



NEW YORK
CITY BAR

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**WRITTEN TESTIMONY OF THE
IMMIGRATION AND NATIONALITY LAW COMMITTEE
OF THE NEW YORK CITY BAR ASSOCIATION**

**NYS ASSEMBLY COMMITTEE ON SOCIAL SERVICES
NYS ASSEMBLY COMMITTEE ON CHILDREN AND FAMILIES**

**“NEW YORK STATE’S ROLE IN ADDRESSING THE INFLUX OF
UNACCOMPANIED MIGRANT YOUTH FROM CENTRAL AMERICAN
COUNTRIES”**

SEPTEMBER 16, 2014

The New York City Bar Association (the “City Bar”), through its Committee on Immigration and Nationality Law (the “Committee”), respectfully submits this testimony on the importance of New York State providing funding to support legal representation of those unaccompanied minors who have fled their Central American countries and entered the United States, and who are currently present in the State of New York.

The City Bar’s support for immigration representation generally is longstanding. In a 2013 position letter, we called for appointed counsel nationwide to indigent persons in immigration removal proceedings,¹ following our 2009 report advocating for appointed counsel for immigration detainees.² We continue to engage lawmakers toward this goal. The City Bar’s Justice Center also represents immigrant detainees and coordinates leading law firms’ *pro bono* assistance.³ Additionally, the City Bar’s Immigration and Nationality Law Committee, to expand the bar’s expertise, has hosted immigration reform panels and a training session on representation of immigrants at bond hearings, co-sponsored trainings with New York City nonprofits and other bar associations and conducted six free trainings inside New York City family courts to improve access to counsel for immigrant children.

In recent years, an epidemic of crime, gang threats, and violence has swept Guatemala, El Salvador, and Honduras, and this year tens of thousands of children have sought refuge in the

¹ New York City Bar Association, *Letter to Senate Judiciary Committee Advocating Appointed Counsel* (Apr. 24, 2013) (“City Bar Letter”), available at <http://bit.ly/105sqW0>.

² New York City Bar Association, *Report on the Right to Counsel for Detained Individuals in Removal Proceedings* (August 2009) (“City Bar Report”), available at <http://bit.ly/1mpE2AS>.

³ City Bar Justice Center, *Varick Removal Defense Project*, at <http://www2.nycbar.org/citybarjusticecenter/projects/immigrant-justice/varick-removal-defense-project>.

United States.⁴ In responding to this humanitarian crisis, we have argued that Congress's top priority should be to protect vulnerable children.⁵ To advance the goals of accurately identifying those children in need of protection and comporting with due process, we have urged Congress to ensure that all children are represented by counsel and that all children have access to full and fair hearings before neutral immigration judges. Congress has failed to act, and states and localities are left to fill the justice gap.

CHILDREN HAVE A UNIQUE NEED FOR LEGAL COUNSEL

As the New York Times has noted, "The Dickensian absurdity often seen in immigration courts—little children propped up before judges and government lawyers with no idea of what is going on—must not be tolerated."⁶ Access to counsel in removal proceedings reflects the fundamental American value of due process.⁷ According to a recent poll, 76% of registered voters, including 87% of Democrats and 67% of Republicans, support ensuring that "immigrants can have legal representation if they face deportation."⁸

A recent study found that nearly half of children in removal proceedings are currently unrepresented.⁹ Many of these children have a valid claim under current law to remain in the U.S. However, the likelihood of winning protection is much lower for children without lawyers: historical data show that one in ten unrepresented children won permission to stay in the United States, compared to 47% of those children appearing with counsel.¹⁰

Deporting children can have grave consequences. Criminal gangs have exerted increasingly brutal control over communities in Mexico, Guatemala, El Salvador, and Honduras, targeting children for torture, killings, rape, and other violence.¹¹ In a recent study, the UNHCR

⁴ Elizabeth Kennedy, *No Childhood Here: Why Central American Children are Fleeing Their Homes* (July 2014), <http://www.immigrationpolicy.org/perspectives/no-childhood-here-why-central-american-children-are-fleeing-their-homes>.

