

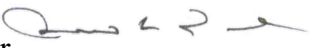


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THE ROLE OF CHILD ADVOCATES IN IMMIGRATION COURT¹

PURPOSE: Provide guidance to adjudicators on Child Advocates

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I. Introduction

Congress authorized the Secretary, Department of Health and Human Services (HHS), “to appoint independent child advocates for child trafficking victims and other vulnerable unaccompanied [] children” in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (2008 TVPRA), Pub. L. 110-457, sec. 235(c)(6), 122 Stat. 5074, 5079 (codified at 8 U.S.C. § 1232(c)(6)). Under the 2008 TVPRA, a Child Advocate’s role is to identify and advocate for the best interest of the child by making a best interests determination (BID) that reflects child protection principles and the unique facts of a child’s situation. This memorandum discusses the role of Child Advocates in immigration court proceedings, including the purpose and content of BIDs and the procedures for considering Child Advocates’ input.²

II. History of Independent Child Advocates in Immigration Courts

In 2004, the Administration for Children and Families within HHS’ Office of Refugee Resettlement (ORR) funded a pilot program to provide child protection advocates – functionally serving as guardians *ad litem* – to unaccompanied children in immigration proceedings.³ For the four years following, HHS appointed Child Advocates to particularly vulnerable children in ORR custody, primarily in Chicago, IL and Harlingen, TX, but also in other locations as needed.

¹ The Executive Office for Immigration Review acknowledges with appreciation the significant contributions of the late Assistant Chief Immigration Judge Amy Hoogasian to this memorandum.

² This memorandum supersedes and rescinds Policy Memorandum 20-03, *Child Advocates in Immigration Proceedings*.

³ A “guardian *ad litem*” is defined as “a party appointed to present recommendations to the court regarding an incapacitated party or minor child.” Black’s Law Dictionary (10th ed. 2014).

Under the pilot program, Child Advocates submitted BIDs to officials with authority over unaccompanied children, including immigration judges, at the discretion of agency officials.

The 2008 TVPRA codified the role of Child Advocates in immigration proceedings. Since 2008, Child Advocates have routinely submitted BIDs to immigration judges, ORR staff, and Department of Homeland Security (DHS) officials on behalf of thousands of children. In 2013, Congress further expanded the Child Advocate program as part of the Violence Against Women Act reauthorization. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, § 1262(3), 127 Stat. 54, 157.

ORR has appointed, through a contract, Child Advocates to assist more than 1,000 children annually since the inception of this program. Child Advocates are currently available to assist children in eight locations: Chicago, Harlingen, Houston, Los Angeles, New York, Phoenix, San Antonio, and Washington, D.C. (serving the immigration courts in both Virginia and Maryland). Child Advocates may also be appointed to serve children outside of these eight locations. *See* 2008 TVPRA, 8 U.S.C. § 1232(c)(6)(B)(iii).

Child Advocates are typically appointed to assist unaccompanied children while they are in ORR custody, but they may also be appointed after a child's release.⁴ Once appointed, Child Advocates typically remain involved in the case while the child is transferred within the ORR network. They also provide services to children after release from ORR custody. Child Advocates may continue advocating on behalf of children who are released from ORR custody to a sponsor who resides in another jurisdiction. As a result, Child Advocates often participate in court proceedings in jurisdictions outside their normal geographical areas of service.

Child Advocates are not appointed for every child in custody. Generally, ORR has appointed Child Advocates to only the most vulnerable children in ORR custody, in particular children who are especially young, are trafficking victims, have complex medical conditions, are pregnant or parenting, have been detained for prolonged periods, or are at risk of aging out of eligibility for immigration relief.

III. Substantive Basis for Best Interest Determinations

“Best interests” is a term of art that is well recognized in domestic and international law. It is widely understood to encompass principles of child development that relate to a child's safety and well-being when considering specific factors affecting the child's life. The primary considerations for any BID include:

- safety
- health
- liberty
- family unity
- physical, social, and educational development

⁴ *See* Section 2.3.4, Child Advocates, ORR Unaccompanied Children Program Policy Guide, <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-2#2.3.4> (last visited June 8, 2023).

- the child’s identity
- the child’s wishes⁵

In determining a child’s best interests, Child Advocates also consider the views of the child’s parents, legal guardians, and/or other trusted caregivers.⁶ BIDs are based on facts provided to the Child Advocate, who is entitled by statute “to materials necessary to effectively advocate for the best interest of the child,” and the BID must be supported by best interests law and principles. *See* 2008 TVPRA, 8 U.S.C. § 1232(c)(6)(A). For example, a BID will consider the child’s expressed wishes and the child’s safety if returned to their country of origin. It may also include, among other things, information on the child’s history, conditions that led the child to leave the country of origin, and any particular vulnerabilities of the child, including physical or mental health needs. The BID represents the Child Advocate’s position on the child’s best interest that may relate to a particular issue or issues affecting the child.

The appointment of an independent Child Advocate is not a substitute for an attorney and vice versa. Child Advocates and attorneys carry out complementary roles, and while their roles may overlap, each performs a critical function with respect to a child’s immigration proceedings. In cases where a child has legal counsel, the attorney has a general ethical duty to represent the child’s expressed interests, while a Child Advocate represents the child’s best interests. An attorney may limit their representation to specific issues, such as the child’s case in immigration court. In contrast, Child Advocates argue for the best interests of the child in all matters affecting the child, including conditions of custody, placement, transfer, reunification with family, permanency, and the ability to repatriate safely. Thus, an attorney provides a child with legal representation specifically, whereas a Child Advocate provides a child with holistic assistance to promote the child’s best interests.

