

Standards for  
the Custody,  
Placement and Care;  
Legal Representation;  
and Adjudication of  
Unaccompanied  
Alien Children  
in the United States

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AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION  
Standards for the Custody, Placement and Care; Legal Representation;  
and Adjudication of Unaccompanied Alien Children in the United States

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The 2018 updated version of the *Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States* resulted from a deeply collaborative effort that brought together many talented individuals who have dedicated their careers to serving unaccompanied children. Special appreciation is due to Maureen Ketler Schad, an ABA Commission on Immigration Advisory Committee member and Senior Counsel at Norton Rose Fulbright US LLP, who led this effort on behalf of the American Bar Association.

The Commission on Immigration gratefully acknowledges the assistance of the following individuals who contributed valuable time and expertise to this process over a two-year period: Jessica Jones (formerly of Lutheran Immigration and Refugee Service); Jennifer Podkul and Wendy Wylegala (Kids in Need of Defense (KIND)); Jennifer Nagda, Maria Woltjen, and Kelly Albinak Kribs (The Young Center for Immigrant Children’s Rights); Aryah Somers (formerly of KIND); Rachel Prandini (Immigrant Legal Resource Center); Angela C. Vigil (ABA Working Group on Unaccompanied Minor Immigrants and Baker McKenzie); Karen T. Grisez (ABA Commission on Immigration and Fried Frank LLP); and Lauren Fisher Flores (Tahirih Justice Center Houston). Special recognition is also due to the law firm of Akin Gump Strauss Hauer & Feld, especially Michelle Reed and her team including Elizabeth Scott, Heather Peckham, Molly Whitman, Lauren York, Karen Dunning, Haley High, Anthony Hilbert, Patrick Benedetto, Fatima Bishawi, Richard Millett, and Nick O’Connor, for thoroughly updating the lengthy footnotes that support these Standards.

The following ABA staff also participated in this project: Meredith Linsky, Director, Commission on Immigration; Cristina Ritchie Cooper, Senior Attorney, Center on Children and the Law; and Dalia Castillo-Granados and Yasmin Yavar of the Children’s Immigration Law Academy.

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Finally, the Commission recognizes the dedicated and skillful editing and drafting by the Reporter, James B. McLindon, Jr. As the original Reporter of the 2004 edition, the Commission was thrilled when Jim agreed to return to work on the updated version. Jim not only drafted the update, but also helped move this process continuously forward and assisted in finding consensus when topics became complicated. His patience, diligence, and commitment to excellence, in drafting both the 2004 Standards and the 2018 Update, were invaluable to their successful completion. Many thanks as well to Thomas M. Fitzpatrick, Chair of the ABA Committee on Scope and Correlation of Work, for supporting this effort and leading us to Jim.

These updated Standards are dedicated to the brave and resilient children who come to the United States seeking safety and opportunity, reunification with family, and the ability to live dignified lives free from fear and violence. These children inspire us to continue to develop thoughtful and child-friendly approaches for their treatment, custody, care, adjudication, and legal representation. During a time when some government officials routinely refer to legal protections for children as “loopholes,” we must uphold protection-based practices that serve as an example across the nation and across the globe.



**M**any people contributed to the development and adoption of the *Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States*; and we are deeply indebted to them for their insight, patience, dedication, and assistance. Special appreciation is due to Tom Fitzpatrick, representative from the ABA Standing Committee on Ethics and Professional Responsibility, who served as Chair of the Standards Review Committee which oversaw their development. Special appreciation is also due to the law firm of Latham & Watkins LLP, under the leadership of Pro Bono Counsel, Steven Schulman, who, through the work of over 50 attorneys and law clerks (including summer associates) generously provided extensive initial research and composed the initial draft. Funding for the development of these *Standards* was generously provided by a grant from the John D. and Catherine T. MacArthur Foundation and by a contribution from the law firm of Latham & Watkins LLP.

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## I. DEFINITIONS

- “*Adjudicator*”—An immigration judge, a member of the Board of Immigration Appeals, or an officer with the U.S. Department of Homeland Security who makes decisions related to immigration matters. Though these standards use feminine pronouns for “Adjudicator” for convenience in some places, they are intended to be gender-neutral.
- “*Adult Family Member*”—Any person who is 18 years of age or older and with whom the Unaccompanied Child has a familial bond through blood or a legal relationship, including, but not limited to, an Unaccompanied Child’s parent, step-parent, grandparent (of any degree), sibling, aunt, uncle, or cousin.
- “*Attorney*”—An individual licensed to practice law in any U.S. jurisdiction who represents an Unaccompanied Child in immigration matters.<sup>1</sup> Though these Standards use feminine pronouns for “Attorney” for convenience in some places, they are intended to be gender-neutral.
- “*Best Interests*”—A guiding principle in Child protection matters that includes consideration of the following factors: the Child’s safety and well-being; expressed interests; health; family integrity; liberty; development; past experiences; Special Needs; age; gender, gender identity, and gender expression; sexual orientation; and religious and cultural background.<sup>2</sup>
- “*CBP*”—The U.S. Customs and Border Protection is an agency of the U.S. Department of Homeland Security charged with enforcing immigration law at U.S. borders and ports of entry. CBP includes, among other departments, U.S. Border Patrol (BP) and the Office of Field Operations (OFO).
- “*Child(ren)*”—See “*Unaccompanied Child(ren)*” below.
- “*Child Advocate*”—An individual who is independent of any organization providing other services to the Unaccompanied Child and who is appointed pursuant to federal law to identify and advocate for the Child’s Best Interests on issues including the Child’s Custody, care, placement, legal relief, and repatriation. Though these Standards use feminine pronouns for “Child Advocate” for convenience in some places, they are intended to be gender-neutral.
- “*Custodial Agency*”—Any entity that has the Custody of an Unaccompanied Child or is responsible either in law or in fact for providing for the care or placement of an Unaccompanied Child, but not including an Immigration Enforcement Agency.
- “*Custody*”—The holding of, care for, supervision of, or protection of an Unaccompanied 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 otherwise enclosed area that is used for the lawful Custody and/or treatment of an Unaccompanied Child. Types of Detention Facilities include, but are not limited to, shelters; secure and staff-secure facilities; emergency reception centers; Temporary Placement Facilities; and other residential and therapeutic facilities and group homes. Foster Care is not included in the definition of Detention Facility.
- “*Developmentally Appropriate*”—Suitable to the Unaccompanied Child’s age; level of education; gender, gender identity, and gender expression; cultural background; intellectual, social, and emotional development; degree of language proficiency; Special Needs; and other individual circumstances in order to ensure the Unaccompanied Child’s comprehension and meaningful participation.
- “*DHS*”—The U.S. Department of Homeland Security is the federal agency tasked with facilitating and enforcing the nation’s immigration laws, as well as disaster response. DHS is made up of seven federal agencies including: U.S. Citizenship & Immigration Services (USCIS or CIS), U.S. Coast Guard, U.S. Customs & Border Protection (CBP), Federal Emergency Management Agency (FEMA), U.S. Immigration & Customs Enforcement (ICE), U.S. Secret Service, and Transportation Security Administration (TSA).

- “*EOIR*”—The Executive Office for Immigration Review is an agency of the U.S. Department of Justice that adjudicates immigration cases through Removal Proceedings, appellate review, and administrative hearings.
- “*Flores*”—The stipulated settlement agreement reached in *Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997), as modified by subsequent litigation, governing Custody, placement, and care of noncitizens under the age of 18.
- “*Foster Care*”—A licensed or approved placement which meets the standards established by a state licensing or approval authority (or authorities) and which provides 24-hour substitute care for Children, including responsibility for the comfort, health, well-being, education, and upbringing of the Unaccompanied Child.
- “*Friend of the Court*”—An individual whose primary purpose is to assist the immigration court and facilitate non-representational communication between an unrepresented Unaccompanied Child and the immigration judge.
- “*Government Oversight Agency*”—Any government agency responsible for the review, investigation, and/or monitoring of compliance with federal and/or state conditions for the Custody, treatment, and care of Unaccompanied Children.
- “*HHS*”—The U.S. Department of Health and Human Services, through its Office of Refugee Resettlement (ORR), has primary responsibility for the placement, Custody, care, and release of Unaccompanied Children.
- “*Home Study*”—An assessment that considers the Sponsor’s ability to care for the Unaccompanied Child and provide for the Child’s needs, including interviews of the Sponsor and exploration of that person’s living conditions.
- “*ICE*”—Immigration and Customs Enforcement is a branch of DHS responsible for enforcement of the immigration laws in the interior of the United States.
- “*Immigration Adjudication*”—Any hearing or interview before a court or administrative agency concerning any aspect of a Child’s immigration status, most commonly through the EOIR (*i.e.*, the immigration court or the Board of Immigration Appeals) and U.S. Citizenship and Immigration Services (part of DHS).
- “*Immigration Enforcement Agency*”—Any entity with authority to enforce the immigration laws of the United States.
- “*Immigration Questioning*”—Any non-privileged communication that is intended to, or does, obtain information that could affect the Unaccompanied Child’s immigration status.
- “*Legal Services Provider*”—Any Attorney or non-attorney Staff members of an organization providing free or low-cost immigration legal services including accredited representatives, paralegals, and other support personnel. Though these Standards use feminine pronouns for “Legal Services Provider” for convenience in some places, they are intended to be gender-neutral.
- “*ORR*”—Office of Refugee Resettlement is a part of HHS that serves new populations to support their successful integration into American society. ORR is the branch of HHS that provides for the care and Custody of Unaccompanied Children.
- “*Removal Proceedings*”—Administrative proceedings under EOIR to determine whether an individual will be expelled or allowed to remain lawfully in the United States pursuant to U.S. immigration law.
- “*Special Needs*”—Any condition or disability, such as an intellectual disability, hearing impairment, speech or language impairment, visual impairment, emotional disturbance, developmental disability, orthopedic impairment, autism, traumatic brain injury, specific learning disability, or other disability 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.



- “*Sponsor*”—Qualified parents, legal guardians, relatives, or other adults to whom Children are released from ORR Custody.
- “*Staff*”—Any individuals, including volunteers, who work at or for a Detention Facility.
- “*Temporary Placement Facility*”—A Detention Facility into which Unaccompanied Children are placed upon apprehension by the Immigration Enforcement Agency pending transfer to the Custodial Agency.
- “*TVPRA*”—Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457) and as subsequently amended in 2013 (P.L. 113-4), codified at 8 U.S.C. § 1232.
- “*Unaccompanied Child(ren)*” or “*Child(ren)*”—Individuals under the age of 18 who lack lawful immigration status in the United States and who, at the time of initial determination, do not have a parent or legal guardian living in the United States available and willing to provide care and physical Custody. (The definition of “Unaccompanied Child(ren)”/“Child(ren)” used herein is based on the definition of “Unaccompanied Alien Child” found in 6 U.S.C. § 279(g)(2) and differs from the definition of “child” found in the Immigration and Nationality Act, at 8 U.S.C. § 1101(b)(1). Because it is no longer customary for people in the legal community to refer to “Unaccompanied Alien Children,” these updated Standards refer simply to “Unaccompanied Children.”) Though these Standards use masculine pronouns for “Child(ren)” and “Unaccompanied Child(ren)” for convenience in some places, they are intended to be gender-neutral.
- “*USCIS*”—The U.S. Citizenship and Immigration Services is a branch of DHS responsible for adjudication of immigration applications and benefits.

## II. PREAMBLE

### A. PREAMBLE TO THE 2018 EDITION

When these Standards were originally published in 2004, they provided critical assistance to practitioners and Adjudicators at a time when very little guidance of any sort existed. The Standards have influenced the practice of law as it relates to Unaccompanied Children, as well as informed numerous trainings, academic articles, and Immigration Adjudications. In so doing, they have protected countless Unaccompanied Children.

The past 14 years have seen many important developments in Children’s immigration law and policy. Collectively, these developments represent an unmistakable trend toward improved treatment of Unaccompanied Children, far closer to that which the original Standards envisioned. Since 2004, the Violence Against Women Act of 2005 (VAWA of 2005), the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA of 2008), the Trafficking Victims Protection Reauthorization Act of 2013 (TVPRA of 2013), and the Violence Against Women Act Reauthorization of 2013 (VAWA of 2013), as well as amendments to other U.S. immigration laws, have provided further protections for this uniquely vulnerable population.<sup>3</sup> Administrative changes in policy over the last decade have also resulted in improved treatment for Unaccompanied Children.<sup>4</sup>

Since the ABA published the original Standards, country conditions affecting the migration of Unaccompanied Children to the United States have changed significantly. Increasing drug- and gang-related violence in the Northern Triangle of Central America (El Salvador, Guatemala, and Honduras) has contributed to mass migration. Indeed, in 2012, San Pedro Sula, Honduras was named the murder capital of the world.<sup>5</sup> That city ceded its title to San Salvador in 2014.<sup>6</sup> In May and June of 2014, at the peak of what has been commonly referred to as the “surge,” U.S. immigration authorities apprehended more than 10,000 Unaccompanied Children at the southwest border each month.<sup>7</sup> The year the ABA House of Delegates first adopted these rules, immigration authorities detained about 5,000 children. In 2014, immigration authorities apprehended over 68,000 Unaccompanied Children.<sup>8</sup> In times of unprecedented volume, the Standards provided a vital guide to the work of all those involved in the apprehension, detention, care, release, legal representation, and Immigration Adjudication of Unaccompanied Children. At the same time, the

Standards reminded all involved that this influx was made up of individual Children, each with a unique history, vulnerability, and need.

Despite the U.S. government's substantial efforts to stop the flow, what began as an unprecedented surge in 2014 has become the new normal at the southwest border. Adhering to our highest ideals by adequately caring for, advocating for, and adjudicating the immigration matters of Unaccompanied Children continues to provide unique challenges. In partnership with the American Bar Association and a national network of nonprofit organizations and *pro bono* providers, hundreds of Attorneys throughout the country continue to provide quality representation to Children. In recognition of this dynamic field of law, the ABA, in collaboration with Kids in Need of Defense (KIND), organized a national conference in Houston, Texas, in December 2017. The conference highlighted the legal and social service needs of Unaccompanied Children and brought together advocates to share best practices.

Despite increased collaborations, improvements in law and policy remain desperately needed. Children still lack the right to free, court-appointed counsel in their Immigration Adjudications, despite significant litigation and advocacy. Over the past few years, federal, state, and city governments have invested significant resources to partially meet this critical need. Despite these admirable efforts, however, approximately 50% of Unaccompanied Children continue to lack legal representation in their Removal Proceedings.<sup>9</sup> Government funding for the Child Advocate program constitutes another recent advancement, although the resources provided for this purpose remain insufficient.

Practitioners working with Unaccompanied Children—attorneys, advocates, judges, and DHS officers alike—must continue to improve their efforts to be child-friendly in a variety of areas. Indeed, existing policies protecting Children throughout the system are often ignored, and some are in jeopardy of being rescinded. Representatives of Unaccompanied Children can and should learn from practitioners in well-established practice areas in the juvenile justice and child welfare systems, especially on issues related to the many ethical concerns that arise in representing children. Finally, in addition to their legal needs, Unaccompanied Children require other services to better integrate them into their communities and address their social, educational, and medical needs. In short, much work remains to be accomplished.

This second edition to the Standards has been drafted to update specific provisions to address these needs as well as significant and wide-ranging changes in law and policy. Despite the passage of time, the core values of the Standards remain constant. At present, much of the progress over the past fourteen years appears to be in jeopardy. Regardless of changes in politics, we must remember that we are dealing with children. We must continue to afford them special consideration to ensure that our immigration enforcement and adjudication systems acknowledge their need for protection and our nation's fundamental traditions.

### III. RULES OF GENERAL APPLICABILITY

The following are Rules of general applicability that should guide the treatment of any Unaccompanied Child in the United States in all respects and that inform the specific standards set forth below, even where not specifically referenced. These Standards are intended to apply to all those who are Unaccompanied Children in the United States, or who have ever been so designated. The Unaccompanied Child designation should remain valid until the case is completed.

#### 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 throughout the Immigration Adjudication and removal process regardless of where the Child is located and regardless of whether the Child is or is not in Custody.

An Unaccompanied Child may be part of legal proceedings in state courts, such as actions that include requests for Special Immigrant Juvenile Status predicate findings. While these Standards may be informative, individuals providing legal representation to Children in state proceedings should adhere to the standards of representation for that particular court and/or jurisdiction.

## **B. TREATMENT OF UNACCOMPANIED 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.<sup>10</sup>

## **C. FULL RIGHTS OF UNACCOMPANIED 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: One who is designated an Unaccompanied Child may have parents or legal guardians in the United States, and may end up living with such parents or legal guardians. The Unaccompanied Child designation does and should continue even after a Child has reached the age of 18, because many Children require the additional protections that accompany such designation. These Standards may also provide useful guidance in cases involving other noncitizen children.*

*The United Nations Convention on the Rights of the Child (“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.<sup>11</sup>*

## **D. BEST INTERESTS OF THE UNACCOMPANIED CHILD**

**Rule:**

1. Except as otherwise required by law, the Best Interests of the Child shall be a primary consideration of the Custodial Agency, Child Advocate, Adjudicator, and all Immigration Enforcement Agency personnel responsible for the Child in the United States in all actions and decisions concerning the Child.<sup>12</sup>
2. A determination of the Best Interests of the Child shall take into account, at a minimum, the following factors:
  - a. the Child’s safety and well-being;
  - b. the Child’s expressed wishes, in accordance with the Child’s age and maturity;
  - c. the integrity of the Child’s family, including the preservation of relationships with parents, siblings, and other family members;
  - d. the age, gender, gender identity, gender expression, sexual orientation, Special Needs, and religious and cultural background of the Child;
  - e. the health and development of the Child, including access to medical care and education;
  - f. the past experiences of the Child, including any resulting trauma, and any other unique strengths or vulnerabilities of the Child; and
  - g. the Child’s liberty, including placement in the least restrictive setting.<sup>13</sup>
3. The importance of each of these factors will vary with each case, and not every factor will be relevant in every case. The factors may conflict with each other, but they should each be considered in the Best Interests determination. Furthermore, the factors should be reevaluated in light of the Child’s progress along the continuum of care, and from apprehension through the final determination of the Child’s legal claim.<sup>14</sup>

*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 a primary consideration.<sup>15</sup>*

## E. RIGHT TO NON-DISCRIMINATION

**Rule:** Every Child is entitled to non-discrimination on the basis of the Child's race, ethnicity, color, gender, gender identity, gender expression, language, religion, Special Needs, political opinion, national and social origin, disability, sexual orientation, or status as a parent.<sup>16</sup>

## F. RIGHT TO FULL PARTICIPATION IN DECISION-MAKING

**Rule:** A Child has the right to understand all proceedings and 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) provide the Child with sufficient and Developmentally Appropriate information to allow the Child to make an informed decision; (ii) account for the Child's evolving ability to understand situations and respond to advice and guidance; and (iii) be free from pressure and manipulation either to reach a certain decision or to make a decision at all. In some circumstances, due to characteristics such as age and capacity, a Child may not be able to comprehend the information presented. In such cases, the Child shall be appointed a Child Advocate.<sup>17</sup>

## 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. In any Immigration Adjudication or Immigration Questioning, interpretation should be full and simultaneous, and cover everything said during any proceeding or questioning by any party or other participant.

*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 and 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. The Child's Attorney should insist on the Child's right in court to have an interpreter in his preferred/best language. All written materials relating to the Child's Custody, placement, care, right to legal representation, charges against him, and adjudication shall be translated into the Child's best language, provided to him, and explained to him in a Developmentally Appropriate manner. Where the Child cannot read, the materials shall also be read to him.<sup>18</sup>

*Interpreters and translators should use standard industry techniques to communicate accurately, effectively, and with impartiality. Privileged or confidential information acquired during an interpretation or translation must remain confidential unless the interpreter or translator is authorized to disclose such information.*

## H. RIGHT TO ATTORNEY

**Rule:** 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 that will affect his Custody, placement, or immigration status.<sup>19</sup> When otherwise unrepresented, an Attorney shall be appointed for the Child at public expense. Where a Child lacks representation, immigration courts should refrain from conducting any hearings involving the taking of pleadings, admissions, or the presentation of evidence before an Unaccompanied Child has had a meaningful opportunity to consult with counsel about the Child's specific legal options. Following apprehension and while in Custody, the Child shall receive a timely legal rights presentation that includes an opportunity for individual consultation with an Attorney.

*Comments:* Every Child shall have access to an Attorney throughout his Immigration Adjudication and any other administrative or court proceedings related to his immigration status.

*The participation of an Attorney on behalf of a Child subject to such proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of such proceedings.*

*Unfortunately, pursuant to federal law, Children from contiguous countries often are not permitted even to speak with an Attorney. Rather, unless they meet certain screening criteria, they are immediately repatriated to their country of origin without ever being provided access to an Attorney. Consistent with the foregoing, these Children should also have the right to a meaningful consultation with an Attorney.<sup>20</sup>*

## **I. RIGHT TO CHILD ADVOCATE**

**Rule:** In order to ensure that the Child's Best Interests are identified, advocated, and considered at all times, a Child shall be referred to a provider of Child Advocate services not later than 72 hours after an agency identifies the Child as a trafficking victim or an otherwise vulnerable Unaccompanied Child. Cases that should be identified as a priority for Child Advocate assignment may include cases in which the Child (i) is of tender age (12 years old or younger); (ii) lacks independent decision-making capacity; (iii) has physical or mental health issues affecting daily functioning; (iv) is suspected to be a trafficking victim; (v) is suspected to have an unresolved or untreated history of trauma and/or abuse; (vi) has one or more identity traits that separates him from most other Children in Custody or in the community, such as indigenous language, sexual orientation, or gender identity; (vii) is at risk of permanent separation from a parent/legal guardian against the will of the Child and/or the parent/legal guardian; (viii) has requested voluntary departure despite safety concerns; or (ix) is expected to be in Custody for more than 90 days.

