

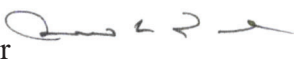


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CHILDREN'S CASES IN IMMIGRATION COURT

PURPOSE: Provide guidance on children's cases and juvenile dockets in immigration court.

OWNER: David L. Neal, Director 

AUTHORITY: 8 C.F.R. § 1003.0(b)

CANCELLATION: Operating Policies and Procedures Memorandum 17-03, *Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children*

I. Introduction

This Director's Memorandum (DM) provides guidance to Executive Office for Immigration Review (EOIR) adjudicators and personnel on cases in immigration court where the lead or sole respondent, or a witness, is a child. Cases where the respondent is a child include, but are not limited to, those where the respondent has been designated as an unaccompanied child. EOIR has a specialized juvenile docket at each immigration court with an established caseload of children's cases.

Children's cases, whether or not on a juvenile docket, require special consideration. EOIR has provided, and will continue to provide, training to immigration judges on children's cases. All immigration judges must be prepared to adjudicate children's cases: they should familiarize themselves with the law and EOIR guidance on children's cases, as well as with child-friendly courtroom procedures. This DM discusses EOIR's specialized juvenile dockets and sets out guidelines for all children's cases. This DM supersedes and rescinds Operating Policies and Procedures Memorandum 17-03, *Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children*.

II. Terminology

The terms “child” and “juvenile” are defined in various ways by statute and regulation, depending on the context.¹ This DM uses “child” and “juvenile” to refer to an individual who is under twenty-one years old. This DM further uses the term “unaccompanied child” to refer to an “unaccompanied alien child” as defined by statute.²

III. Specialized Juvenile Dockets

EOIR has established a specialized juvenile docket at each immigration court with an established caseload of children’s cases. Specialized juvenile dockets consist of cases in which the respondents are under twenty-one years old and are not part of a family unit. Some, but not all, of the respondents on these dockets have been designated by the Department of Homeland Security (DHS) as unaccompanied children. These dockets include both detained cases – that is, those involving child respondents who are in the care of the Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR) – and non-detained cases. Hearings for cases on these juvenile dockets are scheduled on specified days of the week at specified times, separate and apart from hearings for adults. EOIR has designated specific immigration judges to preside over the juvenile dockets. DHS, Immigration and Customs Enforcement, Office of the Principal Legal Advisor (OPLA) will endeavor to assign points of contact to manage cases on the juvenile dockets, as staffing permits.

In immigration courts without enough children’s cases to warrant a specialized juvenile docket, EOIR will schedule children’s cases separate and apart from adult cases.

IV. General Guidelines

The following guidelines apply to children’s cases before the immigration courts. Where a particular point is specific to cases on the juvenile docket, this DM so indicates. Otherwise, the guidelines apply to all cases, whether or not on the juvenile docket, where a child is the lead or sole respondent.

Representation –

Given the particular vulnerability of child respondents, legal representation is particularly important. Therefore, immigration judges should facilitate pro bono representation in cases involving unrepresented children. Many immigration courts identify child-specific advocates on their lists of pro bono legal service providers.³ Immigration Judges should provide such lists to

¹ For example, the Immigration and Nationality Act (Act) defines a “child” in part as “an unmarried person under twenty-one years of age.” Sections 101(b)(1), (c)(1) of the Act. Regulations pertaining to immigration detention define a “juvenile” as a noncitizen “under the age of 18 years.” 8 C.F.R. § 1236.3(a).

² An “unaccompanied alien child” is: “a child who – (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom – (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.” 6 U.S.C. § 279(g)(2); *see also* 8 U.S.C. § 1232(g).

³ The lists of pro bono legal service providers are available at <https://www.justice.gov/media/1183216/dl?inline=>.

the children, their guardians or custodians, or other appropriate adults who can assist in their pursuit of representation.

