



**Litigation Updates Regarding  
Immigrant Children's Rights**  
Excerpted Sections of Children's Rights Manual

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## I. Executive Summary

These training materials are intended as a tool for immigration attorneys, BIA-accredited representatives, and other advocates for the rights of immigrant children to better understand the evolving landscape with regards to key legal issues. They cover recent developments in cutting-edge litigation initiated and led by the Center for Human Rights and Constitutional Law (CHRCL) as well as updates from the various adjudicatory bodies involved in defining the relevant legal standards.

For over thirty years, CHRCL has been at the forefront of the battle for the rights of immigrant children in the United States. In 1982, we enjoyed our first historic victory in the field when the U.S. Supreme Court decided *Plyler v. Doe*, agreeing with our claim that denying children a public education on the basis of immigration status violated the equal protection clause of the United States constitution. That case laid the foundation not only for other advocacy efforts on behalf of immigrant children, but also for promoting the constitutional rights of immigrants and other socially and politically marginalized groups more generally.

Continuing on that trajectory, in the early 1990s, CHRCL initiated *Flores v. Reno*, challenging the treatment and conditions of minors in federal immigration custody. Although the Supreme Court ultimately decided against the due process claims of the plaintiff class in its 1993 decision, it left enough space for robust settlement negotiations, ultimately culminating in a 1997 stipulated Settlement Agreement. The terms of the Settlement Agreement continue to be the main source of legally binding responsibilities of the government in relation to detained immigrant children. The applicability of those terms and their evolution in light of the upsurge of undocumented Central American children entering the United States beginning in the summer of 2014 are described herein.

Similarly, in the early 2000s, CHRCL pursued litigation aimed at promoting access to the Special Immigrant Juvenile (SIJ) classification available under the Immigration and Nationality Act as a pathway to lawful permanent residence. In 2010, the Settlement Agreement was reached in *Perez-Olano v. Holder*, guaranteeing age-related protections and clarifying the procedures for seeking the SIJ status in relation to the state juvenile court system, particularly for children in government custody. Some updates on the implementation of that Settlement Agreement are provided in these training materials.

Beyond covering the developments in these two cases and in the legal standards that they set for immigrant children, these materials review some important immigration benefits and forms of relief currently available to immigrant children, and invite readers to consider opportunities for strategic litigation in this field. As always, CHRCL and its staff remain available to provide technical assistance on these and other immigrants' rights issues. Please contact Peter Schey, Executive Director, at [pschey@centerforhumanrights.org](mailto:pschey@centerforhumanrights.org) should you want to discuss potential cases in greater detail. We look forward to the opportunity to support you in your professional growth and to collaborate to promote the rights of immigrant children in our country.

## **II. Updates from the *Flores* Litigation**

### **A. Settlement Agreement**

The 1997 *Flores* Settlement Agreement provides conditions for the custody, detention, and release practices of the INS. The Settlement Agreement applies to all “minors,” persons under the age of 18 years detained in the legal custody of the INS, unless minor is emancipated or incarcerated due to a conviction for a criminal offense as an adult.

#### **1. General Policy**

Treat minors with dignity, respect and special concern for their particular vulnerability and place in the least restrictive setting appropriate to their age and special needs.

#### **2. Procedures and Temporary Placement Following Arrest**

INS is to expeditiously process minors, provide them a notice of rights, segregate unaccompanied minors from unrelated adults within at least 24 hours and separate minors from delinquent offenders.

#### **3. General Policy Favoring Release**

Where it is not required to secure timely appearance or ensure minor’s safety a minor should be released without unnecessary delay in the following order of preference: (a) a parent; (b) legal guardian; (c) an adult relative (brother, sister, aunt, uncle, or grandparent); (d) an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor's well-being; (e) a licensed program willing to accept legal custody, or (f) an adult individual or entity seeking custody, when there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility

The INS much make and record the prompt and continuous efforts towards family reunification and release of the minor continuing so long as the minor is in INS custody.

#### **4. Custody**

A minor may be held in or transferred to a secure facility if the minor has been charged with, is chargeable, or has been convicted of a crime unless the offense is an isolated offense and did not involve violence against a person or use or carrying of a weapon or is a petty offense. A minor may also be held in or transferred to a secure facility if s/he has committed or made credible threats to commit a violent or malicious act, has engaged in unacceptably disruptive behavior with removal necessary to ensure welfare of the minor or others, is an escape risk, or personal safety of the minor is at stake.