**Comments:** *The Child Advocate is distinct from the Attorney, and her role is to ensure that the Child's Best Interests are identified, advocated for, and considered throughout the entire immigration process. The Child Advocate should have the qualifications, duties, and obligations described in Rule VI.B infra.<sup>21</sup>*

## **J. RIGHT TO FRIEND-OF-THE-COURT ASSISTANCE**

**Rule:** A Child who is unrepresented before the immigration court should have the right to obtain assistance from a Friend of the Court whose primary purpose is to assist the court and facilitate communication between the Child and the immigration judge. The Friend of the Court should serve in a limited, non-representational role and may be an attorney or a non-attorney.

When an attorney provides Friend-of-the-Court services, she must make her limited role abundantly clear to the Child and obtain the Child's consent prior to serving in this capacity before the court. The appearance of a Friend of the Court is not a substitute for legal counsel and a Child who has Friend-of-the-Court assistance will still be unable to fully exercise all his legal rights before the court unless and until he secures legal counsel.

**Comments:** *Since 2014, the immigration court system has been confronted with large numbers of Unaccompanied Children scheduled on detained and non-detained dockets. Substantial numbers of these Children have been unable to obtain counsel, especially early in the proceedings. For this reason, many courts have welcomed the assistance of individuals serving in the role of Friend of the Court.*

*A Friend of the Court should be able to gather and provide accurate information about the Child that will assist the court in deciding how to conduct the Removal Proceedings. Such information includes, but is not limited to, the Child's reunification status, change of address, efforts to secure legal representation, and need for a continuance.*

*The Friend of the Court serves in an advisory role and should not make any legal arguments, enter pleadings, or request legal relief. The Friend of the Court should recognize her role as an*



independent advisor to the court and clearly communicate this limited role to the Child while encouraging the Child to continue to seek representation where possible. It may be particularly confusing to a Child where an attorney represents some children as a Friend of Court and others as their Attorney during the same docket. This difference in roles can be demonstrated by physically sitting in a different seat or standing behind the bar as Friend of Court. In the unfortunate situation where the immigration court is instructing an unrepresented Child to move forward in his legal case pro se, the Friend of Court should not provide the court information regarding the Child's legal claim, sit next to the Child, or in any way give the Court or the Child the impression the Child's right to counsel is being fulfilled by the role of Friend of Court.<sup>22</sup>

## **K. 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 to another appropriate individual or entity.

*Comments:* This Rule is prompted by the fundamental importance of the family in the life of a Child, and the potentially deleterious effects of Custody on Children. See Rule VII.A *infra*.

## **L. 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. It should also include the nondisclosure of sensitive personal information to other residents or nonessential Staff.
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. See Rules III.G *supra*, VIII.D *infra*, V.C.3 *infra*, VIII.C.1 *infra*.

*Comments:* Sensitive personal information includes, but is not limited to, gender identity, gender expression, sexual orientation, and religious beliefs. 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.<sup>23</sup>

## **M. 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 their 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 or trafficking.

*Comments:* Historically, the Custody and care of Unaccompanied Children arriving in the United States was the responsibility of the former 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. Beginning in 2003, Congress delegated to HHS the care of, and Custody over, Unaccompanied Children.<sup>24</sup>

## **N. 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, gender identity, gender expression, sexual orientation, or status as a parent, and to protect the Child's development.

## **O. 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. To the extent possible, the Custodial Agency shall inform the Child's family, any Attorney or Legal Services Provider who has had contact with the Child, and any Child Advocate of the transfer or release.

## **P. CONSISTENT TREATMENT**

**Rule:** Unaccompanied 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 ONGOING TRAINING**

**Rule:** Special training should include Attorneys, Adjudicators, government trial attorneys, Custodial Agency personnel, Immigration Enforcement Agency personnel and/or contractors, and Child Advocates working with Children subject to Immigration Adjudications and appellate 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, Adjudicators, government trial attorneys, Custodial Agency personnel, Immigration Enforcement Agency personnel and/or contractors, and Child Advocates should include:

1. 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;
2. information about the evidentiary rules as they relate to Children in immigration proceedings;<sup>25</sup>
3. an overview of the court process and key personnel in Immigration Adjudications and appellate proceedings involving Children;
4. a description of applicable guidelines and standards for representation, and of the roles of Attorneys and Child Advocates in Immigration Adjudications;
5. information on Child development and a Child's needs and abilities;
6. 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;
7. information concerning family dynamics, dysfunctional behaviors, and trauma that might impact a Child;
8. information on the circumstances under which Children arrive alone in the United States, including victimization by trafficking and smuggling operations, and political, social, and economic conditions in their countries of origin;

9. 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;
10. information about factors relevant to considering the Best Interests of the Child; and
11. information about maintaining the confidentiality of information, including information protected by federal and state law.

### **C. ADDITIONAL TRAINING IN CHILD-SENSITIVE AND CULTURALLY APPROPRIATE INTERVIEWING TECHNIQUES**

**Rule:** Attorneys, Adjudicators, government trial attorneys, Custodial Agency personnel, Immigration Enforcement Agency personnel and/or contractors, and Child Advocates should receive training in child-sensitive interviewing techniques to assist them in communicating with Children in order 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, Adjudicators, government trial attorneys, Custodial Agency personnel, Immigration Enforcement Agency personnel and/or contractors, and Child Advocates should also receive training in interviewing Children in a culturally appropriate manner.

*Comments:* Some specialized training is a necessity for Attorneys, Adjudicators, government trial attorneys, Custodial Agency personnel, Immigration Enforcement Agency personnel and/or contractors, and Child Advocates in Immigration Adjudications and appellate proceedings, given the unique and vulnerable attributes of Children. The term “Interviewer” is used throughout this comment for ease of reference and is meant to include all of these individuals.

*Interviewers should be trained to take a friendly, relaxed approach when interviewing Children, use Developmentally Appropriate language, utilize trauma-informed interviewing techniques, 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 in tolerating 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. Interviewers 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 the interviewer. 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 participation in criminal activity or domestic and sexual abuse, conveying respect for the Child and not judging his behavior is important. In particular, if the Child has suffered sexual abuse in the past, the Child may have a preference as to the gender of the Interviewer or may obtain additional security from the presence of an adult trusted by the Child in the interview.<sup>26</sup> See also Appendix.*

## **V. REPRESENTATION OF UNACCOMPANIED CHILDREN**

### **A. THE ATTORNEY’S ROLE**

#### **1. The Attorney’s Duty to the Child**

**Rule:**

- a. The Attorney for the Child is a lawyer who provides legal services for the Child and who owes the Child the same duties, including undivided loyalty, confidentiality, and competent representation as would be owed to an adult client.<sup>27</sup>
- b. The Attorney shall ensure that the Child participates in the Immigration Adjudication to the greatest extent possible, taking into account the Child's age, development, maturity, level of education, ability to communicate, and personal circumstances.
- c. The Attorney's duty of confidentiality is to the Child, regardless of who engaged, paid, or appointed the Attorney. The Attorney is not permitted to disclose confidential information to a parent, legal guardian, family member, or other individual without the Child's consent.
- d. The Attorney shall provide the Child with legal advice and zealously advocate for the Child's legal interests, as directed by the Child's expressed wishes. The Attorney's obligation is to represent the Child's expressed wishes, even if they conflict with those of the parent or other adult, and regardless of who engaged the Attorney to represent the Child.
- e. This obligation as well as the duty of confidentiality to the Child should be clearly communicated at the outset to the party engaging the Attorney pursuant to Rule 1.6 of the ABA Model Rules of Professional Conduct.
- f. If the Child does not express the objectives of representation, or is found incompetent pursuant to the procedure set forth in Rule X.C *infra*, the Child's Attorney shall advocate his legal interests, preserving to the greatest extent possible any immigration remedies available to the Child. In some instances, it may be appropriate for the Attorney to consider the opinions of a Child's Adult Family Member.
- g. The Attorney, at her first meeting with the Child and throughout her representation, shall determine and monitor whether these Standards are being complied with, and, if not, seek compliance on behalf of the Child.
- h. The Attorney shall not reveal otherwise confidential communications of the Child to the Child Advocate without first obtaining the informed consent of the Child, even when doing so would better inform the Child Advocate's Best Interests assessment.
- i. The Attorney shall take reasonable steps to communicate with her client in a language and manner the client understands and to ensure that any interpreter or translator used in her communications with the Child understands the Attorney's and her own confidentiality obligations. *See* Rule V.C.3.d *infra*.
- j. The Attorney shall respond promptly to all questions and requests for documents and information from the Child.
- k. The Attorney shall investigate and communicate all forms of relief and return available and the impact of each on the Child.
- l. 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 X.C *infra*. 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.)<sup>28</sup>*

*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.<sup>29</sup>*

*Attorney's Duty to Communicate Effectively. Attorneys have an ethical obligation to take reasonable steps to communicate with their clients in a language they understand or be subject to disciplinary action. Disciplinary action can include disbarment, suspension, public or private censure, or other appropriate disciplinary sanctions.<sup>30</sup>*

*To the extent that the Child may be having problems 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, setting aside prejudices and misconceptions about the Child, and refraining from attempting to influence the Child in any way. The accepted standard for legal interpretation is to ensure "direct speech," using the same grammatical person as the speaker. This method allows the Attorney and the client to build a trusting relationship despite an inability to communicate directly. This requires the interpreter to avoid unnecessary interference and to say exactly what the speaker is saying, for example, "[P]lease state your name," instead of "she wants you to state your name."*

*Capacity and Competence. The normal attorney-client relationship assumes that the client, when properly advised and assisted, can make decisions about important matters in the legal proceeding. When representing a client with diminished capacity, a lawyer is expected to maintain a normal attorney-client relationship to the greatest extent possible. Although capacity may be diminished by a client's age, or for some other reason, the Rule does not presume that Children below a certain age lack capacity to determine their wishes in litigation. Capacity refers to a client's ability to understand information relevant to his case and the ability to appreciate the consequences of decisions. Capacity exists in various degrees. In other words, it is contextual and incremental, and may also be intermittent.<sup>31</sup>*

*The Child's ability to contribute to a determination of his 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 Attorney with respect to a particular issue at one time but not at another. Simply because an Attorney disagrees with a Child's decision, or believes what the Child wants is not best for him, this does not mean that the Child lacks capacity to make decisions. Although an Attorney may be tempted to use the substance of a decision as a test of a Child's capacity, she must strive to separate the evaluation of the Child's ability to make a decision from the Attorney's evaluation of the decision itself.<sup>32</sup>*

*ABA Model Rule of Professional Conduct 1.14 discusses circumstances when it may be permissible for an Attorney to act beyond the scope of the Child's expressed wishes. The rule provides that, "[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act*



*in the client's own interest, the lawyer may take reasonably necessary protective action.” That protective action might include “consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.” In the case of an Unaccompanied Child, protective action might include the involvement of a Child Advocate or a trusted family member or professional. (The role of a Child Advocate is discussed in detail in Rule VI.B infra.)*

*Capacity can be distinguished from competence, the latter of which is regularly referred to as a legal standard and denotes a specific level of skill. The most critical distinction between the two concepts is that competence is a characteristic that one either possesses or does not, an all or nothing principle. Competence in the adjudication of Unaccompanied Children's claims is further discussed in Rule X.C infra.<sup>33</sup>*

*Attorney's Duty to Pursue Legal Interests. Where the Child cannot 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 or other government agencies, for example, seeking a release from Custody pending determination of a Child's case, or filing an application for 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. If the Attorney believes that the Child is unable to state his wishes, the Attorney should refer the Child for the appointment of a Child Advocate to identify and advocate for the Child's Best Interests. The Child may also wish to delegate the decision-making authority because of loyalty conflicts or the desire not to hurt a parent or other 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.*

*Legal Interests. In establishing an attorney-client relationship with the Child, the Attorney must define the scope of legal interests that she will represent. Attorneys may limit representation to Immigration Adjudications. However, many Children correctly understand that their legal interests include their placement in and release from Custody. If the Attorney will not represent these legal interests, she should affirmatively disclose this limitation of representation to the Child, consistent with the Standard for Attorney's Scope of Representation. See Rule V.A.2 infra.*

*Investigation of Available Relief. The Attorney must carefully investigate and consider the Child's immigration alternatives. She must consider what impact each form of relief might have on his ability to receive public benefits, qualify for a green card, work, travel outside the United States, and obtain relief for family members. She must also consider the impact of any arrest and court involvement. The Attorney must then advise the Child accordingly. 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.<sup>34</sup>*

## **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, development, education, maturity, and language abilities.

*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 practice, the Attorney’s explanation about her scope of representation should contain at a minimum the following information: the Attorney providing the representation; the duration of the representation, including representation on appeal; the matter(s) for which the Attorney will provide representation, including any appeal; the names of and contact information for the Attorneys who will be working on the Child’s case; the fees and charges for all services (and 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; the Attorney’s professional responsibilities to the Child, including the duty of confidentiality; and the Child’s right to terminate the Attorney’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, and the Child’s understanding should be verified. For example, the Attorney could stop at regular intervals and ask the Child to explain in his own words what is being communicated in the document.<sup>35</sup>

### 3. Responsibilities to the Child Client Following a Decision Rule:

- a. When the Child is granted relief, the Attorney should explain orally and in writing the benefits and limitations of the Child’s newly acquired status.
- b. A Child shall have the right to appeal a final decision in any Immigration Adjudication to an independent judicial authority.
- c. The Attorney shall promptly inform the Child of his appellate rights and take all steps necessary to protect those rights, including making appropriate referrals, 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.
- d. 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.
- e. 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. When appropriate, the Attorney should continue to counsel the Child and assist in securing legal services for the Child in matters arising from the original proceeding.

*Comments:* Once the Child’s case has concluded, the Attorney should discuss with the Child the end of the representation and determine what contact, if any, she and the Child will continue to have.<sup>36</sup>

## B. GENERAL STANDARDS OF PROFESSIONAL CONDUCT

### 1. Standards of Professional Conduct

**Rule:** An Attorney representing a Child in Immigration Adjudication or appellate 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.<sup>37</sup>

## 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 Child Advocate, social worker, and, as appropriate and available, his parent or legal guardian, and mindful of the Child's age and 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 expressed wishes as set forth in Rules V.A.1.d and V.A.1.f *supra*.

*Comments: The ability to access the media may be 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 Child Advocate and, as appropriate and available, his parent or legal guardian, and mindful of the Child's age and 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 in Rules V.A.1.d and V.A.1.f *supra*, 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.*<sup>38</sup>

## C. ESTABLISHING THE CLIENT RELATIONSHIP

### 1. Interviewing the Child

**Rule:** The Attorney shall meet with the Child as soon as possible after agreeing to undertake representation and maintain frequent contact with him thereafter. Whenever possible, the Attorney shall communicate with the Child in person, as opposed to telephonically or virtually.

*Comments: Irrespective of the Child's age, the Attorney should meet frequently with the Child. Communication with the parent or legal guardian is not an appropriate substitute. It is strongly recommended that the Attorney meet with the Child promptly after agreeing to undertake the representation and regularly throughout the case. This is helpful in 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 telephonically or virtually may hinder the establishment of a trusting relationship, though it may be necessary for Children who are in remote locations. In those cases, in-person meetings should occur as frequently as possible, but may need to be supplemented by telephonic or video conversations.*

*The Attorney should use the first meeting to begin to gain the trust of the Child. This process is a deliberate one that should continue throughout the representation. The following approaches should be considered. The Attorney should explain the scope and purpose of her representation, distinguish her role from other individuals within the system, and advise the Child of his rights with respect to the representation. The Attorney should also explain to the Child the basis for the representation, the circumstances of the Child and his Custody, and the nature of any Immigration Adjudication. 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 she is doing so.*<sup>39</sup>

*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. Before any third-party interview, the Attorney should ensure that the Child understands the purpose of the interview, how the information he provides will be used, whether he can request an Attorney, and whether he is obliged to answer the questions.*

*Before making substantive representations on the record, the Attorney shall obtain a full understanding of the Child's background and the circumstances of his arrival in the United States.*

## 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. While options often are limited in a detention setting, whenever practicable, the Attorney should consider the following: the setting and environment of the interview space; the Child's age and development; the Child's cultural norms; the presence of other qualified professionals or a trusted adult for the Child; the provision of child-appropriate activities or tools to facilitate the Child's ease and communication; aides the Attorney can employ to engage the Child (e.g., toys, snacks); and the Attorney's dress. For a full list of suggested activities, see Appendix. 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, engaging in alternative activities such as drawing or playing with a toy while discussing their cases may facilitate communications. 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 X.B.4 Comments *infra*.<sup>40</sup>*

## 3. Interpreter/Translator

**Rule:**

- a. When the Attorney does not fluently speak the Child's best 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 facilitate the use of an interpreter/translator.
- b. The Attorney should ascertain the interpreter/translator's background to ensure impartiality.
- c. The Attorney shall ensure, to the extent she is able, the following: that the interpreter/translator is fluent in both English and the Child's best language and dialect; and that she<sup>41</sup> 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 she 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; that the interpreter communicates well with Children in general, and, where applicable, with traumatized Children; and that the interpreter employs direct speech.<sup>42</sup>
- d. As noted, upon a 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 both the Attorney and the interpreter/translator to maintain confidentiality of the information. If possible, the interpreter/translator should sign a confidentiality agreement in the presence of the Child. See Rules V.A.1.i 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 best language and 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 her remarks to the interpreter. The interpreter should communicate in the first person, avoiding the tendency to use the third person. The Attorney should guard against the interpreter influencing the conversation by mistranslating, summarizing, or omitting selected sections of what is said, or by 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.<sup>43</sup>

#### **D. COORDINATION WITH THE CHILD ADVOCATE (IF APPOINTED)**

**Rule:**

1. Where a Child Advocate has been appointed, the Attorney should keep the Child Advocate informed as to the Child's progress throughout the immigration process and the possible consequences of different legal strategies, provided that such communication is consistent 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 Child Advocate with timely notice of all proceedings.
2. When a Child Advocate is appointed, the Attorney may choose to utilize the Child Advocate's expertise in ascertaining those facts relevant to the Child's Best Interests in the United States. Such information may include facts pertaining to the Child's life in his home country and/or last habitual residence, 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. The Attorney shall not share any information with the Child Advocate without first obtaining the Child's consent. The Attorney should consider any Best Interests recommendation made by the Child Advocate. *See* Rules VI.B.1 and VI.B.7.d *infra*.
3. In certain circumstances, an Attorney may seek the appointment of a Child Advocate. These circumstances may include a Child who is unable to express a legal interest or a Child who is unable to assist the Attorney in pursuing a legal interest.
4. The Attorney should also seek the Child Advocate's recommendation on whether it is in the Child's Best Interests to voluntarily depart from the United States or to apply for relief from removal, and whether the Child's Custody, placement, or release continues to be in his Best Interests. *See* Rule VI.B.1 *infra*. However, the Attorney is not bound to agree with or act in accordance with such recommendations because the Attorney's primary role is to give effect to the client's expressed wishes and promote the client's legal interests both in the short term and long term. *See* Rule V.A.1.d *supra*.<sup>44</sup>

## **VI. CHILD ADVOCATES AND THE BEST INTERESTS OF THE UNACCOMPANIED CHILD**

### **A. CONSIDERATION OF THE BEST INTERESTS OF THE UNACCOMPANIED CHILD**

**Rule:** Each government actor shall consider a Child's Best Interests as part of each decision along the continuum of a Child's care—from apprehension, to Custody, to release, to a decision on the Child's legal claim, including the possibility of repatriation. The decision-maker shall consider the Best Interests of the Child in a manner consistent with existing immigration law.<sup>45</sup>

### **B. THE ROLE OF THE CHILD ADVOCATE**

**Rule:** When appointed to serve an Unaccompanied Child, a Child Advocate shall advocate for the Best Interests of the Child.



## 1. Appointment

**Rule:** The Child Advocate shall be appointed by HHS, or another appropriate agency that is disinterested in the outcome of the Child's Immigration Adjudications, for child trafficking victims and other vulnerable Unaccompanied Children to provide recommendations about the Child's Best Interests with respect to Custody, care, placement, release, permanency, and repatriation.<sup>46</sup>

## 2. Powers

**Rule:** The Child Advocate shall have:

- a. 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;
- b. the right to review all records and information necessary to effectively advocate for the Best Interests of the Child that are not deemed privileged or classified;<sup>47</sup>
- c. the right to obtain independent evaluations of the Child, including, without limitation, psychological and medical evaluations;
- d. the right to be present at all hearings and interviews involving the Child (other than interviews between the Attorney and child); and
- e. the right to submit Best Interests recommendations for consideration by any individual including, but not limited to, immigration judges, DHS and ORR officials, Attorneys, and state court judges.

## 3. Qualifications

**Rule:** A Child Advocate should be:

- a. a child welfare professional, including, but not limited to, lawyers and graduate-degree level social workers; and
- b. 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. If a Child Advocate is not an attorney, the Child Advocate's work must be supervised by an attorney with experience in immigration law or child welfare law while Children are in, or face the prospect of being placed in, adversarial court proceedings.

## 4. Training

**Rule:** For all persons serving as Child Advocates, the appointing Custodial Agency should provide, or cause to be provided, professional training as set forth in Rule IV *supra*.

## 5. Independence

**Rule:** The Child Advocate must be independent, in that the agency overseeing the Child Advocate does not provide any other service or offer any benefit to Unaccompanied Children, including, but not limited to, legal services, care provider (shelter/facility) services, post-release services, home studies, etc., so as to avoid a conflict of interest.<sup>48</sup> Appointment of the Child Advocate is not a substitute for the representation of an Attorney for the Child, nor vice versa.