In addition, immigration judges should be aware that the HHS has the authority to appoint Child Advocates in some cases involving child respondents. Child Advocates are responsible for submitting Best Interest Determinations (BIDs) to the immigration judge. BIDs assess the best interests of the child and are based on a wholistic review of the child's circumstances. While a Child Advocate is not an attorney, a Child Advocate is permitted to speak during immigration court hearings, and the roles of a Child Advocate and an attorney are complementary and sometimes overlap. Detailed information on child advocates is available in DM 23-03, *The Role of Child Advocates in Immigration Court*.⁴

Finally, EOIR welcomes and encourages the participation of Friends of the Court in all proceedings involving unrepresented respondents, especially those where the respondent is a child. A Friend of the Court is an individual or organization that participates in immigration court proceedings in order to facilitate the flow of information in the courtroom. Detailed information on Friends of the Court is available in DM 22-06, *Friend of the Court*.⁵

Legal Standards –

Legal issues in cases involving child respondents – including but not limited to whether the child is subject to removal or is eligible for immigration relief – are governed by the Act, other applicable statutes, immigration regulations, and caselaw. In addition, the concept of “best interests of the child,” which is a widely recognized term of art that encompasses principles of child development relating to a child's safety and well-being, is relevant in children's cases. The concept of “best interests of the child” does not provide a legal basis for findings regarding removability or eligibility for relief in immigration court, but this concept is relevant in that it underlies BIDs prepared by Child Advocates, and immigration judges have a duty to consider BIDs that are submitted to the court. More information is available in DM 23-03, *The Role of Child Advocates in Immigration Court*.

Relief from Removal –

An immigration judge should always inform a child of any relief from removal for which they may be eligible. In some cases, such relief will include special immigrant juvenile classification or asylum under the provisions of the Wilbur Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. 110-457.⁶ Under the TVPRA, United States Citizenship and Immigration Services (USCIS) has initial jurisdiction over an asylum application filed by an unaccompanied child, even if the child is in removal proceedings. *See* section 208(a)(2)(E) of the Act. Further, the one-year filing deadline does not apply to asylum applications filed by unaccompanied children. *See* section 208(b)(3)(C) of the Act.

⁴ Available at <https://www.justice.gov/media/1304256/dl?inline>.

⁵ Available at <https://www.justice.gov/media/1221671/dl?inline>.

⁶ *See, e.g., C.J.L.G. v. Barr*, 923 F.3d 622, 627 (9th Cir. 2019) (holding that an immigration judge must advise a respondent in removal proceedings when there is a “reasonable possibility” the respondent may be eligible for special immigrant juvenile classification).

Immigration judges should be cognizant that some forms of immigration relief for children require the filing of applications or petitions with agencies or entities outside EOIR. Where a respondent is an unaccompanied child and appears potentially eligible for asylum, the immigration judge should inform the respondent that their asylum application must be filed with USCIS and not with the immigration court. Where a child respondent appears potentially eligible for other relief, and that relief requires that an application or petition be filed with an agency or entity outside EOIR, the immigration judge should so inform the respondent. Immigration judges should be mindful of time constraints and deadlines faced by child respondents who may be eligible for relief before USCIS or other outside agencies and entities.

Where an unaccompanied child is in removal proceedings and files an asylum application with USCIS, immigration judges should anticipate receiving a motion to dismiss the case. Assuming there is no dispute between the parties, efficiency and fairness are served by such a dismissal.

Credibility –

Immigration judges should recognize that children, especially young children, will generally not be able to testify with the precision and clarity of an adult. Immigration judges should not assume that inconsistencies or poor articulation in a child's testimony reflect dishonesty. Further, a child's testimony as to an event may be limited not only by their ability to understand what happened, but also by their skill in describing the event in a way that is intelligible to adults. Finally, immigration judges should be mindful that children can be highly suggestible and that their testimony can sometimes be influenced by a desire to please the judge or another adult.

Trafficking, Abuse, and Neglect –

In cases where a child is the lead or sole respondent, there may be concerns about whether the child is being trafficked, abused, or neglected. At the start of a child's hearing, the immigration judge should inquire who accompanied the child to court in order to determine if additional questioning is necessary to confirm the child is not being trafficked. An immigration judge may also ask questions pertaining to potential abuse or neglect. Immigration judges must comply with Department of Justice (DOJ) and EOIR policy on reporting suspicions of child abuse, neglect, and trafficking, as well as with any applicable federal, state, or local reporting requirements.⁷ DHS and ORR may, where those agencies deem it warranted, initiate investigations into potential trafficking, abuse, or neglect.