The INS must not place a minor in a secure facility if there are less restrictive alternatives available and appropriate in the circumstances.

An unreleased has the right to a bond redetermination hearing while in custody; the right to seek judicial review of placement in a particular type of facility, be provided notice of reasons for being housed in a detention or medium secure facility; and be provided with an INS Form I-770, an explanation of the right to judicial review and a list of free legal service providers

## **5. Transportation**

Unaccompanied minors should not be transported with detained adults except when transported from place of arrest to an INS office or where separate transportation would be impractical. When transported with adults, minors shall be separated.

## **6. Transfer**

A minor is to be transferred with all of his or her possessions and legal papers. No minor represented by counsel shall be transferred without advance notice to counsel, except in unusual and compelling circumstances.

## **7. Attorney-Client Visits**

Plaintiffs' counsel are entitled to attorney-client visits. The minor or the minor's parent or legal guardian may refuse permission to meet with the minor.

## **8. Facility Visits**

Plaintiffs' counsel may request access to any facility in which a minor has been placed.

## **9. Minimum Standards for Licensed Programs**

1. Licensed programs shall comply with state child welfare laws and regulations.
2. Routine medical and dental care, a complete medical examination within 48 hours of admission, and appropriate mental health interventions.
3. An individualized needs assessment including family history for reunification, special needs, educational assessment and plan, and religious preference.
4. Educational services appropriate to minor's level of development and communication skills in a structured classroom setting Monday through Friday. Instruction and reading materials in child's language.
5. Daily outdoor recreation.
6. At least one individual counseling session weekly by trained social work staff.
7. Group counseling sessions at least twice a week.
8. Acculturation and adaptation services.
9. Comprehensive orientation upon admission including rules, services and availability of legal assistance.

10. Where possible, access to religious services of the minor's choice.
11. Visitation and contact with family members regardless of immigration status.
12. Right to privacy including wearing own clothes, private space for storage of personal belongings, private phone conversations, and uncensored mail.
13. Family reunification services and assistance in obtaining legal guardianship.
14. Legal services information, availability of free legal assistance, right to be represented by counsel, right to a deportation or exclusion hearing, right to apply for political asylum or request voluntary departure.
15. Service delivery in a manner sensitive to the age, culture, native language and complex needs of each minor.
16. No corporal punishment, humiliation, mental abuse or punitive interference with daily functions of living, such as eating or sleeping, exercise, medical care, correspondence privileges or legal assistance.
17. Comprehensive and realistic individual plan for each minor.
18. Develop, maintain and safeguard confidentiality of individual client case records.
19. Maintain adequate records and make regular reports to INS

## **B. Enforcement of the Settlement Agreement**

### Motion to Enforce #1: No Release Policy and Housing of Children in Secure Facilities

Beginning in the summer of 2014, ICE reacted to a temporary “surge” of Central Americans arriving at the U.S.-Mexico border by adopting a policy to detain all female-headed families, including children, in secure, unlicensed facilities for howsoever long as it takes to determine whether they are entitled to remain in the U.S. This directly affects class member children and their mothers who are not in secure facilities in Pennsylvania and Texas.

- February 2, 2015 – Motion to Enforce filed in U.S. District Court

Considering these conditions in light of the Settlement Agreement, Plaintiffs filed a motion to enforce alleging that “Defendants’ no release policy and housing children in secure facilities breach the Settlement in three principal ways:

First, the Settlement requires ICE to take affirmative steps to release a child to a parent, close adult relative, or other qualified custodian, except where an individual child’s detention is required “either to secure his or her timely appearance before the INS (now ICE) or the immigration court, or to ensure the minor’s safety or that of others...” Settlement ¶ 14. ICE’s no-release policy as applied against class members apprehended with their mothers breaches defendants’ duty to minimize children’s detention. In addition, the Settlement affords class members the right to be released first to their parents. Settlement ¶ 14. ICE’s categorical refusal to consider releasing class members’ mothers denies class members their right to release to the care and protection of their preferred custodian.

Second, except for delinquents or serious flight risks, the Settlement obliges defendants to house children, usually no more than 72 hours after arrest, in non-secure facilities that are licensed to care for dependent (as opposed to delinquent) children. Settlement ¶¶ 12, 19. ICE’s family detention facilities meet neither of these requirements.

