal Children's identities.

Comments: *In any Detention Facility where a Child is detained, a complete and secure record must be maintained which details relevant information about the Child's care. The Custodial Agency shall maintain up-to-date records on all Children who are placed in proceedings and remain in Custodial Agency Custody for longer than 72 hours. Statistical information on such Children should be collected on a weekly basis from all Custodial Agency offices and from border patrol stations. The required documentation should include at least biographical information consisting of each Child's name, date of birth and country of birth; the date the Child was placed in Custody; the date of each placement at a new Detention Facility, removal from a Detention Facility or release from Custody; the name of the person or persons with whom the Child was placed, and the names of the Detention Facilities where the Child was placed and from which the Child was transferred, removed or released, if applicable; the Child's immigration status; and any hearing dates for the Child. It should also include the number of overdue placements, the number of days by which placement in an appropriate Detention Facility was delayed, and justifications for overdue placements. The apprehending Immigration Enforcement Agency should also monitor and document in each Child's file the location of his temporary placement, the length of time he remained there and, if transfer was overdue in violation of Rule VI.C.2. or if the exception in Rule VI.C.2. was invoked, the justification for the delay of transfer.*

When a Child is transferred from one placement to another, the Child's records shall likewise be transferred, and the integrity of those records must not be compromised. Individual records of a Child shall be confidential, and access shall be permitted only to the Child, the Child's Attorney, his Advocate for Child Protection, the entity or individual with whom the Child is placed, and the Custodial Agency charged with Custody, placement and care of the Child. If a Child or his Attorney

objects to the release of the Child's records to any of these entities, that objection should initiate a judicial bypass procedure whereby the Child has an opportunity to present his objection to a judge. Under no circumstances should the Child's records be released to any division of a Custodial Agency with enforcement authority or to an Immigration Enforcement Agency.

The monitoring and reporting procedures addressed in this rule in particular provide accountability for the safety and well-being of Children during processing and enable the Custodial Agency both to determine whether field personnel are using appropriate procedures during processing and to take remedial action as necessary. The September 28, 2001 OIG Report identified under-monitoring and under-reporting as key obstacles to both the analysis of the effectiveness of the Immigration and Naturalization Service ("INS"), now DHS, procedures and the creation of targeted remedies for areas of weakness.³⁵

8. Appointment, Powers, Qualifications, Training and Duties of the Advocate for Child Protection

Rule:

- a. Appointment: The Advocate for Child Protection shall be appointed by a Custodial Agency or other appropriate agency with child welfare expertise that is disinterested in the outcome of the Child's EOIR Proceedings.
- b. Powers: The Advocate for Child Protection shall have:
 - i. reasonable private access to the child at all times, including while the Child is being held in a Detention Facility or in the care of a foster family;
 - ii. the right to review all records and information relating to the Child's EOIR Proceedings that are not deemed privileged or classified, as well as school and medical records;
 - iii. the right to obtain independent evaluations of the Child, including, without limitation, psychological and medical evaluations; and
 - iv. the right to be present at all hearings involving the Child that are held in connection with the Child's EOIR Proceedings
- c. Qualifications: An Advocate for Child Protection should be: (i) a child welfare professional or other individual who has received

training in child welfare matters; and (ii) specially trained in the circumstances and conditions that Unaccompanied Children face, as well as in the various immigration benefits for which a Child might be eligible.

- d. Training: For all persons serving as Advocates for Child Protection, the appointing Custodial Agency should provide, or cause to be provided, professional training as set forth in Rule III.
- e. Duties: The Advocate for Child Protection shall, as appropriate:
 - i. conduct interviews with the Child in a manner that is Developmentally Appropriate;
 - ii. inform the Child about the placement where he lives, including: the resources and facilities available; the areas in which they can communicate in private; the types of food and access to religious services to which he is entitled: and to whom the Child can officially voice complaints;
 - iii. investigate the facts relevant to the Child's presence in the United States, including, but not limited to, the facts pertaining to the country of the Child's nationality and/or last habitual residence, as well as facts concerning the Child's departure from such country, his journey to the United States, and his time in the United States, if any, prior to apprehension;
 - iv. develop and provide recommendations to the Attorney on whether it is in the Child's best interests to voluntarily depart from the United States or apply for relief from removal and otherwise communicate with the Attorney as set forth in Rule V.D.;
 - v. develop recommendations and advocate as to the best interests of the Child with respect to issues related to the Child's Custody, care, detention, and release as well as with respect to any state and federal court proceedings involving the Child;
 - vi. where necessary, inform the Child's Attorney of any violations of the Child's rights at his placement.
 - vii. identify the Child's best interests with respect to his treatment during any administrative or court proceedings and apprise the Child's Attorney of the same (*e.g.*, the need for a more child-friendly environment);

- viii. ensure that the Child understands the processes and procedures of the Immigration Investigation and EOIR Proceedings, and any determinations made therein;
 - ix. report findings and recommendations pertaining to custody, care, detention and release to the Custodial Agency and Attorney; and
 - x. if he has reason to believe that the Child's Attorney is involved in criminal conduct that affects the Child, report the same to appropriate prosecutorial authorities.
- f. Termination of Appointment: The Advocate for Child Protection shall carry out the duties described above until and unless one of the following occurs:
- i. the duties are completed;
 - ii. the Child departs the United States;
 - iii. the Child is granted permanent resident status in the United States;
 - iv. the Child attains the age of 18;
 - v. the Child is placed in the custody of a parent or legal guardian; or
 - vi. the Advocate for Child Protection is relieved of his duties by the Custodial Agency which appointed him.

Comments: *The disinterested agency, which appoints the Advocate for Child Protection, may make the appointment itself or may delegate or contract its authority to another entity, provided that such entity is itself also disinterested. The Advocate for Child Protection plays a vital role in ensuring that the best interests of the Child are a primary consideration in decisions affecting the Child. Particularly for Children without families in this country, an Advocate for Child Protection is the only individual exclusively interested in that Child's physical and mental well-being. The disinterested agency should provide professional training for all persons serving as Advocates for Child Protection as to the Child's special circumstances and conditions and as to any benefits or entitlements for which the Child may qualify. (For other recommended training for Advocates for Child Protection, see Section IV.) To avoid any real or perceived conflicts of interest, the Advocate for Child Protection must not be an employee of the Custodial Agency. Nor should the Advocate for Child Protection also be the Child's Attorney. The purpose of appointing an Advocate for Child Protection is to ensure that the best interests of the*

Child are identified and given voice, while the role of Attorney is to serve the expressed wishes and legal interests of the Child. Appointment of the Advocate for Child Protection is therefore not a substitute for the appointment of an Attorney for the Child, nor vice versa.

The Advocate for Child Protection should consider, before referring the Child to counseling or psychological therapy, that counseling for a Child whose culture does not include Western notions of therapy may be unproductive and potentially damaging. If notions of counseling and psychological therapy are not rooted in the Child's culture, the Advocate for Child Protection should exercise caution in seeking counseling or psychological therapy for the Child. If counseling or psychological therapy is deemed appropriate, such therapy should be undertaken in a stable environment where the session is not likely to be disrupted, where support and follow-up are available for the Child, and where methods that respect the Child's cultural norms are employed.³⁶

D. Parents' and Others' Rights to Custody of the Child

Rule:

1. In accordance with the presumption in favor of family reunification set forth at Rule VI.A. *supra*, the Custodial Agency shall release a Child from Custody and place him with one of the following individuals in the United States, in order of preference, provided that the criteria of Rule VI.D.2 are satisfied:
 - a. A parent;
 - b. An adult family member;
 - c. A legal guardian.
2. The Custodial Agency may deny release of the Child only if the presumption in favor of a parent, Adult Family Member, or legal guardian is overcome by the Custodial Agency possessing a reasonable basis to believe one or more of the following criteria are met: that the purported parent, Adult Family Member, or legal guardian is not in fact the Child's parent, Adult Family Member, or legal guardian; that the parent, Adult Family Member, or legal guardian is not willing to take custody of the Child; or that the parent, Adult Family Member, or legal guardian is not fit.
3. If a Child is not released to a parent, Adult Family Member or legal guardian, the Custodial Agency shall then determine whether detention is necessary for one of three reasons: the Child is (i) a flight risk; (ii) at risk from smugglers, traffickers or others who might seek to victimize or otherwise engage him in criminal, harmful or exploitive activity; and/or

(iii) a danger to himself or to others. Where none of these factors apply, the Custodial Agency should release the Child from Custody and place the Child with one of the following, in order of preference:

- a. a fit and willing adult individual or entity in the United States who satisfies the criteria of Rule VI.D.2. and is designated by the parent or legal guardian in writing as appropriate to care for the Child; or
- b. another adult individual or entity in the United States who satisfies the criteria of Rule VI.D.2.

Where some of these factors apply, the Custodial Agency should make an individualized determination whether release is nevertheless appropriate.

4. The Custodial Agency shall require that any application for release of a Child to the parent, Adult Family Member, legal guardian, or others shall contain sufficient information to permit the Custodial Agency to determine the applicant's identity and whether release to the applicant is in the Child's best interest. Such information may include, for example:
 - a. information concerning the identity of the applicant;
 - b. information concerning the identity and birth date of the Child;
 - c. where available, a copy of a document that establishes a blood or legal relationship between the applicant and the Child;
 - d. the grounds on which the applicant's claim for release of the Child to him are based;
 - e. all available information relating to where the Child will reside upon release;
 - f. an agreement to ensure the Child's presence at all future proceedings before the Immigration Court; and
 - g. any other relevant documents.
5. The Custodial Agency should reach and issue a written decision regarding the release of a Child as quickly as possible and in any event no more than six weeks after receipt of the parent's/Adult Family Member's/legal guardian's application. If the Custodial Agency has not issued a written decision within those six weeks, the Custodial Agency must supply a written statement of the reason(s) for the delay and the parent/Adult Family Member/legal guardian shall have the right to file a grievance with an independent entity.

6. The parent/Adult Family Member/legal guardian shall have the right to an independent review of a decision denying release of a Child to him. This review shall satisfy due process requirements. If the parent/Adult Family Member/legal guardian exercises his right to this review, the Custodial Agency bears the burden of persuasion that release to the parent/Adult Family Member/legal guardian was not suitable and that the Custodial Agency complied with Rule VI.D. in making this determination.
7. If the parent/Adult Family Member/legal guardian is dissatisfied with the outcome of the independent review, he may seek de novo review in federal court.
8. Where the Child is released to a parent/Adult Family Member/legal guardian, the Immigration Enforcement Agency shall be apprised of the Child's release, but shall not be given any information on the identity of the individual accepting custody. The Immigration Enforcement Agency shall not have access to any information generated by the Home Study process. See Rule VI. E.1 *infra*.

Comments:

Release to parent, Adult Family Member, legal guardian or others. This rule is meant to encourage the reunification of families, where possible, and to minimize the number of refugee Children detained in Custodial Agency Detention Facilities. The integrity of the family unit and the best interests of the Child shall be the primary criteria for determining custody of the Child. A reasonable basis to believe that 1) an applicant is not in fact the Child's parent/Adult Family Member/legal guardian, 2) is not truly willing to care for the Child, or 3) is unfit to take custody of the Child should be the only basis for denying custody of the Child to the parent/Adult Family Member/legal guardian. This approach is a departure from Flores, which simply refers to the custodian's ability to provide financial support and the assurance by the custodian that the Child will appear at relevant court proceedings. Because the parent's/Adult Family Member's/legal guardian's ability to provide financial support is extraneous to the stability of the family unit and to the best interests of the Child, it shall not be a criterion by which to determine custody of the Child.

*The Child's desire not to be placed with a parent alone is not a sufficient basis on which to deny custody to the parent/legal guardian. If a Child asserts that the parent/Adult Family Member/legal guardian is unfit, that person's fitness should be determined by the Custodial Agency. See Rule VI.E.1., *infra*. Indeed, a Home Study with respect to a potential release should be, and should only be, conducted where there is compelling evidence that 1) living with the parent/legal guardian would put the child at risk from smugglers, traffickers or others who might seek to victimize or otherwise engage the Child in criminal, harmful or exploitive activity; or 2) the parent/legal guardian is unfit, or as otherwise provided in Rule VI.E.1., *infra*.*

Because assurance that a Child will appear at relevant court proceedings is irrelevant to the integrity of the family unit and the best interests of the Child, but simultaneously considering the Immigration Enforcement Agency's duty to enforce relevant immigration law, the Custodial Agency shall give consideration to this criterion only with respect to a requested release to individuals and entities other than the parent/Adult Family Member/legal guardian. Similarly, the Custodial Agency may consider factors such as whether the Child has a documented history of escape or whether the Child is associated with smugglers, traffickers or others who might seek to victimize or otherwise engage him in criminal, harmful or exploitive activity only with respect to a requested release to someone other than a parent/Adult Family Member/legal guardian. Even in these cases, while these factors may be considered, no single factor should be employed as a per se reason to place a Child in a Detention Facility.

The approach of this Rule is a departure from the former INS's previous unwritten requirement that the parent/legal guardian hold U.S. citizenship or be of a lawful immigration status. Because this factor is also irrelevant to the stability of the family unit and to the best interests of the Child, it shall not be considered. The rule has also been crafted specifically to avoid the placement of other unreasonable requirements such as the production of a bond on individuals or entities seeking custody.

Children should never be used as "bait" to apprehend family members or other individuals when they seek custody or contact with the Child for the purpose of initiating deportation proceedings against such family members or others.

Timely determination whether to release. Because of the severe implications of a prolonged custody determination or a denial of release, the parent/legal guardian must be provided a streamlined form of redress when release is denied. Flores did not delineate a time within which decisions regarding release must be made and the process has sometimes been unreasonably prolonged. Consistent with The Hague Convention on the International Aspects of Child Abduction to which the U.S. is a signatory, determinations should be made within six weeks.

Review of denial of release. This Rule governs the right of the parent/Adult Family Member/legal guardian to the review a decision denying release of a Child to him/them. The Child's right to appeal a denial of release is addressed below at Rule IV.F. Judicial review under Flores has historically been a cumbersome process. While it should be preserved, it should also be supplemented by administrative review. Flores itself sets forth two alternatives to judicial review: administrative review by the Custodial Agency and administrative review by a third party. However, the success of the former depends on a superior's ability to be objective with regard to his subordinate's work, and institutional pressures may therefore impair objectivity. Thus, an independent administrative review of a denial of release, performed by a party outside the Custodial Agency (e.g., by the Office of Children's Services), should be available. This party should also be charged with evaluating a parent's/Adult

*Family Member's/legal guardian's claim regarding the expeditiousness of custody determinations and with enforcing penalties. Nothing in this rule is intended to eliminate judicial review of these matters under Flores.*³⁷

E. Release of the Child: Home Studies and Notice of Rights and Responsibilities

Rule:

1. **Home Study.** A Home Study with respect to a potential release should be, and should only be, conducted 1) where there is compelling evidence that living with the parent/legal guardian would put the child at risk from smugglers, traffickers or others who might seek to victimize or otherwise engage the Child in criminal, harmful or exploitive activity; 2) where there is compelling evidence that the parent/legal guardian is unfit; or 3) at the request of the Child, the Child's Advocate for Child Protection or the Child's Attorney. Such Home Studies should be conducted swiftly and thoroughly by caseworkers, who have expertise in conducting Home Studies and who exercise independent judgment. Except in the event of an emergency, defined for this Rule as a natural disaster (*e.g.* earthquake or hurricane), the Home Study should begin within the 72-hour placement period and should conclude within six weeks of initial apprehension.
2. **Notice of Rights and Responsibilities.** Upon the release of the Child, the Custodial Agency should inform him, both orally and in writing in his preferred language and dialect, of his rights (*e.g.*, the right to obtain an education at a public school) and responsibilities (*e.g.*, to appear at the Immigration Investigation and EOIR proceedings), as well as the responsibilities of the Advocate for Child Protection and the Attorney.

*Comments: The Rule recognizes the potential benefits of Home Study programs in ensuring adequate living conditions and an adequate standard of care for the Child with his new custodian and in protecting the Child from association with smugglers, traffickers or others who might seek to victimize or otherwise engage him in criminal, harmful or exploitive activity.*³⁸

F. Child's Right of Appeal of Placement

Rule:

1. Once the Custodial Agency has made a decision that a Child will not be released and requires a particular placement, this determination becomes a rebuttable presumption, provided that the Custodial Agency has articulated cogent, specific reasons for it. The Custodial Agency must provide to the Child and the Child's Attorney the records regarding the process for making the determination and any evidence used to reach that determination. The Custodial Agency must then also provide the Child with the opportunity to seek, and present evidence supporting, an alternative placement.

2. If the Child's request for release and/or an alternative placement is denied, the Child shall have the right to an independent review of the Custodial Agency's decision(s) that the Child not be released from Custody and/or should be placed or transferred into a particular Detention Facility. The review shall satisfy due process requirements. If a Child exercises his right to this review, the Custodial Agency bears the burden of persuasion that neither release nor a less restrictive alternative was suitable and that the Custodial Agency complied with Rules VI.D., VI.E., and VI.H. in making the determination that the placement or transfer was appropriate.
3. If the Child is dissatisfied with the outcome of the independent review, he may seek de novo review in federal court.

Comments: Due process requires that the Child must receive notice of the determination and a right to be heard. Further, he should be accorded the rights to receive a statement of reasons for the determination, to see the record, and to call and examine witnesses. The need for an independent review, discussed in the Comments to Rule VI.D, supra, in the context of the parent's/Adult Family Member's/legal guardian's right to appeal a denial of a release of the Child to him, applies here as well. This Rule preserves a Child's right to have his placement reviewed by a federal court, as set forth in Flores. In keeping with the general presumption advocated herein in favor of the Child in such proceedings, the Custodial Agency should bear the burden of demonstrating the legitimacy of the determination, as suggested by the ABA JJS. For the Child's right to appeal concerning the conditions of his Custody, see Rule VII.A.3, infra.³⁹

G. Custodial Agency Custody Beyond Initial Apprehension and Before Release Is Accomplished

1. Detention with a Parent or Adult Family Member

Rule: If the Immigration Enforcement Agency apprehends the Child with a parent or Adult Family Members, or already holds a Child's parent or Adult Family Member in its custody, the Immigration Enforcement Agency should keep the Child and such family members together as a unit and place them in the least restrictive setting appropriate to families. If a Temporary Placement Facility that is also used to detain adults is the least such restrictive setting, the detention of the Child and such family members there should be permitted and preferred, provided that the Child is detained solely with the parent(s) or Adult Family Member, unless such concurrent detention creates a substantial burden on the Temporary Placement Facility or puts the security of the Child at risk.

Comments: When Children are detained with adults (whether the adults are accused or convicted criminals or other detainees), the Children are subjected to an increased risk of violence, criminal behavior, abuse and coercion. Children may therefore only be placed in adult Detention

Facilities with their parents or Adult Family Members where their safety is not compromised. In situations where concurrent detention would create a security risk for the Child, custody of the Child shall be transferred to the Custodial Agency. If concurrent detention would impose a substantial burden on the Detention Facility, custody of the Child may be transferred to the Custodial Agency. This rule shall in no way limit the general policy favoring the release of a Child into the custody of a fit adult as set forth in Rule VI.D.

This Rule modifies the Flores standard, which has been interpreted to allow extended commingling of Children with, among others, adults. See Rule VI.B. Comments.⁴⁰

2. **Selection of Appropriate Detention Facilities**

Rule:

- a. If detention of a Child is deemed necessary, the Custodial Agency shall place the Child in the least restrictive setting in accordance with the Child's best interests.
 - i. Such placements shall include, but not be limited to:
 - A. Foster Care;
 - B. Group Homes; and
 - C. Shelter Facilities.
- b. Where the Child exhibits violent or criminal behavior that poses a danger to others or where the Child is at demonstrated risk of harm from smugglers, traffickers or others who might seek to victimize or otherwise engage him in criminal, harmful or exploitive activity, the Child shall be placed in the least restrictive Developmentally Appropriate placement consistent with his safety and the safety of others.

Comments: *Secure Detention Facilities are only to be used in extreme circumstances, for example, where the Child has previously exhibited violent or criminal behavior that poses a danger to others. The Rule intentionally modifies the Flores Agreement, which allows the secure detention of (1) Children who have proven to be "unacceptably disruptive of the normal functioning of the licensed program...", (2) Children who are an "escape-risk," and (3) Children whose safety is in issue, according to INS officers. (Flores, ¶ 21). Such general language has, in the past, (1) allowed INS officers to place a Child in secure Detention Facilities for minor matters such as shouting, smoking a cigarette, or pushing another detainee; (2) allowed INS officers to classify a Child as an escape-risk*

based only on previous instances in which the Child did not exhibit reliable behavior; and (3) provided an overly elastic catch-all category given that the safety of the Child is highly subjective and non-reviewable. Thus, the Flores standards are overly broad and grant too much discretion to DHS, formerly INS, inconsistent with international standards.

The Custodial Agency shall not place a Child in a secure Detention Facility if less restrictive alternatives are available, such as a less restrictive Detention Facility equipped with counseling services and intensive Staff supervision. All placements of Children in Detention Facilities should be intensely reviewed and approved by a Custodial Agency official responsible for coordinating placement of Children at Detention Facilities in that region, and shall be subject to the procedures concerning review and appeal set forth in Rule VI.F. supra. This rule precludes the Custodial Agency from using lack of available space as a justification for placing a Child in a more secure Detention Facility.⁴¹

3. Procedure When a Child Becomes an Adult While in Custodial Agency Custody

Rule: When a Child becomes an adult (*i.e.*, attains his 18th birthday) while in Custody, he should be released on his own recognizance subject to adult parole requirements.

Comments: *Children who turn 18 years old while in Custody, although legally adults, are still considered from a child welfare perspective to be children transitioning to adulthood. Many of these Children have been subjected to harrowing experiences, such as flight from great danger, traveling to and through foreign countries alone, introduction to a novel environment and finally Custody. The emotional effect of these circumstances alone militates in favor of continuing to treat them as Children even after they turn 18. As such, they should continue to possess certain residual rights even upon release from Custody. For instance, the Custodial Agency should assist them in securing housing and the services which they require after release from Custody. Given the fact that their placement in an adult Detention Facility was impermissible merely days earlier, the Custodial Agency and Immigration Enforcement Agency should make every effort to prevent such placements and, if such placements must be made, to find the most suitable among those available.⁴²*

H. Transfers of Children

1. Prohibition on Arbitrary Transfers; Presumption Against Transfer

- a. The Custodial Agency shall minimize the number of times it transfers each Child. A Child should be transferred from one placement to another only when such transfer is voluntary and/or would be in the best interests of the Child. The factors to be considered in determining whether a transfer is in the Child's best interests are the same as those set forth in the Rule VI.B.
- b. Transfer of a Child in Custody to a more restrictive placement should only occur under the following circumstances:
 - i. Since his current placement, the Child has been convicted of a crime involving violence against a person or the use or carrying of a weapon;
 - ii. the Child has committed a violent or malicious act (whether directed at himself or others) while in Custodial Agency Custody or while in the presence of Custodial Agency personnel;
 - iii. the Child has engaged in a pattern of extremely disruptive behavior that has prevented the normal functioning of the facility in which he has been placed and a) the Custodial Agency has determined that removal is necessary to ensure the welfare of the Child, or others, or b) a mental health specialist has concluded that therapy at the current facility would not remedy the behavioral problems; or
 - iv. the Custodial Agency has determined that the Child is an escape risk, based on prior attempts to flee or escape from the Custodial Agency or prior failure to appear at an Immigration Court hearing where the failure was not otherwise explained.

Comments: Transfers of children should not be made arbitrarily, nor on the basis of unsubstantiated perception of danger to or by the Child. Nor should the threat of transfer to a more restrictive placement be used to intimidate or coerce Children. This Rule is designed to prevent such uses of transfer, as well as to prevent Children, whenever possible, from being arbitrarily transferred to more restrictive detention environments. Transfers should be minimized because they can substantially disrupt the lives of Children in Custody, thereby harming their ability to form close relationships and impeding the consistency of the legal assistance and other services that they are able to obtain.⁴³

2. **Notice Requirements**

Rule:

- a. Prior to transfer, the Child shall be advised both orally and in writing, in the Child's preferred language and, where applicable, dialect, of the following:
 - i. the reason he is being transferred;
 - ii. his right to appeal the determination of appropriate transfer; and
 - iii. the procedures for such an appeal.
- b. Prior to transfer, the Custodial Agency shall also provide actual and written notice to the Child's Attorney including the date of transfer and the location, address and phone number of the new Detention Facility.
- c. The Custodial Agency should provide such notice to the Child's Attorney in all cases prior to the transfer, and in no case less than 24 hours prior to such transfer, unless compelling and unusual circumstances arise, such as:
 - i. The Child poses an immediate threat to himself or others; or
 - ii. The Custodial Agency has made an individualized determination that the Child poses a substantial and immediate escape risk.