## 6. Confidentiality

**Rule:** The Child Advocate shall keep communications with the Child confidential except where the Child Advocate determines that the sharing of information is required to ensure the Child's safety or to otherwise serve the Child's Best Interests. The Child Advocate shall not be compelled to testify or otherwise provide evidence in any proceedings concerning information received from the Child in the course of serving as the Child Advocate.<sup>49</sup>

## 7. Duties

**Rule:** The Child Advocate shall, as appropriate:

- a. meet and speak with the Child on a regular basis;
- b. explain her role to the Child in a Developmentally Appropriate manner and explain the difference between a Child Advocate and a Child's Attorney;

- c. investigate the facts relevant to the Child’s presence in the United States, including, but not limited to: the facts pertaining to the Child’s country of origin and/or last habitual residence; the 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; and any other factors relevant to the Child’s Best Interests per Rule III.D *supra*;
- d. identify the Child’s Best Interests as needed at all stages of the continuum of the Child’s care from apprehension, to Custody, to release, to a decision on the Child’s legal claim, including the possibility of repatriation;
- e. advocate for the Child’s Best Interests by submitting a Best Interests recommendation to the relevant decision-maker, including, but not limited to, the Custodial Agency, the Attorney, the immigration court, and/or immigration officials;
- f. ensure that the Child understands information provided by others, including the placement where he lives; access to legal representation; his rights and responsibilities; the processes and procedures of Immigration Questioning and Immigration Adjudication, and any determinations made therein; and to whom the Child can formally voice complaints;
- g. where necessary, inform the Child’s Attorney of any violations of the Child’s rights at his placement; and
- h. if she has reason to believe that the Child’s Attorney is involved in unethical or criminal conduct that affects the Child, report the same to appropriate licensing or prosecutorial authorities.

## 8. Termination of Appointment

**Rule:** The Child Advocate shall carry out the duties described above until and unless one of the following occurs:

- a. the duties are completed, ensuring the Child is safe and stable;
- b. the Child departs the United States;
- c. the Child is granted permanent resident status in the United States;
- d. the Child attains the age of 18;
- e. the Child is placed in the Custody of a parent or legal guardian; or
- f. the Child Advocate is relieved of her duties by the Custodial Agency which appointed her.

**Comments:** *The Child Advocate 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 the United States, a Child Advocate 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 Child Advocates 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 Child Advocates, see Rule IV *supra*.) The disinterested agency, which appoints the Child Advocate, may make the appointment itself or may delegate or contract its authority to another entity, provided that such entity is itself also disinterested. To avoid any real or perceived conflicts of interest, the Child Advocate must not be an employee of the Custodial Agency or of any third party with whom the Custodial Agency contracts to care for Unaccompanied Children, nor should the Child Advocate also be the Child’s Attorney. The Child Advocate is not a substitute for an Attorney for the Child, nor vice versa, because the purpose of appointing a Child Advocate is to ensure that the Best Interests of the Child are identified and communicated, while the role of an Attorney is to serve the expressed wishes and legal interests of the Child.*

## VII. STANDARDS FOR THE CUSTODY, PLACEMENT, AND CARE OF UNACCOMPANIED CHILDREN

### A. GENERAL POLICY FAVORING RELEASE AND FAMILY REUNIFICATION

#### Rule:

1. There is a presumption that release from Custody 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 in Rule VII.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 Removal 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 departure or removal; (3) to encourage the Child to forego any legal rights; (4) to facilitate interrogation of the Child; or (5) for administrative convenience.<sup>50</sup>

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 care of the Child, but who face considerable obstacles in coming forward and/or proving their relationship with the Child, not the least of which is potentially subjecting themselves to the 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, federally prosecute, or 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 to that individual.<sup>51</sup>

### B. APPROPRIATE PLACEMENT AND CUSTODY

#### Rule:

When release is not possible, for any period during which the Child must remain in Custody, 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, gender, gender identity, gender expression, and Special Needs.
2. A Child seeking release to a parent should be placed in the least restrictive setting closest to that parent. When a Child has been apprehended after living in the United States, the Child should be placed in the least restrictive setting closest to his former community. To the extent possible, a Child should be placed in a setting closest to the location where he is most likely to be released.
3. No Child shall be housed with adults in a short-term Temporary Placement Facility, with the exception of an Adult Family Member whose relationship has been confirmed and where such is in the Best Interests of the Child.
4. No Child shall be housed in a secure facility or criminal detention center except as set forth in Rule VII.G.2 *infra*.
5. No Child shall be placed in an adult jail, secure facility, criminal detention center, or any other setting in which he is held with adults.
6. No Child shall be placed in a jail, secure facility, or criminal detention center for children who have been charged or adjudicated delinquent.

7. To the extent possible, Children shall be placed in small, non-secure, community-based programs. 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 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 by 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 developments and best practices in state child welfare programs, Unaccompanied Children should not be placed in large, institutional settings. These programs have been overwhelmingly eliminated within the child welfare system in favor of small group or Foster Care placements based in the community where children have much greater liberty and are integrated into the local community, including schools.

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 availability of a Child Advocate; (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 best 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. For example, if a Child is transgender, considerations as to care and Custody should be aligned with recommendations of reputable medical associations like the American Pediatric Association.<sup>52</sup>

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 exploitative activity, nor shall the 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.<sup>53</sup>

For their safety, Children shall not be housed in Detention Facilities that also house adults. Studies demonstrate that Children so housed are more likely to commit suicide and to be physically or sexually assaulted.<sup>54</sup> (One exception to the foregoing occurs where a Child has been apprehended with a non-parent relative with whom he has a strong relationship and where it is in the Child's Best Interests to be housed with that relative.) Similarly, Children should not be housed in Detention Facilities that also house juveniles accused of being or that have been 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 temporary commingling of Children with adults, Children who have been charged with or convicted of crimes, and juveniles who have been adjudicated delinquent.<sup>55</sup>

## C. INITIAL APPREHENSION AND EXPEDITIOUS PROCESSING<sup>56</sup>

### 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 best language and, where applicable, dialect, that he has the right to contact his parents and his consulate. Under the TVPRA, the Immigration Enforcement Agency must screen a Child from a contiguous country (*i.e.*, Mexico and Canada) within 48 hours. The Immigration Enforcement Agency may return the Child to his country of origin upon finding that 1) the Child has no fear of return to his country of nationality or last habitual residence based on a fear of persecution; 2) the Child has not been a victim of trafficking and runs no risk of being trafficked if returned; and 3) the Child is able to make an independent decision to withdraw his application for admission.<sup>57</sup> If this determination cannot be made within 48 hours, the Child must be transferred to ORR Custody. Once a Child is processed for Removal Proceedings, 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 and other legal relief; (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, reunification procedures and information on alternatives to detention; and (h) information on his rights while in detention and before transfer, including the basic necessities described in Rule VII.C.3 *infra*. 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. Whenever feasible, the Child should be allowed to remain with siblings and Adult Family Members consistent with the Child's Best Interests and federal law.<sup>58</sup>

### 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 any claim or suspicion 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 in Rule VII.H.4 *infra*.<sup>59</sup>

### 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 and/or to endure extreme temperatures; denied adequate privacy, access to restrooms, and/or essential hygiene products; and provided 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 or is suspected 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 III.H *supra*. 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. Suspicion that a Child is over 18 should be individualized, and specific to the Child, and not based on the Child's country of origin, ethnicity, religion, or membership in any other group.
- 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. 579 (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 a Child Advocate. 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 Agency 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 VII.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 satisfy the principles of *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (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*

*Removal Proceedings (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.*<sup>60</sup>

## 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 parent 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 Rule VII.C.6.a-b *supra* of the results of the individualized age determination; the determination of appropriate detention, if applicable; and the Child's rights set forth in Rule VII.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 immediately, and in any event within 24 hours, unless the Child withholds consent. 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.
- e. Any use of psychotropic medication must be consistent with state and federal law.

**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 care 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 likely 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 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.*<sup>61</sup>

## 7. Monitoring and Reporting

**Rule:** The apprehending Immigration Enforcement Agency shall complete and maintain documentation with respect to each Child, his apprehension, temporary placement, processing, and all instances of transfers to a Custodial Agency responsible for care and Custody. Such documentation should be available to the Child, his Attorney, his Child Advocate, 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 or Foster Care setting where a Child is placed, a complete and secure record must be maintained that details relevant information about the Child's care. The Custodial Agency shall maintain up-to-date records on all Children. 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; any family members with whom the Child was traveling when apprehended; the date the Child was placed in Custody; the date of each placement at a new Detention Facility or Foster Care setting, removal from a Detention Facility or Foster Care setting, or release from Custody; the name of the person or persons with whom the Child was placed, and the names of the Detention Facilities or Foster Care settings 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 or Foster Care was delayed, and justifications for overdue placements. The apprehending Immigration Enforcement Agency should also monitor and document in each Child's file the location and type of his temporary placement, the length of time he remained there, and if transfer was overdue in violation of Rule VII.C.2 *supra*, or, if the exception in Rule VII.C.2 *supra* 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 Child Advocate, the entity or individual with whom the Child is placed, and the Custodial Agency charged with Custody, placement, and care of the Child. The Child or his Attorney shall be provided with an opportunity and a procedure to object to the release of the Child's records to any of these entities. Other than to facilitate notification of release, the Child's records should not 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.<sup>62</sup>

## D. PARENTS' AND OTHERS' RIGHTS TO CUSTODY OF THE UNACCOMPANIED CHILD

**Rule:**

1. In accordance with the presumption in favor of family reunification set forth in Rule VII.A *supra*, the Custodial Agency shall release a Child from Custody and place him with one of the following individuals in the United States, listed in order of preference, provided that none of the circumstances listed in Rule VII.D.2 *infra* exist:
  - a. a parent;
  - b. a legal guardian; and
  - c. another Adult Family Member.

2. The Custodial Agency may deny release of the Child only if the presumption in favor of a parent, legal guardian, or other Adult Family Member is overcome because the Custodial Agency possesses a reasonable basis to believe one or more of the following circumstances exist: the purported parent/legal guardian/Adult Family Member is not in fact the Child's parent/legal guardian/Adult Family Member; the parent/legal guardian/Adult Family Member is not willing to take care of the Child; or the parent/legal guardian/Adult Family Member is not fit.
3. If a Child is not released to a parent/legal guardian/Adult Family Member, 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 exploitative 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 is not disqualified by Rule VII.D.2 *supra*, is designated by the parent or legal guardian in writing as appropriate to care for the Child, and with whom the Child consents to live; or
  - b. another adult individual or entity in the United States who is not disqualified by Rule VII.D.2 *supra*, and with whom the Child consents to live.

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/legal guardian/Adult Family Member 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 Interests. 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 or her 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/legal guardian's/Adult Family Member'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/legal guardian/Adult Family Member shall have the right to file a grievance with an independent entity with the authority to investigate and require a decision from the Custodial Agency.
6. The parent/legal guardian/Adult Family Member shall have the right to an independent review of a decision denying release of a Child to him or her. This review shall satisfy due process requirements. If the parent/legal guardian/Adult Family Member exercises this right to review, the Custodial Agency bears the burden of persuasion that release to the parent/legal guardian/Adult Family Member was not suitable and that the Custodial Agency complied with Rule VII.D.4 *supra* in making this determination.



7. If the parent/legal guardian/Adult Family Member is dissatisfied with the outcome of the independent review, *de novo* review may be sought in federal court.
8. Where the Child is released to a parent/legal guardian/Adult Family Member, 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 Safe Release process. See Rule VII.E *infra*.

**Comments:**

*Release to parent, legal guardian, another Adult Family Member, or others.* This Rule is meant to encourage the reunification of families, where possible, and to minimize the number of Children detained in Custodial Agency Detention Facilities or Foster Care. A preference for family unity and for the safety and stability of the Child shall be the primary criteria for determining placement of the Child. A reasonable basis to believe that an applicant 1) is not in fact the Child's parent/legal guardian/Adult Family Member, 2) is not truly willing to care for the Child, or 3) is unfit to take the Child should be the only basis for denying release of the Child to the parent/legal guardian/Adult Family Member. Because the parent's/legal guardian's/Adult Family Member's financial condition or immigration status is not determinative of the integrity of the family unit or the safety of the Child, it shall not be a criterion by which to determine with whom the Child is placed.

The Child's desire not to be placed with a parent/legal guardian/Adult Family Member alone is not a sufficient basis on which to deny release to the parent/legal guardian/Adult Family Member. If a Child asserts that the parent/legal guardian/Adult Family Member is unfit, that person's fitness should be determined by the Custodial Agency in a manner consistent with the laws of the state in which the Child is detained. Indeed, a Home Study with respect to a potential release should be conducted only where there is compelling evidence that 1) living with the parent/legal guardian/Adult Family Member 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/Adult Family Member is unfit, or as otherwise provided in Rule VII.E.2 *infra*.

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 the Immigration Enforcement Agency's duty to enforce relevant immigration law being considered, the Custodial Agency shall give consideration to this criterion only with respect to a requested release to individuals and entities other than the parent/legal guardian/Adult Family Member. 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/legal guardian/Adult Family Member. 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 or Foster Care.

This Rule recognizes that a parent's citizenship or legal immigration status is irrelevant to the integrity of the family unit and to the Best Interests of the Child. Children should never be used as "bait" to apprehend family members or other individuals when they seek placement of or contact with the Child for the purpose of initiating deportation proceedings against such family members or others.

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 placement of the Child with them.

*Timely determination whether to release.* Because of the severe implications of a prolonged placement determination or a denial of release, the parent/legal guardian/Adult Family Member 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 Civil Aspects of International Child Abduction, to which the United States is a signatory, determinations should be made within six weeks.*

*Review of denial of release. This Rule governs the right of the parent/legal guardian/Adult Family Member to the review of a decision denying release of a Child to him or her. The Child's right to appeal a denial of release is addressed in Rule VII.F infra. Judicial review under Flores historically has 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, is essential. This party should also be charged with evaluating the claim of a parent/legal guardian/Adult Family Member regarding the expeditiousness of placement determinations and with enforcing penalties. Nothing in this Rule is intended to eliminate judicial review of these matters under Flores.<sup>63</sup>*

## **E. RELEASE OF THE UNACCOMPANIED CHILD: SAFE RELEASE PROCEDURES AND NOTICE OF RIGHTS AND RESPONSIBILITIES**

### **Rule:**

- 1. Background Checks.** Background checks should be conducted promptly and, whenever feasible, upon all Sponsors. Such checks should never be shared with the Immigration Enforcement Agency.
- 2. Home Study.** A Home Study with respect to a potential release should be needs-based and adhere to best practices in child welfare. A Home Study should only be conducted 1) where there is compelling evidence that living with the potential Sponsor 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 potential Sponsor is unfit; 3) at the request of a clinician or case manager; or 4) at the request of the Child, the Child Advocate, or the Child's Attorney. Such Home Studies should be conducted swiftly and thoroughly by caseworkers who have expertise in child welfare and cultural awareness and who exercise independent judgment. Follow-up Home Study visits should be permitted when a change in circumstances or additional relevant information is provided to the Home Study provider. Such Home Studies should never be shared with the Immigration Enforcement Agency. Except in the event of an emergency, defined for this Rule as a natural disaster (e.g., an earthquake or hurricane), the Home Study should begin within the 72-hour placement period and should conclude within six weeks of initial apprehension.
- 3. Post-Release Case Management Services.** Post-release case management should be offered to every Child and Sponsor. Post-release case management services should be individualized and community-based services, which are trauma-informed, permitting a more flexible and tiered approach based on the Child's and family's needs. Such services should focus on family preservation, ensure the Child's safety, facilitate the location of legal representation, educate the Child and Sponsor on their legal obligations, make referrals to culturally and linguistically appropriate medical and mental health providers, and facilitate enrollment in school.
- 4. Notice of Rights and Responsibilities.** Upon the release of the Child, the Custodial Agency should inform him, both orally and in writing in his best 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 Adjudication), as well as the roles of a Child Advocate and an Attorney.

***Comments:** Background checks are necessary to avoid the release of Children to smugglers, traffickers, or abusive Sponsors, and should be performed to comply with safety and suitability requirements in federal law.<sup>64</sup> The type of background check employed should vary depending*

on the Sponsor's verified relationship to the Child and initial indications of suitability. A Sponsor who has been confirmed to be the Child's parent should be presumed to be a fit parent who will act in the Best Interests of the Child in accordance with U.S. Supreme Court jurisprudence,<sup>65</sup> and should be subject to a limited background check. Non-parent Sponsors or others for whom concerns arise about their suitability as the Child's caregiver will likely require additional background checks.

Home Studies should always be conducted for a non-parent or legal guardian. Best practices among Home Study providers use a functional family model that looks to support the entire family by assessing the Sponsor's needs, determining whether the Sponsor understands his or her obligations under the conditions of release, and by assisting the Sponsor with safety plans for the Child. Home Studies should be conducted by outside providers (not Detention Facility Staff).

Post-release case management services support the Child and Sponsor and ease the transition to family life. Such services should be consistently provided for a significant time period, for example six months, to 1) ensure appropriate safety monitoring and intervention during the most critical period in the family reunification process, 2) minimize the risk of placement breakdown, and 3) support efforts to achieve positive long-term post-release outcomes. Such services should also be individualized based on the needs of the Child and Sponsor.

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 those who might seek to victimize or otherwise engage him in criminal, harmful, or exploitive activity. These interests must be balanced against the parents' constitutional rights and the Best Interests of the Child.<sup>66</sup>

## F. UNACCOMPANIED CHILD'S RIGHT OF APPEAL OF PLACEMENT

### Rule:

1. The Custodial Agency shall make ongoing efforts at family reunification. Once the Custodial Agency has made a decision that a Child will not be released to a particular individual, the Child has the right to seek reconsideration of the decision. The Custodial Agency must provide to the Child, the Child's Attorney, and the Child Advocate the records regarding the process for making the determination, the articulated cogent, specific reasons for the determination, and any evidence supporting the determination. The Custodial Agency must then also provide the Child, the Child's Attorney, and the Child Advocate with the opportunity to seek, and present evidence supporting, an alternative placement.
2. The Custodial Agency's duty to make ongoing efforts to achieve family reunification continues throughout a Child's placement. The Custodial Agency shall review secure placements at a minimum on a monthly basis to ensure that the placements remain warranted. 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 or Foster Care setting. The review shall satisfy due process requirements. The Child shall also have the right to request a bond hearing before an immigration judge. 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 VII.D and VII.E *supra* and Rule VII.H *infra* 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 a bond hearing or *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 right to receive a statement of reasons for the determination, to see the record, and to call and examine witnesses. The TVPRA mandates

that the placement of a Child in a secure facility shall be reviewed at least on a monthly basis.<sup>67</sup> The need for an independent review, discussed in the Comments to Rule VII.D.6 supra, in the context of the parent's/legal guardian's/Adult Family Member'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. A federal court has also held that a Child has a procedural right to a bond hearing before an immigration judge to review the basis of the ORR's Custody determination. 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 Juvenile Justice Standards. For the Child's right to appeal concerning the conditions of his Custody, see Rule VIII.A.3 infra.<sup>68</sup>

## **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 a Child with a parent, legal guardian, or other Adult Family Member, or already holds a Child's parent, legal guardian, or other Adult Family Member in its Custody, the Immigration Enforcement Agency should keep the Child and the parent/legal guardian/Adult Family Member together as a unit. The Immigration Enforcement Agency should make an individualized determination about, and apply a presumption against, detention. When detained, the Child and parent/legal guardian/Adult Family Member should be placed in the least restrictive setting appropriate to families and held for the shortest duration possible. In a Temporary Placement Facility that is also used to detain adults, the Child and the parent/legal guardian/Adult Family Member should remain together, provided that the Child is detained solely with the parent/legal guardian/Adult Family Member, unless such concurrent detention is operationally impossible or puts the security of the Child at risk. In that case, the parent/legal guardian/Adult Family Member and Child should be released from Custody rather than separated. The Immigration Enforcement Agency should not render children unaccompanied by separating them from parents/legal guardians/Adult Family Members due to lack of family detention space or for any other reason.

*Comments:* When Children are detained with adults, the Children are subjected to an increased risk of violence, criminal behavior, abuse, and coercion. Children shall only be placed in adult Detention Facilities with their parents or legal guardians where their safety is not compromised. In situations where concurrent detention would be operationally impossible or create a security risk for the Child, the Child and the parent/legal guardian/Adult Family Member shall be released. If the parent/legal guardian/Adult Family Member is not eligible for release, Custody of the Child should 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 VII.D supra.

*Federal courts have held that the protections afforded by Flores apply not only to Unaccompanied Children, but to accompanied children as well.*<sup>69</sup>

### **2. Selection of Appropriate Placement for Unaccompanied Children**

**Rule:**

- a. Once a child is deemed an Unaccompanied Child, 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. A Child shall not be placed in a secure Detention Facility unless a determination has been made that a Child poses a risk to self or others if less restrictive alternatives (including therapeutic placements) are available, and that placement must be reviewed every 30 days. The Child shall have the right to an independent review of the Custodial Agency's decision(s) that the Child be placed in a secure Detention Facility. The review shall satisfy due process requirements.
- c. Where the Child exhibits violent or criminal behavior that poses a danger to others or where the Child is at a demonstrated risk of harm from smugglers, traffickers, or others who might seek to victimize or otherwise engage him in criminal, harmful, or exploitative 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 paragraph 21 of the Flores Stipulated Settlement 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 an issue, according to INS officers. Such general language has, in the past, (1) allowed INS officers to place a Child in a secure Detention Facility 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 have been interpreted to grant too much discretion to DHS. The TVPRA has also incorporated the concept of the least restrictive setting and ensuring the Best Interests of the Child in all placement decisions.

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 VII.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.<sup>70</sup>

### 3. Procedure When a Child Turns 18 While in Custodial Agency Custody

**Rule:** When a Child turns 18 while in Custody, the Immigration Enforcement Agency should release him on his own recognizance. If the Immigration Enforcement Agency does not authorize release, it must consider alternatives to detention or placement in the least restrictive setting.