Third, the Settlement requires U.S. Customs and Border Protection (“CBP”) to hold recently apprehended children in facilities that are “safe and sanitary and that are consistent with the [Government’s] concern for the particular vulnerability of minors.” Settlement ¶ 12. In breach of this provision, defendants routinely expose class members to unacceptably harsh conditions during Border Patrol custody, including cold, overcrowding, inadequate food and drink, sleep deprivation, and poor sanitation.”

- July 24 and August 21, 2015 – Orders issued by Judge Gee granting Motion to Enforce

After three months of negotiations with attorneys representing the Department of Homeland Security (DHS), on July 24, 2015, Judge Dolly M. Gee of Federal District Court for the Central District of California, issued a ruling that the Obama administration’s detention of children and their mothers who were caught crossing the border illegally is a serious violation of a longstanding court settlement, and that the families should be released as quickly as possible.

Judge Gee gave DHS until August 3rd to "show cause" why she should not enter a nationwide injunction against the department’s inhumane policy of detaining women and children. Later that month, Judge Gee formalized her decision granting CHRCL’s motion to enforce, holding that the Department of Homeland Security’s policy of detaining children and their mothers violated the 1997 Flores settlement and ordered the government to comply with the settlement within ninety days.

Below is a summary of the main points in Judge Gee’s order on the Plaintiffs’ Motion to Enforce and the Defendants’ Motion to Amend the Flores Settlement.

#### *Plaintiffs’ Motion to Enforce*

- The Settlement applies to all minors in immigration custody, accompanied as well as unaccompanied. “The plain language of the Agreement clearly encompasses accompanied minors. First and most importantly, the Agreement defines the class as the following: “*All minors* who are detained in the legal custody of the INS.” (*See* Agreement ¶ 10 (emphasis added).) The Agreement defines a “minor” as “any person under the age of eighteen (18) years who is detained in the legal custody of the INS.” (*See id.* ¶ 4)... The language defining “minor” in the Agreement, however, is wholly unambiguous and Defendants have offered no reasonable alternative reading that would make it ambiguous.... Had the parties to the Agreement intended to exclude accompanied minors from the Agreement, they could have done so explicitly when they set forth the definition of minors who are excluded from the Agreement... In light of the Agreement’s clear and

unambiguous language, which is bolstered by the regulatory framework in which the Agreement was formed and Defendants' past practice, the Court finds that the Agreement applies to accompanied minors.

- ICE's no-release policy as applied to class members' mothers cannot be reconciled with the Settlement's granting minors a preference of release to a parent. ICE must therefore release a class member's accompanying parent except where doing so would create a flight or safety risk. "...ICE's blanket no-release policy with respect to mothers cannot be reconciled with the Agreement's grant to class members of a right to preferential release to a parent. (See Agreement ¶ 14.) Although Defendants argue that the provision could be read to mean a child should be released to a parent only if that parent is already lawfully in the United States, Paragraph 15 clearly contemplates the possible release of a child to an adult who is not lawfully in the United States... It is uncontroverted that, prior to June 2014, ICE generally released children and parents upon determining that they were neither a significant flight risk nor a danger to safety. (See Cambria Decl. ¶ 2; Ps' First Set, Exh. 11 (Declaration of Carol Ann Donohoe) ¶ 2.) Thus, ICE's conduct subsequent to the formation of the Agreement bolsters Plaintiffs' argument that the preference for release provision requires the release of the accompanying mother along with the child, so long as she does not present a significant flight risk or danger to safety... Defendants must release an accompanying parent as long as doing so would not create a flight risk or a safety risk. Since releasing the parent along with the child in this case would, in most instances, obviate Defendants' concern that releasing the child alone would endanger the child's safety, Defendants' argument that this policy falls within the safety risk exception as a blanket matter is unavailing. Therefore, the Court finds that Defendants' blanket no-release policy with respect to minors accompanied by their mothers is a material breach of the Agreement."

- ICE's evidence failed to establish causation between detaining female-headed families and the recent decline in families apprehended. In any event, the policy argument in favor of detaining families is of "dubious" relevance to whether ICE must comply with the Settlement. "The Court is unconvinced of the persuasive value of the statistical evidence Defendants proffer in support of this argument... the Court finds that the statistical evidence... is insufficient to establish causation between defendants' current policy of detaining female-headed families in family detention centers and the decline in family units apprehended at the border... In sum, even assuming the dubious proposition that the Court can consider a policy argument to alter the terms of the Parties' Agreement, the Court is not persuaded by the evidence presented in support of Defendants' policy argument."