3. **Right to Review and Appeal**

- a. The Child shall have the right to an expeditious, independent review of the Custodial Agency's transfer decision. The review shall satisfy due process requirements. The Custodial Agency bears the burden of persuasion that the transfer was necessary.
- b. If the Child is dissatisfied with the outcome of the independent review, he may seek de novo review in federal court.

Comments: In order to prevent arbitrary transfers and facilitate a Child's ability to appeal, this Rule requires the Custodial Agency to provide all relevant information to the Child and his Attorney. The Rule essentially restates the Custodial Agency's obligation under Flores, adding information about the appellate process to the information the Custodial Agency is required to provide the Child. With respect to the manner in which notice should be given to the Child, the requirements in this Rule are identical to those of Rule VI.F.1.⁴⁴

4. **Procedures Used During Transfer; Conditions of Transfer**

a. **Standard of Care During Transfer**

Rule: The Custodial Agency shall make all reasonable efforts to protect the life, safety and welfare of a Child during transfer. The Child should not be subjected to hardship or indignity during transfer such as the unnecessary application of restraints. Provision shall be made for the Child to have access to food and restroom facilities as necessary during transfer.

Comments: This rule reflects a standard that the INS previously, and now the DHS, has recognized in its Detention Operations Manual. It additionally incorporates a protection from indignity advocated by the United Nations Rules and a common-sense admonition requiring that neither the Immigration Enforcement Agency nor the Custodial Agency deprive Children of basic necessities during transfer.⁴⁵

b. **Child's Possessions, Legal Papers and Medical Records**

Rule: Whenever a Child is transferred from one placement to another, all of his possessions, legal papers and medical records shall be transferred with him; provided, however, that if the Child's possessions exceed the amount normally permitted by the carrier in use, the possessions may be shipped to the Child in a timely manner.

Comments: A Child's possessions may be his only ties to his religion, culture, family, or personal history and may be essential to him maintaining a sense of individuality, self-expression or identity. Thus, they may be critically important to his health and welfare while he is in the otherwise homogenizing environment of many Detention Facilities. Every effort should be made to ensure that such possessions accompany the Child at all times.⁴⁶

c. **Same-gender Escorts**

Rule: A Child shall be escorted by at least one Immigration Enforcement Agency or Custodial Agency staff person of the same gender at all times during transfer.

Comments: In order to appropriately safeguard the safety and welfare of Children, the Immigration Enforcement Agency or Custodial Agency shall make every effort to provide a staff person of the same gender.⁴⁷

d. **Separation of Children from Adults During Transfer**

Rule: A Child should be kept separate from detained adults during transfer. Where separate transportation is impossible, the Immigration Enforcement or Custodial Agency shall take all necessary precautions to ensure the safety of the Child, including the physical separation of the Child and detained adults within the vehicle.

Comments: The rule generally follows the rule observed by the INS/DHS pursuant to Flores. The concerns prompted by holding Children in Custody with adults apply equally to the context of transfers.⁴⁸

e. **Monitoring of Transfers**

Rule: The Immigration Enforcement or Custodial Agency shall document the transport of the Child and groups of Children in transportation logs that list the names of all passengers in the vehicle.

Comments: Transportation logs provide accountability for the safety and well-being of Children during transport and enable the Custodial Agency to both determine whether field staff persons are using appropriate procedures during transport and take remedial action as necessary.⁴⁹

VII. Rights of Children in Custody

A. Legal Rights

1. Right to Legal Information and Legal Representation

Rule:

- a. Every Child shall have access to meaningful legal representation throughout all Immigration Investigations, EOIR Proceedings, U.S. Court of Appeals proceedings, and any court proceedings relevant to his immigration case. Each Child therefore shall have the right to legal representation in these matters by an Attorney who is knowledgeable about immigration law. When a Child is unable to obtain the services of an Attorney with his own resources, the government shall appoint and notify an Attorney at the government's expense within 72 hours.
- b. Each Child shall have the right to communicate regularly with his Attorney. Privacy and confidentiality shall be ensured for all such communications. See Rule V.B.2. *supra* and Rule VII.C.3. *infra*.

- c. Every Child shall be informed within 72 hour of apprehension, and in any event prior to the Child's initial meeting with his Advocate for Child Protection, of his legal rights by means of a "Know Your Rights" presentation by an Attorney. The Attorney shall be independent of the Immigration Enforcement Agency and the Custodial Agency although he need not be the same Attorney as that appointed to represent the Child. The Attorney's presentation shall be private and confidential and include an overview of the detention and removal procedures and a discussion of the information provided to the Child by the Immigration Enforcement Agency in its Notice of Rights discussed *supra* at Rule VI.C.1. The presentation should also include an explanation that the Child's communications with the Advocate for Child Protection are not confidential, a discussion of the Child's right to speak privately on the phone, and a summary of the Child's other rights set forth in these Standards. After the presentation, the Child should be given the opportunity for an individual consultation.
- d. The Child's Attorney should not be required to file a notice of appearance, or similar form, prior to a pre-representational visit or a "Know Your Rights" presentation. Attorneys should be required to provide identification as to their status as Attorneys prior to each Detention Facility visit.
- e. A Child in Custodial Agency Custody shall not be requested to, and may not, give consent to any immigration action, other than an acceptance of voluntary repatriation at the border, unless first afforded an opportunity to consult with an Attorney.

*Comments: The participation of an Attorney on behalf of a Child subject to Immigration Investigations and EOIR Proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those matters. Once secured, the Attorney must promptly advise the Child and take actions necessary to protect the rights and legal interests of the Child. It is acknowledged that, at present, BIA-accredited Legal Representatives are permitted to represent Children in EOIR Proceedings despite the fact that such Representatives are not attorneys. This Rule rejects that approach as an inadequate "band-aid" attempt at meeting the legal needs of Children. As noted above, a Child who, immediately upon apprehension, accepts voluntary repatriation, is not entitled to an Attorney. See Rule III.H. *supra*.⁵⁰*

2. **Right to Information and Access to File**

Rule: The Child, his Attorney and his Advocate for Child Protection should have unrestricted access to all non-classified records in the possession of any Immigration Enforcement Agency or Custodial Agency

relating in any way to the investigation, removal proceedings or Custody of the Child.

Comments: The right to access records should not be limited to custodial records. Currently, Children must make a FOIA request in order to gain access to documents gathered by the Department of Homeland Security. In order to ensure that Children's due process rights are respected, this obstacle must be eliminated. Uncertainty creates unnecessary anxiety in a Child and may make him receptive to rumors, bad advice, or unrealistic expectations. Unrestricted access to all documents will help ensure that he is informed generally about the process, where he stands in the process, what decisions have been made, and what results are possible.⁵¹

3. **Right to Challenge Conditions of Custody**

Rule:

- a. Each Child in Custodial Agency Custody shall have the right to challenge the conditions of such Custody, including the denial or limitation of any rights set forth in these Standards.
- b. The Custodial Agency shall establish a written grievance procedure to hear such challenges expeditiously, and a Child shall have the right to assistance by his Attorney in pursuing any grievance. The grievance procedure should include the right to appeal to a senior Custodial Agency official.

Comments: After appealing the conditions of his custody to a senior Custodial Agency official, the Child would, of course, have the right to appeal any decision from such an official to federal court or any other appropriate body. Further, nothing in this Rule is intended to limit the Child's right to challenge his Custody itself or his placement in Immigration Court, federal court, or before any other appropriate body. See Rule VI.F supra.⁵²

B. Physical Conditions

1. **Standards For Detention Facilities; Physical Treatment of the Child**

Rule:

- a. *Safety.* The Immigration Enforcement Agency and the Custodial Agency shall ensure the safety of every Child in its Custody, whether the Child is in temporary Custody, a Secure Facility or any other type of Custody.
- b. *Point-Based Behavior Tracking Systems.* Detention Facilities should not rely solely on point-based systems to reward

compliance with the rules and regulations of a Detention Facility. If a Child displays violent behavior or repeated opposition to the reasonable requests of Staff of a Detention Facility, the Detention Facility may use a point-based behavior monitoring system, but only in conjunction with other behavioral monitoring models until the violent or oppositional behavior subsides.

- c. *Discipline.* The Custodial Agency shall formulate standards and rules for discipline giving due consideration to the differing ages and levels of maturity of Children detained in Custody, and should be sensitive to the needs of Children. Such standards should include a grievance procedure in which a Child has the right to assistance by his Attorney. A Child shall not be subjected to corporal punishment, humiliation, or mental abuse. Any sanctions employed shall not:
 - i. adversely affect the Child's physical or mental health; or
 - ii. deny the Child regular meals, sufficient sleep, exercise including outside play, medical care, correspondence privileges, or legal assistance.
- d. *Restraints.* Restraints should only be used in extremely rare instances in which the Staff has determined that no reasonable alternative to such restraints would prevent escape or physical injury to the Child or others.
 - i. Should the use of physical restraints be deemed necessary, Staff using them should document in writing the type of restraint used and the justification for such use.
 - ii. Staff should use only the minimum amount of force for the minimum amount of time necessary to gain control of the Child and under no circumstances should force or physical restraints be used to punish a Child.
 - iii. Restraints should never be used in a manner that causes physical, emotional or psychological pain, extreme discomfort or injury.
 - iv. A restrained Child should be monitored frequently to ensure his safety.
- e. *Isolation:* Like restraints, isolation should be avoided and used only in accordance with the ABA Juvenile Justice Standards on isolation. In addition, isolation should be documented and imposed for as short a time as possible.

Comments: *These rules demand a high standard of care for Children in Detention and Temporary Placement Facilities to ensure that detained Children receive care that meets their physical, emotional, religious and educational needs. Additionally, these rules encourage the Custodial Agency to house Children in the “least restrictive setting.” See, e.g., Rule VI.B and Rule VI.G.1. and 2. supra. All circumstances concerning any use of force or the imposition of unusual restrictions on a Child, including the circumstances that gave rise to such sanctions, shall be reported immediately to the Detention Facility administrator and the Child’s Attorney, Advocate for Child Protection, and parent or legal guardian.*⁵³

*Consistent with treating Children with respect, dignity and particular concern for their status as Children, physical restraints should not be used on Children at any time except as a last resort, and isolation should be used infrequently. The rule not only severely limits the use of restraints, but also requires that any Staff using restraints on a Child document such use and be held accountable for any misuse. Medication should never be used to subdue an uncooperative Child.*⁵⁴

2. **Physical Condition and Operation of Detention Facilities**

Rule:

- a. *General Standard.* The Custodial Agency shall hold Children in Detention Facilities that are safe and sanitary and that protect vulnerable Children. Detention Facilities should be designed and maintained with due regard to the need of Children for privacy, sensory stimuli, opportunities for association with peers, participation in sports and exercise, and leisure-time activities.
- b. *Compliance with applicable law.* Any Detention Facility used for Custody must meet applicable federal, state and local laws and regulations. The absence of funds is not a justification for allowing a Detention Facility’s conditions, resources, or procedures to fall below such standards. Detention Facilities should be designed and maintained to minimize the risks of danger associated with fire and environmental hazards.
- c. *Physical Housing Requirements.* All Detention Facilities shall provide, at minimum, a bed with a mattress, sheet, blanket and pillow that are appropriate to local weather conditions; regular access to toilets, sinks and showers; adequate temperature control and ventilation; and adequate supervision to protect the Child from others while in Custody.
- d. *Clothing.* If possible, the Child should have the right to wear his own clothes. If not possible or if the Child prefers, the Custodial

Agency should permit him to wear clothing typical of American Citizen children and should issue such clothing to the Child.

Comments: This Rule addresses the safety of other aspects of the Detention Facility besides its population. (As set forth supra at Rule VI.B., for his safety, a Child should not be housed in Detention Facilities which also house adults or children accused of being or adjudicated delinquent except in the extremely limited circumstances set forth in Rules VI.B. and VI.G.2.b.) Detention Facilities should provide access to sanitary facilities; drinking water and food as appropriate for the Child's culture and religion; adequate temperature control; and adequate protection. Children should be allotted a sufficient amount of clothing that will provide for dignity and respect for them as individuals. Clothing should be suitable to the environment, both indoor and outdoor, and should not be ill-fitting. Children should not, for example, be provided only sweatpants and sweatshirts, nor should they be given clothing, such as flip-flops, as a means to restrict their movement. Only if the wearing of civilian clothing will pose a substantial security risk to the Child or to the Detention Facility should the Child be required to wear a uniform.⁵⁵

3. **Right to Privacy**

Rule:

a. In General

A right to individual privacy shall be honored regardless of the Detention Facility in which a Child is held. Because different Children will desire different levels of privacy and because Children will, by their nature, often change their minds, substantial allowance should be made for a Child's individual and varying choice.

b. Strip Searches

Strip searches shall not be allowed in the absence of documented probable cause that they are necessary.

c. Personal Belongings During Custody

i. Every Child shall be permitted to possess personal effects and to have sufficient private storage facilities for those effects. Personal effects shall include religious items and items pertaining to the Child's culture.

ii. Personal effects that the Child does not choose to retain or that are confiscated should be placed in safe custody. Any items, including money, retained by the Detention Facility

should be inventoried. The Child should sign the inventory and receive a copy of it. A copy should also be provided to his Attorney and Advocate for Child Protection. All items so retained by the Detention Facility should be made available if required by the Child and otherwise returned to the Child on release or transfer.

- iii. A Child shall generally be allowed to keep in his possession reasonable quantities of the following items: religious items, religious and secular reading material, legal and personal correspondence, photographs, and any other materials or objects important to the Child, except as provided in Rule VII.B.3.c.iv *infra*.
 - iv. Reasonable quantities of the items listed in Rule VII.B.3.c.iii. *supra* may be denied to a Child only if the Detention Facility Staff determines that they pose a security threat to the Detention Facility. Any such item should be inventoried and placed with the Director of the Detention Facility for safekeeping, to be returned to the Child upon his release.
 - v. All Detention Facilities that hold Children should have written policies and procedures for the handling of contraband (*i.e.*, all items that pose a direct or immediate threat to the health, safety or security of people or property). The policy should include a requirement to handle religious items with particular care. Each Child should be given both oral and written notice of the policy in the Child's language and, where applicable, dialect.
- d. The Custodial Agency shall ensure that interview rooms ensuring a confidential, quiet, non-distracting, Developmentally Appropriate setting in which the Child feels comfortable are available in Detention Facilities and other placements for use by Attorneys, Advocates for Child Protection and others in meeting with Children.

Comments: *In the past, some Detention Facilities' standard operating procedures required a strip search after every contact visit with a visitor. (For the Child's right to private visits, see Rule III.K.1.) This procedure unnecessarily demeans and frightens Children. In the unusual case when a strip search is necessary and supported by documented probable cause, it must be conducted by a person of the same gender as the Child, who should also be someone with an understanding of the Child's cultural background. The possession of personal effects is a basic element of the right to privacy and is essential to the psychological well-being of the*

Child. The right of every Child to possess personal effects and have private storage facilities for them shall be fully recognized and respected. A corollary to the Child's right recognized by Flores to participate in religious services is the Child's right to possess all religious items necessary to maintain his religious practices.⁵⁶

C. Services for Children

1. Language/Interpreter Rights

Rule:

- a. A Child shall have the right to communicate in his preferred language whenever he chooses. A Child therefore should not be discouraged from speaking in his preferred language to anyone, including other Children in Custody.
- b. A Child whose preferred language is not spoken by the Detention Facility Staff shall have the right to the services of a trained, independent interpreter in his preferred language provided free of charge whenever necessary to ensure that his Detention complies with these Standards, and in particular during medical examinations and disciplinary proceedings. The Custodial Agency shall also provide the Child with such an interpreter for all communications with his Attorney at government expense. Any Child whose preferred language is not English shall have the right to the services of a trained, independent translator to translate any official documents which the Child receives into his preferred language and dialect to enable full comprehension of his rights. Similarly, the Child shall have the right to the services of a trained, independent translator to translate any documents which the Child sends pertaining to his immigration matter into English. A Child's preferred language should be determined upon his arrival at the Detention Facility.

***Comments:** The maintenance of the preferred language is a critical factor in retaining identity. Indeed, the Custodial Agency should in some circumstances assist Children in acquiring and maintaining proficiency in their preferred language. However, in the past, Children in Detention have been disciplined for using their preferred language to communicate with other Children. This rule will ensure that Children are encouraged to use and preserve their own language. Access to an interpreter is essential to assist Children in Detention Facilities lacking any personnel proficient in their preferred language to exercise the rights outlined in these Standards.⁵⁷*

2. Right to Health Care

a. **Basic Health Care**

Rule:

- i. Every Child has a right to be examined by a physician immediately upon placement in any Detention Facility to record any evidence of prior ill-treatment, identify any physical or mental condition requiring medical attention, and ensure that any necessary screenings and immunizations are provided. As soon as possible after being taken into Custody, each Child should be interviewed in his own language by a licensed psychological professional who should then prepare a psychological and social report identifying any factors relevant to the specific type and level of care and program required by the Child. When special rehabilitative treatment is required, trained personnel of the Detention Facility should prepare a written, individualized treatment plan specifying the objectives, time-frame, and means of treatment.
- ii. Every Child in a Detention Facility should receive adequate medical care, both preventive and remedial, including dental, ophthalmologic and mental health care, as well as medicines and special diets as medically indicated. Female Children should have access to gynecological services and counseling.
- iii. The Detention Facility should have a written health policy that designates a health care providing agency with a single designated pediatrician or family practice physician to make all final medical judgments with respect to Children. All workers in the health care-providing agency should be licensed, certified or registered by the appropriate state and/or local authorities.
- iv. The health care providing agency should provide Detention Facility management with regular reports on the health of each Child in the Detention Facility, and should review each policy and program in the health care delivery system at least annually.
- v. All Detention Facility personnel should be trained in basic first aid, and the health care-providing agency should have procedures in place to handle medical emergencies 24 hours per day, either directly or through referral to a local provider.

***Comments:** This rule is intended to enhance the medical care provided to Children in Custody. The designated physician shall be a pediatrician or family practice physician to ensure that the medical treatment provided offers both sufficient expertise concerning, and particular attention to, the needs of Children and, in particular, adolescent girls. Detention Facilities should conduct training in personal hygiene as necessary as a preventive medical service. Such training should also include family planning, STD/HIV prevention, eating habits, exercise and alcohol and drug abuse prevention. Medical staff should be familiar with recent research about any health or nutritional issues related to Children of the Child's culture or country of origin. Trained, independent interpreters for physicians and psychologists should be provided as necessary and should not be Detention Facility Staff to preserve the Child's confidentiality.⁵⁸*

b. Physical Integrity

Rule:

- i. A Child shall not be subjected to medical research or experimentation of any kind. This Rule does not preclude a Child from receiving a medical treatment that is not generally available and that has a reasonable potential for therapeutic value.
- ii. While in Detention, the Child should receive an initial medical exam to, among other things, screen for communicable disease. After the initial medical exam, the Child should be examined and treated only:
 - A. where his parent/legal guardian gives Informed Consent;
 - B. in the absence of a parent/legal guardian, where the Advocate for Child Protection gives Informed Consent;
 - C. upon order of a court; or
 - D. in an emergency, including a communicable disease such as tuberculosis that threatens the health of others, in which case any such consent or order is unnecessary.

***Comments:** This rule reinforces the requirement of consent by the Child, or someone appropriate to consent for the Child, before*

*medical treatment is administered, except in emergency circumstances.*⁵⁹

c. **Right to Mental Health Care**

Rule:

- i. A Child who is suffering from mental illness shall, when necessary, be placed in a facility or institution which provides appropriate psychological services and treatment. Steps should be taken, by arrangement with appropriate agencies, to ensure any necessary continuation of mental health care after release from the Custodial Agency, facility or institution.
- ii. When any Child, as a result of mental or emotional disorder or intoxication by alcohol or other drug, is suicidal, has a documented pattern of destructive behavior towards others, or otherwise similarly evidences an immediate need for emergency psychiatric or medical evaluation and possible care, the Custodial Agency shall, upon such reasonable cause, transfer him to a psychiatric or medical facility approved by the state department of health (or relevant governing body) as a facility for emergency evaluation and emergency treatment.
- iii. Detention Facilities should provide Children with mental health needs appropriate individual counseling sessions and group counseling conducted by trained social work Staff with the specific objectives of reviewing the Child's progress, establishing objectives and addressing both the developmental and crisis-related needs of each Child.
- iv. Detention Facilities should provide acculturation and adaptation services which include information regarding the development of social and interpersonal skills necessary to live independently and responsibly appropriate to each child's age and skill set.
- v. A comprehensive and realistic individualized needs assessment should be developed for the Child. The assessment should specify short- and long-term treatment objectives. The assessment should be conducted by competent physical and mental health professionals who take into consideration the particular requirements of the Child as dictated by his age, personality, gender, mental and physical health, and life experiences. Individual plans

should be implemented and closely coordinated through an operative case management system.

***Comments:** Because their psychological development is incomplete, Children face greater psychological risks than adults. Moreover, a Child's developmental needs cannot be deferred until the uncertain resolution of his immigration status is reached. In addition, Child refugees often have special difficulties such as trauma due to witnessing or being the victim of torture, sexual assault or other forms of violence. Addressing these special difficulties may require the involvement of a qualified mental health professional trained to work with Children. Such a professional will preferably be of the same ethnic background as the Child or at least possess good cross-cultural skills. In addition, the professional should be unaffiliated with any Immigration Enforcement Agency to ensure that his primary purpose in treating the Child in a Detention Facility is to resolve any mental health issues. Appropriate placements for Children suffering from mental illness may be mental hospitals, counseling centers, psychiatric institutions, diversion programs, or other agencies which function as independent mental health facilities.⁶⁰*

3. **Right to Education**

Rule:

- a. A Child held in a Detention Facility should be afforded access to the educational institution, if any, which he attended prior to apprehension, if possible, or to an equivalent school, tutorial program or other program adequate to his needs, including those necessary to address any physical, mental, or behavioral disabilities.
- b. Upon placement in a Detention Facility, a Child should be given placement tests to determine his level of English comprehension and his educational level, including whether he has Special Needs.
- c. A Child should be placed in a school and classroom based upon the results of his placement tests. A Child with Special Needs should be provided with the necessary services, education and treatment.
- d. Educational services should be provided in a structured classroom setting, Monday through Friday. Some educational options should be provided in the Child's preferred tongue, whether through an interpreter or in a class specifically designed to accommodate the Child's language needs.

- e. The quality of education for each Child should be equal to that for U.S. citizens of the same age.
- f. Each Child above compulsory school age who wishes to continue his education should be permitted and encouraged to do so.
- g. Each Child should earn academic credits.
- h. Every Detention Facility should provide reasonable access to a library that is adequately stocked with materials, including Internet access, that meet the educational, informational, language, cultural and recreational needs of the Children. The library should also provide access to relevant immigration and juvenile justice legal materials. Materials should be age appropriate and in the Child's preferred language where practicable.

Comments: Education is vital to the development of Children and is recognized as a universal human right. Failure to deliver adequate educational services may hinder a Child for a lifetime. In addition, school provides continuity and structure for Children and is essential to their well-being. For these reasons, education should be a priority. The Detention Facility should make every effort to secure textbooks and reading materials from the Child's country of origin and Staff should encourage the Children to make full use of these materials. If Children attend schools which lack instruction in a language that they understand, in addition to the interpreter discussed in the Rule, special provisions may be necessary to enable them to learn, become literate in, and/or retain their preferred tongue. Children should be, to the extent possible, placed in the local school. Upon the release of a Child who attended an educational program at his Detention Facility, the Custodial Agency should provide the Child with a certified copy of his record and credits to facilitate their transfer to a new school.⁶¹

4. **Right to Vocational Training and Work**

Rule:

- a. Every Child in Custody over the age of fourteen should have the opportunity to participate in a voluntary vocational training program in relevant occupations. Vocational training can occur through work assignments, apprenticeships and on-the-job training. Each Child should be able to choose the type of work he wishes to perform from that which is available and appropriate.
- b. No Child in Custodial Agency Custody should ever be forced to perform labor against his will. All international child labor standards should apply to any work setting.