⁵ *Id.*

⁶ *Innocents at the Border: Immigrant Children Need Safety, Shelter and Lawyers* (Editorial), N.Y. TIMES, June 16, 2014.

⁷ American Immigration Council, *Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice* 12 (Mar. 2013), available at www.immigrationpolicy.org/sites/default/files/docs/aic_twosystemsofjustice.pdf; Mark Noferi, Cascading Constitutional Deprivation: The Right To Appointed Counsel For Mandatorily Detained Immigrants Pending Removal Proceedings, 18 MICH. J. RACE & L. 63, 119-20 (2012).

⁸ Belden Russonello Strategists LLC, *American attitudes on immigration reform, worker protections, due process and border enforcement* 3 (Apr. 2013), available at <http://cambio-us.org/wp-content/uploads/2013/04/BRS-Poll-for-CAMBIO-APRIL-16-2013-RELEASE.pdf>.

⁹ Transactional Records Access Clearinghouse, *New Data on Unaccompanied Children in Immigration Court*, July 15, 2014, <http://trac.syr.edu/immigration/reports/359/>.

¹⁰ *Id.*

¹¹ See, e.g., Pamela Constable, *Could kids fleeing Central America be sent back to face more gang violence?*, WASH. POST, July 25, 2014; Kennedy, *supra* n. 2; U.N. High Commissioner for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* 26-28

found that at least 58% of children arriving from Mexico and Central America had been “forcibly displaced” because they faced violence or harm that signaled a potential need for international protection.¹² This figure does not include many children who are eligible for lawful immigration status because of factors such as domestic abuse, neglect, or abandonment. The Safe Passage Project has found that nearly 90% of the children it has screened in New York are eligible for some type of immigration relief.¹³

Children also face serious challenges in explaining their need for protection. As the National Association of Immigration Judges (NAIJ) recently wrote, in “the legal arena, it is universally accepted that children and juveniles are a vulnerable population with special needs.”¹⁴ For a child's history to be understood, “an atmosphere of trust must be established, and a rapport developed which assures that the minor is both emotionally able and psychologically willing to discuss issues which may be embarrassing, shameful, or traumatizing.”¹⁵ This process takes time and care, especially for a child who has experienced trauma.

The rules for determining whether a child is entitled to protection are exceedingly complicated. As Justice Alito has written, “nothing is ever simple with immigration law.”¹⁶ Children often must obtain decisions from state courts, such as family courts, or other government agencies before they can win permission from an immigration judge to stay in the United States.¹⁷ Without a lawyer, children do not know which facts are important to their cases, let alone how to argue legal points against trained government lawyers.¹⁸ Immigration judges have also voiced support for appointed counsel because they need assistance to determine accurately which children need protection from persecution, trafficking, or abuse.¹⁹

Moreover, children who are represented are more likely to return to the court and complete immigration proceedings. Among hundreds of children represented by *pro bono*

(Mar. 2014), www.washingtonpost.com/local/gang-member-deportations-in-90s-factor-in-border-crisis-some-contend/2014/07/25/10c5adda-0d1d-11e4-8341-b8072b1e7348_story.html.

¹² UNHCR, *Children on the Run* at 6, 17.

¹³ Lenni B. Benson & Claire R. Thomas, Letter to the Editor, *Lawyers for Immigrant Youths*, N.Y. Times, May 27, 2014, <http://nyti.ms/1gzS7S7>; see also Lenni B. Benson, Deborah Lee, & Lisa Frydman, *Helping Child Migrants: Learn How to Represent Children Who Need Immigration and Family Court Assistance*, Practising Law Institute, recorded June 2014, www.pli.edu/Content/OnDemand/Helping_Child_Migrants_Learn_How_to_Represent/_N-4nZ1z129rs?fromsearch=false&ID=227276.

¹⁴ Letter from Dana Leigh Marks, President, National Ass’n of Immigration Judges, July 22, 2014, at 1.

¹⁵ *Id.* at 2.

¹⁶ *Padilla*, 130 S. Ct. at 1490 (Alito, J., concurring). Judges have often compared immigration law to the tax code in complexity. *Castro O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987).