- That family residential facilities cannot be licensed simply means that class members may not be housed in such facilities, except as the Settlement permits. "Under the Agreement, Defendants are required to provide children who are not released temporary placement in a licensed program. The fact that the family residential centers cannot be licensed by an appropriate state agency simply means that, under the Agreement, class members cannot be housed in these facilities except as permitted by the Agreement... Although the Agreement does not mandate that Defendants must release



parents or legal guardians in all circumstances, Defendants certainly can and must make individualized determinations about whether releasing the parent is appropriate in a given situation. Defendants can also use the family residential centers as temporary facilities consistent with Paragraph 12A of the Agreement.”

- Even if conditions in family detention centers were acceptable, ICE cannot be in substantial compliance with the Settlement because those facilities are secure and unlicensed. Class members’ right to be housed in licensed, non-secure facilities is a material term of the Settlement. “Defendants’ responses do not satisfy the Agreement’s unambiguous mandate to place children it does not release in “a program, agency or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children.” (Agreement ¶ 6.)... Because the centers are secure, unlicensed facilities, and the provision is a material term in the Agreement, Defendants cannot be deemed in substantial compliance with the Agreement.”

- CBP’s evidence failed to overcome plaintiffs’ showing of substandard conditions and treatment of class members during Border Patrol custody. The bare existence of holding cell standards says nothing about whether those standards are consistently followed. With regards to temperature, aluminum coverings, absence of trash cans, and keeping lights on at all times, CBP standards confirm the accounts of class members and their mothers regarding substandard conditions. “The testimony of one Border Patrol official regarding CBP’s policies is insufficient to outweigh the evidence presented by Plaintiffs of the widespread and deplorable conditions in the holding cells of the Border Patrol stations. It is true that the Agreement holds Defendants to a lower standard—“safe and sanitary”—with respect to the temporary holding cells. But Defendants have wholly failed to meet even that minimal standard.

*Defendants’ Motion to Amend - Denied*

- Neither the Homeland Security Act nor the TVPRA of 2008 conflicts with the Settlement. The TVPRA is simply inapplicable to accompanied minors. “In light of the HSA’s savings clause and Defendants’ practice with respect to minors for the last 13 years since the enactment of the HSA, Defendants’ argument that the change in the law created by the HAS compels modification of the Agreement falls flat... Defendants’ argument regarding the TVPRA misses the mark since the Agreement’s provision controls release pending removal proceedings and does not interfere with the grounds for removal itself. ... Defendants have not demonstrated that HHS has had any difficulty complying with the Agreement’s provisions... Finally, the TVPRA is simply inapplicable to accompanied children. The fact that the TVPRA requires HHS to decide whether unaccompanied children should be released or housed in secure facilities has little relevance to whether ICE is unable to do the same with accompanied children.”

- ICE failed to show any relationship between its complying with the Settlement and the 2014 “surge” in the apprehension of families and unaccompanied minors. The court found it “astonishing” that ICS has adopted a policy requiring such expensive infrastructure without more evidence to support a belief that doing so would achieve the

desired ends. “It is astonishing that Defendants have enacted a policy requiring such expensive infrastructure without more evidence to show that it would be compliant with an Agreement that has been in effect for nearly 20 years or effective at achieving what Defendants hoped it would accomplish. It is even more shocking that after nearly two decades Defendants have not implemented appropriate regulations to deal with this complicated area of immigration law.”

Based on the foregoing ruling, the Court ordered Defendants to show cause why the proposed remedies should not be implemented within 90 days.

On August 31, 2015, Judge Gee issued her order on the government’s response to the Order to Show Cause, and specifically ordered that the following remedies be implemented no later than October 23, 2015:

1. As required by Paragraph 18 of the Agreement, Defendants, upon taking an accompanied class member into custody, shall make and record prompt and continuous efforts toward family reunification and the release of the minor pursuant to Paragraph 14 of the Agreement.
2. Unless otherwise required by the Agreement, Defendants shall comply with Paragraph 14A of the Agreement by releasing class members without unnecessary delay in first order of preference to a parent, including a parent who either was apprehended with a class member or presented herself or himself with a class member. Class members not released pursuant to Paragraph 14 of the Agreement will be processed in accordance with the Agreement, including, as applicable, Paragraphs 6, 9, 21, 22, and 23.
3. Subject to paragraph 12A of the Agreement, accompanied class members shall not be detained by Defendants in unlicensed or secure facilities that do not meet the requirements of Paragraph 6 of the Settlement, or in appropriate cases, as set forth in the Agreement, in facilities that do not meet the requirements of Paragraphs 12A, 21, and 23. Defendants shall not selectively apply the “influx” provision of Paragraph 12C of the Agreement to house class members apprehended with a parent in facilities that do not comply with the Agreement.
4. To comply with Paragraph 14A of the Agreement and as contemplated in Paragraph 15, a class member’s accompanying parent shall be released with the class member in a non-discriminatory manner in accordance with applicable laws and regulations unless after an individualized custody determination the parent is determined to pose a significant flight risk, or a threat to others or the national security, and the flight risk or threat cannot be mitigated by an appropriate bond or conditions of release.
5. As contemplated in Paragraph 28A of the Agreement, Defendants or their regional Juvenile Coordinator shall monitor compliance with their acknowledged standards and procedures for detaining class members in facilities that are safe and sanitary, consistent with concern for the particular vulnerability of minors, and consistent with Paragraph 12 of the Agreement, including access to adequate drinking water and food, toilets and sinks, medical assistance if the minor is in need of emergency services, temperature control, ventilation, adequate

supervision to protect minors from others, and contact with family members who were arrested with the minor. Defendants shall file such proposed standards within 90 days of the date of this Order. Plaintiffs shall file objections thereto, if any, 14 days thereafter.

6. Defendants shall monitor compliance with the Agreement and this Order and shall provide Class Counsel on a monthly basis statistical information collected pursuant to Paragraph 28A of the Agreement.

- July 6, 2016 – Ninth Circuit Order on Government’s Appeal

At the Ninth Circuit Court of Appeals, the panel affirmed in part and reversed in part the district court’s order granting the motion of a plaintiff class to enforce the 1997 Settlement, and remanded for further proceedings.

The panel held that the Settlement unambiguously applies both to minors who are accompanied and unaccompanied by their parents. The panel held, however, that the district court erred in interpreting the Settlement to provide release rights to accompanying adults. The panel also held that the district court did not abuse its discretion in denying the government’s motion to amend the Settlement.

CHRC issued the following comment:

We hope this decision by the federal court of appeals convinces the Obama administration that its policy of detaining immigrant mothers and children is inhumane and illegal and must come to an end. During the past two years this administration has wasted over one hundred million dollars unnecessarily detaining thousands of refugee children commingled with unrelated adults in unlicensed secure facilities in violation of well-established child detention standards. This disgraceful policy should now be brought to an end by President Obama.

#### Motion to Enforce #2 – Non-Compliance with District Court Order and Need for Special Master

- May 19, 2016 – A second motion to enforce was filed in U.S. District Court, renewing allegations of unacceptable CBP conditions, failure to advise detainees of rights, failure to document efforts to release, housing minors with adults, prolonged detention in inappropriate facilities, and interference with right to counsel

Now the plaintiff children are asking Judge Gee to order the Department of Homeland Security to come into compliance with the settlement within thirty days. The children's lawyers argue that because of the government's failure to comply with the court's prior rulings, Judge Gee should appoint an independent Special Monitor to oversee and report on the government's family detention policy and compliance with the 1997 settlement.

- June 6, 2016 – The Government filed its opposition to the Motion to Enforce arguing that CBP was in compliance with the Settlement Agreement and has monitored compliance as ordered by the District Court on the first Motion to Enforce.
- July 22, 2016 – Status Conference held between the parties in front of Judge Gee
- October 6, 2016 – Status Hearing before Judge Gee

Motion to Enforce #3 – Denial of Bond Hearing to Youth in ORR Custody

- August 12, 2016 – Motion to Enforce filed in U.S. District Court

In August 2016, Plaintiffs brought a third motion to enforce the Settlement Agreement, its time pertaining to the right to a review of their custody status, as protected by the settlement agreement. The Plaintiffs argued, in relevant part:

“For some 19 years the Settlement has guaranteed children whom the Government refuses to release the right to be heard in a bond redetermination... as a procedural check against wrongful detention: “A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing.” Settlement ¶ 24A. Paragraph 24A encourages the Government to comply with its “general policy favoring release” of juveniles and ensures that minors may be heard on whether continued detention is “required either to secure [their] timely appearance ... or to ensure the minor’s safety or that of others...” Settlement ¶ 14. Defendants, however, now insist that they needn’t comply with ¶ 24A:

It is also [ORR and ICE’s] position that ... [b]ecause the TVPRA clearly places all authority for these placement decisions and review of those decisions with HHS, and because no statute or regulation provides an immigration judge with the authority to review the determination made by HHS, Paragraph 24A of the Flores Agreement cannot be applied to this case.