*Comments: Through voluntary vocational training, Children will gain essential skills that will help them successfully gain employment upon release from Detention. The Child's age will determine in large measure the type of work assignment or vocational training program for which he is eligible. Children should be encouraged to work or participate in vocational training, but should not be required to do so.*⁶²

5. **Right to Recreation**

Rule:

- a. All Detention Facilities should provide Children with access to recreational programs and activities under conditions of security and supervision that protect their safety and welfare. Activities should include daily outdoor activity, weather permitting, and at least one hour per day of large muscle activity and two hours per day of structured leisure time activities.
- b. The Child should have access to a wide variety of information and material, especially those aimed at the promotion of his social, cultural and spiritual well-being and physical and mental health.
- c. The Detention Facility should respect and promote the right of the Child to participate fully in cultural and artistic life and should encourage the provision of appropriate opportunities for cultural, artistic, recreational and leisure activity, both inside and outside the Detention Facility.

*Comments: Cognitive, imaginative, and physical play is vital to the healthy development of a Child. Play assists a Child in relieving tension, and in assimilating and coping with what he has experienced and learned. Play therefore is crucial to a Child's healthy development and ability to function within the family and the community. Recreational activities, such as training in traditional music, dance, other arts and sports activities, can be important to the Child's retention of culture and to his mental and psychosocial health, and should therefore be organized for him. Watching television should not be counted toward the Child's two hours per day of structured leisure time activities. Opportunities for additional activities outside the Detention Facility should be utilized where they will have a positive impact on the Child. Examples of the information and material aimed at promoting the Child's social, cultural and spiritual well-being and physical and mental health include newspapers, magazines, books, religious literature, and television programming.*⁶³

D. Freedom of Expression

1. Visitation Rights

Rule:

- a. Every Child in a Detention Facility shall have the right to receive regular and frequent visits (not less than once a week) from family and friends in circumstances that respect the Child's needs for privacy, contact and unrestricted communication.
 - i. The Detention Facility should permit the Child to visit with his Attorney or Advocate for Child Protection any day of the week, including holidays. For the purposes of this paragraph, Attorneys include all persons necessary for the representation of the Child, including but not limited to interpreters, paralegals, experts and witnesses. Such visits should be permitted at any time during the period of at least eight hours a day discussed in Rule VII.D.1.a.ii. *infra*.
 - ii. Detention Facilities should have interview rooms for Children to meet privately with Attorneys, family and friends. Private areas within each Detention Facility should be available as contact visiting areas. Visitation hours, although subject to reasonable regulation by the Detention Facility Staff, should be at least eight hours per day, seven days a week, and should not interfere with the Child's school requirements, except in the event of an urgent need for visitation. The duration of visits should not be unduly restricted.
- b. The Detention Facility's procedures should establish guidelines concerning documentation requirements for visits, as well as permissible conduct and activities during visits. The Detention Facility should delegate authority to appropriately trained Staff to assist Custodial Agency personnel in complying with these visitation requirements.
- c. A Custodial Agency may deny visitation any time it has clear and credible evidence that the prospective visitor is a smuggler, trafficker or someone who might seek to victimize or otherwise engage the Child in criminal, harmful or exploitive activity.

Comments: *Visits should be actively encouraged in order to maintain a link between the Child and his family and community and to facilitate his social reintegration. If the visit occurs during meal times, arrangements should be made for a meal to be provided to the Child to eat during or after the visit. This Rule differs from the Flores standards regulating visitation because those standards often interfere with visits involving family and the Child's Attorney. For example, the requirement that visits*

*be scheduled no less than seven business days in advance is unrealistic and prohibitively inconvenient for many Attorneys and family members.*⁶⁴

2. **Communication Rights: Phone and Mail**

Rule:

- a. Each Child in Custody should have ready access to a telephone for at least 12 hours a day and be permitted to make calls of reasonable duration. Local calls, as well as long distance calls in reasonable number, to a parent, legal guardian, Adult Family Member, Attorney, or Advocate for Child Protection should be at the expense of the Detention Facility. Calls to Custodial Agencies, Advocates for Child Protection, Attorneys, consular offices and courts shall under no circumstances be monitored. Other calls may be monitored, but only to ensure the safety of the Child or others in the Detention Facility.
- b. Certain correspondence, such as written communications between a Child and his Attorney, Advocate for Child Protection, government attorneys, judges, courts, embassies, consulates, or any other member of the executive, legislative, or judicial branch of the government, generally shall not be opened by Detention Facility Staff or Custodial Agency personnel. If reasonable, articulable grounds exist to believe that mail may contain contraband, it may be examined, but only in the Child's presence, and those grounds must be documented in the Child's file. Each Child should be provided with a postage allowance and writing materials, and be permitted to post a reasonable amount of mail each week. All correspondence received by a Detention Facility from which a Child was previously transferred or released should be forwarded via First Class mail to the Child's current location. If no forwarding address is available, all mail should be returned to sender unopened.
- c. To the extent feasible, each Child in a Detention Facility should have supervised access to the Internet, including no-cost email services if desired. Email correspondence to Custodial Agencies, Advocates for Child Protection, Attorneys, consular offices and courts shall under no circumstances be monitored. Other email correspondence may be monitored but only to ensure the safety of the Child or others in the Detention Facility.
- d. The Child should be encouraged, and granted special permission, to leave the Detention Facility for educational, cultural, religious, and vocational reasons.

- e. The Child should be encouraged, and assisted as necessary, to communicate with outside contacts at least once a week, including family members, friends, his Advocate for Child Protection, or his Attorney.

Comments: The Detention Facility should utilize every reasonable means to ensure that a Child has adequate communication with the outside world. Such communication is an integral part of the right to fair and humane treatment and is essential to the preparation of the Child for his return to society. Children should be encouraged to communicate with their families, friends and other persons or representatives of reputable outside organizations; to leave Detention Facilities for visits to their homes and families; and to leave the Detention Facility to take advantage of educational, cultural, religious, vocational and other opportunities in their locale. The Detention Facility should respect the right of the Child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, unless it is contrary to the Child's best interests and the basis for that determination is documented in the file. Rule VII.C.1.b. provides for translation of correspondence which a Child not literate in English wishes to send.⁶⁵

3. **Religious Practices**

Rule:

- a. The religious and cultural beliefs, practices and moral concepts of the Child shall be respected.
- b. To the extent possible, the Child shall have access to religious services of the Child's choice.
- c. The freedom to manifest one's religion or beliefs, including the possession of religious items, may be subject only to such limitations as are prescribed by law or are necessary to protect public safety, order, health or the fundamental rights and freedoms of others.
- d. The Child's dietary needs as dictated by his religion shall be accommodated unless unduly burdensome to the Detention Facility.

Comments: The Child's connection with his culture of origin must be preserved by permitting him to follow his religious practices. A Child, especially a refugee, often has lost his role models. Thus, the role of preserving and encouraging the Child's religious development, central to the inculcation of values, falls to the Detention Facility. The conservation of one's religion, and one's right to practice it, are well recognized human rights. Moreover, the renewed practice of religious and ritual activities is

a crucial element in assisting a Child to retain or regain cultural identity and normalcy. For these reasons, Detention Facilities should afford the Child broad religious rights. The Child's right to possess a reasonable number of religious objects is set forth in Rule VII.B.3.c.⁶⁶

4. **Right to Communicate with the Media**

Rule: A Child shall have the right to communicate with the media, individually or through representatives, when desired and appropriate. Consent to communicate with the media should be secured from a Child's Attorney or Advocate for Child Protection in consultation with the Child as set forth in Rule V.B.2.c. *supra*.

Comments: *Access to the media can be critical in ensuring that the Child's legal rights are protected. This issue is more fully discussed at Rule V.B.2. Comments supra.⁶⁷*

E. **Repatriation**

Rule:

1. Whenever a Child, after consultation with his Attorney and Advocate for Child Protection, requests repatriation, the Child shall be repatriated promptly through the consulate of his home country.
2. With respect to any repatriation, the Immigration Enforcement Agency shall ensure repatriation with dignity and safety.

Comments: *Immediately upon apprehension, the Immigration Enforcement Agency through its arresting agent should inform the Child of the Child's right to immediate repatriation as an alternative to detention. It should be noted that, in those cases, the Child is not entitled to an Attorney or Advocate for Child Protection, and his voluntary request for repatriation may be granted. See Rule III.H Comments and III.I Comments supra. However, Children shall not be forced, coerced or encouraged to accept repatriation as an alternative to detention, especially given that for some Children repatriation is a dangerous option. If the Child cannot be repatriated within 24 hours, he should be placed in temporary Custody, which should last no longer than 72 hours.⁶⁸*

VIII. **Adjudication of Claims of Children**

A. **Rights of the Child**

1. **Right to Full and Fair Process**

Rule: All proceedings concerning a Child's immigration status shall be conducted as promptly as possible consistent with a full and fair adjudication.

Comments: This rule seeks to avoid any harm caused to the Child's well-being or development by unduly lengthy EOIR Proceedings. The Rule also recognizes that, in some cases, a less expeditious process may actually be in the Child's best interests. Examples include circumstances where a Child's asylum case requires additional time for adequate investigation or trial preparation, or where legislation or other proceedings are pending that would benefit the Child.⁶⁹

2. **Adjudicator's Role in Reporting Unethical or Criminal Behavior of Attorneys**

Rule: The Adjudicator shall ensure that, in all administrative and court proceedings, all attorneys before him are acting in accordance with the governing rules of professional conduct. Where an Adjudicator is aware of unethical or criminal behavior on the part of any attorney, he should report it to the proper authorities and should take whatever other action is necessary to ensure that the Child before him is afforded full and fair process.

Comments: The Adjudicator should be cognizant of the fact that some individuals, such as smugglers and traffickers, seek to victimize or otherwise engage Children in criminal, harmful or exploitive activity, and may be assisted by Attorneys in this endeavor. For example, among the most prominent and ruthless of these criminal human smuggling syndicates are the "snakeheads." The snakeheads are extremely well organized around the world and in the United States, charging enormous sums for illegal passage into the United States and keeping their victims as virtual slaves in the United States while they pay off their smuggling debt. The snakeheads are assisted in the United States by certain attorneys, who represent the snakeheads' victims solely to keep them under the snakeheads' control. Their fees are paid by the smugglers and their "clients'" interests are represented only insofar as they coincide with the interests of the snakeheads: keeping the trafficking victims in the United States in order to extract payment.

It is a crime for an Attorney to assist a human trafficker by representing his victims in the immigration process so that they can stay in the United States and under the trafficker's control. The Adjudicator should be alert to situations where the Attorney appears to be serving the interests of someone other than the Child, or is neglecting the Child's case. The Adjudicator should also, to the extent permissible by law, consider reporting likely smuggler Attorneys to bar counsel for disciplinary proceedings and to the federal authorities for prosecution.⁷⁰

3. **Right to Be Present and Free From Restraint**

Rule: A Child shall have the right to be physically present at any proceeding concerning his immigration status. A Child shall not be shackled or otherwise restrained during any such proceeding, except in the rare circumstances where Custodial Agency personnel have demonstrated that no reasonable alternative would prevent physical injury to the Child or others or the Child's escape.

Comments: The Child's right to be present at any proceeding requires all proceedings, including both master calendar and merits hearings, to be conducted live and not via videoconference. The risk of misunderstandings and confusion during hearings conducted by videoconference is very high for children in particular, who may not understand that an Adjudicator who appears on a television screen is actually conducting the Child's hearing. By contrast, when hearings are conducted live, a Child may feel more at ease in the courtroom and testify more effectively, and the Adjudicator can directly observe and respond to the Child's body language that may not be observable by camera in a videoconference. Consistent with treating Children with respect, dignity and particular concern for their status as Children, physical restraints shall not be used on Children at any time except as a last resort. Restraints of any type may be used only when permitted by the Adjudicator. Any person using restraints on a Child in connection with adjudicatory proceedings should document such use and be held accountable for any misuse. Hard restraints (e.g., steel handcuffs and leg irons) should be used only after soft restraints prove ineffective with the Child. Medication should not be used to subdue an uncooperative Child.⁷¹

4. **Right to Be Fully and Timely Informed**

Rule: In all proceedings concerning a Child's immigration status, the Child shall be fully and timely informed by the Adjudicator in a Developmentally Appropriate manner as to the purpose of the proceeding, the procedures to be followed and any actions to be taken, including any decisions made and the possible consequences of such decisions, and the consequences for failure to appear.

Comments: In providing this information, the Adjudicator should present it in an appropriate manner given the Child's age, level of education, gender, cultural background, intellectual, social and emotional development, degree of language acquisition, Special Needs, and other individual circumstances in order to ensure the Child's comprehensive and meaningful participation.⁷²

5. **Right to Interpretation and to Have Interpreter Physically Present**

Rule: A Child whose preferred language is not English shall have the right to have any administrative or court proceeding relevant to the Child's

immigration status interpreted into the Child's preferred language and dialect and to have a trained, independent interpreter physically present and available for the Child throughout any administrative or court proceeding relevant to the Child's immigration status to interpret the entire proceeding. Such interpreter shall be appointed by the court or agency at government expense.

*Comments: The right to an interpreter is essential to the Child's ability to comprehend his rights and obligations in any administrative or court proceeding. An interpreter should speak the Child's preferred language and dialect. A Child should be introduced to an interpreter in advance of the hearing and given the opportunity to speak to the interpreter so as to develop a rapport with him.*⁷³

6. **Right to Privacy in Adjudication**

Rule:

- a. Unless otherwise prohibited by law, a Child shall have the right to choose whether any proceeding, or any portion thereof, concerning the Child's immigration status is open or closed to the public. If a Child has chosen to close the proceedings or any part thereof, an Adjudicator nevertheless shall admit members of the public selected by the Child.
- b. All persons attending closed proceedings shall be admonished by the court to maintain the confidentiality of all matters revealed therein.

*Comments: This Rule seeks to protect and promote the Child's best interests. It is not meant to preclude a Court from sharing basic information on a Child with entities providing pro bono representation, such as docket information, Notices to Appear and other public records, for the purpose of facilitating a Child's representation. See Best Practices for Immigration Proceedings Involving Alien Child Respondents Recommended by the ABA (ABA Best Practices) ¶ 4.*⁷⁴

7. **Right to Present Evidence**

Rule:

- a. In any administrative or court proceeding, the Child shall have the right to present evidence on his behalf, including without limitation the right to testify or not testify, to call witnesses, to examine adverse witnesses, to object to evidence, and to compel the attendance of witnesses.

- b. Where the Child seeks to compel the attendance of a witness in Custodial Agency Custody, the Custodial Agency shall transport the witness to the hearing at the Government's expense.⁷⁵

8. **Right to Have Proceedings Concerning a Child's Immigration Status Transcribed and to a Copy of the Transcript**

Rule: In all administrative and court proceedings concerning the Child's immigration status:

- a. The proceeding shall be recorded in full. Where electronic means are used to record such a proceeding, all parties present shall be notified on the electronic record when the electronic recording device is turned on and off, and shall be permitted to object on the record.
- b. A Child shall have the right upon request to receive a copy of any transcript or to have any electronic recording transcribed and a copy of the transcript provided to the Child at no charge.

Comments: This Rule is intended to include asylum interviews. Transcriptions and electronic recordings of asylum interviews and other administrative and court proceedings should be preserved. This rule is designed in part to prevent the current practice on the part of some Adjudicators of turning the electronic recorder off unannounced during testimony, oral argument or the Adjudicator's decision. A Child's request for a transcript should be processed as expeditiously as possible.⁷⁶

9. **Right of Access to the Child's File**

Rule: A Child, upon request, should have the right to review and receive a copy of any document in written, audio or video format or any other electronic medium contained in any records maintained by any agency or court at no charge. The agency or court should comply timely with any such request.

Comments: In order to ensure that the Child has the ability to prepare and present his case or appeal, the Child must have timely access to all documents in his file.⁷⁷

B. EOIR Proceedings Involving Children

1. **Creation of a Children's Docket**

Rule: EOIR Proceedings involving Children should be scheduled on a separate docket and prioritized over other EOIR Proceedings, subject to the ability of the Child's Attorney to prepare the case.

Comments: Creating a separate Children's docket would serve several important purposes. First, a separate docket would facilitate the expeditious handling of Children's cases and eliminate the difficulties many Children experience in transitioning between Child-friendly and adult environments. Second, a Children's docket would ensure a Child's separation from adults, in furtherance of other aspects of these standards. See, e.g., Rule VI.B supra. Third, such a docket would allow Adjudicators to more rapidly familiarize themselves with the special issues involving Children, and would afford them a better opportunity to provide Children with a setting and procedures that are Child-friendly. For example, Adjudicators and Government Trial Attorneys, like the Child's Attorney, should be mindful that Children require frequent bathroom and snack breaks which they may be too intimidated to request. See Rule IV.C. Comments supra) Thus, a series of shorter sessions may be more effective than a few longer ones. Children should also be granted breaks when they appear distressed, upset, tired, increasingly fidgety or confused.

2. **Structure of Proceedings**

- a. EOIR Proceedings involving Children shall never be conducted in Adult Detention Facilities.
- b. EOIR Proceedings involving Children shall never be conducted by video-conference.

3. **Participants in EOIR Proceedings**

Rule:

- a. With the exception of the initial intake interview, EOIR Proceedings concerning a Child shall not take place until the Child is represented by an Attorney.
- b. At the request of the Child, an Adult Family Member, other trusted adult, or friend should be permitted to attend any EOIR Proceeding concerning the Child. See Rule V.C.2 Comments supra.

4. **Child-friendly Setting**

Rule:

- a. In order to facilitate a Child's full participation at all stages of the EOIR proceedings, a child-friendly environment shall be created and maintained.
- b. The Adjudicator shall ensure adequate time during the proceedings to permit the use of Child-sensitive and Developmentally

Appropriate questioning and a full exploration of the Child's claims.

Comments: In order to create a child-friendly environment, an Adjudicator should consider not wearing a robe, acting more informally, and conducting proceedings in a conference room instead of a courtroom.

The Adjudicator and Government Trial Attorney should be cognizant of the Child's potentially limited attention span as it affects the Child's ability otherwise to participate in a long hearing. At the same time, the hearing should be permitted to continue as long as necessary to allow full disclosure of the Child's relevant experiences. In light of these considerations, if necessary, the hearing should be continued until the next available day to accommodate the Child.

If a Child becomes upset while testifying about traumatic events, the Immigration Court should consider staying the hearing until the Child is able to proceed and/or to consider the use of alternative sources of evidence. In such circumstances, the Immigration Court should also consider whether the retraumatization may be made worse by questioning about these events on more than one occasion.⁷⁸

5. **Special Evidentiary Considerations**

Rule:

- a. Documentary evidence is not required in order for a child to establish a claim. The Adjudicator should consider that Children, even more so than adults, frequently lack the ability to obtain relevant evidence to support their claims.
- b. When two reasonable inferences can be drawn from the evidence, one in the Child's favor and the other adverse to the Child, the Immigration Court shall adopt that reasonable inference in the Child's favor or in support of the Child's asylum claim.
- c. Any statement made by a Child outside the presence of his Attorney to any Custodial Agency or Immigration Enforcement Agency official, including but not limited to statements made by the Child at apprehension, shall not be admissible in an EOIR Proceeding for any purpose.⁷⁹

6. **Testimony of the Child**

Rule:

- a. In assessing the credibility of a Child's testimony, the Adjudicator shall consider the Child's intellectual, social and emotional

development, and cultural background; the subject matter of the Child's testimony; and the circumstances under which the Child is testifying, including whether the Child may be suffering, or has suffered, from post-traumatic stress disorder, malnutrition or other physical or psychological conditions.

- b. Where appropriate and upon timely notice, a Child shall have the right to introduce his testimony through the use of a previously recorded videotape or other electronic means, with due consideration given to the Government Trial Attorney's right to cross-examine the Child. The Adjudicator also should allow a Child to provide narrative testimony.

Comments: Many valid reasons exist why a Child may find it difficult to give clear, consistent testimony to Adjudicators or Government Trial Attorneys, such as: the Child's fear of being returned to the country that he has fled or threats by the smugglers who brought the Child into this country to harm him if he testifies truthfully. In addition, some Children simply do not trust those who ask them for information. Many Children are likely to reveal more information relevant to their case only after they have had an opportunity to become more comfortable with the system and its personnel. The Immigration Court should require of the Child only the level of detail and consistency appropriate to the age and intellectual, social and emotional development of the Child at the time of the events about which he testifies, the ability of the Child to recall past events, the time that has elapsed since the events, the possibility that the Child may have been protected by his family and thus may not know the relevant details of his case, and the ability of the Child to recall and communicate his experiences.

In assessing credibility based upon the Child's demeanor, the Adjudicator should be mindful that cultural differences or the types of experiences about which the Child is testifying may result in the Child appearing nervous or uncooperative. For example, an Adjudicator should not perceive untruthfulness or lack of credibility based upon a Child averting his eyes, shifting posture, hesitating when speaking or generally appearing nervous. Furthermore, Adjudicators should take care to avoid misinterpreting certain emotional reactions and psychiatric symptoms as credibility indicators. By allowing testimony by videotape, a judge should be able to see the Child testify under less intimidating circumstances and thus be able to make a much fairer and more informed decision regarding the Child's claim. Allowing the Child to testify in the narrative form will likely put the Child more at ease and permit him to give a more expansive account of the facts surrounding his claim.

At apprehension, Children often are traumatized, frightened, vulnerable, and uncertain what to say to the law enforcement personnel who have

*captured them. Statements made under such conditions should therefore not be considered in assessing the credibility of the Child in a later formal proceeding after he has received the advice of counsel.*⁸⁰

7. Preservation of Evidence

Rule: All records of any EOIR Proceeding involving a Child, including exhibits, shall be preserved and kept confidential.⁸¹

C. Acceptance of a Remedy/Waiver of Rights

1. Determination of Competency to Accept a Remedy or Waive a Right

Rule:

a. Standard

Where a child's competency has been called into question, the Adjudicator should order an evaluation of the Child to determine the Child's competence. After consideration of such an evaluation as well as other competent information, if the Adjudicator determines that the Child is not competent, the Adjudicator shall not permit the Child to voluntarily decide to forego the pursuit of immigration remedies.

b. Evaluation:

The child's competence shall be evaluated as follows:

- i. Ability to make decisions including: the ability to understand information relevant to the specific definitions at issue; the ability to appreciate one's situation with respect to the legal decisions to be made; the ability to think rationally about alternative courses of action; and the ability to express a choice among alternatives.
- ii. Legal ability, including functional abilities, understanding of the legal process, the ability to assist his Attorney in support of his claim, and the ability to participate in the hearing.
- iii. Intellectual, social and emotional development, considering such factors as age, interest, interaction with peers, psycho-social judgment, and cognitive maturity.

Comments: *These standards adopt a criminal court model for Unaccompanied Children in removal proceedings because this standard is applied to juveniles in delinquency proceedings and is well-tested. As*

such, this standard should provide at least minimum safeguards for Unaccompanied Children who face the daunting complications of a legal proceeding and the waiver of significant rights.

The evaluation with respect to a Child's legal ability, as noted, includes in turn, an evaluation of the Child's functional abilities, his understanding of the legal process, his ability to participate with his Attorney in support of claim, and his ability to participate in the hearing. The evaluation of the Child's functional abilities should include consideration of his ability to appraise the relative likelihood of each of the possible outcomes as well as of the consequences of those possible outcomes, should he proceed. The evaluation with respect to a Child's understanding of the legal process should include consideration of his ability to understand the roles of the participants and other actors in the proceeding (e.g., the Adjudicator, the immigration officer, the government trial attorney, the Child's Attorney, the Advocate for Child Protection and witnesses); his ability to understand the process and potential consequences of voluntary removal, asserting an asylum claim, and waiving such a claim; and his ability to grasp the various stages of the immigration process and their sequence. The evaluation with respect to a Child's ability to assist his Attorney in support of his claim should include consideration of the Child's ability to adequately trust and work collaboratively with his Attorney; his ability to present to his Attorney a reasonably coherent description of the facts relevant to his case; his ability to reason about available options and to weigh the potential consequences of each; and his ability to reasonably assist his Attorney in challenging government witnesses and to monitor hearing events. The evaluation with respect to a Child's ability to participate in the hearing should include consideration of the Child's ability to testify coherently; his ability to control his behavior during the EOIR proceeding; and his ability to manage the stress of a hearing.

With respect to intellectual, social and emotional development, it should be remembered that, although many juveniles begin to approach adult levels of cognitive function at age 14 or 15, they generally lag behind adults on measures such as risk-taking and future perspective for many years to come.⁸²

2. Reviewing Acceptance of a Remedy

Rule: After determining that a Child is competent to accept a remedy, the Immigration Court shall not approve the Child's acceptance of repatriation without first directly informing the Child of his right to a deportation hearing and determining, by speaking directly with the Child, that:

- a. the Child understands the nature of the proceedings;
- b. the Child understands his legal rights;

- c. the Child understands the consequences of the proposed remedy;
- d. the Child accepts the proposed remedy; and
- e. the Child's acceptance is truly voluntary.