In Absentia –

After a Notice to Appear (NTA) is issued, it is generally incumbent on a respondent to notify EOIR of any change of address, but where a child is the sole or lead respondent, immigration judges should anticipate that special considerations may be at play when the child fails to appear

⁷ Immigration judges should direct any questions on such policies and requirements to their supervisor.

for a hearing. Immigration judges should also be aware that there are special notice requirements that apply to some child respondents.⁸

In cases where a child is the sole or lead respondent and fails to appear, the immigration judge should, as with any case, carefully review the Record of Proceedings to verify whether a request to change the respondent's address was filed with the court but overlooked. Immigration judges should anticipate that, for cases on the juvenile docket, the first time a child fails to appear in their proceedings, whether at an initial master calendar hearing or a subsequent hearing, the OPLA attorney will request a thirty-day continuance to reverify the child's address information. Should the child fail to appear at the next hearing, the OPLA attorney will, absent extenuating circumstances, generally request that the immigration judge proceed in absentia.

Whenever a child respondent fails to appear at a hearing and the OPLA attorney requests to proceed in absentia, the immigration judge should consider the totality of the circumstances in determining whether to grant the request, including the respondent's young age and any impediments to the child's attending their hearing of which the judge is aware.⁹

V. Child-Friendly Courtroom Procedures

All cases where a child is the lead or sole respondent, including but not limited to cases on the juvenile docket, should be conducted using child-friendly courtroom procedures. Elements of these procedures are also appropriate where a child testifies as a witness. Below is a summary of the most common child-friendly courtroom procedures. Appropriate procedures will vary depending on the age of the child and other factors, and immigration judges should tailor these procedures to the specifics of the case.

Explain the proceedings –

At the start of an individual calendar hearing where a child is the sole or lead respondent, or a master calendar session on the juvenile docket, the immigration judge should give an opening statement in child-appropriate language. The purpose of such a statement is to explain the nature of the proceedings, to introduce the participants and describe each person's role, and to explain operational matters such as interpretation and note-taking. The goal is to help child respondents understand the process and to alleviate their anxiety about the hearing.

⁸ Where a noncitizen is under fourteen years old at the time of service, a NTA must be served on "the person with whom the . . . [noncitizen] resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend." 8 C.F.R. § 103.8(c)(2)(ii); *see also* 8 C.F.R. §§ 236.2(a), 1236.2(a). Circuit courts may impose additional service requirements in certain situations where respondents are children. *See, e.g., Flores-Chaves v. Ashcroft*, 362 F.3d 1150, 1163 (9th Cir. 2004) (stating that, where a noncitizen under eighteen years old is released into an adult's custody under regulatory procedures, "the agency must serve notice of the minor's rights and responsibilities upon that adult").

⁹ *See, e.g., Matter of S-L-H- & L-B-L-*, 28 I&N Dec. 318, 321 (BIA 2021) (stating that, in determining whether a noncitizen has established exceptional circumstances for failing to appear at a hearing, their "young age may be relevant where there are multiple impediments to attending the removal hearing"); *E.A.C.A. v. Rosen*, 985 F.3d 499, 505 (6th Cir. 2021) (stating that the petitioner's "young age is an important factor in determining whether exceptional circumstances exist").

Remove the robe –

Immigration judges should remove the judicial robe if doing so would make the child feel more comfortable and enhance their ability to participate.

Courtroom orientation –

Where practicable, immigration judges should allow child respondents (along with a guardian or legal representative) to visit an empty courtroom prior to a hearing. Under the supervision of court personnel, a child should be permitted to explore the courtroom, to sit in all locations, including the witness stand and the immigration judge's bench, and to prepare for testimony by practicing answering simple questions.

Courtroom modifications –

Immigration judges should permit reasonable modifications to the courtroom setting so as to accommodate the needs and sensitivities of children and to foster an atmosphere in which they can participate more fully in the proceedings. Examples of such modifications include allowing a young respondent or witness to bring a book, quiet toy, or other personal item to court, allowing them to testify sitting next to an adult companion, and allowing them to testify sitting anywhere reasonable in the courtroom, as opposed to requiring them to testify from the witness stand.