Email from Sarah Fabian, Office of Immigration Litigation, November 23, 2015,

Exhibit 1-ORR.

The parties accordingly appear to disagree solely over whether the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 110 Pub. L. 457, 122 Stat. 5044, *codified in pertinent part at* 8 U.S.C. § 1232 (“TVPRA”), abrogates Settlement ¶ 24A. In plaintiffs’ view, it does not.”

- August 26, 2016 – Defendant’s Opposition to Motion to Enforce #3

Defendants filed their opposition to Plaintiff's third Motion to Enforce, relying on the TVPRA as follows:

"In the Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), 8 U.S.C. §§ 1232(c)(2)(A) and (c)(3)(A), Congress unanimously set forth mandatory procedures requiring the U.S. Department of Health and Human Services ("HHS") to maintain custody of a small subset of unaccompanied alien children ("UACs") in cases where HHS determines that a child poses a danger to self or others or constitutes a flight risk, and in cases where there is not a suitable custodian available who is capable of providing for the minor's physical and mental well-being.

Plaintiffs contend that Defendants' adherence to the plain language of the TVPRA – which was enacted 12 years after the *Flores* Settlement Agreement ("Agreement") was executed – violates the Agreement in cases where a minor in HHS custody is not specifically granted the ability to challenge their continued detention before an immigration judge (even if other administrative and judicial remedies currently exist for minors to challenge their placement in HHS custody). Plaintiffs' motion is meritless and contrary to existing case law, and should be summarily denied for several reasons.

First, Plaintiffs' contention that the Government should provide bond hearings before an immigration judge to UACs in HHS custody fails because Paragraph 24A of the Agreement has plainly been superseded by the unanimous action of Congress, as expressed in the Homeland Security Act of 2002 ("HSA") and the TVPRA, which placed all authority for custody and placement decisions for UACs in the hands of HHS (the agency that has developed expertise and experience over the past fourteen years in determining the placement that is in the best possible interest of UACs in federal custody). Moreover, even if the Court is sympathetic to Plaintiffs' end goal of obtaining custody reviews before an immigration judge, such review is no longer possible or even feasible under the existing statutory and regulatory scheme. Therefore, even if the provision has not been strictly superseded, the Court should decline to enforce it....

Second, to the extent plaintiffs seek to raise a constitutional challenge to HHS' custody decisions and review procedures, they should not be permitted to do so in the context of an enforcement motion. The Court's jurisdiction over this Motion is limited to its powers to enforce the Agreement, and should not be expanded to hear constitutional claims that are not grounded in the Agreement itself. Any such claims should be made separately in a district court with jurisdiction and venue to hear such claims.

Finally, equitable rules of contract enforcement give good reason to deny Plaintiffs' Motion because it is untimely, and raises issues that could have – and should have – been raised years before. The reservation of these issues for a later motion allowed Plaintiffs to avoid highlighting the inherent tension between the TVPRA and the Agreement in their earlier motions, and thus prejudiced Defendants. Class counsel should not be permitted to file an endless series of enforcement motions where they could have filed one motion addressing all issues at the same time."

- September 1, 2016 - Plaintiffs Reply to Opposition to Motion to Enforce #3

In their reply, Plaintiffs argued:

“Defendants fail to point to anything in HSA of 2002 that trumps ¶ 24A of the Settlement. To the contrary, they all but concede that until June of this year the Board of Immigration Appeals (BIA) had affirmed immigration judges’ jurisdiction to review ORR’s detaining class members....Defendants make no pretense of having sought review of those rulings.

As for the TVPRA, reading defendants one would expect something like this in the statute’s text: “HHS’s decisions to detain unaccompanied minors in lieu of releasing them to their parents or other reputable custodians shall be final and not subject to review by any other authority.” The TVPRA, of course, contains no such language, nor anything remotely close.

What defendants’ statutory argument boils down to is this: because the TVPRA “cemented” HHS’s authority over the custody of unaccompanied class members, ORR now has *carte blanche* to detain unaccompanied class members without hearing, never mind that in both the TVPRA and the HSA Congress explicitly saved class members’ right under the Settlement to a bond redetermination. The Court should reject defendants’ bid to distend the term “custody” as granting ORR extravagant prerogative over children’s lives and liberty.

The Court should likewise reject HHS’s bid for exclusive power to decide what process is due class members ORR wishes to detain indefinitely. The TVPRA nowhere grants HHS the unbridled power to prescribe release procedures defendants claim.