*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, separation from primary caregivers, 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. Often, when Children in ORR Custody turn 18, ICE automatically transfers them to an ICE adult detention center. This is generally not an appropriate setting for a young person and violates federal law that requires the ICE Officer to consider placement in the least restrictive setting. A lack of such consideration has been held to violate federal law.<sup>71</sup>

## H. TRANSFERS OF UNACCOMPANIED CHILDREN

### 1. Prohibition on Arbitrary Transfers; Presumption Against Transfer

#### Rule:

- 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 Rule VII.B *supra*.
- 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 of or carrying of a weapon;
  - ii. the Child has committed a violent 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 based on an 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. However, circumstances sometimes exist under which a transfer may be in the Best Interests of the Unaccompanied Child, for example, a transfer to long-term Foster Care.<sup>72</sup>*

### 2. Notice Requirements

#### Rule:

- a. Prior to transfer, the Child and his Attorney shall be advised both orally and in writing, in the Child's best language and, where applicable, dialect, of the following:
  - i. the reason the Child 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 and Child Advocate 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 and Child Advocate 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 is 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 VII.E.1 supra.<sup>73</sup>

### 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 and that ORR has recognized in the ORR Guide: Children Entering the United States Unaccompanied. 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 deprives Children of basic necessities during transfer.<sup>74</sup>

#### 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, the latter two categories in both paper and electronic format; 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, and personal history and may be essential to him maintaining a sense of individuality, self-expression, and 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.<sup>75</sup>

#### 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 or gender identity 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 or gender identity.<sup>76</sup>

#### 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 INS/DHS pursuant to Flores. The concerns prompted by holding Children in Custody with adults apply equally to the context of transfers.<sup>77</sup>

#### 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 and the duration of the transport.

*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.<sup>78</sup>

## VIII. RIGHTS OF UNACCOMPANIED 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 Questioning, Immigration Adjudications, appellate 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 VIII.B.3 *infra*.
- c. Every Child shall be informed within 72 hours of apprehension, and in any event prior to the Child's initial meeting with his Child Advocate (if one has been appointed), 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 who is 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 in Rule VII.C.1 *supra*. The presentation should also include an explanation that the Child's communications with Detention Facility Staff, Foster Care parents and caseworkers, and Custodial Agency Staff are not confidential, an explanation that the Child has the 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. Attorneys, Legal Services Providers, interpreters, and Child Advocates (if one has been appointed) should be given sufficient access, but may be required to provide identification and submit to Detention Facility screening to exclude those who would present a danger to Unaccompanied Children.
- e. A Child in Custodial Agency Custody shall not be requested to, and may not, give consent to any immigration action, unless first afforded an opportunity to consult with an Attorney.

*Comments:* The participation of an Attorney on behalf of a Child subject to Immigration Questioning and/or Immigration Adjudication is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those matters. Ample in-person, telephonic, or video access therefore shall be provided. Once secured, the Attorney must promptly advise the Child and take actions necessary to protect the rights and legal interests of the Child. See Rule III.H supra. It should be noted that a Child's conversations with counselors and therapists contracted by the Custodial Agency or Detention Facility may not be treated as confidential or privileged. In contrast, a Child Advocate cannot be compelled to testify or provide evidence concerning information provided by the Child.<sup>79</sup>

## 2. Right to Information and Access to File

**Rule:** The Child, his Attorney, and his Child Advocate 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. Where such records are classified, the Child's Attorney should request access.

*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 DHS and HHS. 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.<sup>80</sup>

## 3. Procedures to Challenge Violations of the Rights of Children in Custody

**Rule:**

- a. Each Child in Custody shall have the right to challenge violations of his rights, including the denial or limitation of any rights set forth in these Standards.
- b. The Custodial Agency or Temporary Placement Facility shall establish a written grievance procedure to hear such challenges expeditiously, and a Child shall have the right to assistance by his Attorney or any other individual of his choosing in pursuing any grievance. The grievance procedure should include the right to appeal to a senior Custodial Agency or Temporary Placement Facility official. The Child shall also have the right to report the conditions to an outside agency or independent monitor.
- c. The Custodial Agency or Temporary Placement Facility shall provide each Child in Custody with notice of his rights while in Custody and of the grievance procedures to follow if his rights are violated.
- d. Detention Facility Staff and residents should be fully informed of grievance procedures.
- e. Retaliation for filing grievances should be strictly prohibited.

*Comments:* After appealing the conditions of his Custody to a senior Custodial Agency or Temporary Placement Facility 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 or his placement in immigration court, federal court, or before any other appropriate body. See Rule VII.F supra.<sup>81</sup>

## 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 or any individual of his choosing. 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, education, 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. 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., Rules VII.B and VII.G.1-2 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, Child Advocate, and parent or legal guardian. The Custodial Agency or Immigration Enforcement Agency should never use threats or promises regarding the Unaccompanied Child’s immigration case to influence his behavior.<sup>82</sup>*

*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.<sup>83</sup>*

## 2. Physical Condition and Operation of Detention Facilities

### Rule:

- a. *General Standard.* The Custodial Agency shall hold each Child in the least restrictive Detention Facility that is safe and sanitary and that protects 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, for example, 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 U.S. 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 in Rule VII.B supra, for his safety, a Child should not be housed in Detention Facilities that also house adults or children accused of being or adjudicated delinquent, except in the extremely limited circumstances set forth in Rules VII.B and VII.G.2.b supra.) 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 and hygiene products 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.<sup>84</sup>*

## 3. Right to Privacy

### Rule:

- a. *In General.* A right to individual privacy shall be honored regardless of the Detention Facility or Foster Care setting 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.
  - 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 Child Advocate. 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: 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 VIII.B.3.c.iv *infra*.
- iv. Reasonable quantities of the items listed in Rule VIII.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. *Interview Rooms.* The Custodial Agency shall ensure that interview rooms providing 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, Child Advocates, and others in meeting with Children.
- e. *Confidential Communications.* Every Child shall be entitled to confidential communications with Attorneys, Child Advocates, consular offices, media, mental and physical health professionals, and Government Oversight Agencies. To the extent that a Child's communication with medical professionals contracted by the Custodial Agency will not be kept confidential, the physician or clinician shall so inform the Child in advance of any substantive communication.
- f. *Medical Records.* A Child's medical records include both mental and physical health records. Such records are confidential and should not be shared with any person or entity including DHS for law enforcement purposes.
- g. *Privacy for Parenting Children.* The Custodial Agency shall provide private space for any Child who is also parenting his or her own child while in Custody.

*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.L.1 supra.) 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.<sup>85</sup>*

## C. SERVICES FOR UNACCOMPANIED CHILDREN

### 1. Language/Interpreter Rights

#### Rule:

- a. A Child shall have the right to communicate in his best language and dialect whenever he chooses. A Child therefore should not be discouraged from speaking in his best language and dialect to anyone, including other Children in Custody.

- b. A Child whose best language and dialect is not spoken by the Detention Facility Staff or Foster Care parents or caseworker shall have the right to the services of a trained, independent interpreter in his best language and dialect 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 best 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 best 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 best language and dialect should be determined upon his arrival at the Detention Facility or the Foster Care setting.

*Comments: The maintenance of the best language and dialect is a critical factor in retaining identity. Indeed, the Custodial Agency should in some circumstances assist Children in acquiring and maintaining proficiency in their best language and dialect. However, in the past, Children in detention have been disciplined for using their best language and dialect to communicate with other Children. This Rule will ensure that Children are encouraged to use and preserve their own language and dialect. Access to an interpreter is essential to assist Children in Detention Facilities and Foster Care settings that lack any personnel proficient in their best language and dialect to exercise the rights outlined in these Standards.<sup>86</sup>*

## 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 or Foster Care setting 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 and dialect by a licensed psychological professional who should then prepare an individualized psychosocial needs assessment 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 or Custodial Agency should prepare a written, individualized treatment plan specifying the objectives, timeframe, and means of treatment. When a licensed psychological professional finds that a Child should be seen by a psychiatrist, that Child should promptly be so referred and seen.
- ii. Where a Child is held in detention for more than 30 days, an individualized psychosocial needs assessment for the Child shall be reviewed and modified as necessary. The assessment shall specify short- and long-term treatment objectives. The assessment shall 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 shall be implemented and closely coordinated through an operative case management system.
- iii. Every Child in a Detention Facility or Foster Care 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 and reproductive health services and counseling.
- iv. The Detention Facility or Custodial Agency should have a written health policy that designates a health-care-providing agency employing pediatric or family practice

providers 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.

- v. The health-care-providing agency should direct to Detention Facility management or the Custodial Agency regular reports on the health of each Child in the Detention Facility or Foster Care, and should review each policy and program in the health care delivery system at least annually. The Child, the Child's Attorney, or the Child Advocate has the right to seek an independent medical or psychosocial opinion at any time with the Child's consent.
- vi. All Detention Facility personnel or Foster Care parents 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 a prompt referral to a local provider.

*Comments: This Rule is intended to enhance the medical care provided to Children in Custody. The health-care-providing agency shall employ pediatricians or family practice providers to ensure that the medical treatment provided offers both sufficient expertise concerning, and specific attention to, the needs of Children and, in particular, adolescent girls. Detention Facilities and Custodial Agencies should conduct training in personal hygiene as necessary as a preventive medical service. Such training should also include reproductive health and 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 and nutritional issues related to the Child's culture or country of origin and any relevant U.S. guidelines on health concerns. Trained, independent interpreters for physicians and psychologists should be provided as necessary and should not be Detention Facility Staff or Foster Care parents to preserve the Child's confidentiality. Special requirements for Children who have experienced sexual abuse or harassment have been established by federal law and regulation. The relevant federal regulations provide for access to reproductive health care in accordance with state laws and mandate that health care providers must engage the Child's Attorney in discussions.<sup>87</sup>*

#### 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 the Child gives informed consent;
  - B. where his parent/legal guardian gives informed consent;
  - C. in the absence of a parent/legal guardian, where the Child Advocate gives informed consent;
  - D. upon order of a court; or
  - E. 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. This includes the administration of any medication including psychotropic medication.<sup>88</sup>*

### 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 that 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 and Custodial Agencies shall provide Children with appropriate individual counseling sessions and group counseling conducted by trained social work personnel 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 and Custodial Agencies 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.

*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 or Foster Care setting is to resolve any mental health issues. A Child's mental health records are confidential and should not be shared without the consent of the Child. See Rule VIII.B.3.f supra. Appropriate placements for Children suffering from mental illness may be mental hospitals, counseling centers, psychiatric institutions, diversion programs, or other agencies that function as independent mental health facilities.<sup>89</sup>

The Custodial Agency, Attorney, Child Advocate, or anyone else with the ability to refer the Child for counseling or psychological therapy should initially consider 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 Child Advocate 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, support and follow-up are available for the Child, and methods that respect the Child's cultural norms are employed.<sup>90</sup>

### 3. **Right to Education**

#### **Rule:**

- a. A Child held in a Detention Facility or Foster Care setting should be afforded access to the educational institution, if any, which he attended prior to apprehension, if possible, or be immediately enrolled in an appropriate school or educational program adequate to his needs, including those necessary to address any physical, mental, or behavioral disabilities.

- b. Upon placement in a Detention Facility or Foster Care setting, 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 be provided the opportunity to earn academic credits that can be used for matriculation to the next grade level or to a more advanced educational institution. Documentation of such credits shall be provided to such educational institutions when the Child so requests.
- h. Every Detention Facility and Foster Care setting 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 best language and dialect 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 or Custodial Agency 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 that 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 and when in their Best Interests, 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. Should a Child not be afforded these opportunities, his Attorney should consider making a complaint to the U.S. Department of Health and Human Services Office for Civil Rights.<sup>91</sup>*

#### 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.*<sup>92</sup>

## 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. Appropriate footwear and other gear should be provided. 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, music, electronic technology, and television programming.*<sup>93</sup>

## 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. Children in Foster Care should have the opportunity to visit regularly with family and friends.
  - i. The Detention Facility and Foster Care setting should permit the Child to visit with his Attorney, Child Advocate, or other persons necessary for the representation of the Child, including, but not limited to, interpreters, paralegals, experts, and witnesses any day of the week, including holidays. Such visits should be permitted at any time during the period of at least eight hours a day discussed in Rule VIII.D.1.a.ii *infra*.
  - ii. Detention Facilities should have interview rooms for the Child to meet privately with his Attorney, his Child Advocate, other persons necessary for the representation of the Child, 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. The duration of visits should not be unduly restricted. Custodial Agencies should provide private space for interviews of Children in Foster Care.

- 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. The Custodial Agency should establish similar guidelines for Children in Foster Care.
- c. The Detention Facility or Custodial Agency may deny visitation to a Child in a Detention Facility or Foster Care 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 exploitative 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, the Child’s Attorneys, and other persons necessary for the representation of the Child. For example, the requirement that visits must be scheduled no less than seven business days in advance is unrealistic and prohibitively inconvenient for many Attorneys and family members.<sup>94</sup>*

## 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 a reasonable number, to a parent, legal guardian, other Adult Family Member, former caregiver, Attorney, or Child Advocate should be at the expense of the Detention Facility or Custodial Agency. Children who wish to have daily telephone contact with a parent, legal guardian, Adult Family Member, or former caregiver should be permitted to do so. Calls to Attorneys, Child Advocates, consular offices, media, mental and physical health professionals, and Government Oversight Agencies 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 or Foster Care setting.
- b. Certain correspondence, such as written communications between a Child and his Attorney, Child Advocate, government trial 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 or Custodial Agency 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 or Foster Care setting should have supervised access to the Internet, including no-cost email services if desired. Email correspondence to Custodial Agencies, Child Advocates, 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 or Foster Care setting.
- 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 Child Advocate, or his Attorney.

*Comments: The Detention Facility and Custodial Agency 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; where feasible, to leave Detention Facilities or Foster Care settings for visits to their homes and families; and to leave the Detention Facility or Foster Care settings to take advantage of educational, cultural, religious, vocational, and other opportunities in their locale. The Detention Facility and Foster Care setting 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 VIII.C.1.b supra provides for translation of correspondence that a Child not literate in English wishes to send.<sup>95</sup>*

### 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.
- e. Detention Facility and Custodial Agency personnel as well as Foster Care providers, shall receive regular training on respecting and accommodating the religious beliefs and practices of the Children.

*Comments: The Child's connection with his culture of origin must be preserved by permitting him to follow his religious practices. 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 can assist a Child to retain or regain cultural identity and normalcy. For these reasons, Detention Facilities, Custodial Agency personnel, and Foster Care providers should afford the Child broad religious rights. The Child's right to possess a reasonable number of religious objects is set forth in Rule VIII.B.3.c.iii supra.<sup>96</sup>*

### 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 Child Advocate 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 in Rule V.B.2 Comments supra.<sup>97</sup>*

## IX. REPATRIATION OF UNACCOMPANIED CHILDREN

### A. REQUISITE STEPS PRIOR TO A REPATRIATION DETERMINATION

**Rule:**

1. Unaccompanied Children shall consult with an Attorney regarding their legal rights, legal options, including seeking voluntary departure, the legal remedies available, and the implications and consequences of receiving a removal order or voluntary departure order, as well as to pursuing available legal remedies.

2. The Adjudicator shall consider:

- a. Whether repatriation is in the Child's Best Interests, including any recommendation by the Child Advocate, consistent with Rule V.D and Rule VI.B.6 *supra*.
- b. Information regarding the safety of the Child upon his return. In cases where a potential safety concern exists, a Child Advocate shall be appointed.
- c. Whether a family member or other appropriate caregiver is able and willing to care for the Child following repatriation. When safety concerns regarding the potential caregiver have been identified, the Adjudicator shall appoint a Child Advocate, who may request a Home Study. When no appropriate caregiver is available, the Child Advocate should so inform the child welfare officials of the Child's country and the least restrictive alternative care should be sought.

*Comments: A repatriation determination generally includes a removal order, a grant of voluntary departure, or the withdrawal of an application for admission in the case of a Child from a contiguous country, and other removal procedures. Unaccompanied Children sometimes seek voluntary departure because they believe that they have no other options; because they have been informed, sometimes incorrectly, that they will not be released from federal Custody while proceedings are pending; and/or because the prospect of long-term detention seems even worse than a return to unsafe, unstable, or detrimental circumstances. To ensure that a Child's decision regarding voluntary departure is truly voluntary, it is critical that he have an opportunity to speak with an Attorney about his legal options and rights and is informed of the implications of seeking and receiving a voluntary departure order. Repatriating a Child when not in his Best Interests can make the Child vulnerable to potential harm. Unaccompanied Children are extremely vulnerable to abuse or exploitation, by family members or by others. Therefore, appropriate caregivers must be identified prior to returning a Child to his country of origin. If concerns about past abuse are present, a Child Advocate can work with the Child and family to make Best Interest recommendations and determine if the risk of abuse remains. A Home Study enables an informed decision as to the level of risk a Child faces upon return and how to ensure his safety and protection.*

## **B. REQUISITE STEPS AFTER A REPATRIATION DETERMINATION**

**Rule:**

1. DHS shall consider the Best Interests and safety of the Child prior to the implementation of such determination.
2. The Child shall maintain the right to seek and receive consultation from an Attorney regarding the Child's potential legal options, including the right to seek to reopen his case to pursue previously unpursued legal remedies.
3. DHS shall inform consular officials from the Child's country of the impending repatriation as soon as possible following the removal or voluntary departure order to avoid unnecessary delays.
4. DHS shall provide information about the repatriation to the Child, the Child's caregiver in the country of origin, and the relevant government agencies in the Child's country of origin as soon as possible, *e.g.*, the Child's date of arrival and flight information, as well as any changes to the flight schedule or plans.
5. ORR shall coordinate with the relevant government agencies in the Child's country of origin to ensure proper care and attention and continuity of care upon return for the Child, in particular Children with Special Needs or particular vulnerabilities. ORR shall also communicate with the Child's family to provide accurate information about logistical details of repatriation.
6. DHS shall provide Children with Developmentally Appropriate information about the repatriation process and their rights from the determination of repatriation until their reunification with family or placement with another suitable caregiver.

7. ORR shall provide Children in its Custody with their records such as a copy of their legal records, school records, vocational or other skills training records, medical records, mental health records, identification documents, and any other relevant documents from the Child's time in the United States.
8. ORR shall provide Children who have been prescribed medication while in its custody with a 60-day supply of medication at the time of their return. Prior to the Child's return, ORR shall work with relevant government and civil society organizations in the Child's country of return to secure a follow-up medical appointment there after return.
9. DHS shall pay for the costs associated with voluntary departure for Children whether or not they are in federal custody.

*Comments: Consideration by ICE of the safety and Best Interests of a Child prior to implementation of a removal or voluntary departure order is consistent with the spirit of the TVPRA, as well as with section 1232(a)(5)(B) and (c)(iii) requiring assessment of country conditions prior to repatriation and a report to Congress on the same. Sometimes after a Child has received a voluntary departure order, the Child discloses harm suffered or feared in the country of origin that may qualify the Child for relief, or the Child may change his mind and decide to seek relief that he previously declined to pursue. Unaccompanied Children need to maintain access to an Attorney to receive legal consultation regarding these and other rights and options even following a grant of voluntary departure. Detained Children in removal proceedings are highly vulnerable and may experience a great deal of pressure or anxiety when making decisions about whether to pursue relief or seek voluntary departure. Those who seek voluntary departure and decline to seek legal relief for which they may be eligible, or who do not initially feel safe to disclose harm suffered or feared and later decide to pursue a motion to reopen to seek asylum or another form of relief, should not be penalized or subject to potential return to danger because they initially sought and received voluntary departure. Rather, they should be provided an opportunity to seek protection.*

*Repatriation is a disruptive and potentially traumatic experience for Children. Unaccompanied Children have more success in reintegrating into their families and communities if they are able to build upon the counseling, schooling, and services they have received while in the U.S. Receiving governments can better coordinate follow-up support and reintegration services if they are aware of education and services the Child has received while in the U.S. and what his plans and needs are post-return. When ORR shelter case-managers and government officials in the country to which the Child is returning do not provide consistent information to families regarding requirements to re-unify with a returning Child, the Child and family suffer unnecessary delays, expenses, and upset in the reunification process. Coordination to ensure consistency of information also ensures efficient and less traumatic family reunification.*

*The return process for Unaccompanied Children can be confusing and anxiety producing. Providing as much information as possible in a form that the Child can understand will help to alleviate anxiety, assuage uncertainty, and contribute to a smooth and less traumatic return process. This documentation is essential for successful reintegration, including continued medical care and re-enrollment in school without delay. It also helps to minimize duplication of services once the Child is returned to his home country. Children who have been diagnosed with and begun treatment for medical or mental health conditions while in the U.S. should have access to appropriate follow-up services prior to their return to ensure no adverse effects from a disruption in treatment, and to ensure that they will have access to on-going care.*

### **C. REQUISITE STEPS TO REPATRIATE AN UNACCOMPANIED CHILD**

#### **Rule:**

1. Children under the age of 12 as well as Children with particular vulnerabilities, such as those warranting appointment of a Child Advocate, and those with Special Needs, shall be



- accompanied during their travel by a child welfare professional or otherwise by a consular official from the Child's country, rather than by an immigration enforcement agent.
2. Unaccompanied Children under the age of 12 shall only be repatriated on commercial flights.
  3. Unaccompanied Children being repatriated on Justice Prisoner and Alien Transportation System (JPATS) flights shall be kept separate from unrelated adults.
  4. Children shall receive food, drink, and access to restrooms in a manner appropriate to their age throughout the repatriation process.
  5. Prior to leaving the Child in his country of origin, the U.S. representative who has accompanied the Child shall ensure that the Child is transferred to the designated official(s) from the agency or agencies responsible for receiving repatriated Children and reunifying them with their family.