Comments: *In decisions involving the acceptance of a remedy or the waiver of a right, the Immigration Court must ascertain whether the Child has knowingly, intelligently, and voluntarily accepted the remedy or relinquished the right involved. In conducting this inquiry, the Immigration Court should consider that child development research suggests that the concepts of "knowing, intelligent and voluntary" are fluid prior to adulthood. An Immigration Court should therefore assess whether the Child has 1) sufficiently understood the information received about the remedy or right involved; (2) engaged in rational decision making; and (3) accepted the remedy or waived the right volitionally. Furthermore, the Immigration Court should evaluate the totality of the circumstances each time a child wishes to accept a remedy or waive a right. With respect to acceptance of removal, the inquiry should include personally questioning the Child about the Child's intent to be removed and, if necessary, inquiring into any suspicious circumstances surrounding the Child's acceptance of a remedy.*⁸³

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1 Nugent & Schulman, *A New Era in the Legal Treatment of Alien Children: The Homeland Security and Child Status Protection Acts*, 80 No. 7 Interpreter Releases 233 (2003); Nugent & Schulman, *Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children*, 78 No. 39 Interpreter Releases 1569 (2001).

2 *Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997) (“*Flores*”), ¶ 11 (“The INS treats, and shall continue to treat, all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors.”); Immigration and Naturalization Service Juvenile Detention and Shelter Care Program, Juvenile Aliens: A Special Population (Juvenile Protocol Manual) (Mar. 1999) (“INS JPM”), Introduction (“The *Flores* Agreement formalizes many common-sense principles governing the treatment of juveniles in INS custody and includes the following principles...All juveniles should be treated with dignity, respect, and a special concern for their particular vulnerability.”), Sec. 2.3.1 (describes procedures for the District Juvenile Coordinator to “[a]rrange to place juveniles in facilities that are safe and sanitary and consistent with INS’ concern for the particular vulnerabilities of juveniles.”); United Nations Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, Supp. No. 49, U.N. Doc. A/44/49 (1989) (“CRC”), Preamble (“The peoples of the United Nations have, in the Charter, reaffirmed their faith in the fundamental human rights and in the dignity and worth of the human person ... [and] recognize that in all countries in the world there are children living in exceptionally difficult conditions, and that such children need special consideration.”).

3 G.A. Res. 44/25, U.N. GAOR, Supp. No. 49, U.N. Doc. A/44/49 (1989). United Nations High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care* (1994) (“UNHCR GPC”), Chapter 2: Refugee Children and the Rights of the Child (children have internationally recognized human rights); European Council on Refugees and Exiles, *Position on Refugee Children* (Nov. 1996) (“ECRE”), Key Recommendations ¶ 1 (“Refugee children have the full rights of children and the full rights of refugees. This requires that each state should fully respect both the 1989 UN Convention on the Rights of the Child and the 1951 Convention relating to the Status of Refugees.”); AMERICAN CORRECTIONAL ASSOCIATION STANDARDS FOR JUVENILE DETENTION FACILITIES (American Correctional Association 3d. ed. 1991) (“ACA Juvenile Standards”), 3-JDF-3D, Introduction (“Principle – The facility protects the safety and constitutional rights of juveniles and seeks a balance between expression of individual rights and preservation of facility order.”). Although the United States is not a signatory to the CRC, nearly every other nation is.

4 CRC, Article 3 (in all actions concerning children, the best interests of the child shall be a primary consideration), Article 8(1) (the right of the child to preserve his identity, including nationality, name and family relations shall be respected), Article 12(1) (a child who is capable of forming his own views has the right to express those views freely in all matters affecting the child, with the views of the child being given due weight in accordance with the age and maturity of the child), Article 19 (States Parties directed to take appropriate measures to protect the child from violence, abuse, neglect and negligent treatment while in the care of parents, guardians or any other person), and Article 20(3) (due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background); Guidelines Issued by the Chairperson Pursuant to 65(3) of the Immigration Act, Guideline 3, Refugee Claimants: Procedural and Evidentiary Issues, Immigration and Refugee Board, Ottawa, Canada, Sept. 30, 1996 (“Canadian Child Refugee Guidelines”) at A.I. (“General Principle: In determining the procedures to be followed, when considering the refugee claim of a child, the CRDD should give primary consideration to the “best interests of the child.”); The Hague Convention on the Civil Aspects of International Child Abduction *adopted at* The Hague Conference on Private International Law, 14th Sess., Convention No. 28 (1980) (“Hague Convention”), Article 1, 3 (providing that “the interests of children are of paramount importance” and that an object of the Convention is to return children who are “wrongfully removed,” and defining “wrongful” removal as removal “in breach of rights of custody,” which include rights arising “by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of [the particular] State.”); International Bureau for Children’s Rights, Focal Point on Separated Children in the Americas, “Best Practice Statement: Separated Children in Canada,” (2003) (“IBCR Statement”), A(1) (citing to CRC 3(1)).

5 ABA House of Delegates Policy on Immigrant Children’s Rights, Adopted Feb. 1995 (“the American Bar Association urges federal, state, local, and territorial governments ... to respect the rights of all children, in the United States and its territories, including those rights articulated under the United States Constitution and the

United Nations Convention on the Rights of the Child, and ... not to discriminate against any child based on the child's citizenship or immigration status or the immigration or citizenship status of the child's parents"); *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that children of aliens whose presence in the United States is not lawful are nonetheless guaranteed equal protection of the law under the Fifth and Fourteenth Amendments of the Constitution and, as a result, cannot be denied education because of their immigration status); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (holding that detainment (for longer than a presumptively-appropriate six-month period) of resident aliens who had been ordered removed because of criminal offenses violated their due process rights where there was no realistic chance that they would be deported and, therefore, the detainment would be indefinite); *Lewis v. Thompson*, 252 F.3d 567, 568 (2d Cir. 2001) ("citizen children of alien mothers are entitled to automatic eligibility for Medicaid benefits for a year after birth equivalent to the automatic eligibility extended to the citizen children of citizen mothers."); *Xiao v. Reno*, 81 F.3d 808 (9th Cir. 1996) ("[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term,' and is therefore a 'person' guaranteed due process of law by the Fifth and Fourteenth Amendments" (quoting *Plyer v. Doe*)); CRC, Article 2 ("parties shall respect and ensure the rights of each child without discrimination of any kind, irrespective of the child's or his parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status"); United Nations Rules for the Protection of Juveniles Deprived of their Liberty. G.A. Res. 45/113, Annex, U.N. GAOR, Supp. No. 21, U.N. Doc. A/45/49 (1990) ("UN RPJDL"), II.13 ("Juveniles deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural rights to which they are entitled under national or international law, and which are compatible with the deprivation of liberty."); ECRE Key Recommendations ¶ 5 ("A refugee child should have the same social, economic, cultural, civil and political rights as other children living in the host state."); African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, art. 21 (1990) ("States Parties . . . shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth, and development of the child and in particular . . . (b) those customs and practices discriminatory to the child on the grounds of sex or other status."); AMERICAN CORRECTIONAL ASSOCIATION STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (American Correctional Association 3d. ed. 1990) ("ACA Adult Standards"), 3-JDF-3D-03 ("all remedies available to free persons should be available to juveniles in case of discriminatory treatment"), 3-JDF-3D-04 ("There should be no discrimination in work assignments."), Statement, A(2) (Separated Children are entitled to the same treatment and rights as national or resident children. They must be treated as children first and foremost. Other considerations, including their immigration status, must be secondary.").

6 United States Department of Justice, Departmental Plan Implementing Executive Order 13166, 2.0 Background ("Executive Order 13166 requires federal agencies to assess and address the needs of otherwise eligible persons seeking access to federally conducted programs and activities who, due to limited English proficiency, cannot fully and equally participate in or benefit from those programs and activities."); INS JPM 2.4.5 (positive suitability assessment of a prospective custodian prior to release may include consideration of the juvenile's concerns); CRC, Article 12 ("States Parties shall assure to the child who is capable of forming his own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. . . . For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."), *see also* "Article 12, An Overview," at <http://www.unicef.org/crc/crc.htm> ("Respecting children's views means that such views should not be ignored; it does not mean that children's opinions should be automatically endorsed," and further discussing the salient elements of a Child's right to self-determination); Separated Children in Europe Programme, Executive Summary, at 5 (study of separated children in Europe, finding that "[i]n practice, attempts are made to incorporate the principle of the right to participate into the refugee or asylum determination process. Children normally do have the right to have their views represented during interviews, and most states have an age limit above which the child either should be or must be consulted (usually 12).").

7 *Augustin v. Sava*, 735 F. 2d 32, 37 (2d Cir. 1984) (an asylum applicant "must be furnished with an accurate and complete translation of official proceedings...translation services must be sufficient to enable the applicant to place his claim before the judge."); INS JPM 2.1.1 ("The arresting officer must be sure to explain the documents in the juvenile's native tongue in terms the juvenile can understand."); CRC Article 40(b)(vi) ("Every child alleged as or accused of having infringed the penal law has at least the following guarantees... to have the free assistance of an interpreter if the child cannot understand or speak the language used"); UN RPJDL, I.6 ("Juveniles who are not fluent in the language spoken by the personnel of the detention facility should have the right to the services of an

interpreter free of charge wherever necessary.”); Sandy Ruxton, *Separated Children Seeking Asylum in Europe: A Programme for Action* (Save the Children and United Nations High Commissioner for Refugees 2000) (“Separated Children in Europe Programme”) Executive Summary, at 5 (among factors that facilitate child participation are “the availability of skilled interpreters”); ACA Juvenile Standards, 3-JDF-5A-15 (“New juveniles receive written orientation materials and/or translations in their own language if they do not understand English. When a literacy problem exists, a staff member assists the juvenile in understanding the material.”); *Detained and Deprived of Rights: Children in the Custody of the U.S. Immigration and Naturalization Service*, Human Rights Watch Vol. 10, No. 4 (G) (Dec. 1998). (“*Detained and Deprived of Rights*”) (noting that “a problem identified repeatedly in our interviews was the unavailability of translation” and recommending that the INS “ensure that all written rights advisory forms are translated into the language spoken by each child and provided to each child” and that the INS “provide a sufficient number of trained interpreters at facilities housing unaccompanied children.”).

8 American Bar Association Commission on Immigration Policy, Practice and Pro Bono Report to the House of Delegates (Feb. 2001) (“RESOLVED, that the American Bar Association supports the appointment of counsel at government expense for unaccompanied children for all stages of immigration processes and proceedings.”); American Bar Association Standards for Lawyers Who Represent Children in Abuse and Neglect Cases (Feb. 1996) (“ABA Standards of Practice”), Preface to Part I (“All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court’s jurisdiction continues.”), H-1., Comment (“These ... Standards take the position that courts must assure the appointment of a lawyer for a child as soon as practical (ideally, on the day the court first has jurisdiction over the case, and hopefully, no later than the next business day); ABA JJS, Standards Relating to the Juvenile Intake Function 2.13 (a juvenile should have an unwaivable right to the assistance of counsel in connection with any questioning by intake personnel or in connection with any discussions or negotiations regarding a nonjudicial disposition, including discussions and negotiations); Homeland Security Act of 2002, P.L. 107-296 (H.R. 5005), Title IV, Subtitle E, § 462 (b)(1)(A) (directing Office of Refugee Resettlement to develop a plan “to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each [unaccompanied] child, consistent with the law regarding appointment of counsel that is in effect on the date of enactment of this Act.”); Unaccompanied Alien Child Protection Act, S.2444, 107th Cong. (2002) (“S.2444”) § 332(a) (all unaccompanied alien children in custody shall have competent counsel to represent them in immigration proceedings (is this the term 2444 uses or should we switch to Im. Investigation?) or matters); *INS v. Lopez*, No. CV 78-1912-WMB (C.D. Cal. June 4, 1992); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”); *Plyler v. Doe*, 457 U.S. 202, 210 (1981) (“Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”); *In re Gault*, 387 U.S. 1, 41 (1967) (holding that the due process clause of the Fourteenth Amendment provides a right to counsel in juvenile delinquent proceedings in which the juvenile’s freedom may be curtailed. Further, if the child’s family is unable to afford counsel, the Court will appoint counsel to represent the child); INS JPM Sec. 2.3.6 (“In meeting with juveniles, the District Juvenile Coordinator should update juvenile on their cases, facilitate attorney visits, ensure access to attorneys”), 7.1.2 (juveniles not released shall be provided a list of free legal services), 7.4.3 (“The Arresting Officer must provide all juveniles with specific information regarding the availability of free legal assistance and advise each juvenile of the right to be represented by counsel at no expense to the government and of the right to a hearing before an Immigration Judge. This process is to be repeated by the Local or District Juvenile Coordinator upon the juvenile’s placement in the facility.”); CRC, Article 37(d) (Every child deprived of his liberty shall have the right to prompt access to legal and other appropriate assistance); United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”). G.A. Res. 40/33, U.N. GAOR, 96th Sess., Supp. No. 53, U.N. Doc. A/40/53 (1985) (“Beijing Rules”) §7, §15 (basic procedural safeguards such as the right to counsel shall be guaranteed at all stages of proceedings); Canadian Child Refugee Guidelines, A.II and n.12 (legal counsel may be appointed for an unaccompanied child); ECRE Key Recommendations ¶ 8 (“Each unaccompanied refugee child should be provided rapidly with legal representation throughout the fully asylum procedure at no cost to the child or those caring for the child.”); ACA Juvenile Standards 3-JDF-3D-02 (“...ensure and facilitate juvenile access to counsel and assist juveniles in making confidential contact with attorneys and their authorized representatives. Such contact includes, but is not limited to telephone communications, uncensored correspondence, and visits”); *Prison Guard or Parent: INS Treatment of Unaccompanied Refugee Children* (Women’s Commission for Refugee Women and Children, May 2002), p. 6 (Noting various reasons why children should have a right to counsel, among them: the fact that asylum proceedings

are very complex and may not be understood by children, a recent study revealing that represented asylum seekers are four to six times more likely to win their asylum cases, and children are often held in remote Detention Facilities which create obstacles for *pro bono* legal services with limited resources to overcome); IBCR Statement, B(11) (The CWA should ensure separated children are referred to competent legal representatives and should provide assistance to the child in relation to refugee or immigration processes. Those working with separated children should be aware that children are entitled to maintain a confidential relationship with their legal representative.”), B (12) (“Separated Children should have legal representation at all stages of the refugee process, including any appeals or reviews. Such legal services should be at no cost to the child. Legal representatives should have expertise in refugee law proceedings, be skilled in communicating with and representing child refugee claimants and be knowledgeable of child-specific forms of human rights violations.”); *Detained and Deprived of Rights* (citing to *In re Gault*, 387 U.S. 1 (1967)) Michael F. Rahill, *What Child is This?: How Immigration Courts Respond to Unaccompanied Minors* (Institute for Court Management: Court Executive Development Program, May 2000) (noting that immigration judges “heartily endorse the need for legal representation of Unaccompanied Minors”).

9 Homeland Security Act of 2002, P.L. 107-296 (H.R. 5005), title IV, Subtitle E, Sec. §462(b)(1)(I) (directing Office of Refugee Resettlement to compile a list of entities available to provide guardian services to Children); Vienna Convention on Consular Relations and Optional Protocols U.N.T.S. Nos. 8638-8640, vol. 596 (1963), Articles 5, 37 (imposing a duty on the United States “to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor.”). S.2444 § 331(a) (the Director shall appoint a *Child Protection Advocate* for each unaccompanied alien child in the custody not later than 72 hours after the Office assumes physical or constructive custody of such child); Canadian Child Refugee Guidelines, A.II (Section 69(4) of the Immigration Act requires appointment of a designated representative for any child in Immigration Proceedings (Investigation?)); IBCR Statement, B(6) (As soon as a separated child is identified, the competent child welfare authority should be notified to take jurisdiction and take measures to protect and safeguard the child’s best interests. The CWA should assume guardianship of the child.”).

10 IJA-ABA JUVENILE JUSTICE STANDARDS, ANNOTATED (Robert E. Shepherd, Jr. ed., American Bar Association 1996) (“ABA JJS”), Standards Relating To Interim Status 10.7 (a right to individual privacy should be honored in each institution); CRC, Article 16 (No child shall be subjected to arbitrary or unlawful interference with his privacy); ACA Juvenile Standards, 3JDF-5G-01 through 5G-15 (providing that juveniles should be permitted to engage in correspondence, use telephones, and receive guests with minimum supervision, inspection, and/or censorship); CRC Art. 13 (the right to freedom of expression is subject to certain restrictions, but only as are necessary to respect the rights and reputations of others and for the protection of national security or public order); UN RPJDL, Part I, Sec. 59 (juvenile shall have the right to communicate with family, friends, media).

11 8 C.F.R. §240.7(a) (“Any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing or trial.”) 8 C.F.R. §240.010(c) (“An Immigration Judge should not accept admissions of deportability from an unrepresented minor under the age of 18 who is not accompanied by a guardian, friend or relative.”); FRE Rule 403 (providing that evidence may be excluded where “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). *Sandoval-Rubio v. INS*, 246 R.3d 676 (9th Cir. 2000) (unpublished) (text available at 2001 WL 1523064) (successful suppression of alienage warranting termination of removal proceedings in illegal, race-based stop); *United States v. Lopez-Valdez*, 178 F.3d 282 (5th Cir. 1999); *United States v. Jiminez-Medina*, 173 F.3d 752 (9th Cir. 1999); *Davila-Bardales v. INS*, 27 F. 3d 1 (1st Cir. 1994) (explaining that the rationale for 8 C.F.R. § 242.16(b), which prohibits the special inquiry officer from accepting “an admission of deportability from an unrepresented respondent who is incompetent or under age 16 and is not accompanied by a guardian, relative, or friend” is that “...an unaccompanied minor under 16 lacks sufficient maturity to appreciate the significance of an interrogation by a Service official and lacks the capacity to evaluate the foreseeable consequences of any responses provided. . .”); *Matter of Perez*, A73 128 867 (BIA Apr. 28, 2000) (finding that information on Form I-213, Record of Deportable Alien, obtained through INS officer coercion or duress rendered I-213 unreliable and thus, inadmissible to prove alienage; *Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999), 785 (“The test for the admissibility of evidence in deportation proceedings is whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process.”); *Matter of S-M-J-*, 21 I&N Dec. 722, 727-29 (BIA 1997) (encouraging the Immigration Judge to consider his own understanding of background information regarding the applicant’s claim in rendering a decision), 729 (“While the burden of proof in principle rests on the

applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.” (citing Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva, 1992)); *In re Hernandez-Jimenez*, No. A29-988-097 (BIA Nov. 8, 1991) [unpublished decision] (holding that any admissions or confessions allegedly made by an unaccompanied minor during custodial interrogation will be treated as “inherently suspect.”); *Matter of Wadud*, 19 I&N Dec. 182 (BIA 1984) (the Federal Rules of Evidence are relaxed in an immigration hearing); *The Basics of Immigration Law*, The Hearing ¶ 2 (suggesting the benefits to the child of a relaxed interpretation of the Federal Rules of Evidence); Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 Wash. U.L.Q. 675 (2000); Terry Coonan, *Tolerating No Margin for Error: The Admissibility of Statements by Alien Minors in Deportation Proceedings*, 29 Texas Tech L. Rev. 75 (1998) (Asserting that while Immigration Judges may not accept an admission to a charge of deportability of unrepresented alien minors under the age of 16 (8 C.F.R. §242.16(b)), the practice of admitting the same, but out-of-court, statement made to an INS official is inconsistent with the rule and results in disparate treatment.); Christopher Nugent & Steven Schulman, *Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children*, 78 Interpreter Releases 1569,1588 (2001) (A motion to suppress evidence of alienage derived from an unconstitutional stop in violation of the Fourth Amendment resulted in termination of proceedings, thereby requiring the release of the Child from custody).

12 S. 2444 § 342(a) (Requires the Attorney General to provide training for State and county officials, including juvenile counsel, to educate them on the specific needs pertaining to unaccompanied alien children with pending immigration status and the available relief.); Separated Children in Europe Programme, p.43 (In order to carry out their role effectively, advisers or Guardians *Ad Litem* must have relevant childcare expertise and an understanding of the special and cultural needs of separated children. They should receive training and professional support.); ABA Standards of Practice, Rule D-8 (“The child’s attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.”); United Nations High Commissioner for Refugees, Action for the Rights of Children (ARC): A Rights-Based Training and Capacity Building Initiative (2001), Topic 2: Key Skills (Recommending an interviewing approach which includes: introductions, confidentiality, simple language, a friendly, informal and relaxed approach, adequate time, a non-judgmental attitude, and follow-up support after the interview.); ANNE M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES (West Group 1993) (discussing several factors that are relevant in the process of eliciting testimony from children, including the witness’s developmental stage, suggestibility, and suggesting special accommodations for children, including taking the testimony in the judge’s chambers, which are less imposing than the courtroom, preparing a child-friendly environment for the child’s testimony (“with child-size furniture, bright colors on the walls...”) and suggesting special interview techniques that reflect the witness’s language and cognitive development); Ellen Matthews & Karen Saywitz, *Child Victim Witness Manual*, 12/1 C.J.E.R.J. 40 (1992); ECRE, Rule 27 (“Those who interview children and assess their claims should be appropriately trained, with additional knowledge of child development, the Convention on the Rights of the Child, and relevant cultural factors. Oral interviews with children should never be used for the primary purpose of finding discrepancies. If possible, provision should be made for an expert assessment of the child’s ability to express a well-founded fear of persecution.”); John C. Yullie, Robin Hunter, Risha Joffe, and Judy Zaparniuk, Interviewing Children in Sexual Abuse Cases, in CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY (Gail S. Goodman & Bette L. Bottoms, eds., Guilford Press, 1993) (“Interview problems can arise if the interviewer is unaware of developmental changes in language ability and cognition. An untrained interviewer may misinterpret a child’s word or may use age-inappropriate language that will confuse the child. Further, an untrained interviewer may not understand that children often conceptualize events in a different manner from adults. This can lead to a misunderstanding or misinterpretation of the child’s description of the events. In addition, interviewers may unwittingly use suggestive or leading questions...”), 102 (“There must also be an appreciation for the varying narrative forms children use at different ages. Preschool children typically provide an idiosyncratic organization when describing a specific episode...In contrast, primary school children have usually acquired the narrative organizational skills necessary to tell an event from beginning to end.”); Latham & Watkins Memorandum from Nicole Thorpe to Steve Schulman (Sept. 6, 2001) (on Suggested Accommodations for Children in Immigration Proceedings) (Recommending tactics such as physical alteration of the court room to make the room less intimidating, the presence of a familiar support person for the child, giving the child breaks while he testifies, and creating questions tailored to the assessed language comprehension abilities of the child.); United Nations High Commissioner for Refugees, Action for the Rights of Children (ARC): A Rights-Based Training and Capacity Building Initiative (2001), Topic 4: Psycho-social Intervention and Cultural Considerations (“People in different cultural contexts perceive, understand and make sense

of events and experiences in different ways. Traditional beliefs and practices, religious beliefs and political ideology may confer a sense of meaning on events and thereby contribute to healing and recovery.”).

13 United Nations High Commissioner for Refugees, Action for the Rights of Children (ARC): A Rights-Based Training and Capacity Building Initiative (2001), 5 (“[C]hildren’s psycho-social well-being is inextricably bound up with that of their parents or other carers. ...Separated children may be disproportionately affected by their experiences: not only have they experienced violence, loss of their family and the experience of being suddenly uprooted: they are having to cope with all of this without the presence and support of familiar adults. It is for this reason that identifying these children, documenting them and tracing their families is an urgent priority.”); Canadian Child Refugee Guidelines (“In determining what evidence the child is able to provide and the best way to elicit this evidence, the panel should consider, in addition to any other relevant factors, the following: the age and mental development of the child both at the time of the hearing and at the time of the events about which they might have information; the capacity of the child to recall past events and the time that has elapsed since the events; and the capacity of the child to communicate his experiences.” ... “The child may, due to age, gender, cultural background or other circumstances, be unable to present evidence concerning every fact in support of the claim. In these situations, the panel should consider whether it is able to infer the details of the claim from the evidence presented.”).