Nor should the Court decline to enforce ¶ 24A on the ground ORR is an inerrant and wholly benevolent child welfare agency. The agency’s *ad hoc* protocol for deciding whether a minor should be detained would be unrecognizable to anyone familiar with accepted child welfare and juvenile justice standards, which uniformly counsel transparency and procedural fairness in decisions to detain children.

And, of course, ORR is neither infallible nor invariably benevolent. The agency rather manifests a penchant for leaving detained, traumatized youth to twist in the wind: to puzzle over why they have been refused release and with no way of knowing when the hardships of imprisonment may end.”

- October 6, 2016 – Hearing – Oral Argument on Motion to Enforce

### **C. Monitoring of Implementation of Settlement Agreement**

Since the *Flores* Settlement Agreement was entered in 1997, CHRCL has led efforts to monitor its implementation, including receipt of relevant official reports and in-person monitoring of detention facilities.

Generally, Plaintiffs' counsel are entitled to attorney-client visits with class members even though they may not have the names of class members who are housed at a particular location. All visits shall occur in accordance with generally applicable policies and procedures relating to attorney-client visits at the facility in question. Upon Plaintiffs' counsel's arrival at a facility for attorney-client visits, the facility staff shall provide Plaintiffs' counsel with a list of names and alien registration numbers for the minors housed at that facility. In all instances, in order to memorialize any visit to a minor by Plaintiffs' counsel, Plaintiffs' counsel must file a notice of appearance with the DHS prior to any attorney-client meeting. Plaintiffs' counsel may limit any such notice of appearance to representation of the minor in connection with this Agreement. Plaintiffs' counsel must submit a copy of the notice of appearance by hand or by mail to the local DHS juvenile coordinator and a copy by hand to the staff of the facility.

Every six months, Plaintiffs' counsel shall provide the DHS with a list of those attorneys who may make such attorney-client visits, as Plaintiffs' counsel, to minors during the following six-month period. Attorney-client visits may also be conducted by any staff attorney employed by the Center for Human Rights & Constitutional Law in Los Angeles, California or the National Center for Youth Law in San Francisco, California, provided that such attorney presents credentials establishing his or her employment prior to any visit.

A minor always has the right to refuse to meet with Plaintiffs' counsel. Further, the minor's parent or legal guardian may deny Plaintiffs' counsel permission to meet with the minor.

Plaintiffs' counsel are entitled to attorney-client visits with class members even though they may not have the names of class members who are housed at a particular location. All visits shall occur in accordance with generally applicable policies and procedures relating to attorney-client visits at the facility in question. Upon Plaintiffs' counsel's arrival at a facility for attorney-client visits, the facility staff shall provide Plaintiffs' counsel with a list of names and alien registration numbers for the minors housed at that facility. In all instances, in order to memorialize any visit to a minor by Plaintiffs' counsel, Plaintiffs' counsel must file a notice of appearance with the DHS prior to any attorney-client meeting. Plaintiffs' counsel may limit any such notice of appearance to representation of the minor in connection with this Agreement. Plaintiffs' counsel must submit a copy of the notice of appearance by hand or by mail to the local DHS juvenile coordinator and a copy by hand to the staff of the facility.

The Settlement Agreement provides many of the parameters of this monitoring. In addition to the attorney-client visits permitted pursuant to Paragraph 32, Plaintiffs' counsel may request access to any licensed program's facility in which a minor has been placed pursuant to Paragraph 19 or to any medium security facility or detention facility in which a minor has been placed pursuant to Paragraphs 21 or 23. Plaintiffs' counsel shall submit a request to visit a facility under this paragraph to the DHS district juvenile coordinator who will provide reasonable assistance to Plaintiffs' counsel by conveying

the request to the facility's staff and coordinating the visit. The rules and procedures to be followed in connection with any visit approved by a facility under this paragraph are set forth in Exhibit 4 attached, except as may be otherwise agreed by Plaintiffs' counsel and the facility's staff. In all visits to any facility pursuant to this Agreement, Plaintiffs' counsel and their associated experts shall treat minors and staff with courtesy and dignity and shall not disrupt the normal functioning of the facility.

Attorneys interested in participating in the monitoring of facilities should contact Chapman Noam at [chapmannoam@centerforhumanrights.org](mailto:chapmannoam@centerforhumanrights.org).