*Comments: Unaccompanied Children identified to have Special Needs or to be of a sensitive age should be accompanied by an adult who is trained in how to care for children and address their anxieties during travel. In the event that a child welfare professional is unavailable, a Consular official from the Child's country of origin could accompany the Child. Commercial flights provide a more child-friendly atmosphere for younger Unaccompanied Children than flights through the Justice Prisoner and Alien Transportation System (JPATS). Unaccompanied Children returning to their countries of origin are highly vulnerable, and should be received directly by government entities to ensure that they are appropriately screened for safety and protection concerns and reunified with an appropriate caretaker.<sup>98</sup>*

## X. SPECIAL CONSIDERATIONS IN ADJUDICATION OF CLAIMS OF UNACCOMPANIED CHILDREN

### A. RIGHTS OF THE UNACCOMPANIED 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 an unduly lengthy Immigration Adjudication. 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.<sup>99</sup>*

#### 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 her are acting in accordance with the applicable rules of professional conduct. Where an Adjudicator is aware of unethical or criminal behavior on the part of any Attorney, she should report it to the proper authorities and should take whatever other action is necessary to ensure that the Child before her 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. 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.<sup>100</sup>*

#### 3. Right to Be Present and Free from Restraint

**Rule:** A Child shall have the right to be physically present at any Immigration Adjudication or

any other court proceeding involving the Child. It is the obligation of the Custodial Agency to ensure the Child's physical presence at any such proceeding. A Child shall not be shackled or otherwise restrained during any such proceeding, except in the rare circumstances where Custodial Agency personnel have demonstrated to the Adjudicator 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 Immigration Adjudication 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. In addition, the Child's Attorney faces the difficult choice of being present with the Adjudicator or with the Child. By contrast, when hearings are conducted in person, 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. While the Child being present is generally preferable, the Child has the right to choose to appear through technological means such as phone or video.*

*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.<sup>101</sup>*

#### 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, 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, development, degree of language proficiency, Special Needs, and other individual circumstances in order to ensure the Child's comprehensive and meaningful participation.<sup>102</sup>*

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

**Rule:** A Child whose best language is not English shall have the right to have any Immigration Adjudication relevant to the Child's immigration status fully interpreted into the Child's best language and dialect and to have a trained, independent interpreter physically present and available for the Child throughout any Immigration Adjudication 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 Immigration Adjudication. An interpreter should speak the Child's best language and dialect. A Child should be introduced to an interpreter before the hearing and given the opportunity to speak to the interpreter to develop a rapport.<sup>103</sup>*

#### 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 proceeding 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.*<sup>104</sup>

## 7. Right to Present Evidence

### Rule:

- a. In any Immigration Adjudication, 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.<sup>105</sup>

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

### Rule: In all Immigration Adjudications:

- a. The proceeding shall be recorded in full and preserved. 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 designed in part to prevent the 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.*<sup>106</sup>

## 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 timely comply 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.*<sup>107</sup>

# B. IMMIGRATION ADJUDICATIONS INVOLVING UNACCOMPANIED CHILDREN

## 1. Creation of a Children's Docket

**Rule:** Immigration Adjudications involving Children should be scheduled on a separate docket and prioritized over other Immigration Adjudications, 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 VII.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

### Rule:

- a. Immigration Adjudications involving Children shall never be conducted in adult Detention Facilities.
- b. The Child shall be physically present at any Immigration Adjudication unless it is better for the Child to appear through technological means such as phone or video.

**Comments:** *In some instances, the Child may live several hundred miles from the immigration court where he is due to appear. In such cases, the Child may elect to appear via technological means. See X.A.3 *supra*.*

## 3. Participants in Immigration Adjudications

### Rule:

- a. With the exception of the initial intake interview, an Immigration Adjudication 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 Immigration Adjudication concerning the Child. See Rule V.C.2 Comments *supra*.
- c. Child Advocates appointed pursuant to federal law shall attend and participate (as defined herein) in the Child’s Immigration Adjudication. See Rule VI.B.2.d *supra*.

**Comments:** *Consistent with ABA policy, “Immigration Courts should not conduct any hearings, including final hearings, involving the taking of pleadings or the presentation of evidence, before [the U]naccompanied [C]hild has had a meaningful opportunity to consult with counsel about [the C]hild’s specific legal options.” While the Rule recognizes that, in any Immigration Adjudication, a Child shall have an Attorney to protect his interests, some Children, after meaningful consultation with their Attorneys, may choose to proceed without counsel.<sup>108</sup>*

## 4. Child-Friendly Setting

### Rule:

- a. In order to facilitate a Child’s full participation at all stages of the Immigration Adjudication, 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 Adjudicator 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 Adjudicator should also consider whether the re-traumatization may be made worse by questioning about these events on more than one occasion.<sup>109</sup>*

## 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 Adjudicator 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 Immigration Adjudications for any purpose.<sup>110</sup>

## 6. Testimony of the Child

### Rule:

- a. In assessing the credibility of a Child's testimony, the Adjudicator shall consider the Child's 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 regarding 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 a smuggler 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 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 through a previously recorded statement, 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 therefore should not be considered in assessing the credibility of the Child in a later formal proceeding after he has received the advice of counsel.<sup>111</sup>*

## 7. Preservation of Evidence

**Rule:** All records of any Immigration Adjudication involving a Child, including exhibits, shall be preserved and kept confidential.<sup>112</sup>

## C. DETERMINATIONS OF COMPETENCY IN IMMIGRATION ADJUDICATIONS

**Rule:**

### 1. Standard

Where indicia exist that a Child lacks competency to participate in an Immigration Adjudication, the Adjudicator shall order an evaluation of the Child by a professional qualified in determining the competency of children in legal proceedings to determine the Child's competency. If the Adjudicator, after consideration of such an evaluation as well as other relevant information, determines that the Child is not competent, the Adjudicator shall not permit the Child to make decisions in the Immigration Proceedings.

### 2. Evaluation

The Child's competency shall be evaluated for four competencies: factual understanding of the proceedings; rational understanding of the proceedings; ability to consult and assist defense counsel; and decisional capacity.

**Comments:** *Not all Children lack competency to participate in an Immigration Adjudication merely because of their age. A careful evaluation must therefore be made by the Adjudicator. Assessing the four competencies articulated in this Rule can provide such an evaluation. Factual understanding of the proceedings includes the Child's capacity to understand the basic roles, duties, and interests of the participants in the adjudication; his rights in the adjudication; and the consequences of his various choices in responding to questioning, allegations of fact, and charges of removability, as well as seeking legal relief. Rational understanding of the proceedings includes an abstract ability to manipulate what the Child factually understands and to understand the implications of various choices. The ability to consult and assist defense counsel includes the capacities to both receive and to express communications with counsel about matters relevant to the adjudication; identify witnesses with relevant information; follow and comprehend testimony; and provide relevant testimony coherently and with independence of judgment. Decisional capacity contemplates an ability to act autonomously and direct a self-interested course of action, rather than cede decision-making to the Child's Attorney or others.*

*The BIA issued its first precedential decision on competency in Immigration Adjudications in Matter of M-A-M, 25 I. & N. Dec. 474 (BIA 2011), holding that respondents in Immigration Adjudications are presumed to be competent and, that if indicia of incompetency are present, the immigration judge must determine if the respondent is competent to participate in the proceedings employing a three-part test that includes whether the respondent 1) has a rational and factual understanding of the nature and object of the proceedings; 2) can consult with the Attorney or representative if there is one; and 3) has a reasonable opportunity to examine and*

*present evidence and cross-examine witnesses. Although the test in Matter of M-A-M provides helpful language for Children's cases, the circumstances of Children in Removal Proceedings require a stronger construct of analysis that takes into account Children's unique developmental context and capacities set forth herein.<sup>113</sup>*

#### **D. REVIEW OF A WAIVER OF RIGHTS**

**Rule:** After determining that a Child is competent to participate in an Immigration Adjudication, the Adjudicator shall not approve the Child's waiver of rights and remedies and acceptance of a removal order without first: 1) allowing the child to have a meaningful opportunity to consult with counsel about the child's specific legal options; 2) directly informing the Child of his right to a full hearing, if available, on all rights and remedies; and 3) determining, by speaking directly with the Child, that:

1. the Child factually and rationally understands the nature of the proceedings;
2. the Child understands his legal rights;
3. the Child understands the consequences of the waiver of rights and remedies and acceptance of a removal order;
4. the Child has agreed to forego all rights and remedies; and
5. the Child's acceptance is truly voluntary.

**Comments:** *In decisions involving the acceptance of a remedy or the waiver of a right, the Adjudicator must ascertain whether the Child has knowingly, intelligently, and voluntarily accepted the remedy or relinquished the right involved. In conducting this inquiry, the Adjudicator should consider that child development research suggests that the concepts of "knowing, intelligent and voluntary" are fluid prior to adulthood. An Adjudicator 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 Adjudicator 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.<sup>114</sup>*



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- 6 U.S.C. § 462
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## APPENDIX TO RULES IV.C AND V.C: ADDITIONAL TRAINING IN CHILD-SENSITIVE AND CULTURALLY APPROPRIATE INTERVIEWING TECHNIQUES

### 1. *Preparing for the Interview:*

- Understand the Child and Child background review:
  - Determine the Child's development based on his<sup>i</sup> age and cognitive capacity and consider how to interview accordingly.
  - Learn the Child's culture and how cultural factors may impact the interview. Be familiar with in-country risk factors and migration experiences of Children from the Child's country of origin. For example, for children from Northern Triangle countries [El Salvador, Guatemala, and Honduras], school attendance drops significantly at nine years of age; children from these countries also experience high levels of gang violence.<sup>ii</sup>
  - Review trauma-informed interviewing techniques.<sup>iii</sup> Understand how the cultural and migration experience informs the Child's mental health risk factors and trauma response. Anticipate possible reactions a Child may have and how to address them.
  - Discover if the Child has mental health or medical disabilities, or other Special Needs by contacting program Staff or family members prior to meeting the Child. If the Child has such issues, consider whether additional support or consulting with a specialist is needed and adjust the interview accordingly.
- Interpreter/Translator:
  - Determine if you will require an interpreter and/or documents translated.
  - If documents will be reviewed in an interview, be sure to provide them to the interpreter in advance.
  - Make sure the interpreter understands her responsibilities.
- Obtain a child-appropriate interviewing space:
  - Consider the location and environment of the space, the set-up of the furniture, and the manner in which best to ensure privacy in the space. For example, avoid barriers between the Child and the interviewer, and between the Child and the exit; consider child-sized furniture if available. Consider other alternative spaces or activities depending on what space is available and what setting will best put the Child at ease (for example, a play room, outdoor recreation area, etc.).
  - Consider providing toys and drawing materials. Determine in advance if such items may be brought into the Detention Facility.
  - Consider using emotional mapping tools and other illustrative materials to help the Child understand specific concepts or talk about events. For instance, body maps are often used so that Children can point to parts of a body to show where they have been hurt.<sup>iv</sup>
  - In a detention context, a private, child-appropriate interviewing space may be difficult to obtain. However, bringing resources with you is one way to make the space more child-centered. You may decide that sitting in a room on the floor or sitting side-by-side at school-room desks will be the best way to make the Child feel comfortable. For more secure areas, your only option may be to meet with the Child in his holding cell. No matter what space is initially offered, the Attorney should insist upon a setting in which the Child's privacy can be adequately guarded.
- Consider Attorney appearance, materials needed for the interview, and appropriate preparation:
  - Consider attire that may be more suitable to a child interview (for example, for younger Children, consider dressing more casually).

- Consider using tools and materials that do not interfere with the Child-Attorney interview (for example, avoid using a laptop or smartphone that may interfere with eye contact).
  - Bring the appropriate agreements/releases.
  - Take time to formulate specific questions as well as transition questions in advance, especially if abuse or another traumatic event is involved (for example, “Now we are going to talk about your time in border patrol detention. Can you tell me what happened when you first got there?” Or, “Let’s talk about the gangs in your home country. Can you share examples of where they would talk to you or your family members?”).
  - Take time to consider alternative explanations for statements or behavior by the Child that appear inconsistent or confusing.
  - Tailor the length of the interview based on child development, rapport, and the sensitive nature of content.
- Determine whether additional persons should be present in the interview:
    - Does the Child want a parent or other relative present? It is essential to ask the Child this question outside the parent’s or relative’s presence. The Attorney should also consider how this will interfere with confidentiality.
    - Should a social worker or paralegal be present in addition to the Attorney? In some cases where a traumatic event is being discussed, the presence of a social worker may be helpful. In other cases, additional support such as a paralegal to take notes may be useful so that the Attorney is free to be more engaged to talk and play, especially with a young Child.

## 2. *Beginning the Interview:*

- Introduce yourself:
  - Explain your responsibilities to the Child and distinguish your role from that of the immigration authorities, in a manner that the Child can understand. This should be repeated at every interview.
  - Provide an overview of what you will discuss.
  - Explain how the information that the Child provides will be used. (*See Confidentiality section below.*)
  - Use developmentally appropriate language and tools to help with this explanation.
  - Ask the Child to explain back his understanding of your role.
  - Introduce any other individuals in the room and their roles (for example, interpreters, observers, or social workers).
  - Consider a few preliminary conversational questions or observations to build rapport. (*See Rapport section below.*)
- Explain your documentation method:
  - Tell the Child about your method of documenting (for example, hand-written notes or recording the interview).
  - Explain how others, such as an interpreter, may also take notes and the purpose for this.
  - Offer the Child paper and a pen or crayons to take notes or draw if he would like.

## 3. *Establishing Ground Rules:*

- Explain confidentiality:
  - Determine whether the Child understands this concept, for example, by asking him to explain the concept back. Repeat this with every interview.



- Give examples of how confidentiality works. Tell the Child, for example, that if his mother asks you what he shared about his home life in [country of origin], you cannot tell his mother without his permission.
  - Explain that sometimes you may ask permission to share information. Explain when and how you might do that.
  - Explain when you may be required to disclose confidential information, for example, where the Child reveals that he may harm himself, has been a victim of child abuse at home or in a placement, plans to harm another, or intends to commit a crime. *See MODEL RULES OF PROF'L CONDUCT R. 1.16 (AM. BAR ASS'N 2016)* and your applicable state rules and statutes for mandatory reporting requirements.
    - Note: Social workers have their own professional rules of conduct. The Attorney should therefore ascertain what rules of conduct govern any social worker on her team and convey that information to the Child.
    - Note: Attorneys may always consult state ethics boards for guidance concerning their duty of confidentiality.
- Explain the difference between the truth and a lie:
- Ask if the Child understands the difference between the truth and a lie. Use age appropriate tools and questions. For example, when interviewing a Child in an office, ask the Child, “Where are you right now?” Allow the Child to answer, then ask, “If someone said that you’re in the park right now, would that be the truth or a lie?”
  - Ask the Child to promise to tell the truth. Tell him that it is important to tell the truth, not what he may think you or others want to hear.
  - Make sure that the Child understands the consequences of lying.
- Provide the Child with authority by telling him:
- That he may correct the Attorney if she misstates something;
  - That it is never wrong for the Child to say he does not remember or does not know the answer to a question, if that is the case;
  - That he may stop the interview whenever he likes, that he may ask if the interview will be over soon, that he can end the interview if he is tired and wants to stop, or that he can take a break if he likes;
  - That he may bring up topics not covered by the Attorney or ask additional questions; and
  - That he may ask the Attorney to talk to other individuals and provide permission for her to do so, about matters of concern to the Child. For instance, if the Child has a complaint about treatment in a facility, the Child can ask the Attorney to help him make a complaint.

#### ***4. Attorney Techniques and Ground Rules During the Interview:***

- Attorney interactions:
- Avoid leading the Child into thinking that the Attorney is the Child’s friend or parent.
  - Avoid stepping into the role of a therapist.
  - Avoid inappropriate reactions such as crying or scolding.
  - Be empathetic and provide counsel consistent with an attorney-client relationship.
  - Sit at eye-level with the Child and consider the power dynamics inherent in adult-child interactions.
  - Be aware that a Child often expresses 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.

■ The Attorney should be an active listener:

- Tell the Child you may ask additional questions to make sure you fully understand an event.
- Avoid interrupting the Child whenever possible.
- Avoid overly positive or negative responses to answers so as not to mislead the Child into thinking that there is a right or wrong way to answer.
- Affirm responses and ask follow-up questions. Use prompts and questions to elaborate whenever appropriate. Younger Children may need additional prompting, but guard against leading the Child.
- Use open-ended questions to facilitate the Child's response in the form of a narrative. Children who do not respond in this fashion may need additional time and conversational questions to build a rapport.
- Allow the Child to come to his own conclusions and solutions. While recommending a course of action is appropriate, do not tell the Child what he should do in his case.

■ Build rapport with the Child:

- When appropriate, attempt to first engage the Child in topics of interest to him (for example, discuss a hobby or what he did that day).
- While building rapport, avoid discussing details about the Child's relationship with family members as the Child may have experienced abuse at their hands.
- Try to have the Child provide an account of a neutral event (for example, ask the Child to describe the house he lived in or what he did in school that day), to help you understand the Child's ability to provide a sequence of events, the Child's language and pacing, and the Child's development.

### 5. *The Interview—Eliciting the Child's Story:*

■ Chronology:

- Begin with basic biographical information and build towards critical events.
- Be aware that the Child's account may be out of order, as children often discuss events in cyclical patterns or out of order based on their own emotional perception. Illustrative mapping tools may help guide the Child.<sup>v</sup>
- Children may need follow-up questions on time segmentation and sensory questions to fully elicit the event chronology.

■ Eliciting narratives of substantive issues:

- Formulating questions: Formulate questions ahead of time and review any factual information you may have (for example, I-213s, FOIAs, assessments, family reports, etc.). As noted, use open-ended questions to invite a narrative.
  - “Tell me about...”
  - “What happened next?”
  - “Tell me about when the gang member first approached you, where were you?”

You may need a transition statement to frame up a series of questions that reference a time or place for the information you are seeking.

- “Now we are going to talk about your trip through Mexico.”

- Eliciting details: Ask Yes or No questions or directed questions to ascertain specifics. For example, “Were there any other persons present when the gang member threatened you?” “Did [sponsor] know about the abuse by [family member] in the home country?” “Think about what the agent was wearing—was it a green or blue uniform?”
- Abuse/trauma: The Attorney should help focus the Child in describing the most recent incident of abuse/trauma, and then follow-up with time segmentation and sensory focus questions to elicit additional information, instead of asking how many times an incident occurred. For example, “You told me that a Border Patrol agent locked you in a cold room. Tell me about what happened before he took you to that room.” You may want to use emotional mapping tools, drawings, or other illustrative tools to facilitate discussion of these topics. For example, “Can you show me using this doll what part of the man’s body touched you?”
  - Note: The Attorney should be very careful not to re-traumatize the Child during such questioning. A social worker or other clinical professional should be employed whenever possible in eliciting details of traumatic events.
  - Note: *The Attorney should never ask the Child to show where on their own body they were hurt/abused. For younger children it may be easier for them not to talk about how they were abused but instead point to a part of a doll or use therapeutic illustrations.*
- Push/pull factors: A Child will usually have more than one reason for coming to the U.S. and for wanting to leave his country of origin. The Attorney should have this fact in mind when framing her questions to elicit a more complete answer.
- Fear in home country: Many Children have become acclimated or desensitized to violence. Asking Children if they are afraid to return to their home country may elicit a negative response. However, if the question is rephrased, the Child may express fear of death or other harm (for example, “Does anyone want to harm you in your home country? What do you think would happen if you returned?”).
- Trauma signs: Be alert for signs of anxiety and reluctance, such as aggression, sorrow, non-responsiveness, or apathy when discussing traumatic events. You should adjust your interview accordingly. This may include providing tissues, taking a break, getting some water, stopping the interview, getting help, or calling for emergency health services.<sup>vi</sup>

■ Breaks:

- Ask the Child if he needs a break during a lengthy interview.
- Remind the Child that he can ask for a break if needed and may also stop the interview and continue it another day.

■ Closing:

- Thank the Child for his time.
- Ask the Child safety questions (for example, “Who can help you if you are sick?”). Ask the Child if he would like referrals or suggest services to the Child for mental health issues, medical issues, or education when such needs are identified (depending on available resources). For released Children, be sure to provide information for the ORR Help Line.<sup>vii</sup>
  - Note: For many Children, mental health services or other medical services may not be the cultural norm. Be prepared to explain how these services can be helpful and can be utilized.
- Ask the Child if there is anything he would like to discuss and share before you end the interview.
- Ask the Child if he has any questions for you.

- Ask the Child if he would like you to do anything specific on his behalf. Be clear that you may not be able to help depending on the request.
- If necessary, ask the Child for permission to share some information he provided with specific individuals. See the Confidentiality section above; it may be necessary to review confidentiality basics with the Child. Complete the necessary consent and/or release of information forms.
- Provide the Child with the Attorney’s business card/contact information. Explain what other adults will also have the Attorney’s contact information.<sup>viii</sup>



## APPENDIX ENDNOTES

- i. Male and female pronouns are used for convenience only and are not meant to exclude others except where the context so indicates.
- ii. U.N. High Comm’r for Refugees (UNHCR), *Children on the Run, Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (Mar. 2014), <http://www.unhcr.org/en-us/children-on-the-run.html>.
- iii. National Child Traumatic Stress Network (NCTSN), *Screening and Assessment*, <http://www.nctsn.org/what-is-child-trauma/trauma-types/refugee-trauma/screening-and-assessment>; Lorna Collier, *Helping Immigrant Children Heal*, 46 *MONITOR ON PSYCHOLOGY* 3, 58 (2015), <http://www.apa.org/monitor/2015/03/immigrant-children.aspx> (discussing trauma’s impact on Children and treatment strategies). The Substance Abuse and Mental Health Services Administration defines the trauma-informed approach to the delivery of behavioral health services to include an understanding of trauma and an awareness of the impact it can have across settings, services, and populations. Such an approach involves viewing trauma through an ecological and cultural lens and recognizing that context plays a significant role in how individuals perceive and process traumatic events. The trauma-informed approach involves four key elements: (1) realizing the prevalence of trauma; (2) recognizing how trauma affects all individuals involved with the program, organization, or system, including its own workforce; (3) responding by putting this knowledge into practice; and (4) resisting retraumatization. See Substance Abuse and Mental Health Servs. Admin. (SAMHSA), 22 *SAMHSA NEWS* 2 (2014), [http://www.samhsa.gov/samhsaNewsLetter/Volume\\_22\\_Number\\_2/trauma\\_tip/key\\_terms.html](http://www.samhsa.gov/samhsaNewsLetter/Volume_22_Number_2/trauma_tip/key_terms.html).
- iv. The Lutheran Immigration and Refugee Service (LIRS) has an illustrated mapping exercise to help Children talk about their journeys in which Children can draw in their own experiences: [http://lirs.org/downloads/ABA\\_Poster\\_English\\_8.5x11.pdf](http://lirs.org/downloads/ABA_Poster_English_8.5x11.pdf) (English version) and [http://lirs.org/downloads/ABA\\_Poster\\_Spanish\\_8.5x11.pdf](http://lirs.org/downloads/ABA_Poster_Spanish_8.5x11.pdf) (Spanish version); see also ANNE WALKER & JULIE KENNISTON, *HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE* (AM. BAR ASS’N 3d ed. 2013).
- v. See *supra* note iv.
- vi. *Recognizing and Treating Child Traumatic Stress*, SAMHSA (2015), <http://www.samhsa.gov/child-trauma/recognizing-and-treating-child-traumatic-stress#signs>; Richard Mollica, *The New H5 Model, Trauma and Recovery: A Summary*, Harvard Program in Refugee Trauma (2014), [http://www.nasmhpd.org/sites/default/files/THE\\_NEW\\_H5\\_MODEL\\_TRAUMA\\_AND\\_RECOVERY.pdf](http://www.nasmhpd.org/sites/default/files/THE_NEW_H5_MODEL_TRAUMA_AND_RECOVERY.pdf); THE MENTAL HEALTH OF REFUGEES: ECOLOGICAL APPROACHES TO HEALING AND ADAPTATION (Kenneth E. Miller & Lisa M. Rasco eds., 2004); Inter-Agency Standing Committee (IASC), *Mental Health and Psychosocial Support in Humanitarian Emergencies* (2010), [http://interagencystandingcommittee.org/system/files/legacy\\_files/MHPSS%20Protection%20Actors.pdf](http://interagencystandingcommittee.org/system/files/legacy_files/MHPSS%20Protection%20Actors.pdf); NCTSN, *Refugee Trauma*, <https://www.nctsn.org/what-is-child-trauma/trauma-types/refugee-trauma>; Gulf Coast Jewish Family & Community Services (JFCS), *Information Guide*, <http://gulfcostjewishfamilyandcommunityservices.org/refugee/resources/information-guide/> (includes a compendium of guides and resources on refugee mental health).
- vii. The phone number for the ORR Help Line as well as information about services offered by the ORR National Call Center can be found at <http://www.acf.hhs.gov/orr/resource/orr-national-call-center>.
- viii. Child Welfare Information Gateway, *Interviewing*, <http://www.childwelfare.gov/topics/responding/iaa/investigation/interviewing/>.