14 ABA JJS, Standards Relating to Counsel with Private Parties, § 3.1 (“Where a Child Protection Advocate has not been appointed and, for some reason, it appears that independent advice to the juvenile will not otherwise be available, counsel should inquire thoroughly into all circumstances that a careful and competent person in the juvenile’s position should consider in determining the juvenile’s interests with respect to the proceeding. After consultation with the juvenile, the parents (where their interests do not appear to conflict with the juvenile’s) and any other family members or interested persons, the attorney may remain neutral concerning the proceeding, limiting participation to presentation and examination of material evidence or, if necessary, the attorney may adopt the position requiring the least intrusive intervention justified by the juvenile’s circumstances.”); ABA Standards of Practice (To support the client’s position, the child’s attorney should conduct thorough, continuing, and independent investigations and discovery which may include, but should not be limited to, contacting lawyers for other parties and non-lawyer guardians *ad litem* or court-appointed special advocates for background information, and contacting and meeting with the parents/legal guardians/caretakers of the child, with permission of their lawyer.); Jessica Matthews Eames, *Seen But Not Heard: Advocating for the Legal Representation of a Child’s Expressed Wish in Protection Proceedings and Recommendations for New Standards in Georgia*, 48 Emory L.R. 1431 (1999) (Attorneys have “an obligation to become educated about the role of culture, race, ethnicity, and class in the choices that a child client might make.”); Katherine H. Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 Fordham L.R. 1655 (1996) (“Despite valid reasons for treating child and adult clients similarly, the capacity, maturity, and intellectual development of the child are thought to require special communicative and interviewing techniques.”); Fordham Conference on Ethical Issues in the Legal Representation of Children, Working Group on Interviewing and Counseling, *Report of the Working Group: Interviewing and Counseling*, 64 Fordham L.R. 1351 (1996) (The lawyer should make use of other experts as well as family in assessing the child’s circumstances.).

15 ABA JJS, Standards Relating to Counsel for Private Parties, § 3.1 (“Counsel for the respondent in a delinquency or in need of supervision proceeding should ordinarily be bound by the client’s definition of his interests with respect to admission or denial of the facts or conditions alleged. It is appropriate and desirable for counsel to advise the client concerning the probable success and consequences of adopting any posture with respect to those proceedings.”); ABA Standards of Practice (“The child is a separate individual with potentially discrete and independent views. To ensure that the child’s independent voice is heard, the child’s attorney must advocate the child’s articulated position...The child’s attorney should ensure the child’s ability to provide client-based directions by structuring all communications to account for the individual child’s age, level of education, cultural context, and degree of language acquisition.”); CRC (“States Parties shall assure to the child who is capable of forming his own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”); Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 Cornell L.R. 895 (1999), (advocating “child empowerment,” as children represented have “an important, influential role to play in a decision-making process that could greatly affect the course of their lives” and “enabling clients to exercise direct influence over the litigation process and indirect influence over litigation outcomes”); Frank P. Cervone & Linda M. Mauro, *Ethics, Cultures and Professions in the*

Representation of Children, 64 Fordham L.R. 1975 (1996), (Recommending collaboration between the lawyer, traditionally a “zealous advocate” of the child’s wishes, and the social worker who traditionally champions the “best interests” of the child.); Jessica Matthews Eames, *Seen But Not Heard: Advocating for the Legal Representation of a Child’s Expressed Wish in Protection Proceedings and Recommendations for New Standards in Georgia*, 48 Emory L.R. 1431 (1999) (“[L]awyers for children can and must individualize every representation, in a way that allows maximum possible participation of the client, so that the representation reflects the child-in- context and her unique view of the world.” citing Jean Koh Peters, *Representing Children in Child Protection Proceedings: Ethical and Practical Dimensions* xiv (1997)); Katherine H. Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 Fordham L.R. 1655 (1996) (Comparing the “Client Autonomy Model” with the “Lawyer Autonomy Model” with the appropriate choice turning on assessment of client competency); William A. Kell, *Voices Lost and Found: Training Ethical Lawyers for Children*, 73 Indiana L.J. 635 (1998). (“As translator, the child advocate must diligently seek to hear the child’s story, both as told and as observed, according to what the story means to the child.”); Fordham Conference on Ethical Issues in the Legal Representation of Children, Working Group on Interviewing and Counseling, *Report of the Working Group: Interviewing and Counseling*, 64 Fordham L.R. 1351 (1996) (The vast majority of the Working Group favored an ‘empowerment’ or attorney model of representation in which the attorney advocates the position or interest of the client after full consultation with the client and independent case investigation. In so doing, the attorney assesses whether the client possesses the capacity to make a “considered judgment” about her case. If the child demonstrates decision-making capacity, the attorney affords the child’s wishes great weight, and treats that child client in a manner similar to an adult client.”).

16 CRC Article 12(1) (states Parties must ensure that a child “who is capable of forming his own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”), Article 12(2) (a child shall have “the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”); African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), Article 4(2) (“In all judicial or administrative proceeding affecting a child who is capable of communicating his/her own views, and [sic] opportunity shall be provided for the view of the child to be heard either directly or through an impartial representative...and those views shall be taken into consideration by the relevant authority.”); ECRE (November 1996) Section 25 (every child “who is capable of forming his own views has the right to express these views freely in all matters affecting the child – particularly the refugee determination procedure. These views should be taken into account and given due weight, in accordance with age and maturity.”), Section 26 (all procedures and determinations affecting the child should be done in a child-appropriate way (for example, with breaks, non-threatening surroundings and the presence of the guardian (ad litem, legal) or trusted family member)); Christopher Nugent & Steven Schulman, *Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children*, 78 Interpreter Releases 1569 (2001) (“*Giving Voice to the Vulnerable*”) (a lawyer representing a detained child must be loyal to the child’s expressed interests over other considerations.).

17 Beijing Rules (Rule 17.1(b) (“[r]estrictions on the personal liberty of the juvenile shall ... be limited to the possible minimum.”); UN RPJDL, Section 70 (“No juvenile should be sanctioned unless he or she has been informed of the alleged infraction in a manner appropriate to the full understanding of the juvenile, and given a proper opportunity of presenting his defence, including the right of appeal to a competent impartial authority”), Section 75 (“Every juvenile should have the opportunity of making requests or complaints to the director of the Detention Facility and to his authorized representative.”); UNHCR GPC, at page 6 (“States shall assure to the child who is capable of forming his views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”); Wendy Ayotte, *Statement of Good Practice*, Separated Children in Europe Programme, International Save the Children Alliance and UNHCR (Oct. 2000), p.4 (“The views and wishes of separated children must be sought and taken into account whenever decisions affecting them are being made. Measures must be put in place to facilitate their participation in line with their age and maturity.”); Elizabeth Amon, *The Snakehead Lawyers*, *The National Law Journal* (July 17, 2002) (Citing Robert Hirshon, president of the American Bar Association, who stated that “[i]mmigration judges should inquire into the child’s free consent to and understanding of this representation and its scope, since the child is the client with the ultimate right to hire and fire counsel at will.”); Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 Cornell L.R. 895 (1999), (advocating “child empowerment,” as children represented [have] “an important, influential role to play in a decision-making process that could greatly

affect the course of their lives” and “enabling clients to exercise direct influence over the litigation process and indirect influence over litigation outcomes”); Frank P. Cervone & Linda M. Mauro, *Ethics, Cultures and Professions in the Representation of Children*, 64 Fordham L.R. 1975 (1996), (“[T]he child’s attorney must advocate the child’s choice of direction.”); Donald N. Duquette, *New Perspectives on Child Protection: Legal Representation for Children in Protection Proceedings: Two Distinct Roles Are Required*, 34 Family L.Q. 441 (2000) (Arguing that we should resolve the ambivalence not by adopting a client-directed or a best interests approach, but by having two sets of standards—one for the client-directed attorney role and one for a best interests Child Protection Advocate (GAL), that both roles should be clearly established, aggressive, active, and the court should appoint either one or the other, or both, under certain circumstances as set out in law.); Jessica Matthews Eames, *Seen But Not Heard: Advocating for the Legal Representation of a Child’s Expressed Wish in Protection Proceedings and Recommendations for New Standards in Georgia*, 48 Emory L.R. 1431 (1999) (“[L]awyers for children can and must individualize every representation, in a way that allows maximum possible participation of the client, so that the representation reflects the child-in-context and her unique view of the world.” Citing Jean Koh Peters, *Representing Children in Child Protection Proceedings: Ethical and Practical Dimensions* xiv (1997).); Karen A. Hallstrom, *On Behalf of Our Children: The Ethical Challenges of Representing Children*, 46 LA Bar Jnl. 488 (1999) (“The rule does not permit the attorney to substitute his judgment for that of his impaired client; rather, only when the lawyer reasonably believes that the client cannot act in his own best interest may the lawyer seek the appointment of a curator, tutor or other legal representative or take such other protective action as may appear appropriate under the circumstances.... Rule 1.4 of the Rules of Professional Conduct requires the attorney to give his client sufficient information to participate intelligently in decisions to the extent the client is willing and able to do so.”); Fordham Conference on Ethical Issues in the Legal Representation of Children, Working Group on Interviewing and Counseling, *Report of the Working Group: Interviewing and Counseling*, 64 Fordham L.R. 1351 (1996) (The vast majority of the Working Group favored an ‘empowerment’ or attorney model of representation in which the attorney advocates the position or interest of the client after full consultation with the client and independent case investigation. In so doing, the attorney assesses whether the client possesses the capacity to make a “considered judgment” about her case. If the child demonstrates decision-making capacity, the attorney affords the child’s wishes great weight, and treats that child client in a manner similar to an adult client.”); Katherine H. Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 Fordham L.R. 1655 (1996) (proposing a new lawyering model that stems from an empowerment perspective on the rights of children); Separated Children in Europe Programme, p.7 (“Although the right to participation is lacking in the EU Resolution on Unaccompanied Minors, any national and EU level legislation on asylum procedures should include the principle of consulting children and taking their views into account whenever decisions affecting them are being made.”); Stephen Wizner & Miriam Berkman, *Being a Lawyer for a Child Too Young to be a Client: A Clinical Study*, 68 Nebraska L.R. 330 (1989) (The lawyer’s role in representing a child should include determining the child’s preference.).

18 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 104 P.L. 208, §§ 501-553 (setting forth limitations on eligibility for public benefits of aliens with various immigration statuses); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 104 P.L. 193, Title IV (1996) (setting forth restrictions on welfare and public benefits for aliens); Balanced Budget Act of 1997, 105 P.L. 33 § 4723 (1997) (setting forth parameters for adding funding for State emergency health services furnished to undocumented aliens); Agricultural Research, Extension, and Education Reform Act of 1998 105 P.L. 185, Title V, § 503-504 (1998) (setting forth the parameters of extension of eligibility period for Food Stamps for refugees and certain other qualified aliens from 5 to 7 years); NonCitizen Benefit Clarification and Other Technical Amendments Act of 1998 105 P.L. 306, § 2 (1998) (setting forth the continuing eligibility for SSI and related benefits for nonqualified aliens who were receiving benefits on the date of the enactment of the PRWORA); *De Sousa v. Day*, 22 F.2d 472, 473 (2d Cir. 1927) (finding that a 15 year old unaccompanied alien who was the subject of the case was unlikely to become a public charge because his uncle “had taken enough interest in him to pay his passage to the United States and to agree that he should not become a public charge and should attend school during the short time that would elapse before reaching the age of 16 years”); *Immigrant’s Eligibility for Public Benefits*, Community Service Society/Public Benefits Resource Center (1999), pp. 2-9 (setting forth the various categories of immigration status and summarizing the ways in which public benefits eligibility is affected by such status); www.ins.usdj.gov/graphics/publicaffairs/summaries/public.htm, “A Quick Guide to Public Charge and Receipt of Public Benefits, October 18, 1999 (indicating that the INS “may consider” an alien’s use of cash welfare or institutionalization for long-term care in determining whether to issue a “green card” to an alien in light of the INS’

ability to deny such status to any alien found likely to become a “public charge” under 8 U.S.C. § 1182(a)(4)(A) of the Immigration Nationality Act [the factors to be taken into account in determining whether an alien is inadmissible under the INA are, “at a minimum,” the alien’s (i) age; (ii) health; (iii) family status; (iv) assets, resources and financial status; and (v) educational skills]).

19 AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, ANNOTATED (American Bar Association Center for Professional Responsibility, 2002 ed.), Rule 1.5(a) (a lawyer’s fee must be reasonable; factors determining the reasonableness of the fee include, among other things, the time and labor required, the difficulty of the matter, the skill requisite for the matter and whether the fee is fixed or contingent.), Rule 1.5(b) (when a lawyer has not represented that client on a regular basis, then “the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.”), Rule 1.5 (c) (any contingent fee agreement “be in writing.”), Rule 1.2 (“[a] lawyer shall abide by a client’s decisions concerning the objectives of representation, . . . and shall consult with the client as to the means by which they are to be pursued.” The ABA’s comments to Rule 1.2 state that the rule “requires a lawyer to pursue the specific objectives, as defined by the client, for which the lawyer was retained.”), Rule 1.3 (requires that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” The ABA’s comments to Rule 1.3 state that a lawyer should “pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer,” should see the client’s matter to its conclusion (unless terminated) and shall not unreasonably procrastinate.); GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* (Aspen Law and Business 2001), § 5.1 (2003 Supplement) (Cites the ABA’s Rule 1.2, which is discussed above); Elizabeth Amon, *The Snakehead Lawyers*, *The National Law Journal* (July 17, 2002) (In order to reduce the prevalence of “snakehead” lawyers – lawyers who ostensibly represent illegal aliens when really they are hired by the aliens’ smugglers and thus have a conflict of interest – “[i]mmigration judges should inquire as to the [alien] child’s free consent to and understanding of [the snakehead lawyer’s] representation and its scope, since the child is the client with the ultimate right to hire and fire counsel at will.”) RONALD E. MALLEEN & JEFFREY L. SMITH, *LEGAL MALPRACTICE* (West Publishing Company, College and School Division 4th ed. 2000) (the purpose of a written retainer agreement is to ensure that the lawyer and client understand the scope of the representation, the staffing the of the representation among lawyers, the compensation and any actual or potential ethical issues. As such, the following information should be included in a retainer agreement: scope of the representation, the delegation of responsibilities among lawyers, compensation and method of payment, file retention, confirmation and execution by the client.).

20 ABA Standards of Practice, F-1 at p.17 (requiring a child’s attorney to discuss the option to appeal with child and take all necessary steps to perfect the appeal); ECRE (November 1996) Section 24 (every child “have the right to appeal against a negative decision to an independent judicial authority”).

21 AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, ANNOTATED (American Bar Association Center for Professional Responsibility, 2002 ed.), 1.16 (providing that “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct or other law . . . a lawyer may withdraw from representing a client if: . . . (2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;”), 1.2 (“... (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”), 8.4 and Comment (“It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . .” “A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.”).

22 ABA JJS, Standards Relating to Counsel for Private Parties 3.1 (the determination of the client’s interests in the proceedings . . . is ultimately the responsibility of the client after full consultation with the attorney.”); INS DOM, 4.L. (providing that detainees may communicate with members of the news media, and that members of the news media may initiate correspondence with a detainee), 16.A. (requiring that the Detention Facility establish procedures whereby legal representatives and members of the news media may visit detainees); Beijing Rules, rule 15.2 and Commentary (“The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. . . .The competent authority’s search for an

adequate disposition of the case may profit, in particular, from the cooperation of the legal representatives of the juvenile (or, for that matter, some other personal assistant who the juvenile can and does really trust.”); UN RPJDL (“Every juvenile should have the right to receive regular and frequent visits, in principle once a week and not less than once a month, in circumstances that respect the need of the juvenile for privacy, contact and unrestricted communication with the family and the defense counsel....Every juvenile should have the right to communicate in writing or by telephone at least twice a week with the person of his choice,...should be assisted as necessary in order effectively to enjoy this right...[and] should have the right to receive correspondence.”); AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, ANNOTATED (American Bar Association Center for Professional Responsibility, 2002 ed.), Rule 3.6 (2002 Edition) (Trial Publicity – discussing limitations on publicity that a “lawyer knows or reasonably should know... will have a substantial likelihood of materially prejudicing an adjudicative proceeding”); 8 C.F.R. § 208.6 (2000) (“(a) Information contained in or pertaining to any asylum application, records pertaining to any credible fear determination conducted pursuant to § 208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General; (b) The confidentiality of other records kept by the Service and the Executive Office for Immigration Review that indicate that a specific alien has applied for asylum, received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure. The Service will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.”); CRC, Article 16 ((1) “No child shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation (2) The child has the right to the protection of the law against such interference or attacks.”); Beijing Rules, (Juveniles' privacy should be respected and they should be protected from public exposure).

23 ABA Standards of Practice Rule C-1 (“Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child’s age, the child’s attorney should visit with child prior to court hearings and when apprised of emergencies or significant events impacting on the child.”); *Giving Voice to the Vulnerable* (“Ideally, the first interview should be viewed as a ‘get-acquainted’ session rather than a fact-finding mission. Even when introduced by a trusted person, the first interview should as much as possible focus on building this trust rather than exploring the child’s legal claims in depth, even when logistical challenges might put time at a premium... After establishing some basis for a trusting relationship with the client preferably after the first interview, the attorney may turn to discussing the legal proceedings and questions related to surfacing the child’s claims to ultimate relief from removal.”); *Working With Refugee and Immigrant Children: Issues of Culture, Law and Development*, Lutheran Immigration and Refugee Service (1998), 34 (“Developing trust with a child requires both time and testing. For this reason, some legal practitioners who work with minors suggest meeting several times for short periods before really delving into a minor’s asylum case.”), 45 (“Explain the child’s role, the purpose of your interview, your expectations and what the next steps will be. Just as you want to know about the child, he has the right to understand your role and the process at hand.”); Fordham Conference on Ethical Issues in the Legal Representation of Children, Working Group on Interviewing and Counseling, *Report of the Working Group: Interviewing and Counseling*, 64 Fordham L.R. 1351 (1996) (“The lawyer should explain her role, including an explanation that the judge, and not the lawyer, is the ultimate decision maker. The GAL should explain that the GAL will advocate what she thinks is best for the child, even if it conflicts with the child's wishes. ... The child needs to understand that the lawyer's role is not to make the ultimate decision.”); ABA JJS, Standards Relating to Counsel for Private Parties, § 4.2(a) (“The lawyer should confer with a client without delay and as often as necessary to ascertain all relevant facts and matters of defense known to the client.”); ABA Standards of Practice, Rule C-1 (“Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child’s age, the child’s attorney should visit with child prior to court hearings and when apprised of emergencies or significant events impacting on the child.”); *Rusu v. INS*, 296 F.3d 316, 322 (4th Cir. 2002) (“Therefore, regardless of how rapidly technological improvements, such as video conferencing, may advance, the Government remains obliged to ensure that asylum petitioners are accorded a meaningful opportunity to be heard before their cases are determined. In this regard, the procedures utilized in Rusu's hearing could have resulted in the denial of a full and fair hearing on his claim. The utilization of video conferencing, although enhancing the efficient conduct of the judicial and administrative process, also has the potential of creating certain problems in adjudicative proceedings.”); Elizabeth Amon, *The Snakehead Lawyers*, *The National Law Journal* (July 17, 2002) (“Smugglers also sometimes are linked to unethical attorneys at “travel agencies,” businesses that offer Chinese immigrants job placement and legal services. Sometimes these services are fronted by lawyers, like Joseph Muto, who was recently

disbarred in New York for his involvement with them. Among his numerous ethics violations were accepting client referrals from nonlawyers and relying on nonlawyers he did not supervise to perform legal work, such as consulting with the client. Also, in most cases he undertook representation without meeting with or discussing the case with the clients, it was found.”); *Giving Voice to the Vulnerable* (“Ideally, the first interview should be viewed as a ‘get-acquainted’ session rather than a fact-finding mission. Even when introduced by a trusted person, the first interview should as much as possible focus on building this trust rather than exploring the child’s legal claims in depth, even when logistical challenges might put time at a premium.”); Fordham Conference on Ethical Issues in the Legal Representation of Children, Working Group on Interviewing and Counseling, *Report of the Working Group: Interviewing and Counseling*, 64 Fordham L.R. 1351 (1996) (Recommending “statutory/court rules to require the judiciary to provide the attorney for the child with the opportunity to adequately interview and counsel the child in a setting conducive to the establishment of an attorney-client relationship.”); Separated Children in Europe Programme, p.9 (“Representation by specialist lawyers should be available to every child throughout the determination procedure; lawyers should be present at asylum interviews, and they should be skilled in supporting children; regular and open contact should be established between the lawyer and the child; free legal aid should be provided; and training should be available to legal representatives.”).

24 UNCHR Action for the Rights of Children, 2001 – Working with Children, Revision Version 2000 (“Selecting an appropriate location for interviewing children, or having an informal conversation, can have an important bearing on the effectiveness of the communication. For most young people, a quiet space with comfortable and culturally appropriate seating may be the ideal choice, though for others going for a walk, or playing or working together may provide the best opportunity for communication.”); AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, ANNOTATED (American Bar Association Center for Professional Responsibility, 2002 ed.). Rule 1.6 (governing when a lawyer may reveal a client’s confidential information).

25 UNHCR GPC, Chapter 8: Legal Status (“Trained independent interpreters should be used when the interviewer does not share the child’s language, even if the child appears to speak the interviewer’s language adequately.”); United Nations High Commissioner for Refugees, Action for the Rights of Children (ARC): A Rights-Based Training and Capacity Building Initiative (2001), Topic 1: The Importance of Skills in Communicating with Children (“When the use of an interpreter is unavoidable, it is vital that the interpreter is fluent in both languages, understands any specialist terminology and is able to use words which the child can understand. He or she needs to be acceptable within the community and be seen as impartial. It is vital to ensure that the interpreter has good skills at communicating with children, can cope with any emotions being expressed and does not influence the conversation by mistranslating, summarizing or omitting selected sections of what was said.”); *Giving Voice to the Vulnerable* (“When using an interpreter, the attorney should also explain to the child the purpose and role of the interpreter. Even before retaining an interpreter, the attorney should take care to evaluate the interpreter’s expertise and background, any U.S. or foreign governmental affiliation, and capacity to interpret in the dialect of the child. The attorney must also ensure that the interpreter understands the ethical duty to maintain confidentiality of the information. The child client should be informed of his right to consent to or refuse the interpreter.”).

26 ABA JJS, Standards Relating to Pretrial Court Proceedings, 6.5, 6.7 (providing, with respect to adjudication of juveniles who are delinquency respondents, that “the function of a Child Protection Advocate is to act toward the juvenile in the proceedings as would a concerned parent” that “[a] Child Protection Advocate should have all the procedural rights accorded to parents,” and that “parents should be encouraged to take an active interest in the juvenile’s case. Their proper functions include consultation with the juvenile and the juvenile’s counsel at all stages of the proceedings concerning decisions made by the juvenile or by counsel on the juvenile’s behalf...”); ABA Standards of Practice (Comments that because the child has a right to confidentiality and advocacy of his position, the child’s attorney can never abandon this role, while the Child Protection Advocate-client relationship may not be confidential, B-2 [p.4]); S.2444 (Section 331 provides that the duties of the Child Protection Advocate include interviewing the child, investigating the facts and circumstances relevant to the child’s presence in the United States, working with counsel and developing recommendations of issues relating to the child’s custody and immigration status, among other things.); UNHCR GPC (Chapter 10: An unaccompanied child should have a legal guardian with respect to involvement in any legal proceedings and may need a legal guardian to advocate for the child’s interests or to make decision on behalf of the child in other situations.); Wendy Ayotte, *Statement of Good Practice*, Separated Children in Europe Programme, International Save the Children Alliance and UNHCR (Oct. 2000), Sec. B.8 (Organizations, government departments and professionals involved in providing services to separated children must cooperate to ensure that the welfare and rights of separated children are enhanced and protected.); Jessica

Matthews Eames, *Seen But Not Heard: Advocating for the Legal Representation of a Child's Expressed Wish in Protection Proceedings and Recommendations for New Standards in Georgia*, 48 Emory L.R. 1431 (1999) (Summarizes the ABA's Standards of Practice stating that the attorney should keep the child's safety as a paramount concern, but maintain confidentiality while requesting the appointment of a Child Protection Advocate to advise the child of his best interests), 1465-66 (The Child Protection Advocate should speak candidly with the child and carefully explain his role, interview and counsel the child and explain that he will represent the child's best interests in the proceedings even though they conflict with the child's expressed wishes. The Child Protection Advocate should disclose the child's confidences only to the extent that disclosure is in the child's best interests).