Interpretation –

Before a child testifies through an interpreter, the immigration judge should allow the child and interpreter to establish a rapport by talking about matters unrelated to the proceeding. The immigration judge should, before and during testimony, watch for any indication that the child and interpreter are having trouble communicating.

Testimony –

Before a child testifies, the immigration judge should ensure that the child is sufficiently competent to do so, including whether the child is capable of understanding the oath and giving sworn testimony. The immigration judge should take care to explain the oath to the child at a level appropriate to the age of the child. For example, a child may be told they should promise to "tell the truth" or to "tell what really happened." A child should also be reassured that they may say "I don't know" if they are unsure how to answer a question and that they may request a question be asked a different way if they do not understand it. A child should be told they should not feel at fault if an attorney raises an objection to a question. Finally, immigration judges should be aware that it is often appropriate to rely on a child's written statement in lieu of their oral testimony.

Child-Sensitive Questioning –

When a child is testifying, the immigration judge should speak to the child using the appropriate language and tone, and the judge should ensure that others questioning the child do so as well. The immigration judge and others should always listen carefully to the child's responses. These points apply even though immigration court proceedings are adversarial. When appropriate language and tone are used when questioning children, this enhances a child's ability to participate in the proceedings and results in a more complete and accurate record. Some techniques for child-sensitive questioning are outlined in the Attachment below.

Length and Number of Hearings –

Like any other proceeding, the parties in a case with a child respondent must be given a full opportunity to present and challenge evidence. However, children can be particularly impacted by stress and fatigue, which can limit a child's ability to participate in their removal proceedings. Immigration judges should bear these factors in mind when conducting proceedings where a child is the lead or sole respondent. Immigration judges should, as much as possible, limit the number of times a child must be brought to court, as well as the duration of hearings and the length of a child's testimony. Immigration judges should also recognize that, for emotional and physical reasons, children may require more frequent breaks than adults. As much as possible, immigration judges should prompt parties to resolve issues through pre-hearing conferences and stipulations.

Control Access to the Courtroom –

As a general practice, it is best to have as few people in the courtroom as possible. Children may be reluctant to testify about painful or embarrassing incidents or may simply be intimidated when there are too many adults in the room. A child's reluctance to speak may increase with the number of spectators or other respondents, and immigration judges should, to the extent possible, limit the number of individuals present in the courtroom to only those necessary to complete the hearing.

VI. Conclusion

Immigration court cases involving children present special considerations. EOIR has established dedicated juvenile dockets, and provides specialized training to immigration judges, in light of these considerations. Fairness concerns and the need for a complete and accurate record dictate that immigration judges bear in mind the special nature of children's cases when adjudicating these cases, whether or not a particular case is on the juvenile docket. If you have questions about the juvenile docket or any of the guidelines in this DM, please contact your supervisor.¹⁰

¹⁰ This memorandum is not intended to, does not, and may not be relied up on to, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States; its departments, agencies, or entities; its officers, employees, or agents; or any other person. Immigration judges and appellate immigration judges must always exercise their independent judgment and discretion in adjudicating cases, consistent with the law. *See* 8 C.F.R. §§ 1003.1(d)(1)(ii), 1003.10(b).

Attachment

The Attachment contains suggestions for child-sensitive questioning. The suggestions are largely drawn from a document entitled *Guidelines for Children's Asylum Claims*, issued by the former Immigration and Naturalization Service (INS) in 1998 and still posted on USCIS's website as of the issuance of this DM. Though dated, this INS document reflects continuing best practices.¹¹

Always be mindful of your demeanor and tone when questioning child respondents.

As a general rule, use short, clear, age-appropriate questions and sentences, avoiding long or compound questions. Use one or two syllable words in questions and avoid three or four syllable words. For example, it is better to ask a child "Who was the person?" than to instruct a child to "Identify the person." Use simple, straight-forward questions: "What happened?" Avoid multi-word verbs: "Might it have been the case . . . ?" Ask the child to define the use of a term or phrase in the question posed in order to check the child's understanding. Choose easy words over hard ones: use expressions like "show," "tell me about," or "said" instead of complex words like "depict," "describe," or "indicate."