BIDs will include consideration of the child’s expressed interests, but a child’s best interests and expressed interests may not always align. For example, an attorney may advocate for voluntary departure – in line with the child’s expressed interest to return home – while the Child Advocate presents a BID that identifies potential harm to the child if returned and therefore expresses concern with voluntary departure. While the Child Advocate will consider the child’s expressed interest, they are not bound by it and will submit a BID that represents an analysis of what is best for the child in relation to a particular situation in question. (That said, nothing in this paragraph limits an attorney’s ability to consider or present additional information on the child’s behalf.)

IV. Procedures for Considering BIDs Filed in Immigration Court

ORR has the exclusive authority to appoint Child Advocates for unaccompanied children before the immigration court. *See* 2008 TVPRA, 8 U.S.C. § 1232(c)(6)(A). Child Advocates first notify the immigration court of their appointment by filing a “Notice of Appointment” with the court

⁵ *See Framework for Considering the Best Interests of Unaccompanied Children* (BID Framework Report) at 5, <https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/Best-Interests-Framework.pdf> (last visited June 8, 2023). The BID Framework Report is a collaborative document produced in 2016 by a working group comprised of U.S. Government representatives and experts from non-governmental organizations. The BID Framework Report contains extensive guidance on the nature and scope of BIDs.

⁶ *See* Section 2.3.4, Child Advocates, ORR Unaccompanied Children Program Policy Guide, *supra* note 4.

and serving it on the parties, including the local DHS Office of Chief Counsel.⁷ Subsequent filings in the child's case are made in the form of BIDs that are filed with the immigration court and served on the parties. Because Child Advocates have a statutory role under the 2008 TVPRA, immigration judges have a legal basis to accept BIDs for filing. *Id.* Therefore, an immigration judge should accept BIDs filed by a Child Advocate, enter them into the record, and weigh them accordingly in making decisions in the child's case.

BIDs may address any applications or motions filed in a child's case, including motions to terminate or administratively close proceedings, motions to change venue, and motions to advance a hearing. BIDs may also address the child's claim for relief from removal.⁸ For example, BIDs may include country conditions information and address various issues at stake in the child's claim. BIDs may also assess the objective nature of the child's fear of returning or address the well-founded nature of the child's subjective fear. Additionally, BIDs may also opine on whether immigration judges should favorably exercise their discretion on motions to continue, as well as on motions relating to legal relief, including voluntary departure and asylum.

BIDs are subject to the same rules of evidence as other filings in immigration proceedings. Evidence is admissible in immigration proceedings if the evidence is probative and its admission is fundamentally fair. *Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011). Accordingly, an immigration judge should consider a BID in a manner similar to other evidence before the immigration court and give it the weight the judge deems appropriate. In instances where the child's best interests, as articulated by the Child Advocate, conflict with the child's expressed interests, an immigration judge should weigh the evidence in the record and decide the case under the applicable laws and regulations, informed by the recommendations made in the BID.

Child Advocates have a statutory role under the 2008 TVPRA and are permitted to speak during immigration court hearings. A Child Advocate must file their Notice of Appointment prior to speaking during a hearing, but advance filing of the notice prior to a hearing is not required. Therefore, a Child Advocate is permitted to file a Notice of Appointment during a hearing. When the Child Advocate has not made a BID at the time of the hearing, the Child Advocate may provide the immigration judge with status updates regarding their progress in reaching a BID. Once the Child Advocate has made a BID, the Child Advocate may present it orally in court or file it in writing.

Whether the Child Advocate is submitting an oral or written BID, an immigration judge may ask a Child Advocate to provide testimony or to respond to questions from the court or either party. The testimony or questioning may relate to any number of topics, including the current situation in the child's country of origin or the contents of a BID. This testimony is permitted under the same rules that apply to testimony offered by a party or witness in removal proceedings. *See* section 240(b)(1), (4) of the Immigration and Nationality Act; *see also* 8 C.F.R. §§ 1003.10(b), 1003.34, 1240.1(c). While the testimony is allowed, immigration judges cannot compel a Child Advocate to "testify or provide evidence in any proceeding concerning any information or

⁷ Child Advocates are not representatives of record and are not required to file documents electronically.

⁸ *See generally* BID Framework Report, *supra* note 5.

opinion received from the child in the course of serving as a child advocate.” 2008 TVPRA, 8 U.S.C. § 1232(c)(6)(A).⁹

Where an appointed Child Advocate resides or works distantly from the immigration court, it may be necessary for them to appear remotely at a hearing, whether by telephone or video.¹⁰ Given the benefit that the Child Advocate provides both the child and the immigration court, immigration judges should allow Child Advocates to file a BID with the court and to participate remotely.

In most cases, Child Advocates continue to work with children as they move within ORR custody and for a limited period after the child’s release from ORR custody. Occasionally, Child Advocates will assist children even after they age out of ORR custody and are released or placed in adult detention. Therefore, including all BIDs in the child’s record of proceedings will ensure that the BIDs are available to any immigration judge who might hear that child’s case in the future and that the identity of Child Advocate is on record, should that information be pertinent to subsequent hearings.

V. Conclusion

Child Advocates appointed by ORR have played, and will continue to play, an important function in immigration court proceedings involving unaccompanied children. This memorandum is intended as an overview of Child Advocates’ role in such proceedings. If you have questions about the appointment of Child Advocates, or their role once appointed, please contact your supervisor.¹¹

⁹ Child advocates must keep the information in the ORR case file, and information about the child’s case, confidential from non-ORR grantees, contractors, and Federal staff. *See* Section 2.3.4, Child Advocates, ORR Unaccompanied Children Program Policy Guide, *supra* note 4.

¹⁰ A child advocate appearing by video might appear either by a closed video teleconferencing system, or by an internet-based platform, such as Webex by Cisco.

¹¹ 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).