## ENDNOTES

1. While most legal representatives of Unaccompanied Children are Attorneys, these Standards recognize that Children may be represented by others, including accredited representatives, law students, law graduates, or other reputable individuals as defined in 8 C.F.R. § 1292.1(a)(3). These Standards should also guide such representation by non-attorneys.
2. SUBCOMMITTEE ON BEST INTERESTS OF THE INTERAGENCY WORKING GROUP ON UNACCOMPANIED AND SEPARATED CHILDREN, FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN 5 (May 2016), <https://www.gcir.org/sites/default/files/resources/2016%20Young%20Center%20Framework%20for%20Considering%20Best%20Interests%20of%20Unaccompanied%20Children.pdf> [hereinafter FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN].
3. For example, VAWA of 2005, H.R. 3402, 109th Cong. § 822 (2005), protects a Child applying for Special Immigrant Juvenile Status from being compelled to contact his abuser. The TVPRA of 2008, 8 U.S.C. § 1232(c) (2)(A), expanded several provisions regarding the care and Custody of Unaccompanied Children, including asylum protections for Unaccompanied Children and eligibility for Special Immigrant Juvenile Status. The TVPRA of 2013, P.L. 113-4, which was passed as an amendment to VAWA, expanded protection for Unaccompanied Children, increased federal Foster Care for certain Unaccompanied Children, and ordered a study of border screenings.
4. Mary Beth Keller, Chief Immigration Judge, Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children (U.S. DEP'T OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW Dec. 20, 2017), <https://www.justice.gov/eoir/file/oppm17-03/download>; David L. Neal, Chief Immigration Judge, Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services (U.S. DEP'T OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW Mar. 10, 2008), <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Guidelines%20for%20Facilitating%20Pro%20Bono%20Legal%20Services.pdf>; Questions and Answers: Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children (USCIS June 10, 2013), <https://www.uscis.gov/sites/default/files/USCIS/Refugee,%20Asylum,%20and%20Int%271%20Ops/Asylum/ra-qanda-determine-jurisdiction-uac.pdf>; Donald Neufeld, Acting Associate Director of Domestic Operations & Pearl Chang, Acting Chief of the Office of Policy & Strategy, Policy Memorandum: Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions (USCIS Mar. 24, 2009), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/TVPRA\\_SIJ.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf); Dep't of Homeland Security, Policy Memorandum: Implementation of the Special Immigrant Juvenile Perez-Olano Settlement Agreement, PM-602-0034 (USCIS Apr. 4, 2014), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/April/perez-olano-settlement.pdf>; Dep't of Homeland Security, Policy Memorandum: Updated Implementation of the Special Immigrant Juvenile Perez-Olano Settlement Agreement, PM-602-0117 (USCIS June 25, 2015), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0624\\_Perez-Olano\\_Settlement\\_Agreement\\_PM\\_Effective.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0624_Perez-Olano_Settlement_Agreement_PM_Effective.pdf).
5. Carol Kuruvilla, *San Pedro Sula in Northwest Honduras Is the Murder Capital of the World*, N.Y. DAILY NEWS, Mar. 30, 2013, <http://www.nydailynews.com/news/crime/honduran-city-murder-capital-world-report-article-1.1303512>.
6. Robert Muggah, *It's Official: San Salvador Is the Murder Capital of the World*, L.A. TIMES, Mar. 2, 2016, <http://www.latimes.com/opinion/op-ed/la-oe-0302-muggah-el-salvador-crime-20160302-story.html>.
7. Dep't of Homeland Security, Press Release, DHS Update on the Situation Along the Southwest Border (Aug. 7, 2014), <https://preview.dhs.gov/news/2014/08/07/dhs-update-situation-along-southwest-border>.
8. UNITED STATES BORDER PATROL SOUTHWEST FAMILY UNIT SUBJECT AND UNACCOMPANIED ALIEN CHILDREN APPREHENSIONS FISCAL YEAR 2016, STATEMENT BY SECRETARY JOHNSON ON SOUTHWEST BORDER SECURITY (Oct. 18, 2016), <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>. The number fell in 2016 to just under 60,000. *Id.*
9. See Transactional Records Access Clearinghouse (TRAC), Syracuse University, *Juveniles—Immigration Court Deportation Proceedings: Court Data through March 2018*, <http://trac.syr.edu/phptools/immigration/juvenile/>. According to this data, current through July 2018, there are 414,724 cases of juveniles currently pending in the immigration court system. Of those pending cases, 207,519 Children are represented (50%), and 207,205 are unrepresented (50%).
10. *Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997), Stipulated Settlement Agreement ¶ 11 [hereinafter *Flores*] (“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.”); G.A. Res. 44/25, U.N. Convention on the Rights of the Child, preamble (Nov. 20, 1989) [hereinafter CRC] (“[T]he peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person . . . [and] [r]ecogniz[ed] that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration.”).

11. U.N. High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care*, ch. 2 (1994) [hereinafter UNHCR GPC] (Children have internationally-recognized human rights); European Council on Refugees and Exiles, *Position on Refugee Children*, Key Recommendations ¶ 1 (Nov. 1996) (“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.”). The United States is a signatory to the UN Convention on the Rights of the Child but is the only country that is not a party to the Convention. See [https://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en](https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en) (showing ratification status by country for the Convention). Generally, a signatory that has not ratified a convention has not consented to be bound by the convention but has an obligation to refrain from acts that would defeat the object and the purpose of the convention. See Vienna Convention on the Law of Treaties, *concluded on* May 23, 1969, Art. 2(1)(b), 18(a), 1155 U.N.T.S. 331, 333, 336.
12. Trafficking Victims Protection Reauthorization Act (TVPRA), 8 U.S.C. § 1232(c)(2)(A).
13. *Id.*; U.N. Convention on the Rights of the Child, *Gen. Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* (art. 3, para. 1) ¶¶ 71-74 (COMM. ON THE RIGHTS OF CHILDREN 2013) (well-being includes “basic material, physical, educational, and emotional needs”; “safety” includes protection from “all forms of physical or mental violence, injury or abuse . . . , sexual harassment, peer pressure, bullying, [and] degrading treatment,” in addition to protection from “sexual, economic and other exploitation, drugs, labour, [and] armed conflict,” among other things); FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN at 5 (acknowledging the Best Interests of the Child as “the foundational principle of child protection” and identifying the “widely accepted best interests principles: safety and well-being, child’s expressed interests, health, family integrity, liberty, development, and identity”).
14. TVPRA, 8 U.S.C. § 1232(c)(2)(A); FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN at 6 (envisioning “consideration of the best interests of the child from the moment the child is identified by federal officials as unaccompanied until there is a durable solution, *i.e.*, the child is granted the right to remain permanently in the United States or is safely repatriated to the child’s country of origin”).
15. CRC art. 3(1) (in all actions concerning Children, the Best Interests of the Child shall be a primary consideration); Hague Convention on the Civil Aspects of International Child Abduction, T.I.A.S. no. 11,670, 19 I.L.M. 1501, preamble (Oct. 20, 1980) [hereinafter Hague Convention] (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”); UNHCR, Reg’l Office for the U.S. and the Caribbean, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* 43 (2014), <http://www.unhcr.org/en-us/about-us/background/56fc266f4/children-on-the-run-full-report.html> [hereinafter *Children on the Run*] (providing an overview of challenges when interviewing Children, including that Children often provide information they have heard from someone else and may be more likely to give an answer that is safe and simple instead of volunteering all potentially relevant information).
16. *Plyler v. Doe*, 457 U.S. 202, 215 (1982) (holding that children of undocumented persons whose presence in the United States is not lawful are nonetheless guaranteed equal protection of the law under the Fifth and Fourteenth Amendments to the Constitution and, as a result, cannot be denied education because of their immigration status). Courts have upheld the constitutional rights of Unaccompanied Children, as well as other immigrants, in a variety of circumstances. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 701-02 (2001) (interpreting 8 U.S.C. § 1231(a)(6) to hold that detention for longer than a presumptively appropriate six-month period of resident undocumented persons violated their due process rights where there was no realistic chance that they would be deported, and therefore, the detention would be indefinite); *Lewis v. Thompson*, 252 F.3d 567, 569 (2d Cir. 2001) (“[C]itizen 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.”); *Wang v. Reno*, 81 F.3d 808, 817 (9th Cir. 1996) (“Whatever 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 *Plyler*, 457 U.S. at 210)); CRC art. 2 (“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her 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.”).
17. Exec. Order No. 13166, 65 Fed. Reg. 159 (2000) (requiring 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); ORR GUIDE: CHILDREN ENTERING THE U.S. UNACCOMPANIED § 2.3.4 (ADMIN. FOR CHILDREN & FAMILIES 2018), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied> [hereinafter ORR GUIDE] (providing an outline of the duties of the Child Advocate and advising when Child Advocates are necessary); CRC art. 12 (“States Parties shall assure to the child who is capable of forming his or her 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.”).
  18. *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984) (holding that an asylum applicant “must be furnished with an accurate and complete translation of official proceedings” and that “translation services must be sufficient to enable the applicant to place his claim before the judge”); ORR GUIDE § 3.2.2 (explaining that care providers must ensure that the Unaccompanied Child understands all documents given to him during orientation; if the Child is illiterate, the documents must be explained to him in his native tongue, and if no interpreter or translator is able to communicate with the Child, the caretakers must consult with relevant stakeholders to make an appropriate communication plan); CRC art. 40(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.”); G.A. Res. 45/113, annex ¶ 6, Rules for the Protection of Juveniles Deprived of their Liberty (1990), <http://www.un.org/documents/ga/res/45/a45r113.htm> [hereinafter UN RPJDL] (“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 whenever necessary, in particular during medical examinations and disciplinary proceedings.”).
  19. *See supra* note 1.
  20. TVPRA, 8 U.S.C. § 1232(a)(2)(B) (Children from contiguous countries can be returned to their country of nationality upon a set of determinations of an immigration officer); ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, preface (ABA 1996) [hereinafter ABA STANDARDS OF PRACTICE] (“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.”); *id.* § H-1 commentary (“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).”); JUVENILE JUSTICE STANDARDS, ANNOTATED *Standards Relating to the Juvenile Intake Function* § 2.13 (ABA 1996), <https://www.ncjrs.gov/pdffiles1/ojdp/166773.pdf> [hereinafter ABA JJS] (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); 6 U.S.C. § 279(b)(1)(A) (directing ORR 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); *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*, 457 U.S. at 210 (“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 and that if the juvenile’s family is unable to afford counsel, the Court will appoint counsel to represent the juvenile); CRC art. 37(d) (“Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance.”). Children who have legal representation have significantly different outcomes than Children without legal representation. WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 12 (2017), <https://fas.org/sgp/crs/homsec/R43599.pdf> [hereinafter UNACCOMPANIED ALIEN CHILDREN].

21. 6 U.S.C. § 279(b)(1)(I) (directing ORR to compile a list of entities available to provide guardian services to Children); ORR GUIDE § 2.3.4 (“Child Advocates are third parties who make independent recommendations regarding the best interests of a child.”).
22. Office of the Chief Immigration Judge, Friend of the Court Guidance (U.S. DEP’T OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW Sept. 10, 2014), *attaching* Office of Legal Access Programs & the Office of the Chief Immigration Judge, The Friend of the Court Model for Unaccompanied Minors in Immigration Proceedings (Sept. 10, 2014) <http://www.americanbar.org/content/dam/aba/administrative/immigration/UACFriendCtOct2014.authcheckdam.pdf>; *Opinion No. 628, May 2013*, 76 TEX. B.J. 653, 654 (2013) (“If the lawyer appointed as a ‘friend of the court’ for a minor does not intend to create a client-lawyer relationship with the minor, the lawyer must clearly define to the minor the role the lawyer intends to perform and such role cannot involve participating in the proceeding in any manner that would reasonably lead the minor to believe that the lawyer was representing the minor.”).
23. ABA JJS, *Standards Relating to Interim Status* § 10.7(A) (“A right to individual privacy should be honored in each institution.”); *id.*, *Standards Relating to Corrections Administration* § 7.6 (Children shall have the right to correspondence and liberal access to friends and family while detained); CRC art. 16 (“No child shall be subjected to arbitrary or unlawful interference with his or her privacy.”); *id.* art. 13 (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, annex ¶ 59 (juveniles shall have the right to communicate with family, friends, and other persons or representatives of reputable outside organizations).
24. 6 U.S.C. § 279(a).
25. *See, e.g.*, 8 C.F.R. § 1240.7(a) (“The immigration judge may receive in evidence any oral or written statement that 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. § 1240.10(c) (“The Immigration Judge shall not accept an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend.”); FED. R. EVID. 403 (evidence may be excluded where “its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence”). Attorneys should also be apprised of applicable and helpful case law. *See, e.g., Sandoval-Rubio v. INS*, No. 98-71394, 2000 WL 1523064, 246 F.3d 676, at \*1 (9th Cir. 2000) (successful suppression of alienage warranting termination of removal proceedings in illegal, race-based stop); *United States v. Lopez-Valdez*, 178 F.3d 282, 286 (5th Cir. 1999) (stating that “a vehicle may not be stopped simply because it is traveling on a road near the U.S.-Mexican border”); *United States v. Jiminez-Medina*, 173 F.3d 752, 754 (9th Cir. 1999) (explaining that reasonable suspicion must be individualized, it cannot be based on broad profiles that cast suspicion on entire groups); *Davila-Bardales v. INS*, 27 F.3d 1, 3-4 (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 Ponce-Hernandez*, 22 I. & N. Dec. 784, 785 (BIA 1999) (“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); *Matter of Wadud*, 19 I. & N. Dec. 182, 188 (BIA 1984) (stating that “the strict rules of evidence are not applicable in deportation proceedings”). Secondary sources can also yield helpful arguments and ideas for a Child’s Attorney. *See, e.g., Terry Coonan, Tolerating No Margin for Error: The Admissibility of Statements by Alien Minors in Deportation Proceedings*, 29 TEXAS TECH L. REV. 75 (1998) (immigration judges may not accept an admission to a charge of deportability of unrepresented Children under the age of 16 (8 C.F.R. § 242.16(b)), and the practice of admitting the same, but out-of-court, statement made to an immigration official is inconsistent with the rule and results in disparate treatment).
26. ABA STANDARDS OF PRACTICE § D-8 (“The child’s attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.”); ACTION FOR THE RIGHTS OF CHILDREN (ARC), *Foundations: Working with Children*, UNICEF 38 (Revision Version 2001), [https://www.unicef.org/violencestudy/pdf/ARC\\_working\\_with\\_children.pdf](https://www.unicef.org/violencestudy/pdf/ARC_working_with_children.pdf) [hereinafter ACTION FOR THE RIGHTS OF CHILDREN] (recommending an interviewing approach that includes introductions; confidentiality; simple language; a friendly, informal, and relaxed approach; adequate time; a non-judgmental attitude; and follow-up support after

the interview); *Children on the Run* at 43 (providing an overview of challenges when interviewing Children, including that Children often provide information they have heard from someone else and may be more likely to give an answer that is safe and simple instead of volunteering all potentially relevant information). The cultural context of the Child’s communication should also be considered. *See* ACTION FOR THE RIGHTS OF CHILDREN at 16 (“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.”); *id.* at 21 (“[C]hildren’s psycho-social well-being is inextricably bound up with that of their parents or other caregivers. . . . 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.”).

27. ABA STANDARDS OF PRACTICE § A-1; MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY HEARINGS § 1(c) (ABA Aug. 2011) [hereinafter MODEL ACT].
28. 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 or her 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 § A-1 commentary, A-3 (“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. . . . [T]he 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.”); MODEL ACT § 7(c) commentary (stating that “the lawyer shall advocate for the child’s counseled and expressed wishes” and “is not merely the child’s mouthpiece”); *id.* § 7(e) commentary (“Lawyers should be careful not to conclude that the child suffers diminished capacity from a client’s insistence upon a course of action that the lawyer considers unwise or at variance with the lawyer’s view.”); CRC art. 12 (“States Parties shall assure to the child who is capable of forming his or her 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.”); Katherine Hunt Federle, *Lawyering in Juvenile Court Lessons for a Civil Gideon Experiment*, 37 FORDHAM URB. L.J. 93, 110 (2010) [hereinafter *Lawyering in Juvenile Court*] (advocating for a client-directed lawyering model for Attorneys of children); Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. ON LEGIS. 331, 377-78 (2013) (recognizing a middle ground within the spectrum of an attorney’s determination of the child’s Best Interests and the child’s expressed wishes, “where the attorney gives the child a voice while realistically accounting for children’s limited cognitive and decision-making abilities”); Olga Byrne, *Promoting a Child Rights-Based Approach to Immigration in the United States*, 32 GEO. IMMIGR. L.J. 59, 93 (2017) (stating that “the child’s right to participate is only one side of the equation; the other is ‘adults’ evolving capacity and willingness’ to hear children, consider their perspective, examine their own attitudes, and work toward solutions that address children’s concerns”).
29. ABA STANDARDS OF PRACTICE § B-4 commentary (“A lawyer must remain aware of the power dynamics inherent in adult/child relationships . . . [and] needs to understand what the child knows and what factors are influencing the child’s decision.”); Dawn Hathaway Thoman, *Testifying Minors: Pre-Trial Strategies to Reduce Anxiety in Child Witnesses*, 14 NEV. L.J. 236, 255 (2013) (to ensure reliable testimony from a child witness or during an interview, because children require special communicative and interviewing techniques, the attorney should “1) build rapport and trust; 2) practice perspective-taking; 3) attend to nonverbal cues; 4) use props; and 5) enforce limits”).
30. 8 C.F.R. §§ 1003.101(a), 1003.102(r).
31. MODEL RULES OF PROF’L CONDUCT r. 1.14(a) & cmt. (AM. BAR ASS’N 2016) [hereinafter MODEL RULES].
32. *Id.*; ABA STANDARDS OF PRACTICE § B-3; MODEL ACT § 7(e) commentary; J. Renne, LEGAL ETHICS IN CHILD WELFARE CASES 39 (Claire Sandt ed. 2004) (ebook); CRC art. 12 (signatories must ensure that a child “who is capable of forming his or her own views [has] the right to express those views freely in all matters affecting the child” and that 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”); *Giving Voice to the Vulnerable* at 1569 (a lawyer representing a detained Child must be loyal to the Child’s expressed interests over other considerations). The Attorney’s approach to meeting with the Child should be child-centered, including selecting a child-friendly setting,



providing breaks as necessary, and involving a trusted guardian or parent. *Giving Voice to the Vulnerable* at 1569.