Tolerate pauses, even if they are long.

Ask the child to describe the concrete and observable, not the hypothetical or abstract.

Use visual terms (e.g., "gun"), instead of categorical terms (e.g., "weapon"). Reduce questions to their most basic and concrete terms.

Avoid the use of technical legal terms, such as "persecuted" or "persecution." Instead of "Were you persecuted?" ask "Were you hurt?" Likewise, avoid the use of procedural terms or phrases such as "direct examination" or "cross examination."

Use the active voice when asking a question (e.g., "Did the man hit your father?").

Avoid the passive voice (e.g., "Was your father hit by the man?").

Avoid "front-loading" questions. Front-loading involves using a number of qualifying phrases before asking the crucial part of the question (i.e., questions that list several previously established facts before asking the question at hand).

¹¹ In addition, the following documents provide guidance on interviewing and otherwise interacting with children in courtroom and similar settings: DOJ, Office for Victims of Crime, "Child Victims and Witnesses Support Materials: A Guide for Practitioners," available at <https://ovc.ojp.gov/child-victims-and-witnesses-support/guides/practitioners>; DOJ, Office of Juvenile Justice and Delinquency Prevention, "Child Forensic Interviewing: Best Practices," available at <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/248749.pdf>.

For example, “When you were in the house, on Sunday the third, and the man with the gun entered, did the man say . . . ?” should be avoided.

Do not ask compound questions, and keep each question to a simple, single query. For example, avoid asking a question like “Was your mother killed when you were 12?” The question asks about the child’s mother and the child’s age at the same time.

Avoid leading questions whenever possible. Research reveals that children may be more highly suggestible than adults. Leading questions may influence children to respond inaccurately.

Use open-ended questions to encourage narrative responses. Children’s spontaneous answers, although typically less detailed than those elicited by specific questioning, can be helpful in understanding the child’s background. Try not to interrupt the child in the middle of a narrative response.

If you are asking questions more than once, explain to the child why you are doing so. Make clear to the child that they should not change or embellish earlier answers and explain that you are asking repeated questions to make sure you understand the story correctly. Repeated questioning is often interpreted (by adults as well as children) to mean that the first answer was regarded as a lie or wasn’t the answer that was desired.

Coercion has no place in any hearing. Children are never to be coerced into answering questions during the hearing. For example, a child should never be told they cannot leave the hearing until they answer the questions posed by counsel or the immigration judge.

Do not expect children to be immediately forthcoming about events that have caused great pain. When a question involves painful memories, do not expect the initial answer to be particularly complete or articulate.

Before asking how many times something happened, try to determine the child’s ability to count. Children may try to answer without the requisite skill, resulting in irrelevant, inconsistent, misleading, or erroneous responses.

A child may not know the specific circumstances that led to their flight from their home country and, even if they know the circumstances, they may not know the details of the circumstances. The child may also have limited knowledge of conditions in their home country, as well as their vulnerability in that country.

Imprecise time and date recollection may be common for children. Even older children may not have mastered many of the concepts relating to conventional systems of measurement for telling time (minutes, hours, calendar dates). In addition, note that, in many cultures, events are often noted not by specific dates

but by reference to cyclical (rainy season, planting season, etc.) or relational (earthquakes, typhoons, religious celebrations, etc.) events. For example, a child may well respond to the question “When were you hurt?” by stating “during harvest season two seasons ago” or “shortly after the hurricane.” Answers such as these may be the best and most honest testimony the child has to offer.

Children may require frequent breaks during testimony. Explain to child respondents at the beginning of testimony that they are allowed to ask for breaks at any point. During a child respondent’s testimony, periodically ask them whether they need a break. Also, watch the child for signs of fatigue, confusion, and disorganized thinking – which may be related to recalling traumatic events – and take breaks as needed.

Avoid questions that a child might interpret as accusatory. For example, ask a child “Why do you think they did that to you?” as opposed to “What did you do to make them do that?”