¹⁷ See, e.g., 8 U.S.C. §§ 1101(a)(27)(J); Olga Byrne & Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System: A Resource for Practitioners, Policy Makers, and Researchers* 26 (2012), www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf (explaining requirement of state court ruling in special immigrant juvenile status cases).

¹⁸ Detained children and children in foster care also face major practical barriers to obtaining the state court findings necessary to gain protection based on abuse or neglect.

¹⁹ Letter from Dana Leigh Marks, *supra* n.14.

counsel through the Safe Passage Project in New York, all but three appeared for their hearings. In a recent analysis of nearly ten years of government data, the Immigration Policy Center found that while only 28% of *unrepresented* children appeared for their immigration court proceedings, 93% of children represented by lawyers appeared at such hearings. That is to say, children are more than three times as likely to appear for immigration court proceedings when represented by an attorney.²⁰

In sum, requiring children to appear before Federal immigration judges and U.S. immigration enforcement attorneys—without the benefit of legal counsel—challenges the very notion of due process. The due process issue is framed by the convergence of three distinct factors: 1) the extreme *complexity* of U.S. immigration law, 2) the limited *competency* of children to represent themselves in immigration court proceedings, and, 3) the grave *consequences* associated with erroneous factual and/or legal findings, which, under the current country conditions in Mexico and in Central America, mean for many children the very real prospect of persecution, torture, and even death at the hands of brutal gang members. Taken together, and in the absence of legal counsel, these three factors—complexity, competency, and consequences—work to undermine any semblance of fundamental fairness and strike at the heart of due process.

THE ECONOMIC IMPACT OF LEGAL REPRESENTATION

A recent report by Dr. John D. Montgomery of NERA Economic Consulting²¹ demonstrates that providing counsel to indigent non-citizens can reduce other government costs by: 1) preventing unnecessary court proceedings; 2) reducing the amount of time individuals spend in detention; and 3) relieving the burden of government support to disrupted families. A system of appointed counsel for all individuals in removal proceedings could save the government approximately as much money as it would cost, primarily because such representation would increase efficiency and decrease the amount of time individuals must be detained before their cases are completed.²² Although the report did not separately analyze fiscal impacts only for children,²³ the analysis illustrates the kind of cost efficiencies that counsel would produce.

While many of these children reside in the New York City area, many more have been reunited with family members throughout New York State. There is a need for the State to help build capacity to serve these children. Long Island has received over 2,000 children in the past six months alone and existing nonprofit resources are stretch beyond capacity. On August 13, 2014, under direction from headquarters, the Executive Office for Immigration Review in New

²⁰ *Taking Attendance: New Data Finds Majority of Children Appear in Immigration Court*, Immigration Policy Center, July 29, 2014, available at <http://immigrationpolicy.org/just-facts/taking-attendance-new-data-finds-majority-children-appear-immigration-court>.

²¹ Dr. John D. Montgomery, *Cost of Counsel in Immigration: Economic Analysis of Proposal Providing Public Counsel to Indigent Persons Subject to Immigration Removal Proceedings* (2014), http://www.nera.com/67_8564.htm.

²² *Id.* at 3.

²³ *Id.* at 3 n. 3.

York began holding special priority dockets for children apprehended alone or for adults with small children apprehended after May 2014. These priority dockets are held daily with between 30 and 90 cases scheduled each day. The legal community came together to try to screen and greet these children and to provide them with referrals to existing non-profit or low cost legal providers. Now in mid-September, families are calling the bar associations and experienced immigration providers and reporting that no one is able to take their cases. Even those who can afford private counsel are being told to go to court and to tell the judge that their private lawyer is unable to come that day. The crisis for our justice system is real and deeply felt in our state.

For these reasons, New York State must act now and take all necessary steps to provide funding for lawyers to represent unaccompanied minors. State leaders should innovate and find ways to provide access to civil justice. The immigration law remedies for these children are all parts of civil proceedings. Children who are able to secure a guardianship or custody order in family court will be on the path to more stable lives supporting their integration into school and appropriate access to our existing Child Health systems. Providing lawyers will help ensure that we discharge our obligation—fairly and with full respect for due process—to determine who among these children has a right to stay in this country and who must return home.

Thank you for the opportunity to submit testimony on this important issue.