33. MODEL RULES at r. 1.14 & cmt. (providing guidelines and best practices for the attorney-client relationship with a person with diminished capacity, such as a Child). Whether an attorney should take a “client-directed” approach or employ a traditional “best interests” test when advising a child is a matter of some debate and varies by state. Bruce A. Boyer, *Representing Child-Clients with “Diminished Capacity”*: Navigating an Ethical Minefield, 24 THE PROF’L LAWYER, no. 1 (2016), [https://www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/2016/volume-24-number-1/representing\\_childclients\\_diminished\\_capacity\\_navigating\\_ethical\\_minefield.html](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-1/representing_childclients_diminished_capacity_navigating_ethical_minefield.html) (discussing the ethical challenges a lawyer can face when a child’s wishes conflict with the Best Interests of the child); Donald N. Duquette, *New Perspectives on Child Protection: Legal Representation for Children in Protection Proceedings, Two Distinct Roles Are Required*, 34 FAM. L.Q. 441 (2000) (arguing that the ambivalence should be resolved 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 or guardian *ad litem*, and the court should appoint either one or the other, or both, under certain circumstances as set out in law); see also Britany Orlebeke, Donald N. Duquette & Xiaomeng Zhou, *Characteristics of Attorneys Representing Children in Child Welfare Cases*, 49 FAM. L.Q. 477 (Fall 2015) (discussing various experiences of attorneys serving as representatives for children); *Lawyering in Juvenile Court* at 110 (advocating for a client-directed lawyering model for attorneys of children).
34. See, e.g., Tanya Broder, Avidah Moussavain & Jonathan Blazer, *Overview of Immigrant Eligibility for Federal Programs* (NAT’L IMMIGRATION LAW CTR. 2015), <https://www.nilc.org/issues/economic-support/overview-immeligfedprograms/> (discussing the impact immigration status can have on federal public benefits programs); FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN 25-46 (providing checklists for considering the Best Interests of the Child in all actions).
35. MODEL RULES at r. 1.5 (providing parameters for a lawyer’s fees and how to communicate those fees to clients); *id.* at r. 1.2 & cmt. (“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.”); *id.* at r. 1.3 & cmt. (requiring that a lawyer act with reasonable diligence and promptness in representing a client; pursue a matter on the client’s behalf despite opposition, obstruction, or personal inconvenience; and see a client’s matter through to its conclusion unless terminated). A retainer agreement should include the scope of the representation, the delegation of responsibilities among lawyers, compensation, and method of payment, file retention, and confirmation and execution by the client, among other things. See, e.g., RONALD E. MALLEN, LEGAL MALPRACTICE § 2.27 (2018) (purpose of a written retainer agreement is to ensure that the lawyer and client understand the scope of the representation, the staffing of the representation among lawyers, the compensation, and any actual or potential ethical issues).
36. MODEL RULES at r. 1.16 & cmt. (Attorney must “take steps to the extent reasonably practicable to protect a client’s interests” when terminating the attorney-client relationship); ABA STANDARDS OF PRACTICE § E (requiring the child’s attorney to discuss an order and its consequences with the child); *id.* § F-1 (requiring the child’s attorney to discuss the option to appeal with the child, and, “[i]f after such consultation, the child wishes to appeal the order and the appeal has merit,” take all necessary steps to perfect the appeal).
37. MODEL RULES at r. 1.16 (providing that “a lawyer shall not represent a client or . . . shall withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law,” and “a lawyer may withdraw” if “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent”); *id.* at r. 8.4 & cmt. (“It is professional misconduct for a lawyer to . . . 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.”).
38. ABA JJS, *Standards Relating to Counsel for Private Parties* § 3.1 (stating that “determination of the client’s interests in the proceedings . . . is ultimately the responsibility of the client after full consultation with the attorney”); UN RPJDL ¶¶ 59-62 (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”; “the right to communicate in writing or by telephone at least twice a week with the person of his or her choice”; and “the right to receive correspondence”); MODEL RULES at r. 3.6 (lawyers are barred from making statements that could “have a substantial likelihood of materially prejudicing an adjudicative proceeding”); 8 C.F.R. § 208.6 (information relating to an asylum application, credible fear determination, or reasonable fear determination should not be disclosed without the applicant’s written consent); CRC art. 16.1 (“No child shall be subjected



to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation,” and “[t]he child has the right to the protection of the law against such interference or attacks.”). Journalistic ethical standards concerning interviewing children provide helpful perspective on some of these issues. See, e.g., RUTH TEICHROEB, COVERING CHILDREN & TRAUMA: A GUIDE FOR JOURNALISM PROFESSIONALS (Dart Ctr. for Journalism & Trauma 2006), [http://dartcenter.org/sites/default/files/covering\\_children\\_and\\_trauma\\_0.pdf](http://dartcenter.org/sites/default/files/covering_children_and_trauma_0.pdf).

39. ABA STANDARDS OF PRACTICE § 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 the child prior to court hearings and when apprised of emergencies or significant events impacting on the child.”); *Giving Voice to the Vulnerable* at 1576 (“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.”). Courts have recognized the importance of in-person communication because of the difficulties inherent with technology. *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 . . . . 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.”).
40. ACTION FOR THE RIGHTS OF CHILDREN at 8 (“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.”).
41. Though these standards use feminine pronouns for “interpreters” for convenience in some places, they are intended to be gender neutral.
42. “Direct speech” is a form of interpretation using the speaker’s exact words and employing the speaker’s exact pronouns and tenses. DIRECT SPEECH IN LEGAL SETTINGS (NAT’L ASS’N OF JUDICIARY INTERPRETERS & TRANSLATORS 2004), <https://najit.org/wp-content/uploads/2016/09/DirectSpeech200609.pdf>.
43. UNHCR GPC at 44 (“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.”); *Giving Voice to the Vulnerable* at 1577 (“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.”).
44. ABA JJS, *Standards Relating to Pretrial Court Proceedings* §§ 6.5, 6.7 (a guardian *ad litem* is charged with acting “toward the juvenile in the proceedings as would a concerned parent,” and “[t]heir 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”); UNHCR GPC at 45 (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 decisions on the Child’s behalf in other situations).
45. FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN at 4.
46. TVPRA, 8 U.S.C. § 1232(c)(6).
47. *Id.* § 1232(c)(6)(A).
48. *Id.* (appointed Child Advocates should be “independent”).
49. *Id.* (“The child advocate shall not be compelled to testify or provide evidence in any proceeding concerning any information or opinion received from the child in the course of serving as a child advocate.”).
50. ORR GUIDE §§ 2.2.1, 2.8.4 (ORR gives preference to releasing a Child with his or her parents or legal guardians, and ORR performs a follow-up call after placing a Child); *Flores* ¶¶ 14, 18 (INS has a general policy

- favoring release, and INS shall make continuing efforts at family reunification); Exec. Comm. of the High Comm'r's Programme, Agenda for Protection Addendum §§ (3)(1)(2), (3)(1)(9), U.N. Doc. A/AC.96/965/Add.1 at 6, 8 (June 26, 2002), <http://www.refworld.org/docid/3d4fd0266.html> [hereinafter Agenda for Protection Addendum] (states should give due weight to the principle of family unity, explore appropriate alternatives to the detention of asylum seekers and refugees, and abstain in principle from detaining Children); G.A. Res. S-27/2, annex, A World Fit for Children ¶ (3)(B)(3)(44)(29) (May 10, 2002), <http://www.un-documents.net/s27r2.htm> (states should continually monitor case arrangements for displaced or Unaccompanied Children); see also U.N. High Commissioner for Refugees, *UNHCR Guidelines on Determining the Best Interest of the Child* 31-32 (May 2008), <http://www.unhcr.org/4566b16b2.pdf> (family unification is usually in the Best Interests of the Child).
51. See ORR GUIDE §§ 2.2.1, 2.7.4 (stating policies that give preference to releasing Children with their parents or legal guardians and denying release to a parent only if the home is unsafe or if the parent has been convicted of a felony, sex crime, or other charge that could endanger a Child).
  52. See *id.* § 3.5 (detailing the proper care and treatment of LGBTIQ Children). For a more exhaustive list of factors to consider, see FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN 30-31. For standards on care and Custody of transgender youth, see Gabe Murchison, *Supporting & Caring for Transgender Children*, HUM. RTS. CAMPAIGN 18-19 (Sept. 2016), <https://assets2.hrc.org/files/documents/SupportingCaringforTransChildren.pdf>.
  53. ORR GUIDE § 2.1 (ORR policies for placing Children are based on providing a safe and nonrestrictive environment); *Flores* ¶ 11 (“INS shall place each detained minor in the least restrictive setting appropriate to the minor’s age and special needs.”); DETENTION GUIDELINES: GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION 16-20, 34-35 (UNITED NATIONS HIGH COMM’R FOR REFUGEES 2012), <http://www.unhcr.org/publications/legal/505b10e9/unhcr-detention-guidelines.html> [hereinafter UN DETENTION GUIDELINES] (asylum-seekers should not be detained without legitimate purpose, and in principle, Children should never be detained); see 6 U.S.C. §§ 462(b)(1)(B), (b)(2)(A) (requiring that the Director of the ORR consider the interests of the Children and “consult with appropriate juvenile justice professionals” to ensure that Unaccompanied Children are “placed in a setting in which they are not likely to pose a danger to themselves or others”); see also Agenda for Protection Addendum § (3)(1)(9) (states should explore appropriate alternatives to the detention of asylum-seekers and refugees and abstain, in principle, from detaining Children).
  54. See, e.g., *A Guide to Children Arriving at the Border: Laws, Policies and Response*, AM. IMMIGR. COUNCIL 9 (2015), [https://www.americanimmigrationcouncil.org/sites/default/files/research/a\\_guide\\_to\\_children\\_arriving\\_at\\_the\\_border\\_and\\_the\\_laws\\_and\\_policies\\_governing\\_our\\_response.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/a_guide_to_children_arriving_at_the_border_and_the_laws_and_policies_governing_our_response.pdf) (detaining Children can have severely negative mental and physical effects); *National Prison Rape Elimination Commission Report*, NAT’L PRISON RAPE ELIMINATION COMM’N 155-57, 178 (June 2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf> (noting that when undocumented Children are placed in facilities with adults, they are at risk of sexual assault); James Austin, Kelly Dedel Johnson & Maria Gregoriou, *Juveniles in Adult Prisons and Jails: A National Assessment*, NAT’L CRIM. JUST. REFERENCE SERV. 9 (Oct. 2000), <https://www.ncjrs.gov/pdffiles1/bja/182503.pdf> (explaining that reports show juveniles housed in adult populations are more likely to commit suicide).
  55. 34 U.S.C. § 11133(13) (mandating that juveniles not be detained with adults); ORR GUIDE § 1.7.6 (care facilities should separate Unaccompanied Children with criminal histories from other Children); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 10(2)(b) (1976) (“Accused juvenile persons shall be separated from adults and brought as speedily as possible to adjudication.”); ABA JJS, *Standards Relating to Interim Status* §§ 3.4, 10.2, 10.3 (stating policies favoring placing juveniles in the least restrictive facility possible and prohibiting placing juveniles in adult prisons).
  56. U.S. Customs & Border Protection has issued national standards for short-term Custody; these standards include provisions to ensure the Best Interests of the Child are considered as well as additional safeguards and special treatment for vulnerable, at-risk populations. E.g., U.S. CUSTOMS & BORDER PROTECTION, NATIONAL STANDARDS ON TRANSPORT, ESCORT, DETENTION, AND SEARCH § 1.6 (2015), [https://www.cbp.gov/sites/default/files/documents/cbp-teds-policy-20151005\\_1.pdf](https://www.cbp.gov/sites/default/files/documents/cbp-teds-policy-20151005_1.pdf) [hereinafter NATIONAL STANDARDS ON TRANSPORT].
  57. TVPRA, 8 U.S.C. §§ 1232(a)(2), (a)(4).
  58. ORR GUIDE §§ 1.2.7, 1.7.6, 2.2.1, 3.3, 5.4.2 (mandating that ORR and care facilities inform Children of their legal rights and place Children with family members); *Flores* ¶ 12.A (INS shall provide the minor with a notice of rights whenever it takes the Child into Custody); ABA JJS, *Standards Relating to Interim Status* §§ 5.3(A), 6.5(A) (intake official should inform the juvenile of his right to silence, right to make statements, and

- right to an Attorney; tell the juvenile that his parent will be contacted immediately to aid in effecting release; and explain the basis for detention); UN DETENTION GUIDELINES 27-28 (asylum seekers have 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).
59. ORR GUIDE § 1.3.2 (“ORR attempts to identify and designate a placement for the unaccompanied alien child within 24 hours of the initial referral whenever possible.”); *see Flores* ¶ 14 (noting that the general policy favors release without unnecessary delay); *id.* ¶ 24 (discussing the proper procedure during a minor’s deportation proceeding); *see also* TVPRA, 8 U.S.C. § 1232(a)(4) (mandating that Unaccompanied Children be released to their home country or transferred to the Secretary of Health and Human Services within 48 hours of apprehension).
  60. ORR GUIDE §§ 1.6, 1.6.2 (ORR evaluates the totality of the circumstances when making age determinations because it acknowledges that Children may have contradictory or fraudulent documentation); *see, e.g.,* Betsy Cavendish & Maru Cortazar, APPLESEED NETWORK, *Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors* 14, 33 (2011), <http://www.appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf> (in many instances Children are intercepted at the border with false papers).
  61. ABA JJS, *Standards Relating to Adjudication* § 1.4 (parents should be entitled to be present at an adjudication proceeding); *id.*, *Standards Relating to Interim Status* § 5.3(B) (all reasonable efforts shall be made to notify a parent of the juvenile during the period between arrest and the presentation of the juvenile to any Detention Facility); *see also* ORR GUIDE § 2.2.1 (ORR gives preference to releasing Children to their parents or legal guardians).
  62. *See generally* ABA JJS, *Juvenile Records and Information Services* (standards for the creation and retention of records); 6 U.S.C. § 279(b)(1)(A) (requiring ORR to maintain information about Unaccompanied 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); UN RPJDL, annex ¶ 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); AMERICAN CORRECTIONAL ASSOCIATION, *STANDARDS FOR JUVENILE DETENTION FACILITIES* § 3-JDF-1C-22 (ACA 3d ed. 1991 & Supp. 2016) [hereinafter *ACA JUVENILE STANDARDS*] (confidentiality of information as between worker and juvenile); *id.* § 3-JDF-5H-04 (confidentiality of juvenile file material); *id.* § 3-JDF-1E-01 through -04 (right to privacy provisions in general, including policies, daily population reports, medical records, and transfer of records); *id.* 3-JDF-1E-08 (addressing confidentiality including computerized records).
  63. *Ms. L., et al. v ICE, et al., Case No. 18cv0428, 13, 14 (S.D. Cal. Feb. 26, 2018)*; 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. ORR GUIDE § 2.2.1 (parents, legal guardians, and adult relatives are prioritized in determining release plans); *id.* § 2.7.4 (ORR may deny a release request if the Sponsor is unable to provide for the Child’s mental or physical well-being or if there is a risk to the Child’s safety); CRC arts. 5, 7.1, 9.1, 10.1, 14.2 (states should respect the role of parents to guide their Children; a Child has a right to know his parents; a Child should not be separated from his parents against his will unless it is in the Best Interests of the Child; states should deal with family reunification in a positive, humane, and expeditious manner); UNHCR GPC, ch. 10, § 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.”); U.N. High Commissioner for Refugees, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* §§ 5.14, 9.4, 10.5 (Feb. 1997) [hereinafter “UNHCR Guidelines”] (explaining that “[t]he 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 that “[f]amily reunion is the first priority and it is essential that unaccompanied children are assisted in locating and communicating with their family members[;] . . . [a]ll attempts should be made to reunite the child with his/her family or other person to whom the child is close, when the best

- interests of the child would be met by such a reunion”); Hague Convention arts. 8, 11, 13 (providing that “[a]ny 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”; proceedings for the return of children should conclude within six weeks, otherwise the applicant has the right to request an explanation for the delay; and the child does not have to be returned if the authority of the requested State determines that returning would harm the child); *Flores* ¶¶ 11, 14 (INS shall place detained minors in the least restrictive setting appropriate to the minor’s age and special needs; general policy favoring release); *Zadvydas*, 533 U.S. at 690-91 (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’ non-punitive ‘circumstances,’” such as where the detainee is particularly dangerous (internal citations omitted)). The *Flores* Stipulated Settlement 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 INS discretion to interpret the expeditiousness of the process, which discretion sometimes results in an unreasonable prolonging of the process. A significant gap in legislation (and, indeed, in resources to implement legislation) exists with regard to the parent/legal guardian’s 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 2(j) of the *Flores* Stipulated Settlement Agreement requires that a juvenile who is not released be explained the right of judicial review. *See also* ORR GUIDE §§ 2.7.7, 2.7.8 (providing denial and appeal of denial procedures).
64. TVPRA, 8 U.S.C. § 1232(c)(3)(A) (Unaccompanied Child “may not be placed with a person or entity unless the Secretary of Health and Human Services makes a determination that the proposed custodian is capable of providing for the child’s physical and mental well-being.”).
  65. *See Troxel v. Granville*, 530 U.S. 57, 70-71 (2000) (there is a presumption that fit parents act for the Best Interests of the child); *Parham v. J.R.*, 442 U.S. 584, 602 (1972) (“[O]ur constitutional system long ago rejected any notion that a child is the ‘mere creature of the State’ and, on the contrary, asserted that parents generally ‘have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.’”).
  66. ORR GUIDE § 2.7.3 (explaining the process by which a Home Study is suggested and conducted by ORR); *Flores* ¶ 17 (a suitability assessment may be required before a Child is released to an individual or program; it may include an investigation of the living conditions, interviews of members of the household, and a home visit); Statement of Steven Wagner before the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate (ADMIN. FOR CHILDREN & FAMILIES Apr. 26, 2018), <https://www.hsgac.senate.gov/imo/media/doc/Wagner%20Testimony.pdf> (describing ORR’s policy changes since February 2016 in the areas of Sponsor assessments and home studies).
  67. TVPRA, 8 U.S.C. § 1232(c)(2)(A).
  68. ABA JJS, *Standards Relating to Corrections Administration* § 4.5 (“[B]asic concepts of due process should apply to a juvenile under correctional supervision. Alterations in the status or placement of a juvenile that result in more security, additional obligations, or less personal freedom should be subject to . . . challenge.”); *id.*, *Standards Relating to Interim Status* § 4.2 (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); *Flores* ¶ 24.A (minor shall be afforded a bond redetermination hearing before an immigration judge); *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1177 (N.D. Cal. 2017) (“The minors and their sponsors have the right to participate in a prompt hearing before an immigration judge in which the government’s evidence of changed circumstances is put to the test. By shipping the minors across the country for indefinite detention in a high-security facility before providing that hearing, the government has violated their due process rights.”).
  69. *Flores v. Lynch*, 828 F.3d 898, 905-08 (9th Cir. 2016) (plain language of *Flores* settlement agreement encompasses accompanied minors, citing Western District of Texas decision holding the same); 8 C.F.R. § 236.3(d) (juvenile may be temporarily placed in any Detention Facility having separate accommodations for juveniles); NATIONAL STANDARDS ON TRANSPORT § 1.6 (family unity should be maintained wherever feasible); *id.* § 4.3 (family units with juveniles generally should not be separated); ABA JJS, *Standards Relating to Interim Status* § 10.2 (prohibiting use of adult jails for interim detention of accused juveniles); 34 U.S.C. § 11133(a) (13) (discouraging the incarceration of juveniles in any jail or lockup for adults); G.A. Res. 2200A (XXI), U.N. Int’l Covenant on Civil & Political Rights, art. 10(2)(b) (1966) (“Accused juvenile persons shall be separated from adults and brought as speedily as possible to adjudication.”).



70. See TVPRA, 8 U.S.C. § 1232(c)(2)(A) (minors in HHS custody should be placed in least restrictive setting); ABA JJS, *Standards Relating to Interim Status* § 3.1 (policy favoring release); *id.* § 10.2 (prohibiting use of adult jails for interim detention of accused juveniles); *id.* § 10.3 (policy favoring non-secure alternatives); *Flores* ¶ 11 (mandating placement of detained minors in the least restrictive setting appropriate to the minor’s age and Special Needs); *id.* ¶ 14 (general policy favoring release); *id.* ¶ 23 (agency shall not place a minor in a secure Detention Facility if there are less restrictive alternatives available); ORR GUIDE § 1.2.1 (providing factors that should be considered when making juvenile placement determinations or recommendations); *id.* § 1.4.1 (“Care providers must make every effort to place and keep children and youth in a least restrictive setting.”); G.A. Res. 2200A (XXI), U.N. Int’l Covenant on Civil & Political Rights, art. 10(2)(b) (1966) (“Accused juvenile persons shall be separated from adults and brought as speedily as possible to adjudication.”); ACA JUVENILE STANDARDS § 3-JDF-5A-08 (factors for evaluating juveniles for whom petition has been filed regarding secure or non-secure placement).
71. TVPRA, 8 U.S.C. § 1232(c)(2)(B) (juveniles reaching 18 years of age are eligible for alternatives to detention); *Ramirez v. U.S. Immigration & Customs Enf’t*, No. 18-508 (RC), 2018 WL 1882861 (D.D.C. Apr. 18, 2018) (granting preliminary injunction where plaintiffs who turned 18 in detention alleged agency transferred them to adult detention facilities without considering less restrictive placements in violation of 8 U.S.C. § 1232(c)(2)(B)). See also NAT’L IMMIGRANT JUSTICE CENTER, *Federal Court Says ICE Must Stop Jailing Unaccompanied Immigrant Youth Without First Considering Alternatives to Detention* (Apr. 19, 2018), <http://www.immigrantjustice.org/press-releases/federal-court-says-ice-must-stop-jailing-unaccompanied-immigrant-youth-without-first>; *Flores* ¶ 14 (general policy favoring release).
72. TVPRA, 8 U.S.C. § 1232(b)(3) (Unaccompanied Child in Custody of another federal agency shall be transferred to HHS Custody within 72 hours absent exceptional circumstances); ORR GUIDE § 1.4 (transfers within the ORR program); ABA JJS, *Standards Relating to Corrections Administration* § 7.7(C) (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); FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN 30 (checklist for placing or transferring Child within ORR Custody); 8 C.F.R. § 236.3(d) (if necessary, a minor may be held in or transferred to a juvenile Detention Facility under certain circumstances, for such interim period as is required to locate suitable placement for the juvenile); UN RPJDL, annex ¶ 26 (“Juveniles should not be transferred from one facility to another arbitrarily.”).
73. *Flores* ¶ 12.A (minors placed into Custody shall immediately receive notice of rights); *id.* ¶ 24.B (minor may appeal placement decision); *id.* ¶ 27 (no minor represented by counsel shall be transferred without 72 hours’ notice to counsel); ORR GUIDE § 1.4 (“If an alternate placement would better meet the child’s individual needs, care providers must promptly make transfer recommendations—within 3 days of identifying the need for a transfer for routine transfers and immediately in urgent situations.”); *id.* § 1.4.7 (Unaccompanied Child may request reconsideration of placement in a secure Detention Facility); UN RPJDL, annex ¶ 22 (mandating that information on admission, place, transfer, and release be provided without delay to the Child’s parents and guardians or closest relative).
74. ORR GUIDE § 1.4 (transfers within ORR care provider network); ACA JUVENILE STANDARDS § 3-JDF-3A-15 & cmt. (“Guidelines for transporting juveniles should emphasize safety and should be made available to all personnel involved in transporting juveniles.”); *id.* (“The facility should have policies governing the use of restraints.”); *Flores* ¶ 25.B (when transporting Children with adults, all necessary precautions shall be taken to protect Children’s well-being).
75. *Flores* ¶ 27 (Child shall be transferred with all of his possessions and legal papers).
76. ORR GUIDE § 3.3.14 (“To the greatest extent possible under the circumstances, when transporting unaccompanied alien children care providers will assign transport staff of the same gender as the child or youth.”); OFFICE OF INSPECTOR GEN., DEP’T OF HOMELAND SECURITY, OPEN INSPECTOR GENERAL RECOMMENDATIONS CONCERNING THE FORMER IMMIGRATION AND NATURALIZATION SERVICE FROM UNACCOMPANIED JUVENILES IN INS CUSTODY 4 (2004) [hereinafter RECOMMENDATIONS CONCERNING THE FORMER IMMIGRATION AND NATURALIZATION SERVICE] (Unaccompanied Children should receive same-sex escorts or alternative safeguards); NATIONAL STANDARDS ON TRANSPORT § 2.6.
77. *Flores* ¶ 25 (Unaccompanied Children shall not be transported in vehicles with detained adults); NATIONAL STANDARDS ON TRANSPORT § 4.3 (Children shall not be held with adult detainees); *id.* § 5.4 (Unaccompanied Children must not be transported with unrelated adults or all necessary precautions should be taken for the Child’s well-being); ACA JUVENILE STANDARDS § 3-JDF-3A-15 & cmt. (“Guidelines for transporting juveniles should emphasize safety and should be made available to all personnel involved in transporting juveniles.”).