27 *Flores* ¶ 14 (general policy favoring release), ¶ 18 (INS shall make continuing efforts at family reunification); INS JPM 2.4 ("Family reunification efforts must continue while a juvenile is in INS custody and must be documented by the District Juvenile Coordinator."); CRC Art. 5 ("States Parties shall respect the responsibilities, rights and duties of the parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide "in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized by the present convention."); United Nations High Commissioner for Refugees Agenda for Protection (2002), Part III, Goal 1(2) (States should introduce or enhance gender and age-specific safeguards in asylum procedures, with due weight being given to the principle of family unity); IBCR Statement, B(5) ("Tracing of a child's parents and family needs to be undertaken as soon as possible, but this should only be done where it will not endanger the child's family in the country of origin.... Where appropriate those responsible for a child's welfare should facilitate regular communication between the child and her or his family."); UN Report "A World Fit for Children" (2002), para. 44(29) (States to give priority to programmes for family tracing and reunification); United Nations High Commissioner for Refugees Agenda for Protection (2002), Part III, Goal 1(9) (States should explore appropriate alternatives to the detention of asylum-seekers and refugees, and abstain in principle, from detaining children); IBCR Statement, B(9) ("Separated children who have not been arrested or charged with a crime should never be detained for reasons related to their immigration status nor as a measure of protection because of a suspicion that the child has been trafficked.").

28 ABA JJS, Standards Relating to Interim Status 5.3(B) (all reasonable effort shall be made to notify a parent of the juvenile), 6.5(A) (the intake official should inform the juvenile of his rights, inform the juvenile that his parent will be contacted immediately to aid in effecting release and explain the basis for detention), Standards Relating to Adjudication 1.4 (parents should be entitled to be present at an adjudication proceeding); INS JPM, 2.3.1 ("All post-arrest facilities, including temporary holding areas, will provide access to: ...contact with family members who were arrested with the juvenile."); Beijing Rules §10.1 (upon the apprehension of a juvenile, his parents or guardian shall be immediately notified of such apprehension); UN RPJDL §§ 56-57 (the family or guardian of a juvenile and any other person designated by the juvenile have the right to be informed of the state of health of the juvenile); ACA Juvenile Standards, 3-JDF-5A-02 (assistance to juveniles in notifying their families); Beijing Rules § 10.1 (upon the apprehension of a juvenile, his parents or guardian shall be immediately notified).

29 Homeland Security Act of 2002 (H.R. 5005), Title IV, Subtitle E, § 462 (b)(1)(A) (requiring that the Director of the Office of Refugee Resettlement "consult with appropriate juvenile justice professionals" to ensure that unaccompanied alien children are "placed in a setting in which they are not likely to pose a danger to themselves or others."), Title IV, Subtitle E, § 462 (b)(1)(B) (requiring that the Director of the Office of Refugee Resettlement ensure that "the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child."); *Flores* ¶ 11 (INS shall place detained minors in the least restrictive setting appropriate to the minor's age and special needs); *see also* 20 C.F.R. §§300, 550-556 (Regulations implementing Individuals with Disabilities Education Act, describing the requirement that children with disabilities be placed in the least restrictive environment suitable for disability); INS JPM, Introduction (acknowledging that the *Flores* Agreement requires that Children be placed "in the least restrictive setting appropriate to their age and special needs, provided that the setting is consistent with being able to ensure the juvenile's timely appearance in court and to protect his well-being and that of others"); United Nations High Commissioner for Refugees Agenda for Protection (2002), Part III, Goal 1(9) (States should explore appropriate alternatives to the detention of asylum-seekers and refugees, and abstain in principle, from detaining children); IBCR Statement, B(9) ("Separated children who have not been arrested or charged with a crime should never be detained for reasons related to their immigration status nor as a measure of protection because of a suspicion that the child has been trafficked.") ABA JJS, Standards Relating to Corrections 7.8 (restraints should not be necessary in facility).

30 ABA JJS, Standards Relating to Interim Status 10.2 (use of adult jails prohibited); Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5633(a)(13) (juveniles alleged to be or found to be delinquent and youths shall not be detained or confined in any institution in which they have contact with adult persons incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges); S.2444 § 323(a)(1) (an unaccompanied alien child shall not be placed in an adult Detention Facility or a Detention Facility housing delinquent children); *Flores* ¶ 12(A) (The INS will segregate unaccompanied minors from unrelated adults. Where such segregation is not immediately possible, an unaccompanied minor will not be detained with an unrelated adult for more than 24 hours); INS JPM 2.3.2 (“Separate unaccompanied juveniles from unrelated adults whenever possible. If not immediately possible, an unaccompanied juvenile will not be detained with an unrelated adult for more than 24 hours.”), 2.3.1 (“All post-arrest facilities, including temporary holding areas, will provide access to...contact with family members who were arrested with the juvenile.”); United Nations International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) Article 10(2)(b) ([a]ccused juvenile persons shall be separated from adults and brought as speedily as possible to adjudication); ACA Juvenile Standards 3-JDF-2B-03, Comment (“If the facility is located on property shared with another corrections facility, such as an adult detention facility, it should be administered as a separate program.”); ACA Adult Standards § 3-4293 (adjudicated delinquent offenders and youths charged with offenses that would not be crimes if committed by adults do not reside in adult institutions); M. Flaherty, *An Assessment of the National Incidence of Juvenile Suicide in Adult Jails, Lockups, and Juvenile Detention Centers* (1980) (The suicide rate of juveniles in adult jails is 7.7 times higher than that in juvenile detention centers); Fagan, Forst & Vivona, *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, Juvenile and Family Court, No. 2, at 10 (1989) (Children are more likely to be physically assaulted and sexually assaulted in adult prisons than in juvenile institutions and more likely to be assaulted by staff); ABA JJS, Standards Relating to Interim Status 3.4 (when juvenile is not unconditionally released, conditional or supervised release that results in the least necessary interference with the juvenile’s liberty is favored), 10.2 (use of adult jails prohibited), and 10.3 (policy favoring non-secure alternatives); S.2444 §§ 322-323 (children should be detained in appropriate facilities; an unaccompanied alien child shall not be placed in an adult detention facility or a Detention Facility housing delinquent children); *Flores* ¶ 12(A) (INS shall expeditiously process minors; INS shall release the minor or transfer the minor to an appropriate facility within three days if the minor was apprehended in an INS district in which a licensed program is located or five days in all other cases except in the event of an emergency or influx of minors), ¶ 19 (in any case where the INS does not release the minor, the minor shall remain in INS custody); INS JPM 2.3 (“The District Juvenile Coordinator is responsible for placing juveniles in appropriate facilities, according to the *Flores* Agreement (see Section 4. Non-Secure and Secure Juvenile Facilities)...[and] for ensuring that facilities meet minimum required standards (see Section 5, Inspection Standards for Juvenile Shelter Care and Secure Juvenile Detention Facilities)”), 2.3.1 (describes procedures for the District Juvenile Coordinator to... arrange “to place juveniles in facilities that are safe and sanitary and consistent with INS’ concern for the particular vulnerabilities of juveniles”), 2.3.6 (District Juvenile Coordinator required to make weekly visits where juveniles are being housed to...“assess the juveniles’ welfare...and should ensure that their needs are being met...”), 2.3.3 (“If a juvenile cannot be immediately released (see Section 2.4), and no licensed program is available for immediate placement, he may be held by INS contract facility with separate accommodations for juveniles, or in a state or county juvenile detention facility that separates them from delinquent offenders. Make every effort to ensure the safety and well-being of juveniles placed in these facilities (see Section 4 for further guidance on the use of secure juvenile detention facilities).”); Beijing Rules § 26 (the objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society); ACA Juvenile Standards, 3-JDF-5A-08 (factors for determination for juveniles for whom petition has been filed regarding secure or Non-Secure placement), 3-JDF-2C-01 through 3-JDF-2G-02 (juvenile Detention Facility standards).

31 ABA JJS, Standards Relating to Interim Status 5.3(A) (juvenile shall be informed of the right to silence, the making of statements and the right to presence of an attorney, including providing this information in the juvenile’s native language), 6.5(A) (the intake official should inform the juvenile of his rights, inform the juvenile that his parent will be contacted immediately to aid in effecting release and explain the basis for detention); S.2444 § 323(a)(4)(B) (children shall be notified orally and in writing of the standards for conditions of detention including educational services, medical care, mental health care, access to telephones, legal services and interpreters); *Flores* ¶ 12(A) (INS shall provide the minor with a notice of rights whenever it takes the child into custody); INS JPM 4.2.4 (“Juveniles placed in a medium-secure or secure detention facility must be provided written notice of the reasons

why”), 7.4.3 (“The Arresting Officer must provide all juveniles with specific information regarding the availability of free legal assistance and advise each juvenile of the right to be represented by counsel at no expense to the government and of the right to a hearing before an Immigration Judge. This process is to be repeated by the Local or District Juvenile Coordinator upon the juvenile’s placement in the facility.”); UNITED STATES DEPARTMENT OF STATE CONSULAR NOTIFICATION AND ACCESS (1998) (when foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified); Vienna Convention on Consular Relations and Optional Protocols U.N.T.S. Nos. 8638-8640, vol. 596 (1963), Article 36(1)(b) (a person arrested, in prison, custody or detention may request that the consular post be informed of his situation); UN RPJDL § 24 (all juveniles shall be given a copy of the rules governing the Detention Facility and a written description of their rights and obligations in a language they can understand); United Nations High Commissioner for Refugees, Guidelines on Detention of Asylum Seekers (1999), Guideline 4 (asylum seekers should be entitled to the right to be informed of the reasons for detention in a language they understand, the right to challenge the lawfulness of the deprivation of liberty and the right to contact the local UNHCR office, available national refugee or other agencies and a lawyer); United Nations High Commissioner for Refugees, Executive Committee of the High Commissioner’s Programme Standing Committee, Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice. U.N. Doc. EC/49/SC/CRP.13 (1999), § 26(c) (if detained, asylum-seekers should be provided in writing, in a language they understand, with the reasons for detention, together with a written explanation of their rights and how to exercise them); ACA Juvenile Standards, 3-JDF-5A (“Principle: All incoming juveniles undergo thorough screening and assessment at intake and receive thorough orientation to the facility’s procedures, rules, programs, and services.”).

32 S.2444 § 321(b)(3)(A) (initial custody shall not last longer than 72 hours); *Flores* ¶14 (general policy favoring release), ¶ 24 (minor shall be afforded a bond redetermination hearing before an immigration judge); INS JPM 2.3.2 (“Separate unaccompanied juveniles from unrelated adults whenever possible. If not immediately possible, an unaccompanied juvenile will not be detained with an unrelated adult for more than 24 hours.”), 2.4.5 (“As merited by specific cases and allowed by district policy, an INS Officer may deem it necessary to require a positive suitability assessment of a prospective custodian prior to releasing a juvenile to an individual or program,” including investigating living conditions, standard of care, background check on supporter, interviews at household, home visits, and a consideration of the juvenile’s concerns); Beijing Rules § 17.1 (restriction on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum), and § 19.1 (the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period); ACA Juvenile Standards 3-JDF-2B-03 (“If the facility is on the grounds of another type of corrections facility, such as an adult detention facility, it should be administered as a separate program.”).

33 IBCR Statement, B(8) (Suggesting that age assessments be carried out by an independent pediatrician, that such assessments should take into account the “genetic environmental and cultural diversity” of children, that such examinations should be gender appropriate, where the child’s age is in doubt, there should be a presumption in favor of the child’s claim of minority, and that age assessment is not an exact science); *see* United Nations Convention Relating to the Status of Refugees (requiring the Government Agency and/or Non-Governmental Organization to bear the burden of establishing that the person is not a Child by objective manifestations; IJA-ABA JUVENILE JUSTICE STANDARDS, ANNOTATED (“ABA JJS”) (providing that the Government Agency and/or Non-Governmental Organization should bear the burden of proof with regard to determining the person’s status).

34 ABA JJS, Standards Relating to Interim Status 5.3(B) (all reasonable effort shall be made to notify a parent of the juvenile), 6.5(A) (the intake official should inform the juvenile of his rights, inform the juvenile that his parent will be contacted immediately to aid in effecting release and explain the basis for detention), Standards Relating to Adjudication 1.4 (parents should be entitled to be present at an adjudication proceeding); INS JPM, 2.3.1 (“All post-arrest facilities, including temporary holding areas, will provide access to: ...contact with family members who were arrested with the juvenile.”); Beijing Rules §10.1 (upon the apprehension of a juvenile, his parents or guardian shall be immediately notified of such apprehension); UN RPJDL §§ 56-57 (the family or guardian of a juvenile and any other person designated by the juvenile have the right to be informed of the state of health of the juvenile); ACA Juvenile Standards, 3-JDF-5A-02 (assistance to juveniles in notifying their families); Beijing Rules § 10.1 (upon the apprehension of a juvenile, his parents or guardian shall be immediately notified).

35 ABA JJS, Juvenile Records and Information Services (standards for the creation and retention of records); Homeland Security Act of 2002, P.L. 107-296 (H.R. 5005), signed into law by President Bush on November 25, 2002, Section 462 (Requiring that the Office of Refugee Resettlement assume responsibility to maintain information

about unaccompanied alien children, including biographical information, the date on which custody began and the reason for the child's immigration status, information relating to the child's placement, removal, or release, explanations of circumstances in which the child was placed in detention or released, and the disposition of any actions in which the child is the subject); *Flores* ¶ 28(A) (INS shall maintain an up-to-date record of all minors who are placed in proceedings and remain in INS custody for more than 72 hours; statistical information shall be collected on minors); INS DOM, Detention Files, I (All Detention Facilities will create a detention file for each INS detainee booked into the Detention Facility for more than 24 hours); INS JPM 6.1.3 ("Juveniles must be transported with their legal papers and possessions unless possessions exceed the amount normally permitted by the carrier, in which case possessions must be shipped in a timely manner."); UN RPJDL § 19 (all reports and records should be placed in a confidential file; every juvenile should have the right to contest any fact or opinion in his file); ACA Juvenile Standards, 3-JDF-1C-22 (confidentiality of information as between worker and juvenile), 3-JDF-5H-04 (confidentiality of juvenile file material), 3-JDF-1E-01 through -04 (right to privacy provisions in general, including policies, daily population reports, medical records, and transfer of records); INS JPM 2.3.5 (the "District Juvenile Coordinator enters and routinely updates each case into the Juvenile Alien Management System (JAMS) and ensures that the case will be updated in the Deportable Alien Control System (DACS). The District Juvenile Coordinator will submit a copy of the JAMS juvenile data file to Headquarters weekly so that the National Juvenile Coordinator can maintain an up-to-date record of all juveniles in INS custody."), 4.4 (details extensive record-keeping responsibilities of National Juvenile Coordinator); OIG Report, Chapter 2, Placement Requirements, Recommendation 8 (The INS should implement procedures that require the monitoring and regular reporting of instances of non-compliance with the 3-5 day placement requirement), Documentation of Transportation & Detention, Recommendation 4 (The INS should implement procedures that require juvenile transportation and detention custodial records that provide sufficient accountability), and Chapter 3, Meaning of Influx, Recommendations 18-20 (The INS should implement procedures that require: reporting of instances of non-delinquent juveniles placed in secure detention; the regional juvenile coordinator to monitor, document and report juvenile housing facility inspections; and procedures to track, analyze and report on significant incident reports involving juveniles).

36 ABA JJS, Standards Relating to Counsel for Private Parties, 3.1 ("Where a Child Protection Advocate has been appointed, primary responsibility for determination of the posture of the case rests with the guardian and the juvenile."); S.2444 § 331 (each unaccompanied alien child shall be appointed a Child Protection Advocate). UNHCR Action for the Rights of Children – Identifying and Communicating with Distressed Children, Revision Version, December 2000 ("[E]xtreme caution should be exercised in providing counseling or psychological therapy unless these are rooted in the local culture. Most approaches to counseling and psychological therapy have been developed in the West and cannot easily be translated into non-western societies. The inappropriate use of such approaches can not only be unhelpful, but potentially damaging to the child.").

37 The integrity of the family unit is protected by the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment and the Ninth Amendment of the U.S. Constitution. In international law, the integrity of the family unit is protected by the Universal Declaration of Human Rights and the Convention on the Rights of the Child. The principle of the best interests of the Child is also embodied in the Convention on the Rights of the Child. INS JPM Standard 2.4 (Family reunification efforts must continue while child is in INS custody.), 2.4.4 (INS may terminate custody arrangements when custodian fails to comply with the custody agreement); CRC, Article 5 ("States Parties shall respect the responsibilities, rights and duties of parents... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance..."), Article 7.1 ("The child shall...have... the right to know and be cared for by his parents."), Article 9.1 ("States Parties shall ensure that a child shall not be separated from his parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence."), Article 10.1 ("In accordance with the obligation of States Parties..., applications by a child or his parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by the States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family."), Article 14.2 ("States Parties shall respect the rights and duties of the parents... to provide direction to the child in the exercise of his rights in a manner consistent with the evolving capacities of the child."); UNHCR GPC, Chapter 10, Section IV ("The plan for a long-term solution must be based on the individual

child's best interests. Family reunion should be the first priority for the child...Eventual family reunion or repatriation should be kept open as long as possible: separated families never stop looking and hoping.”); United Nations High Commissioner for Refugees, *Refugee Children: Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (1997) (“UNHCR Guidelines”) § 9.4 (“The best interests of an unaccompanied child require that the child not be returned unless, prior to the return, a suitable care-giver such as a parent...has agreed, and is able to take responsibility for the child and provide him/her with appropriate protection and care.”), and § 10.5 (“Family reunion is the first priority and it is essential that unaccompanied children are assisted in locating and communicating with their family members.... All attempts should be made to reunite the child with his family or other person to whom the child is close, when the best interests of the child would be met with such a reunion....”); Hague Convention, Article 8 (“Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child’s habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child. The application must contain - a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child; b) where available, the date of birth of the child; c) the grounds on which the applicant’s claim for return of the child is based; d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be. The application may be supplemented by - e) an authenticated copy of any relevant decision or agreement; f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child’s habitual residence, or from a qualified person, concerning the relevant law of that State; g) any other relevant document.”), Article 11 (“The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.”), Article 13 (“[T]he judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that... there is a grave risk that his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”), Article 23 (“No legalization or similar formality may be required in the context of this Convention”); *Flores* ¶ 11 (INS shall place detained minors in the least restrictive setting appropriate to the minor’s age and special needs), ¶ 14 (general policy favoring release) *Plyler v. Doe*, 457 U.S. 202 (1981) (alien children are entitled to attend public schools); *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001) (noting that government detention violates the detainee’s constitutional rights “unless the detention is ordered in a criminal proceeding with adequate procedural protections, . . . or, in certain special and ‘narrow’ nonpunitive ‘circumstances,’” such as where the detainee is particularly dangerous); INS JPM 2.1.2 (release to a “qualified custodian”), 2.3 (District Juvenile Coordinator is responsible for initiating family reunification efforts), 2.4.5 (“As merited by specific cases and allowed by district policy, an INS Officer may deem it necessary to require a positive suitability assessment of a prospective custodian prior to releasing a juvenile to an individual or program”) The *Flores* Agreement does not delineate a time within which decisions regarding custody shall be made; it merely states that the INS “shall expeditiously process the Child,” giving discretion to the INS to interpret the expeditiousness of the process, which discretion sometimes results in an unreasonable prolonging of the process. The Hague Convention on the International Aspects of Child Abduction, a primary source of law regarding the Detention of Children to which the U.S. is a signatory, determines six weeks as an appropriate amount of time to conclude the process of custody determination. A significant gap in legislation (and, indeed, in resources to implement legislation) exists with regard to the parent/legal guardian right to seek redress when determination of custody is unreasonably prolonged, or when custody is denied altogether. Article 11 of the Hague Convention provides that the parent is due merely an explanation for the prolongation or denial, a form of redress that merely provides a reason for the problem, but does not correct it. Exhibit 2j of *Flores* requires that a juvenile who is not released be provided with an explanation of the right of judicial review.

38 S.2444 §§ 322(a)(1)-(3) (no child shall be placed with a person or entity unless a valid home study is conducted by an agency of the state of the child’s proposed residence; parents shall have the right to seek custody of a child who has been placed with another person or entity); *Flores* ¶ 17 (a suitability assessment may be required prior to release to an individual or program; it may include an investigation of the living conditions, interviews of members of the household and a home visit).

39 ABA JJS, Standards Relating to Corrections Administration 4.5 (basic concepts of due process should apply to a juvenile under correctional supervision), Standards Relating to Interim Status, 4.2 (the state shall bear the burden of proof at all levels that restraints on the juvenile's liberty are necessary and that no less intrusive alternative will suffice), (alterations in the status or placement of a juvenile that would result in more security, additional obligations, or less personal freedom should be subject to challenge); *Flores* ¶ 24(B) (minor shall be afforded a bond redetermination hearing before an immigration judge); INS DOM, Detainee Classification System, III(H) (all Detention Facility classification systems shall include procedures by which new arrivals can appeal their classification levels).

40 ABA JJS, Standards Relating to Interim Status 10.2 (use of adult jails prohibited); Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5633(a)(13) (juveniles alleged to be or found to be delinquent and youths shall not be detained or confined in any institution in which they have contact with adult persons incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges); S.2444 § 323(a)(1) (an unaccompanied alien child shall not be placed in an adult Detention Facility or a Detention Facility housing delinquent children); INS JPM 2.3.1 ("All post-arrest facilities, including temporary holding areas, will provide access to: ...contact with family members who were arrested with the juvenile."); United Nations International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) Article 10(2)(b) ([a]ccused juvenile persons shall be separated from adults and brought as speedily as possible to adjudication); ACA Juvenile Standards 3-JDF-2B-03, Comment ("If the facility is located on property shared with another corrections facility, such as an adult detention facility, it should be administered as a separate program."); ACA Adult Standards § 3-4293 (adjudicated delinquent offenders and youths charged with offenses that would not be crimes if committed by adults do not reside in adult institutions).

41 ABA JJS, Standards Relating to Interim Status 3.1 (policy favoring release), Standards Relating to Interim Status 10.2 (use of adult jails prohibited), and 10.3 (policy favoring non-secure alternatives); *Flores* ¶ 11 (INS shall place detained minors in the least restrictive setting appropriate to the minor's age and special needs), ¶ 14 (general policy favoring release), and ¶ 23 (the INS shall not place a minor in a secure Detention Facility if there are less restrictive alternatives available); INS JPM 4.1.2 ("When placing a juvenile in a facility, the Placing Official must strictly adhere to the guidelines contained in the *Flores v. Reno* decision."), 4.1.3 ("A juvenile who remains in INS custody must be placed in an appropriate Non-Secure juvenile facility (licensed program) within 3 days (72 hours from when INS assumes custody) if he or she was apprehended in an INS district with a licensed program that has space. In all cases, juveniles must be placed within 5 days, with certain exceptions: ...Juvenile is an escape risk, criminal, or delinquent."); United Nations International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), Article 10(2)(a) (accused persons shall be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons); Beijing Rules §17.1(b) (restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum), and § 19.1 (the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period); UN RPJDL § 2 (deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases), and § 28 (the placement for the juvenile should take account of his particular needs, status and special requirements according to his age, personality, gender, the type of offence, and the juvenile's mental and physical health, and the placement should ensure the juvenile is protected from harmful influences and risk situations); ACA Juvenile Standards 3-JDF-5A-08 (factors for determination for juveniles for whom petition has been filed regarding secure or Non-Secure placement), 3-JDF-5A-09 (conditional release provision).

42 *Flores* ¶ 14 (general policy favoring release); INS JPM 4.3.1 through 4.3.4 (requiring thorough review of all cases of juveniles turning 18, and, if release is appropriate, allowing release on own recognizance or release on bond to relative, current Foster Care provider, NGO or the juvenile. If juvenile is to be transferred to detention, should be placed with aliens of same nationality); UNHCR Guidelines, 5.11 (an age assessment of a child should take into account the physical appearance of the child, his psychological maturity; margins of error should be allowed for scientific procedures used to determine age; the child should be given the benefit of the doubt if the exact age is uncertain).

43 ABA JJS, Standards Relating to Corrections Administration 7.7 (unless the transfer involves an emergency relating to the health and safety of the juvenile or others, the department should provide notice at least seven days in advance to the juvenile and the juvenile's parents or guardian); *Flores* ¶ 21 (a minor may be held in or transferred to

a juvenile Detention Facility or a secure INS Detention Facility under certain circumstances), and ¶ 23 (INS will not place a minor in a secure Detention Facility if there are less restrictive alternatives available and appropriate in the circumstances); INS JPM 4.4.5 (“To the extent practical, the INS will attempt to locate emergency placements where culturally and linguistically appropriate community services are located.”); UN RPJDL § 26 (juveniles should not be transferred from one Detention Facility to another arbitrarily).

