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## EOIR revises guidance on immigration court cases involving juveniles

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**Last Updated:** February 1, 2018

**Topics:** [Children's Issues](#), [Unaccompanied Children](#)

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On December 20, 2017, the Executive Office for Immigration Review (EOIR) issued Operating Policies and Procedures Memorandum ([OPPM](#)) [17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children](#). This OPPM rescinds and replaces OPPM 07-01, *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, which had been in effect since May 22, 2007. While OPPM 17-03 retains some of the guidance in the prior OPPM about the unique nature of juvenile cases and references to using age-appropriate procedures, the overall tone of this OPPM is significantly less favorable to children.

An important preliminary distinction between these two OPPMs is that the prior OPPM applied only to unaccompanied alien children, who are defined in the Homeland Security Act of 2002 as someone who has no lawful immigration status in the United States, has not attained 18 years of age, and who has no parent or legal guardian in the United States, or no parent or legal guardian in the United States available to provide care and physical custody. 6 USC § 279(g)(2). The new OPPM acknowledges that immigration law has several definitions for juveniles and minors. In contrast to OPPM 07-01, EOIR in OPPM 17-03 applies a much broader standard than the statutory definitions and states that the OPPM applies to any case involving an unmarried individual under the age of 18, regardless of whether that individual meets the definition of an unaccompanied alien child. See OPPM 17-03 at p. 2.

Throughout the OPPM, prior guidance on engaging in child-friendly practices is weakened. EOIR instructs immigration judges that issues of law are governed by the INA and the regulations and not the best interests of the child standard. See OPPM 17-03 at p. 3. While former OPPM 07-01 included this same instruction, it also clarified that the best interests of the child standard is a factor that relates to the immigration judge's discretion in taking steps to ensure that a

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child appropriate hearing environment is established, allowing a child to discuss freely the elements and details of his or her claim. The latest OPPM lacks this language. Without the clarification that the best interests of the child standard helps ensure a child appropriate hearing environment, the new OPPM contradicts the [U.N. Convention on the Rights of the Child](#). The U.N. Convention on the Rights of the Child provides that the best interests of the child should be the primary consideration in all actions concerning children. Furthermore, this instruction directly contradicts the [Guidelines for Children's Asylum Claims](#) promulgated by legacy INS in 1998, which adopt the best interests of the child as a useful measure for appropriate interview procedures for child asylum seekers.

OPPM 17-03 contains language encouraging the immigration courts to provide separate juvenile dockets. See OPPM 17-03 at p. 5 (Whenever feasible, courts should conduct cases involving juvenile respondents, particularly unaccompanied alien children, on a separate docket or at a fixed time in the week or month). However, omissions of specific child-friendly practices that were present in OPPM 07-01 are reason for concern. References to the recommendation by family and juvenile court experts that children be allowed to visit an empty courtroom before their hearing are no longer included in the section on courtroom setting and procedures. See OPPM 17-03 at p. 4. Flexible language in the prior OPPM allowing for telephonic conferences for master calendar hearings or status conferences when a child does not reside close to the immigration court has also been removed from the section on courtroom setting and procedures. See OPPM 17-03 at pp. 3 - 8. In addition, guidance on using age-appropriate language and tone is no longer included as an attachment to the OPPM.

Among the sections of the revised OPPM that raise the greatest concern is Section IV, Part L which addresses credibility and burden of proof assessments. EOIR retains some of the language from the prior OPPM, which states that inconsistencies, vague, speculative or generalized answers by a child are not necessarily indicators of dishonesty. However, the new OPPM includes additional language emphasizing that legal requirements, including credibility standards and burdens of proof, are not relaxed or obviated for juvenile respondents, and that vague, speculative or generalized testimony may not be sufficient on its own to be found credible or meet the burden of proof. See OPPM 17-03 at p. 7. This language seems to indicate that immigration judges should use the same standards when evaluating the testimony of children and adults and de-emphasizes developmental and capacity differences between them. This language also contradicts Board precedent that mandates immigration judges take into account a minor's age and pro se and unaccompanied status in assessing the testimony. *Matter of Amaya*, 21 I&N Dec. 583 (BIA 1996).

Section IV, Part M of the revised OPPM, titled Unaccompanied Alien Child (UAC), also raises significant concerns. Rather than focusing on the unique needs of this population as the prior OPPM did, the new OPPM emphasizes rooting out fraud in UAC cases. EOIR instructs immigration judges to evaluate whether a child continues to meet the definition of a UAC because there is an incentive to misrepresent accompanied status or age in order to attempt to qualify for the benefits associated with UAC status. See OPPM 17-03 at pp. 7 . 8. EOIR directs immigration judges to be vigilant in adjudicating cases of purported UACs. It reminds them of their duty to be on alert for fraud and to report any suspected fraud to the EOIR Office of the General Counsel Fraud and Abuse Prevention Program. Through the language of the OPPM, EOIR appears to presume that UACs are fabricating their claims or otherwise lack credibility. *Contra Matter of S-M-J*, 21 I&N Dec. 722 (BIA 1997) (concurrence); see also *Figeroa v. INS*, 886 F.2d 76 (4th Cir. 1989) (emphasizing that the fact that an applicant is an alien does not mean the Board is entitled to presume he is a liar).

Another example of the overall negative tone of this OPPM is the reference to illegal alien. Prior OPPMs, including those dealing with adults and the detained docket, employed the term respondent or alien without additional qualifiers. See, e.g. [OPPM 97-9](#): Motions for Prima Facie Determination and Verification Requests for Battered Spouses and Children.

Finally, rescission of OPPM 07-01 affects [OPPM 08-01](#), titled Guidelines for Facilitating Pro Bono Legal Services. Part G of OPPM 08-01 states that judges are reminded to employ the child-friendly practices described in OPPM 07-01. Many

of those practices can and should be applied to any case involving a minor, whether unaccompanied, accompanied, detained, or non-detained. EOIR's rescission of OPPM 07-01 may erode Part G of OPPM 08-01; however, OPPM 17-03 does not rescind OPPM 08-01. OPPM 08-01 instruction that immigration judges are strongly encouraged to facilitate pro bono representation whenever minors are involved remains in effect. In fact, OPPM 17-03 reaffirms the provisions of OPPM 08-01 that encourage the facilitation of pro bono representation by stating in Section III, Part C, All Immigration Judges are required to provide a list of pro bono legal service providers and should encourage the use of appropriate pro bono resources.

How much of an effect the revised OPPM has on day-to-day courtroom procedures remains to be seen, but the emphasis on fraud detection, use of legal standards to which adults are held, and the de-emphasis of child-friendly and age-appropriate procedures are part of a disturbing trend in policies affecting children in removal proceedings.

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