78. ORR GUIDE §§ 3.3.4, 3.3.17 (care providers must keep “a daily log on resident population movement (for example, arrivals and departures, [and] room assignments)” and “must document all instances of the use of restraints in transportation logs”); RECOMMENDATIONS CONCERNING THE FORMER IMMIGRATION AND NATURALIZATION SERVICE at 4 (agency “should implement procedures that require juvenile transportation and detention custodian records that provide sufficient accountability for all juveniles detained in the custody of the Border Patrol sectors and the districts”); UN RPJDL, annex ¶ 21.
79. Victoria Dempsey, *Immigrant Children and Broadening the Constitutional Right to a Lawyer*, 20 PUB. INT. L. REP. 14, 15 (2014) (stating that “immigration advocates have urged the federal government to step in and ensure unaccompanied youth are afforded proper due process”); ABA JJS, *Standards Relating to Pretrial Court Proceedings* § 5.1 (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); *In re Gault*, 387 U.S. at 41 (Fourteenth Amendment’s Due Process Clause provides a right to counsel in juvenile delinquent proceedings in which the juvenile’s freedom may be curtailed and where the juvenile’s family is unable to afford counsel, the court will appoint counsel to represent the juvenile); *Shaughnessy*, 345 U.S. at 212 (holding that undocumented persons are guaranteed due process of the law under the Fifth and Fourteenth Amendments); *Plyler*, 457 U.S. at 211-12 (holding that undocumented persons are entitled to equal protection of the laws under the Fourteenth Amendment); CRC art. 22 (Unaccompanied Children seeking refugee status shall “receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth” in the convention); *id.* art. 37(d) (“Every child deprived of his or her 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 or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”); 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); *id.*, *Standards for the Juvenile Facility Intake Official* § 6.5(A)(1)-(3) (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); *Giving Voice to the Vulnerable* at 1570 (explaining that Children represented in asylum proceedings are four times as likely to receive relief); TVPRA, 8 U.S.C. § 1232(c)(6) (a Child Advocate cannot be compelled to testify or provide evidence concerning information provided by the Child).
80. 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).
81. ORR GUIDE § 1.4.7; CRC art. 25 (stating that “a child who has been placed by the competent authorities for the purpose of care, protection, or treatment of his or her physical or mental health” has the right to a periodic review of the treatment provided and all other circumstances relevant to his or her placement); *Flores* ¶ 24.B (providing the right to judicial review in order to contest placement “in a particular type of facility” before a federal district court if a Child believes he has been improperly placed or treated improperly).
82. ORR GUIDE § 1.2 (placement of Children should be “based on child welfare best practices in order to provide a safe environment and place the child in the least restrictive setting appropriate for the child’s needs”); *id.* § 1.2.3 (safety of Children is paramount in placement decisions); *id.* § 1.4.1 (Children should be placed in least restrictive setting or transferred to least restrictive setting when ready); *id.* § 3 (summarizing services to be provided by care provider facilities); *id.* § 3.3.15 (use of restraints and seclusion should be a last resort to be used only when Child poses a risk of physical harm to self or others). See also *Flores* at Ex. 1.A (licensed programs shall provide proper physical care and maintenance); *id.* at 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); UN RPJDL, annex ¶ 37 (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); ACA JUVENILE STANDARDS § 3-JDF-5C (setting forth principle of a written body of policy and procedure that governs the Detention Facility’s academic, vocational education, and work programs for children); *id.* § 3-JDF-5G (setting forth principle of a written body of policy and procedure that governs the Detention Facility’s mail, telephone, and visiting services for children).
83. ORR GUIDE § 3.3.15 (use of restraints and seclusion should be a last resort to be used only when Child poses a risk of physical harm to self or others); ABA JJS, *Standards Relating to Corrs. Admin.* § 7.8(A) (mechanical restraints should not be used within the Detention Facility and only possibly during transportation); *id.* § 7.11(H) (governing sparing use of isolation as sanction); *id.* § 8.7(F) (prohibiting corporal punishment, silence, or “any other punishment designed to cause contempt, ridicule, or physical pain” as sanction).

84. *Flores* at Ex. 1.A.1 (licensed programs shall provide proper physical care and maintenance, including suitable living accommodations, food, appropriate clothing, and personal grooming items); ORR GUIDE § 1.1 (“ORR policies for placing children and youth in its custody into care provider facilities are based on legal requirements as well as child welfare best practices in order to provide a safe environment and place the child in the least restrictive setting”); *id.* § 1.2.1 (describing ORR placement considerations, including age, gender, behavior, increased vulnerability, and immigration issues); *id.* § 3.3 (under *Flores*, care providers must provide several minimum services, including counseling, reasonable privacy, legal services information, suitable living accommodations, food, appropriate clothing, and personal grooming items); *id.* § 3.21 (care providers must provide, at a minimum, clean clothing, clean bedding, and personal hygiene items); *id.* § 1.24 (ORR only places a Child in a secure facility if the Child “poses a danger to self or others; or has been charged with having committed a criminal offense”); *id.* § 3.1 (ORR facilities provide Children with “classroom education, health care, socialization/recreation, vocational training, mental health services, access to legal services, access to Child Advocates where applicable, and case management”).
85. UN RPJDL, annex ¶ 35 (stating that “the right of every juvenile to possess personal effects and to have adequate storage facilities for them should be fully recognized and respected”); CRC art. 16 (“No child shall be subjected to arbitrary or unlawful interference with his or her privacy.”); ABA JJS, *Standards Relating to Interim Status* § 10.7 (right to individual privacy should be honored in each institution).
86. *Augustin*, 735 F.2d at 37 (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”); UN RPJDL, annex ¶ 6 (if the Child is not fluent in the language spoken by the Detention Facility personnel, he “should have the right to the services of an interpreter free of charge whenever necessary”); *id.* annex ¶ 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); CRC art. 40 ¶ 2 (every Child alleged or accused of violating the penal code possesses certain guarantees, including “[t]o have the free assistance of an interpreter if the child cannot understand or speak the language used”).
87. *Flores* ¶ 12.A (detention facilities must provide medical assistance if a Child needs emergency services); *id.* at Ex. 1 A.2 (licensed programs shall provide appropriate routine medical and dental care, family planning services, and emergency health care services); UN RPJDL, annex ¶ 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.”); CRC art. 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); ABA JJS, *Standards Relating to Rights of Minors* §§ 4.1-4.9 (provisions relating to Children’s medical care); ORR GUIDE § 4 (provisions for preventing, detecting, and responding to sexual abuse and harassment of Unaccompanied Children); 34 U.S.C. § 30307(d)(1) (requiring that HHS publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of rape and sexual assault in facilities that maintain custody of unaccompanied children); 45 C.F.R. § 411.93(a)-(e) (requiring that ORR facilities offer ongoing medical and mental health evaluations and treatment to all unaccompanied children who are victimized by sexual abuse or sexual harassment while in ORR care and custody, including lawful pregnancy-related medical services ); *id.* § 411.93(d) (saying that ORR facilities should engage the unaccompanied child in discussions with family members or attorneys of record to the extent practicable so that the unaccompanied child can make informed decisions regarding medical services); *id.* § 411.92(a) (ORR facilities must provide unaccompanied children who are victims of sexual abuse with access to medical treatment, crisis intervention services, emergency contraception, and sexually transmitted infections prophylaxis, in accordance with professionally accepted standards of care, where appropriate under medical or mental health professional standards).
88. *See supra* note 88; Linda Britton, *Limiting Psychotropic Medication and Improving Mental Health Treatment for Children in Custody*, C.P.L. ONLINE (Apr. 2016) [HTTPS://WWW.AMERICANBAR.ORG/GROUPS/CHILD\\_LAW/RESOURCES/CHILD\\_LAW\\_PRACTICEONLINE/CHILD\\_LAW\\_PRACTICE/VOL-35/APRIL-2016/LIMITING-PSYCHOTROPIC-MEDICATION-AND-IMPROVING-MENTAL-HEALTH-TRE.HTML](https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/april-2016/limiting-psychotropic-medication-and-improving-mental-health-tre.html).
89. *See supra* note 89.
90. ACTION FOR THE RIGHTS OF CHILDREN at 14 (“[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.”).

91. *Plyler*, 457 U.S. at 230 (holding that the Fourteenth Amendment’s Equal Protection Clause prohibits a public school system from denying equal access to education to children lacking legal status); *Flores* ¶¶ 14, 18 (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); 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); G.A. Res. 217 (III) A, U.N. Doc. A/810, Art. 26, Universal Declaration of Human Rights (1948) (stating that everyone has the right to education); ABA JJS, *Standards Relating to Interim Status* § 10.6 (all juveniles held in detention should be afforded access to education).
92. 29 U.S.C. §§ 203(l), 212 (defining and prohibiting “oppressive child labor” under the Fair Labor Standards Act); UN RPJDL ¶ 18(b) (Children should be given opportunities to pursue work, with remuneration, and continue education or training, but should not be required to do so).
93. *Flores* at Ex. 1.A.5 (licensed programs should provide activities according to a recreation and leisure time plan that include, daily outdoor activity at least one hour per day of large muscle activity, and one hour per day of structured leisure time activities); UN RPJDL ¶ 47 (every Child 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); CRC art. 31 (every Child has the right to rest and leisure, to engage in play and age-appropriate recreational activities, and to participate freely in cultural life and the arts); ORR GUIDE § 3.3.8.
94. *Flores* at Ex. 1.A.11 (licensed programs shall provide visitation and contact with family members regardless of their immigration status); UN RPJDL, annex § 60 (every Child 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 Child’s need for privacy, contact, and unrestricted communication with family and counsel); CRC art. 37(c) (every Child shall have the right to maintain contact with his family through correspondence and visits); ABA JJS, *Standards Relating to Interim Status* § 10.7(C) (private areas should be available for visitation at least 8 hours a day).
95. UN RPJDL, annex § 61 (every Child should have the right to communicate in writing or by telephone); CRC art. 13 (every 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); ABA JJS, *Standards Relating to Interim Status* § 10.7(D), (F) (each Child in detention should have ready access to a telephone between 9:00 a.m. and 9:00 p.m. daily; calls may be limited in duration, but not in content unless otherwise specifically directed by the court; local calls should be permitted at the expense of the institution, but should under no circumstances be monitored; long distance calls in reasonable number may be made to a parent or Attorney at the expense of the institution, and to others, collect; mail to and from an accused Child should not be opened by authorities; if reasonable grounds exist to believe that mail may contain contraband, the mail should be examined only in the Child’s presence).
96. ABA JJS, *Standards Relating to Corrections Administration* § 4.9 (providing that juveniles must be allowed to practice their religion while in custody); *Jama v. INS*, 343 F. Supp. 2d 338, 370 (D.N.J. 2004) (extending rights granted by the Religious Freedom Restoration Act to immigration detainees).
97. ABA JJS, *Standards Relating to Counsel for Private Parties* § 3.1 (determination of the client’s interests in the proceedings is ultimately the responsibility of the client after full consultation with the Attorney); UN RPJDL, annex ¶¶ 59-62 (acknowledging the Child’s right to communicate with and receive correspondence from persons and organizations, in writing, via telephone, and in person).
98. *Flores* ¶ 15.E (mandating that a Child be presented information regarding his right to request voluntary departure in lieu of deportation); U.N. High Commissioner for Refugees, *Agenda for Protection* 51 (3d ed. 2003), <http://www.unhcr.org/en-us/protection/globalconsult/3e637b194/agenda-protection-third-edition.html> (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); UNACCOMPANIED ALIEN CHILDREN at 11.
99. *Flores* ¶ 9 (stating that the court envisioned Children would be in Custody no more than 30 days); UNHCR GPC ch. 8 (refugee status determination must be made quickly; keeping Children in limbo regarding their status can be harmful); Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT’L J. OF REFUGEE L. 84, 119-20 (1999) [hereinafter *Not Adults in Miniature*] (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 Child’s well-being, carrying a life-long impact on a Child’s development; while generally expeditious processing of Children’s cases is a desirable goal, the timeline for a case must be balanced against the Child’s needs; priority in scheduling should not be at the expense of full exploration of the Child’s claim nor should it prejudice the Child’s Attorney’s ability to develop full documentation of the asylum claim).

100. 18 U.S.C. §§ 1591, 1594 (anyone who gains any property used in furtherance of trafficking or gained from illegal trafficking activity must forfeit the property to the U.S. government); *see id.* § 2 (anyone who aids and abets the commission of a crime against the United States is punishable as a principal).
101. ORR GUIDE § 3.3 (use of restraints should be limited to circumstances when a Child presents a risk of imminent physical harm); 8 U.S.C. § 1229a(b)(2)(B) (persons subject to removal proceedings should be “advised of the right to proceed in person”); *In re A-A-*, 22 I. & N. Dec. 140, 148 n.2-3 (BIA 1998) (collecting cases stating the right to appear is an essential liberty interest); ABA JJS, *Standards Relating to Adjudication* § 1.3 (juvenile respondent has the right to be present at all adjudication proceedings); *id.*, *Standards Relating to Corrs. Admin.* § 7.8 (noting that neither chemical nor mechanical restraints should be used); ABA STANDARDS OF PRACTICE § D-5 (“In most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify.”); *see* ORR GUIDE § 2.4.2 (mentioning that the use of unnecessary physical restraints constitutes abuse).
102. 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.”).
103. ORR GUIDE § 3.3.7 (mandating that care providers make every effort to provide services in Unaccompanied Children’s native language); *Flores* ¶ 12.A.4 (acknowledging INS’s responsibility to locate interpreters to facilitate the processing of minors); *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2002) (due process violation for failure to properly translate); *Matter of Tomas*, 19 I. & N. Dec. 464, 465 (BIA 1987) (finding an absolute right to competent translation); UNHCR Guidelines § 5.13 (“Insofar as possible, interpreters should be skilled and trained in refugee and children’s issues.”); CRC art. 40(2)(b)(vi) (Children alleged to violate penal law are entitled to free assistance from an interpreter); ABA JJS, *Standards Relating to Adjudication* § 2.7 (court should appoint an interpreter when the juvenile is incapable of speaking and understanding English); *id.*, *Standards Relating to Interim Status* § 5.3(A) (arresting officer must inform the juvenile of his rights in his native language); Jeff Weiss, Acting Dir., Off. of Int’l Affairs, Guidelines for Children’s Asylum Claims (File 120/11.26) 7 (U.S. DEP’T OF JUSTICE, INS Dec. 10, 1998), <https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf> [hereinafter Weiss Memorandum] (“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.”).
104. ABA JJS, *Standards Relating to Adjudication* § 6.2(A) (recommending that jurisdictions enact laws allowing a juvenile to waive his right to a public trial and laws that allow judges to permit members of the public, with a significant interest, to view the adjudication, even when the juvenile has waived his right to a public trial); 6 U.S.C. § 279(b)(2)(A) (ORR is responsible for ensuring the Child’s interest when making decisions regarding the Child’s care and custody); 8 C.F.R. § 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”); *see also* EXEC. OFF. FOR IMMIGRATION REVIEW, FACT SHEET (U.S. DEP’T OF JUSTICE Feb. 2017), <https://www.justice.gov/eoir/observing-immigration-court-hearings> (detailing when immigration court hearings are closed).
105. 8 U.S.C. § 1229a(b)(4)(B) (persons subject to removal proceedings shall have the right to present evidence and to cross-examine witnesses); *see also* CRC art. 40(2)(b)(iv) (noting that Children alleged to have violated penal law shall not be compelled to testify to guilt).
106. 8 U.S.C. § 1229a(b)(4)(C) (mandating a complete record of all testimony and evidence); 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).
107. *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 . . . 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”); *Augustin*, 735 F.2d at 37 (asylum applicant “must be furnished with an accurate and complete translation of official proceedings[,] . . . [and] translation services must be sufficient to enable the applicant to place his claim before the judge”); 8 U.S.C. § 1229a(b)(4) (B) (a person subject to removal proceedings shall have a reasonable opportunity to examine all the evidence



- against him); ABA JJS, *Standards Relating to Juvenile Records & Information Services* § 5.2 (juveniles, their parents, and juveniles' Attorneys should be given access to all records and information collected or retained by a juvenile agency).
108. ABA Resolution and Report to the House of Delegates, Res. 113 (ABA Feb. 2015), [https://www.americanbar.org/content/dam/aba/administrative/young\\_lawyers/assembly/uac\\_resolution\\_and\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/assembly/uac_resolution_and_report.authcheckdam.pdf), [hereinafter ABA Res. 113].
  109. 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.”); see *Not Adults in Miniature* at 119-20 (explaining that processing a Child’s asylum case must be done expeditiously, while also balancing the Child’s needs, to act in the Child’s Best Interest); Weiss Memorandum at 7 (highlighting that asylum officers should accommodate Children’s needs).
  110. Weiss Memorandum at 20 (level of corroborating details expected should be appropriate to the Child’s age and maturity level, and a Child’s story should be given a liberal “benefit of the doubt”); 8 C.F.R. § 208.13(a) (stating that “testimony of the applicant, if credible, may be sufficient to sustain the burden of proof [for establishing refugee status] without corroboration”); John Morton, Director, U.S. Immigration & Customs Enf’t, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) (factors, including a person’s age, should be evaluated when exercising prosecutorial discretion).
  111. Weiss Memorandum at 14-15 (asylum officers should be aware that some Children may appear uncooperative, not because of their unreliability, but because of their cognitive development and cultural differences); see 8 U.S.C. § 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); see also 8 C.F.R. §§ 208.13(a), 208.16(b) (applicant’s testimony, if credible, is sufficient to sustain the applicant’s burden of proof). Furthermore, when proving one’s case for asylum, a person seeking asylum is not required to show that it is more likely than not that he or she will face persecution in his or her home country; he or she only needs to show a “well-founded fear” of persecution. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Also, the courts use a “clear probability” standard when evaluating withholding of removal. *INS v. Stevic*, 467 U.S. 407, 429 (1984).
  112. 8 U.S.C. § 1229a(b)(4)(C) (mandating a record of all testimony and evidence); 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).
  113. M. Aryah Somers, *Children in Immigration Proceedings: Child Capacities and Mental Competencies in Immigration Law and Policy* 2-3, 6 (ABA May 2015), [https://cliniclegal.org/sites/default/files/children\\_in\\_immigration\\_proceedings\\_-\\_child\\_capacities\\_and\\_mental\\_competency\\_in\\_immigration\\_law\\_and\\_policy.pdf](https://cliniclegal.org/sites/default/files/children_in_immigration_proceedings_-_child_capacities_and_mental_competency_in_immigration_law_and_policy.pdf) (discussing factors related to evaluating a Child’s competency to participate in immigration adjudication); see also ABA CRIMINAL JUSTICE STANDARDS ON MENTAL HEALTH §§ 7-5.3(b), 7-5.4 (4th ed. 2016) [hereinafter ABA CRIMINAL JUSTICE STANDARDS] (highlighting the test to determine whether a defendant is competent to waive his rights); ABA JJS, *Standards Relating to Adjudication* § 3.1 (court should not accept a plea without considering factors regarding whether the respondent has the mental capacity to understand his rights and the significance of the plea); see generally Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. OF JUV. L. & POL’Y 275 (2006) (discussing inconsistencies that have developed in the area of assessing a child’s capacity and arguing for a comprehensive revision and codification); Wallace J. Mlyniec, *A Judge’s Ethical Dilemma: Assessing a Child’s Capacity to Choose*, 64 FORDHAM L. REV. 1873 (1996) [hereinafter *Assessing a Child’s Capacity to Choose*].
  114. ABA Res. 113(2); *Fare v. Michael C.*, 442 U.S. 707, 724-28 (1979) (totality of the circumstances approach should be used to evaluate a defendant’s waiver of rights); ABA CRIMINAL JUSTICE STANDARDS §§ 7-5.3(b), 7-5.4 (standard to determine whether someone has competently waived his right is to determine whether the respondent has the ability to make a voluntary, knowing, and rational decision); ABA JJS, *Standards Relating to Adjudication* § 3.2 (before a court accepts a plea admitting allegations, the court should personally address the Child in a way that effectively communicates with the Child); see *Drope v. Missouri*, 420 U.S. 162, 79-81 (1974) (explaining that proper weight must be given to testimony and extrinsic evidence regarding a defendant’s inability to stand trial); see also generally *Assessing a Child’s Capacity to Choose* (discussing the impact of a child’s age and cognitive abilities on his ability to waive his rights).







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