44 S.2444 § 332(d)(2) (absent compelling and unusual circumstances, no child who is represented by counsel shall be transferred from the child’s placement to another placement unless advance notice of at least 24 hours is made to counsel of such transfer); *Flores* ¶ 24(C) (minors should be provided with notice of the reasons for housing the minor in a Detention Facility or medium security Detention Facility what is the difference here?), ¶ 27 (no minor who is represented by counsel shall be transferred without advance notice to such counsel); INS JPM 4.4.1, 4.2.4 (“Juveniles placed in a medium-secure or secure detention facility must be provided written notice of the reasons why.”) (“Juveniles represented by counsel in an INS proceeding may not be transferred without advanced notice to such counsel except in an emergency, in which case, counsel shall be notified as soon as possible.”), 6.1.4 (“If a juvenile is represented by counsel, that counsel must be notified prior to transfer *unless* the safety of the juvenile is at issue, the juvenile is an escape risk, or counsel has waived notice. In any case, counsel must be notified within 24 hours of the transfer.”); UN RPJDL § 22 (information on admission, place, transfer and release should be provided without delay to the parents and guardians or closest relative of the juvenile concerned).

45 INS DOM, Transportation, I (The INS will take all reasonable precautions to protect the lives, safety, and welfare of officers, other personnel, the general public, and the detainees themselves involved in the ground transportation of detainees); INS JPM 6 (“INS Officers must adhere to the guidelines contained in the *Flores* Agreement.”); UN RPJDL § 26 (the transport of juveniles should be carried out at the expense of the administration in conveyances with adequate ventilation and light, in conditions that should in no way subject them to hardship or indignity); ACA Juvenile Standards 3-JDF-3A-15, Comment (“Guidelines for transporting juveniles should emphasize safety and should be made available to all personnel involved in transporting juveniles. The facility should have policies governing the use of restraints.”).

46 *Flores* ¶ 27 (minor shall be transferred with all of his possessions and legal papers); INS JPM 4.4.1 (“In such cases (where compelling circumstances necessitate transfer), juveniles should be transferred with all their possessions and legal papers...”), 6.1.3 (“Juveniles must be transported with their legal papers and possessions unless possessions exceed the amount normally permitted by the carrier, in which case possessions must be shipped in a timely manner.”).

47 INS JPM 6.2.4 (“There must be one escort of the same sex per juvenile.”); OIG Report Chapter 2, Same Sex Transport, Recommendation 3 (The INS should implement procedures that require same-gender escort of juveniles); ACA Juvenile Standards, 3-JDF-3A-07 (“When both males and females are housed in the same facility, at least one male and one female staff member are on duty at all times.”).

48 *Flores* ¶ 25 (unaccompanied minors shall not be transported in vehicles with detained adults); INS JPM, 6.1.1. (“Do not transport juveniles with detained adults unless: [(1)] juveniles are being transported from the place of arrest to an INS office; or [(2)] separate transportation would be impractical (but then the juvenile must be kept separate, with precautions taken for his safety). Unaccompanied juveniles will be separated from unrelated adult males by separate passenger compartments or by an empty row of seats.”); ACA Juvenile Standards, 3-JDF-3A-14, Comment (“All juvenile movement from one location to another should be controlled and supervised by staff, including individual and group juvenile movement to and from work and program assignments.”), 3-JDF-3A-15, Comment (“Guidelines for transporting juveniles should emphasize safety and should be made available to all personnel involved in transporting juveniles.”).

49 OIG Report, Chapter 2, Documentation of Transportation and Detention, Recommendation 4 (The INS should implement procedures that require juvenile transportation and detention custodial records); UN RPJDL § 21 (complete records concerning the day and hour of admission, transfer and release shall be kept).

50 American Bar Association Commission on Immigration Policy, Practice and Pro Bono Report to the House of Delegates (Feb. 2001) (Notes ABA support for the appointment of counsel at government expense for unaccompanied children for all stages of immigration processes and proceedings); ABA Standards of Practice (“Effective representation of parties is ‘essential’ and . . . courts should take active steps to ensure parties in child abuse and neglect cases have access to competent representation,” Part II [p.19] preface); ABA JJS (In delinquency

cases, the juvenile should have effective assistance of counsel at all stages of the proceeding and the right to counsel should attach as soon as the juvenile is taken into custody by an agent of the state. Pretrial Proceedings, Part V.); S.2444 (Section 332(c) requires that an unaccompanied child have competent counsel in “all proceedings and actions relating to the child’s immigration status or other actions involving the [INS] and appear in person for all individual merits hearings before the Executive Office for Immigration Review and interviews involving the [INS].” Sections (d), (f) and (e), respectively, provide that counsel have reasonable access to the Child; be given “prompt and adequate notice” of immigration matters relating to the Child; and continue to represent the Child until matter is completed, the Child departs the United States, the Child is granted withholding of removal, protection under the Convention Against Torture, asylum, permanent resident status or reaches 18 years of age.); *In re Gault*, 387 U.S. 1, 41 (1967) (holding that the due process clause of the Fourteenth Amendment provides a right to counsel in juvenile delinquent proceedings in which the juvenile’s freedom may be curtailed and that, if the child’s family is unable to afford counsel, the Court will appoint counsel to represent the child); *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953) (Holds that aliens, including those present illegally, are guaranteed due process of the law under the Fifth and Fourteenth Amendments); *Plyler v. Doe*, 457 U.S. 202, 211-212 (1981) (Holds that aliens are entitled to equal protection of the laws under the Fourteenth Amendment); CRC Article 22 (unaccompanied children seeking refugee status shall “receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth” in the convention), Article 37(d) (“[e]very child deprived of his liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”); Beijing Rules (Rule 7 requires that children have the right to counsel); ECRE (Section 24 recommends that all unaccompanied children be “provided promptly with legal advice and representation throughout the determination procedure, including any appeals ... at no cost to the child or those caring for the child”); *Detained and Deprived of Rights* (citing to *In re Gault*, 387 U.S. 1 (1967); *Prison Guard or Parent: INS Treatment of Unaccompanied Refugee Children* (Women’s Commission for Refugee Women and Children, May 2002), p.6 (Notes various reasons why children should have a right to counsel, among them: the fact that asylum proceedings are very complex and may not be understood by children, a recent study revealing that represented asylum seekers are four to six times more likely to win their asylum cases, and children are often held in remote detention facilities which create obstacles for *pro bono* legal services with limited resources to overcome); IBCR Statement, B(12) (“Separated Children should have legal representation at all stages of the refugee process, including any appeals or reviews. Such legal services should be at no cost to the child. Legal representatives should have expertise in refugee law proceedings, be skilled in communicating with and representing child refugee claimants and be knowledgeable of child-specific forms of human rights violations.”); ABA JJS, Standards Relating to Interim Status 5.3(A) (juvenile shall be informed of the right to silence, the making of statements and the right to presence of an attorney, including providing this information in the juvenile’s native language) and Standards for the Juvenile Facility Intake Official, 6.5(A) (the intake official should inform the juvenile of his rights, inform the juvenile that his parent will be contacted immediately to aid in effecting release and explain the basis for detention); *Flores* Ex. 1 (A)(4) (licensed programs should provide legal services information regarding the availability of free legal assistance and the right to be represented by counsel at no expense to the government); INS DOM, Group Presentations on Legal Rights, I (Detention Facilities holding INS detainees shall permit authorized persons to make presentation to groups of detainees for the purpose of informing them of U.S. immigration law and procedures); INS JPM Secure Juvenile Detention Facility Standard 60-61 (incorporating ACA Juvenile Standards, 3-JDF-5D-01, -02); CRC, Article 37(d) (Every child deprived of his liberty shall have the right to prompt access to legal and other appropriate assistance); UN RPJDL, § 18(a) (Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers); ACA Juvenile Standards 3-JDF-3D-01, -02 (access to counsel and courts).

51 ABA JJS, Standards Relating To Juvenile Records and Information Systems 5.2 (juvenile, his parent and juvenile’s attorney should be given access to all records and information collected or retained by a juvenile agency).

52 CRC, Art. 25 (“Children who are placed in a care institution have the right to periodic reviews of their circumstances.”); IBCR Statement B(10) (“Separated Children should be enabled and encouraged to voice their views, concerns and complaints regarding their care and guardianship, education, health services and legal representation.”); *Flores*, VII. 24. B. (A minor may seek judicial review in federal district court of the INS’s placement of him in a particular facility or of the compliance of that facility with the standards set forth in *Flores*).

53 ABA JJS, Standards Relating to Interim Status 10.7 (all juveniles held in interim detention should be afforded access to the educational institution they normally attend, or to equivalent tutorial or other programs adequate to their needs), Standards Relating to Corrections Administration 7.8 (it should not be necessary to use mechanical restraints within the Detention Facility; the program director may authorize the use of mechanical restraints during transportation only; chemical restraints may be used only under extreme situations and under strict controls), and VIII (discipline standards); *Flores* Ex. 1, Minimum Standards for Licensed Programs, No. A–A.1 (licensed programs shall provide proper physical care and maintenance) and Ex. 1 (a)(6-7) (licensed programs shall provide at least one individual counseling session per week conducted by trained social work staff and group counseling sessions at least twice a week); CRC, Article 22 (a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments), and Article 28 (each child has the right to education, and primary education shall be compulsory and available free to all); UN RPJDL § 37 (every Detention Facility shall ensure that every juvenile receives food that is suitably prepared and presented at normal meal times and of a quality and quantity to satisfy the standards of dietetics, hygiene and health and, as far as possible, religious and cultural requirements); United Nations Standard Minimum Rules for the Treatment of Prisoners. E.S.C. Res. 663C (XXIV), U.N. Doc. A/CONF/611, (1957) § 20 (young prisoners shall receive physical and recreational training), § 22 (availability of medical services, including psychiatric care), § 27 (discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life), and § 33 (instruments of restraint, such as handcuffs, chains, irons and strait-jackets, shall never be applied as a punishment); ACA Juvenile Standards, 3-JDF-5C (Principle: a written body of policy and procedure governs the Detention Facility’s academic, vocational education, and work programs for juveniles) and 3-JDF-5G (Principle: a written body of policy and procedure governs the Detention Facility’s mail, telephone, and visiting services for juveniles).

54 ABA JJS, Standards Relating to Corrections Administration 7.8(A) (it should not be necessary to use mechanical restraints within the Detention Facility; mechanical restraints may only be used during transportation) and 7.11(H) (governing isolation); IMMIGRATION AND NATURALIZATION SERVICE DETENTION OPERATIONS MANUAL (2002) (“INS DOM”), Transportation, III (AA) (officers shall use authorized techniques and common sense when applying restraints), and Use of Force, III.B. (setting forth principles governing the use of force and application of restraints with adult detainees); INS JPM 6.1.5 (“Escorting Officers have the responsibility to determine the need and level of restraints used at any time while escorting a detainee.”); UNITED STATES DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, UNACCOMPANIED JUVENILES IN INS CUSTODY, Report No. I-2001-009 (2001) (“OIG Report”), Chapter 2, Use of Restraints, Recommendations 6 (The INS should implement specific rules that govern the use of restraints on juveniles); CRC, Article 8 (protection of identity), Article 27 (recognizing the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development); ACA Juvenile Standards 3-JDF-3A–16 (restraints “are never applied as punishment”), 3-JDF-3A–17, Comment (“A written record detailing who receives restraint equipment and the nature of the equipment they receive is necessary to establish responsibility and accountability for use.”), 3-JDF-3D-06, Comment (“In situations where physical force or disciplinary detention is required, only the least drastic means necessary to secure order or control should be used.”), 3-JDF-4A-07 (prohibiting use of food as sanction).

55 *Flores* Ex. 1, Minimum Standards for Licensed Programs, No. A–A.1 (licensed programs shall provide proper physical care and maintenance, including suitable living accommodations, food, appropriate clothing, and personal grooming items); INS JPM 2.3.1 (Detention Facilities should be “safe and sanitary and consistent with INS’s concern for the particular vulnerability of juveniles”); United Nations Standard Minimum Rules for the Treatment of Prisoners. E.S.C. Res. 663C (XXIV), U.N. Doc. A/CONF/611, (1957) § 17 (prisoners shall be provided with clothing, a separate bed and separate and sufficient bedding); ACA Juvenile Standards 3-JDF-2 (detailed standards on building and safety codes, size, organization and location, juvenile housing, environmental conditions, program and service areas, administrative and staff areas, and security); INS JPM 2.3 (“The District Juvenile Coordinator is responsible for placing juveniles in appropriate facilities, according to the *Flores* Agreement (see Section 4. Non-Secure and Secure Juvenile Facilities)...[and] for ensuring that facilities meet minimum required standards (see Section 5, Inspection Standards for Juvenile Shelter Care and Secure Juvenile Detention Facilities)”), 2.3.1 (describes procedures for the District Juvenile Coordinator to...arrange “to place juveniles in facilities that are safe and sanitary and consistent with INS’ concern for the particular vulnerabilities of juveniles”), 2.3.6 (District Juvenile

Coordinator required to make weekly visits where juveniles are being housed to...“assess the juveniles’ welfare... and should ensure that their needs are being met...”), 2.3.3 (“If a juvenile cannot be immediately released (see Section 2.4), and no licensed program is available for immediate placement, he may be held by INS contract facility with separate accommodations for juveniles, or in a state or county juvenile detention facility that separates them from delinquent offenders. Make every effort to ensure the safety and well-being of juveniles placed in these facilities (see Section 4 for further guidance on the use of secure juvenile detention facilities.)”); Beijing Rules § 26 (the objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society); ACA Juvenile Standards, 3-JDF-2C-01 through 3-JDF-2G-02 (juvenile Detention Facility standards), 3-JDF-2A-01 through 3-JDF-2A-04 (building and safety codes compliance), 3-JDF-1A-02 (“program meets applicable licensing requirements of the jurisdiction in which it is located”).

56 ABA JJS, Standards Relating To Interim Status 10.7 (a right to individual privacy should be honored in each institution); CRC, Article 16 (No child shall be subjected to arbitrary or unlawful interference with his privacy); ACA Juvenile Standards 3-JDF-3A-19 (requiring use of alternatives to strip searches where possible). *Flores* ¶ 27 (minor shall be transferred with all of his possessions and legal papers); INS DOM, Funds and Personal Property (describing the standards and procedures for personal property in adult INS detention); UN RPJDL § 35 (the right of every juvenile to possess personal effects and to have adequate storage facilities for them should be fully recognized and respected); ACA Juvenile Standards 3-JDF-2E-12 (space for storing personal property should be provided), 3-JDF-3A-19 (Detention Facility should have a written policy on contraband), 3-JDF-5A-15 (personal property retained by the Detention Facility should be itemized).

57 *Flores*, V. 12. A. 4. (acknowledging the INS’s responsibility to locate interpreters to facilitate processing of minors); *Augustin v. Sava*, 735 F. 2d 32, 37 (2d Cir. 1984) (an asylum applicant “must be furnished with an accurate and complete translation of official proceedings... translation services must be sufficient to enable the applicant to place his claim before the judge.”); INS DOM, Access to Legal Material, III. L. (mandating that Detention Facilities establish procedures to help non-English-speaking and/or illiterate detainees access legal materials, draft legal documents and contact *pro bono* legal assistance); INS JPM, Secure Juvenile Detention Facility Standard 126, 54, 93 (incorporating ACA Juvenile Standards 3-JDF-05A-15, 3-JDF-3C-03, 3-JDF-4C-07); CRC Article 40(b)(vi) (“Every child alleged as or accused of having infringed the penal law has at least the following guarantees... to have the free assistance of an interpreter if the child cannot understand or speak the language used”); UN RPJDL, I.6 (“Juveniles who are not fluent in the language spoken by the personnel of the detention facility should have the right to the services of an interpreter free of charge wherever necessary.”), IV. B. 24 (mandating that the rules governing the Detention Facility, as well as a description of the child’s rights and obligations, be provided in a language and manner that facilitates full comprehension); Separated Children in Europe Programme, 57 (encouraging “active participation of the child during the care planning process, including placements and reviews,” and suggesting that “written records of reviews should also be translated into the child’s first language”), 43 (suggesting that an advisor should be appointed for the child so that, among other things, the child has suitable “language support”), 58 (“Language issues are also important. The Finnish assessment indicates that there are too few interpreters who specialise in working with children. The Spanish assessment also mentions the lack of interpreters available for languages other than English and French. And the Greek assessment suggests that all separated children should be given the opportunity to express themselves in their mother tongue.”), 70 (“Legal representatives should have the skills to interview and support children throughout the asylum procedure; they should make every effort to communicate with the child regularly, openly, and in language which the child can understand.”); ACA Juvenile Standards, 3-JDF-3C-03 (rulebook must be in language understood by juvenile), 3-JDF-4C-07 (right to access to health care must be communicated in language understood by juvenile), 3-JDF-5A-15 (orientation materials must be in language understood by juvenile); IBCR Statement, A(5) (“Separated children must be provided with gender sensitive and child-friendly interpreters who speak their preferred language whenever they are interviewed or require access to services or legal procedures”); *Detained and Deprived of Rights* (noting that “a problem identified repeatedly in our interviews was the unavailability of translation” and recommending that the INS “ensure that all written rights advisory forms are translated into the language spoken by each child and provided to each child” and that the INS “provide a sufficient number of trained interpreters at facilities housing unaccompanied children.”).

58 ABA JJS, Standards Relating To Rights of Minors IV (provision of medical care to juveniles); S.2444 § 323(A)(4)(a)(ii) (at a minimum minors should be provided with medical care); *Flores* ¶ 12(A) (Detention Facilities

will provide medical assistance if the minor is in need of emergency services) and Ex. 1 (A)(2) (licensed programs shall provide appropriate routine medical and dental care, family planning services, and emergency health care services); INS DOM, Medical Care, I (all detainees shall have access to medical services that promote detainee health and general well-being); INS JPM Secure Juvenile Detention Facility Standards 90-92, 96-99, 101-104, 105-114, 122-124 (incorporating ACA Juvenile Standards, 3-JDF-4C-01, -04, -06, -10, -11, -13, -14, -18 through -20, -21, -23, -24, -26 through -31, and -33); CRC, Article 24 (every child has the right to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health); UN RPJDL § 49 (Every juvenile shall receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated); ACA Juvenile Standards 3-JDF-4C-01 through 3-JDF-4C-06 (outlining policies, qualifications and responsibilities of health authority), 3-JDF-4C-10 through 3-JDF-4C-15 (outlining requirements for administration of treatment), 3-JDF-4C-18 through 3-JDF-4C-20 (pharmaceuticals), 3-JDF-4C-21 through 3-JDF-4C-24 (health screening and examination requirements), 3-JDF-4C-25 (dental care), 3-JDF-4C-26 (emergency care), 3-JDF-4C-26 through C-30 (emergency care and first aid), 3-JDF-4C-33 (agreement with local hospital for transfer) 3-JDF-4C-34 (health education); IBCR Statement, B(11) (“Separated children should have access to health care on an equal basis with national children. This should include dental care, mental health care and, for adolescents, sexual and reproductive health care.”).

59 ABA JJS, Standards Relating To Rights of Minors IV (provision of medical care to juveniles); S.2444 § 323(A)(4)(a)(ii) (at a minimum minors should be provided with medical care); *Flores* ¶ 12(A) (Detention Facilities will provide medical assistance if the minor is in need of emergency services), and Ex. 1 (A)(2) (licensed programs shall provide appropriate routine medical and dental care, family planning services, and emergency health care services); INS DOM, Medical Care, I (all detainees shall have access to medical services that promote detainee health and general well-being); INS JPM Secure Juvenile Detention Standards 93-95, 116-121 (incorporating relevant ACA Juvenile Standards with the exception of the requirement of informed consent); CRC, Article 24 (every child has the right to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health); UN RPJDL § 49 (Every juvenile shall receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated); ACA Juvenile Standards 3-JDF-4C-43, 3-JDF-4C-44 (prohibiting participation in medical experiments), Secs. 3-JDF-4C-07 through -09 (unimpeded access to care), 3-JDF-4C-42 (informed consent).

60 ABA JJS, Standards Relating To Rights of Minors IV (provision of medical care to juveniles); S.2444 § 323(A)(4)(a)(ii) (at a minimum minors should be provided with mental health care, including treatment of trauma); *Flores* ¶ 12(A) (Detention Facilities will provide medical assistance if the minor is in need of emergency services) and Ex. 1 (A)(2) (licensed programs shall provide appropriate routine medical and dental care, family planning services, and emergency health care services); INS DOM, Medical Care, I (all detainees shall have access to medical services that promote detainee health and general well-being); UN RPJDL § 49 (Every juvenile shall receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated); ACA Juvenile Standards 3-JDF-4C-16 (Mental health services should be provided by qualified professionals), 3-JDF-4C-35, -39 through -41 (suicide prevention and intervention and management of chemical dependency), 3-JDF-5B-01 through -05 (social services and counseling).

61 ABA JJS, Standards Relating To Interim Status 10.6 (all juveniles held in detention should be afforded access to education); S.2444 § 323(A)(4)(a)(i) (at a minimum, minors should be provided with educational services appropriate to the child); *Flores* Ex. 1 (A)(4) (licensed programs shall provide educational services appropriate to the minor’s level of development, and communication skills in a structured classroom setting, Monday through Friday, which concentrates primarily on the development of the basic academic competencies and secondarily on English Language Training); United Nations Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 (1948), Art. 26 (Everyone has the right to education); CRC, Article 28 (every child has the right to education); UN RPJDL § 38 (Every juvenile of compulsory school age has the right to education suited to his needs and abilities and designed to prepare him for return to society); ACA Juvenile Standards 3-JDF-5C-01 through 3-JDF-5C-04 (Detention Facility should have a comprehensive education program that includes bilingual and remedial programs, specialized equipment that meets state standards, and an annual evaluation of effectiveness), 3-JDF-5D-01 through 3-JDF-5D-03 (Detention Facility should have a library with a qualified librarian, principles of material

selection, and services available to all juveniles); IBCR Statement, B(11) (“Separated children, irrespective of their immigration status, should have access to the same statutory education as national children. Separated children should have full access to all services within schools, including the services of school social workers and counselors.”).

62 29 U.S.C. §§ 203(l) and 212 (defining “oppressive child labor” under the Fair Labor Standards Act of 1938); INS DOM, Voluntary Work Program, I (every Detention Facility with a work program will provide detainees the opportunity to work and earn money); UN RPJDL § 18(b) (Juveniles should be provided, where possible, with opportunities to pursue work, with remuneration, and continue education or training, but should not be required to do so. Work, education or training should not cause the continuation of the detention), IV-B; ACA Juvenile Standards 3-JDF-5C-05, 3-JDF-5C-06 (Juveniles are not required to work unless they are compensated or unless the work is related to maintenance of the Detention Facility or is part of a training program. Work should not violate labor laws); ACA Adult Standards § 3-4412 (expounding upon relevant vocational training and standards).

63 *Flores* Ex. 1 (A)(5) (licensed programs should provide activities according to a recreation and leisure time plan which shall include daily outdoor activity, weather permitting, at least one hour per day of large muscle activity and one hour per day of structured leisure time activities); INS DOM, Recreation, I (all Detention Facilities shall provide INS detainees with access to recreational programs and activities, under conditions of security and supervision that protect their safety and welfare); INS JPM Secure Juvenile Detention Facility Standard 135 (incorporating ACA Juvenile Standards, 3-JDF-5E-04); CRC, Article 31 (every child has the right to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts); S.2444 § 323(a)(4)(A)(viii) (at a minimum minors should be provided with recreational programs and activities); UN RPJDL § 47 (every juvenile should have the right to a suitable amount of time for daily free exercise, in the open air whenever weather permits, during which time appropriate recreational and physical training should normally be provided); ACA Juvenile Standards 3-JDF-5E-02 (recreational opportunities and equipment, including outdoor exercise when climate permits), 3-JDF-5E-03, -04 (access to fixed and moveable equipment, and at least one hour per day of large muscle activity and one hour of structured leisure time activity); IBCR Statement, B(11) (“Separated Children should have access to sporting, recreational and cultural activities on a par with national children. Where it has jurisdiction, the child welfare authority should provide resources to facilitate access to these activities.”).

64 ABA JJS, Standards Relating to Interim Status 10.7(C) (private areas available for visitation at least 8 hours a day); *Flores* Ex. 1 (A)(11) (licensed programs shall provide visitation and contact with family members regardless of their immigration status); INS DOM, Visitation, I (Detention Facilities holding INS detainees shall permit authorized persons to visit detainees; INS encourages visits from family and friends); INS JPM Secure Juvenile Detention Facility Standard 147-150 (incorporating ACA Juvenile Standards 3-JDF-5G-12 through -15); OIG Report Chapter 2, Visits, Recommendation 2 (The INS should implement procedures that ensure weekly visits with all juveniles in custody and to all juvenile housing facilities); CRC, Article 37(c) (every child shall have the right to maintain contact with his family through correspondence and visits); UN RPJDL, § 60 (Every juvenile should have the right to receive regular and frequent visits, in principle once a week and not less than once a month, in circumstances that respect the need of the juvenile for privacy, contact and unrestricted communication with the family and the counsel); ACA Juvenile Standards 3-JDF-5G-12 through -15 (encouraging visits, including physical contact visits).

65 ABA JJS, Standards Relating to Interim Status 10.7(D) (juvenile shall have ready access to a telephone between 9:00 a.m. and 9:00 p.m. daily; calls should not be monitored; institution shall bear expense of all local calls and long distance to parent or attorney) and 10.7(F) (mail to and from the juvenile should not be opened by another unless there is a reasonable suspicion of contraband, in which case the mail should be opened in front of the juvenile); S.2444 § 323(a)(4)(A)(iv) (access to telephones); INS DOM, Telephone Access, I (Detention Facilities holding INS detainees shall permit them to have reasonable and equitable access to telephones) and Correspondence and Other Mail, I (all Detention Facilities will ensure that detainees send and receive correspondence in a timely manner); INS JPM Standards 135-146 (incorporating ACA Juvenile Standards 3-JDF-5E-04, 3-JDF-5F-03, 3-JDF-5G-01 through -05, 3-JDF-5G-07 through -11); INS Field Memorandum, issued Aug. 22, 2001, re: implementation of notice of telephone privileges (detainees can make free, private, unmonitored phone calls to the immigration court, consular officials, and to *pro bono* representatives and legal service providers through pre-programmed phone technology); OIG Report Chapter 2, Telephone Access, Recommendation 7 (The INS should revise its policy regarding telephone use by juveniles to ensure juveniles without funds are able to make appropriate telephone calls and juveniles are

permitted access to telephones that at least meet the minimum requirements); CRC, Article 13 (the child shall have the right to freedom of expression, including the freedom to seek and impart information and ideas of all kinds through any media of the child's choice); UN RPJDL § 61 (every juvenile should have the right to communicate in writing or by telephone); ACA Juvenile Standards 3-JDF-5E-1 through -11 (juveniles shall have access to telephones and mail).

66 ABA JJS, Standards Relating to Counsel for Private Parties 3.1 (the determination of the client's interests in the proceedings . . . is ultimately the responsibility of the client after full consultation with the attorney."); INS DOM, Correspondence and Other Mail, L. (acknowledging a detainee's rights to communicate with representatives of the news media, and ensuring that such correspondence will be treated as confidential material by Detention Facility staff); Beijing Rules, I. 8 (protecting a juvenile's right to privacy and, concurrently, from adverse effects resulting from publication in the mass media); UN RPJDL, I. 59-62 (acknowledging the juvenile's right to communicate with and receive correspondence from persons and organizations, in writing, via telephone, and in person); ACA Juvenile Standards 3-JDF-3D-05 (juveniles should have reasonable access to general public through communications media, subject only to limitations necessary to maintain Detention Facility order).

67 ABA JJS, Standards Relating to Counsel for Private Parties 3.1 (the determination of the client's interests in the proceedings . . . is ultimately the responsibility of the client after full consultation with the attorney."); INS DOM, Correspondence and Other Mail, L. (acknowledging a detainee's rights to communicate with representatives of the news media, and ensuring that such correspondence will be treated as confidential material by Detention Facility staff); Beijing Rules, I. 8 (protecting a juvenile's right to privacy and, concurrently, from adverse effects resulting from publication in the mass media); UN RPJDL, I. 59-62 (acknowledging the juvenile's right to communicate with and receive correspondence from persons and organizations, in writing, via telephone, and in person); ACA Juvenile Standards 3-JDF-3D-05 (juveniles should have reasonable access to general public through communications media, subject only to limitations necessary to maintain Detention Facility order).

68 *Flores*, Exhibit 1. A. 14 (mandating that a child be presented information regarding his right to request voluntary departure in lieu of deportation; United Nations High Commissioner for Refugees Agenda for Protection (2002), Part III, Goal 2(7) ("States, working in consultation with relevant intergovernmental organizations, should develop strategies to promote return and readmission of persons not in need of international protection, in a humane manner and in full respect for their human rights and dignity, without resort to excessive force, and in the case of children, taking due account of their best interests."); IBCR Statement, B(14) (noting that "[t]he best way for returns and family reunification to be carried out is on a voluntary basis, following a detailed assessment of family and country situation." and that, before a child is returned to a country of origin, several things must be considered, including (1) whether it is safe to return the child to his home country; and (2) whether it is in the child's best interests to return, and noting that "the child should be fully informed and consulted at all stages. . .").

69 Beijing Rules 20.1 ("Each case shall from the outset be handled expeditiously, without any unnecessary delay."); UNHCR GPC, page 100 ("[T]he refugee status determination must be made quickly...[k]eeping children in limbo regarding their status, hence their security and their future, can be harmful to them."); Canadian Child Refugee Guidelines § A.III.3 ("[A child's] claim should be given scheduling and processing priority because it is generally in the best interests of the child to have the claim processed as expeditiously as possible. There may be circumstances, however, where in the best interests of the child, the claim should be delayed."); *Matter of Salik-Lopez*, No. A 95 283 410 (Phoenix, December 2, 2002)(Judge Richardson held the INS in contempt for its "[A]rrogance and callous disregard for the rights of detained juveniles to a prompt hearing and decision of their cases.); *Flores*, (The Court envisioned juveniles would be in INS custody no more than 30 days.); IBCR Statement, B(12) ("Any immigration or refugee application pending on behalf of a separated child should be prioritized for processing. Authorities should eliminate unnecessary delays that can result in a child reaching the age of majority during the process."); Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 International Journal of Refugee Law 84 (1999) ("*Not Adults in Miniature*") § 3.8.3 p. 119 ("While slow processing of an asylum claim is undesirable for any asylum seeker, it is particularly so in the case of children... Prolonged institutionalization can seriously harm the well-being of the child, carrying a life-long impact on a child's development."), p. 120 ("While generally expeditious processing of children's cases is a desirable goal, the timeline for a case must be balanced against the needs of the child. Priority in scheduling should not be at the expense of full exploration of the child's claim nor should it prejudice the ability of the child's attorney to develop full documentation of the claim to asylum.").

70 The Trafficking Victims Protection Act of 2000, 18 U.S.C. §§1591, 1594 et. seq. (Any property used in furtherance of trafficking or gained from illegal trafficking activity is forfeit to the U.S. government.), 18 U.S.C. § 2, (Anyone who aids and abets the commission of a crime against the United States is punishable as a principal.)

71 ABA JJS, Standards Relating to Adjudication, § 1.3.A-B ("The presence of the respondent should be required for EOIR Proceedings to begin. The respondent should be afforded the right to be present throughout EOIR Proceedings, although the juvenile court should be permitted to proceed without a respondent who is voluntarily absent after EOIR Proceedings have begun."), Standards Relating to Corrections Administration 7.8(A) (it should not be necessary to use mechanical restraints within the Detention Facility; mechanical restraints may only be used during transportation); ABA Standards of Practice § D.5 (Child at Hearing) ("In most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify."); American Bar Association Recommendation: Best Practices for Immigration Proceedings Involving Alien Child Respondents (Jun. 6, 2002) (ABA Best Practices) § 5 ("Judges may refuse to hear cases, if the conditions in the courtroom... adversely affect [children's] meaningful participation in the proceedings and thus, their due process rights."); Immigration and Nationality Act of 1952 8 U.S.C. (2002) § 242 (b) (providing reasonable opportunity to be present); *In re A-A*, 22 I&N Dec. 140, Interim Decision 3357 (BIA 1998), n.2 (collecting cases where right to appear determined to be an essential liberty interest); 8 C.F.R. § 240.4 (An attorney, legal representative, legal guardian, near relative or friend is permitted to appear on behalf of the respondent); INS DOM, Transportation, III(AA) (officers shall use authorized techniques and common sense when applying restraints), and Use of Force, III.B. (setting forth principles governing the use of force and application of restraints with adult detainees); INS JPM 6.1.5 ("Escorting Officers have the responsibility to determine the need and level of restraints used at any time while escorting a detainee."); OIG Report, Chapter 2, Use of Restraints, Recommendations 6 (The INS should implement specific rules that govern the use of restraints on juveniles); CRC, Article 8 (protection of identity), Article 27 (recognizing the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development); Canadian Child Refugee Guidelines, §B.I, n.20 ("A child refugee claimant has the right to be present at his or her refugee proceedings."); Canadian Immigration Act §69(2) ("[P]roceedings before the Refugee Division shall be held in the presence of the person who is the subject of the proceedings, wherever practicable"); ACA Adult Standards 3-JDF-3D-06 ("In situations where physical force or disciplinary detention is required, only the least drastic means necessary to secure order or control should be used."), 3-JDF-4A-07 (prohibiting use of food as sanction), 3-JDF-3A -16 (restraints "are never applied as punishment"), 3-JDF-3A -17 ("A written record detailing who receives restraint equipment and the nature of the equipment they receive is necessary to establish responsibility and accountability for use.").

72 UNHCR Guidelines §5.14 ("Children should be kept informed in an age-appropriate manner, about the procedures, what decisions have been made about them, and the possible consequences of their refugee status."); Canadian Child Refugee Guidelines § B.I.1. ("The process which is to be followed should be explained to the child throughout the hearing to the extent possible, taking into account the age of the child.").

73 ABA JJS, Standards relating to Adjudication, §2.7 (When a witness or respondent is incapable of hearing, speaking or understanding the English language, or of speaking in the English language so as to be understood by counsel and court, an interpreter whom the witness or respondent can understand and who can understand the witness or respondent should be appointed to translate all proceedings. Such interpreter should be appointed by the court and compensated from public funds) and relating to Interim Status, 5.3(A) (juvenile shall be informed of the right to silence, the making of statements and the right to presence of an attorney, including providing this information in the juvenile's native language); 8 C.F.R. § 240.5 (any person acting as an interpreter shall be sworn to interpret and translate accurately); *Flores*, V. 12. A. 4 (acknowledging the INS's responsibility to locate interpreters to facilitate processing of minors); *Matter of Tomas*, 19 I&N Dec. 464 (BIA 1987) (finding an absolute right to competent translation); *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2002) (finding due process violation for failure to properly translate); Immigration and Naturalization Service Guidelines for Children's Asylum Claims, Immigration and Naturalization Service File No. 120/11.26 (Dec. 10, 1998) ("INS Guidelines") § II.d. ("Interpreters play a critical role in ensuring clear communication between the child and Asylum Officer. Asylum Officers should confirm that the child and interpreter fully understand each other."); CRC art. 40.2.b.vi ("Every child alleged as or accused of having infringed the penal law has at least the following guarantees...[t]o have the free assistance of an interpreter if the child cannot understand or speak the language used."); UNHCR GPC, Chapter 8: Legal Status ("Trained independent interpreters should be used when the interviewer does not share the child's language, even if the child appears to speak the interviewer's language adequately."); UNHCR ARC, Topic 1: The

Importance of Skills in Communicating with Children (“When the use of an interpreter is unavoidable, it is vital that the interpreter is fluent in both languages, understands any specialist terminology and is able to use words which the child can understand. He or she needs to be acceptable within the community and be seen as impartial. It is vital to ensure that the interpreter has good skills at communicating with children, can cope with any emotions being expressed and does not influence the conversation by mistranslating, summarizing or omitting selected sections of what was said.”); UN RPJDL § I.6 (Right to services of interpreter free of charge whenever necessary); UNHCR Guidelines §5.13 (“In so far as possible, interpreters should be skilled and trained in refugee and children’s issues.”); IBCR Statement, A(5) (“Separated children must be provided with gender sensitive and child-friendly interpreters who speak their preferred language whenever they are interviewed or require access to services or legal procedures”); Sandy Ruxton, *Separated Children Seeking Asylum in Europe: A Programme for Action* (Save the Children and United Nations High Commissioner for Refugees 2000) (“Separated Children in Europe Programme”) Executive Summary, at 5 (among factors that facilitate child participation are “the availability of skilled interpreters”); *Detained and Deprived of Rights* (noting that “a problem identified repeatedly in our interviews was the unavailability of translation” and recommending that the INS “ensure that all written rights advisory forms are translated into the language spoken by each child and provided to each child” and that the INS “provide a sufficient number of trained interpreters at facilities housing unaccompanied children.”).

74 ABA JJS § 6.1 (recommending that jurisdictions enact legislation permitting a juvenile to waive right to a public trial) and § 6.2 (permitting a juvenile to select certain members of the public to be admitted to his adjudication where he has waived the right to a public trial); Homeland Security Act of 2002, P.L. 107-296 (H.R. 5005) § 462(b)(2)(A) (providing that a concern in making determinations regarding the custody and care of unaccompanied alien children is that they not be exploited); Privacy Act, 5 U.S.C. § 552a(b) (“no agency shall disclose any record ... except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains...” unless one of certain exceptions applies, including where disclosure of the record would be required under the Freedom of Information Act); Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 (a) (recognizing that an agency otherwise required to produce information covered by the Act may “may delete identifying details” “to the extent required to prevent a clearly unwarranted invasion of personal privacy...”), (b)(7) (providing that the Act does not apply to “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy...”); 8 CFR § 240.11 (“An asylum and withholding of removal hearing is open to the public unless the applicant requests otherwise.”), § 208.6(a) (Disclosure of information contained in or pertaining to an asylum application or any records pertaining to a credible fear or reasonable fear determination “shall not be disclosed without the written consent of the applicant.”); CRC, Art. 8 (protection of identity), Art. 16 (“Children have the right to protection from arbitrary or unlawful interference with their privacy, family, home and correspondence.”), Art. 40.2(b)(vii) (“Every child alleged as or accused of having infringed the penal law has at least the following guaranties...[t]o have his or her privacy fully respected at all stages of the proceedings.”); Beijing Rules §8.1 (“The juvenile’s right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labeling.”); American Convention on Human Rights (“ACHR”), Art. 11(2) (“No one may be the object of arbitrary or abusive interference with his or her private life, family, home or correspondence.”); IBCR Statement, A(6) (“Care must be taken not to disclose information about a separated child that could endanger the child’s family members in her or his home country. The permission of separated children must be sought in an age appropriate manner before sensitive information is disclosed to other organizations or individuals.”); Elaine Cassel, “The Shameful Treatment of John Lee Malvo,” CNN.com, Nov. 21, 2002 (available at www.cnn.com/2002/LAW/11/21/findlaw.analysis.cassel.malvo).

75 Immigration and Nationality Act of 1952 8 U.S.C. (2002) §§ 240 (b)(1) and (4)(B) (providing for the right to present evidence and cross-examine witnesses); CRC, art. 40.2(b)(iv) (right not to be compelled to testify); Canadian Child Refugee Guidelines §B.I (“Like an adult claimant, a child claimant also has a right to be heard in regard to his or her refugee claim.”); ECRE ¶ 4 (“Each refugee has the right to be heard in any procedure affecting the child”).

76 ABA JJS, Standards relating to Adjudication § 2.1.A-B (A verbatim record should be made of all EOIR Proceedings, and the record and any exhibits should be preserved and kept confidential); 8 C.F.R. § 240.9 (“The hearing before the immigration judge, including the testimony, exhibits, applications, proffers, and requests, the immigration judge’s decision, and all written orders, motions, appeals, briefs, and other papers filed in the proceedings shall constitute the record in the case. The hearing shall be recorded verbatim except for statements

made off the record with the permission of the immigration judge. In his or her discretion, the immigration judge may exclude from the record any arguments made in connection with motions, applications, requests, or objections, but in such event the person affected may submit a brief.”).

77 ABA JJS, Standards Relating To Juvenile Records and Information Systems 5.2 (juvenile, his parent and juvenile’s attorney should be given access to all records and information collected or retained by a juvenile agency); *Augustin v. Sava*, 735 F. 2d 32, 37 (2d Cir. 1984) (an asylum applicant “must be furnished with an accurate and complete translation of official proceedings...translation services must be sufficient to enable the applicant to place his claim before the judge.”); *Maycock v. Nelson*, 938 F.2d. 1006, 1008 (9th Cir. 1991) (noting that “Congress intended that a [FOIA] requester with exceptional need should be given priority over other requesters,” and that “the government admits in its brief that a particular FOIA request accompanied by a showing of genuine urgency warrants priority over pending requests, at least as a matter of agency policy.”).

78 ABA Best Practices ¶ 1. (“Judges are encouraged to provide flexibility in scheduling cases handled by pro bono attorneys. In addition, judges are encouraged to provide pro bono rooms for attorneys to meet with child clients before the proceedings.”), ¶ 2. (“Judges may establish formal juvenile dockets at sites with significant numbers of children. The juvenile docket, in which all children’s cases are consolidated for a designated day with a designated rotating judge, facilitates pro bono representation. The practice helps legal service providers screen and refer the children for pro bono representation.”); National Benchbook on Psychiatric and Psychological Evidence and Testimony, ABA Commission on Mental and Physical Disability Law (“Competency is the capacity to testify.”); 8 C.F.R. 208.9(b) (“The purpose of the [asylum] interview shall be to elicit all relevant and useful information bearing on the applicant’s eligibility for asylum.”); 8 C.F.R. §3.25(a) (“The Immigration Judge may, for good cause, and consistent with section 240(b) of the Act, waive the presence of the alien at a hearing when the alien is represented or when the alien is a minor child and at least one of whose parents or whose legal guardian is present. When it is impracticable by reason of an alien’s mental incompetency for the alien to be present, the presence of the alien may be waived provided that the alien is represented at the hearing by an attorney or legal representative, a near relative, legal guardian or friend; 8 C.F.R. § 240.4 (“When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative or friend who was served a copy of the notice to appear shall be permitted to appear on behalf of the respondent.”); *Not Adults in Miniature* § 3.8.3 p. 119 (“While slow processing of an asylum claim is undesirable for any asylum seeker, it is particularly so in the case of children... Prolonged institutionalization can seriously harm the well-being of the child, carrying a life-long impact on a child’s development.”), p. 120 (“While generally expeditious processing of children’s cases is a desirable goal, the timeline for a case must be balanced against the needs of the child. Priority in scheduling should not be at the expense of full exploration of the child’s claim nor should it prejudice the ability of the child’s attorney to develop full documentation of the claim to asylum.”); ABA Best Practices § 7 (“It is always advisable to minimize a child’s time in court, in order to avoid further trauma.”); INS Guidelines § II.(d) (“The atmosphere created during the non-adversarial asylum interview should allow the child to testify at a comfortable speed and should promote a full discussion of the child’s past experiences.”), (recommending that the asylum officer be attentive and responsive to the child’s need for a recess); Canadian Child Refugee Guidelines § B.I.6. (“The hearing should, if possible, conclude in one sitting. If this is not possible then the earliest possible resumption date should be scheduled. Notwithstanding the desirability of concluding the hearing in one sitting, a child’s possible need for breaks and adjournments should always be taken into consideration.”).

79 8 C.F.R. §§ 208.13(a), 208.16(b), 240.11(c)(3)(iii), 240.33(c)(3), and 240.49(c)(4)(iii) (The burden of proof is on the applicant for asylum or withholding of removal); 8 C.F.R. s. 208.13(a) (the "testimony of the applicant, if credible, may be sufficient to sustain the burden of proof [for establishing refugee status] without corroboration"; But see *In re S-M-J-*, Interim Decision 3303 at 722 (BIA 1997); INS Guidelines § III(f) (discussing evidentiary issues and noting, among other things, that “[a] child, like an adult, is not required to provide corroborating evidence in all cases, . . .” “The level of detail and consistency required of a child . . . should be appropriate to the child’s age and maturity level.” and noting also that, although “certain elements of a child’s claim . . . such as those relating to identity or verifiable incidents of persecution, may require corroborating evidence...” the adjudicator should evaluate the strength of the evidence presented based, in part, on the child’s individual circumstances.”); INS Guidelines III(f) (“children’s testimony should be given a liberal ‘benefit of the doubt’ with respect to evaluating a child’s alleged fear of persecution”), citing UNHCR Guidelines at ¶ 219; Doris Meissner, Exercising Prosecutorial Discretion, Memorandum to Regional Directors, District Directors, Chief Patrol Agents and Regional and District Counsel (Nov. 17, 2000).

80 *INS v. Cardoza-Fonseca* 480 U.S. 421 (1987) (establishing that the “well founded fear” standard is more generous than withholding standard – as long as the Child establishes by evidence and testimony a subjective fear and an objective situation); *INS v. Stevic* 467 U.S. 407 (1984) (stating the standard for withholding of removal is “clear probability” or “more likely than not”); 8 C.F.R. §§208.13(a), 208.16(b) and *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) (for asylum claims, uncorroborated but credible testimony by the applicant may be sufficient to sustain the burden of proof); Immigration and Nationality Act of 1952 8 U.S.C. (2002) §240(b)(3) (If the Child cannot be present at his hearing because of mental incompetency, the Attorney General shall prescribe safeguards to protect his rights and interests); 8 C.F.R. §240.4 (By regulation, the Attorney General has allowed an attorney, legal representative, legal guardian, near relative or friend to appear on behalf of the Child.); INS Guidelines, p. 14, § II(g) (Some children can appear uncooperative for reasons having nothing to do with the reliability of their testimony. For example, there may be cultural reasons why a child will not maintain eye contact...during an interview... In other cultures...body language does not convey the same message.) and p. 15 § II(g) (Asylum Officers must remember the possible developmental and cultural reasons for a child’s vagueness or inconsistency, and not assume that it is an indicator of unreliability... The fact that a child begins to tell a fabricated story at the interview should not foreclose further inquiry.); Canadian Child Refugee Guidelines § B(I)(5) (“Where appropriate, the evidence of the child may also be obtained by using videotape evidence of an expert as a liaison between the CRDD and the child. For example, the panel may be able to indicate to a medical expert the questions which the panel would like the child to answer.”).

81 ABA JJS, Standards relating to Adjudication § 2.1.A-B (A verbatim record should be made of all EOIR Proceedings, and the record and any exhibits should be preserved and kept confidential); 8 C.F.R. § 240.9 (“The hearing before the immigration judge, including the testimony, exhibits, applications, proffers, and requests, the immigration judge’s decision, and all written orders, motions, appeals, briefs, and other papers filed in the proceedings shall constitute the record in the case. The hearing shall be recorded verbatim except for statements made off the record with the permission of the immigration judge. In his or her discretion, the immigration judge may exclude from the record any arguments made in connection with motions, applications, requests, or objections, but in such event the person affected may submit a brief.”).

82 The test for adjudicative competence in criminal matters was enunciated in the U.S. Supreme Court case of *Dusky v. U.S.*, 362 U.S. 402 (1960): “whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has rational as well as factual understanding of the proceedings against him.” The court went on in *Drope v. Missouri*, 420 U.S. 162 (1975), to state the consequences for a defendant who fails to meet this standard: “It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.” In *Godinez v. Moran*, 509 U.S. 389 (1993), the Supreme Court held that the standard for competence for trial should be the same for competence to take a plea in a criminal matter. See also “Evaluating Youth Competence in the Justice System.” [Juvenile Court Training Curriculum] American Bar Association Juvenile Justice Center, Juvenile Law Center, Youth Law Center, Robert Schwartz and Lourdes Rosado, Editors, June 2000; ABA Criminal Justice Mental Health Standards; ABA JJS, Standards relating to Adjudication, § 3.1.A (court should not accept plea without considering whether respondent has the mental capacity to understand his rights and the significance of the plea), § 3.1.B (listing factors to be considered in determining mental capacity); Wallace J. Mlyniec, *A Judge’s Ethical Dilemma: Assessing a Child’s Capacity to Choose*, Ford. L. Rev. 1873 (March 1996).

⁸³ *Dusky v. United States*, 362 U.S. 402 (1960); *Drope v. Missouri*, 420 U.S. 162 (1974); *Fare v. Michael C.*, 442 U.S. 707, 724-28 (1979); ABA Criminal Justice Mental Health Standards; ABA JJS, Standards relating to Adjudication, § 3.2 (before accepting plea, court should address respondent in a language calculated to communicate effectively with the respondent); Wallace J. Mlyniec, *A Judge’s Ethical Dilemma: Assessing a Child’s Capacity to Choose*, Ford. L. Rev. 1873 (March 1996).