### **III. Updates from *Perez-Olano* Litigation**

#### **A. Special Immigration Juvenile Status**

##### Generally

Special Immigrant Juvenile status (SIJ) provides a path to lawful permanent residence for abused, abandoned or neglected youth.

SIJ statutes, 8 U.S.C. §§ 1101(a)(27)(J) and 1255, amended by 2008 Trafficking Victims Protection Reauthorization Act, 110 Pub. L. 457, 122 Stat. 5044 (Dec. 23, 2008).

##### Statutory Definition

Under the INA, the term “special immigrant” means—

(J) an immigrant who is present in the United States—

(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;... and

(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that—

no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; ...

##### Statutory Requirements

The juvenile court either must declare the youth a dependent or place the child with a state department, agency, or an individual. This can include youth in dependency proceedings, delinquency proceedings, probate court guardianship proceedings, adoption proceedings, and family court proceedings.

Reunification with *one* or both parents not viable due to *abuse, neglect, abandonment, or similar basis under state law*.

A juvenile court or state agency must find that it is not in the child's best interest to return to her/his country of origin.

If in HHS/ORR custody, *specific consent* sometimes required.

#### **B. *Perez-Olano* Litigation**

Settlement Agreement: Three Areas of Impact

- (1) Age-out
- (2) Specific consent
- (3) Adjustment of status for youth ordered removed

### **Benefit 1 – Age-Out Protection**

CIS may not deny SIJ or SIJ-based adjustment of status or revoke SIJ “on account of age or dependency status, if, at the time the class member *files* or filed a complete application for SIJ classification, he or she was under 21 years of age *or* was the subject of a valid dependency order that was subsequently terminated based on age.” Settlement ¶¶ 23-24.

Clarification: “USCIS will not deny, revoke, or terminate a class member’s application for Special Immigrant Juvenile (SIJ) classification or SIJ-based adjustment of status if, at the time of filing an application for SIJ classification (Form I-360), (1) the class member is or was under 21 years of age, unmarried, and otherwise eligible, and (2) the class member either is the subject of a valid dependency order or was the subject of a valid dependency order that was terminated based on age prior to filing.” — Stipulation, March 4, 2015, ¶ 1.

### **Benefit 2 – Specific Consent**

Specific consent only required where a youth asks “a state court, not HHS, [to] decide to move him or her out of HHS custody and into a state-funded foster care home or other placement...” Settlement ¶ 7 (definition).

State court may exercise jurisdiction, including to issue SIJ predicate orders, *without* specific consent. *Id.*; *see also id.* ¶ 17

ORR must comply with TVPRA ‘08 § 235(c)(2) in adjudicating specific consent requests, which directs ORR to weigh “danger to self, danger to the community, and risk of flight.” *Id.* ¶ 19.

### **Benefit 3 – Adjustment of Status**

Where youth wins SIJ classification after being ordered removed, ICE must join in motion to reopen so that immigration judge may adjudicate adjustment of status. Settlement ¶ 29.

### **Sunset Clause – Original Settlement Agreement**

*Specific consent benefit; and  
Adjustment of status benefit  
Sunset December 13, 2016.*

(Settlement ¶ 41)

ORR and DHS will thereafter be free to resume following existing regulations and policy memoranda with respect to both specific consent and adjustment of status adjudications.

### Extended Sunset for Age-out Benefit

Age-out benefit survives until June 15, 2018. — Stipulation, March 4, 2015, ¶ 10.

Also, TVPRA §235(d)(6) provides:

“Notwithstanding any other provision of law, an alien described in section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)), as amended by paragraph (1), may not be denied special immigrant status under such section after the date of the enactment of this Act based on age *if the alien was a child on the date on which the alien applied for such status.*”

### Practice Pointers – Age-Out Benefit

- Strive to obtain adjudication of SIJ classification and adjustment of status applications by December 13, 2016.
- If CIS delays, make specific request for expedited adjudication and record of having done so.
- Appeal age-related denials to Administrative Appeals Office.
- Contact class counsel re: age-related denials.

### Specific Consent – What to Expect

TVPRA 2008, § 235(d) transferred authority over specific consent from DHS to HHS, effective March 23, 2009.

January 21, 2011, HHS internal guidance provides that specific consent required “before obtaining a predicate order of a state court, if the UAC applicant also seeks a change in custody status or placement order by the state court.”

September 2011 proposed rule: “The SIJ petitioner is not required to obtain specific consent from HHS if the juvenile court order makes no findings as to custody status or placement.” 76 Fed. Reg. 54978 (Sept. 6, 2011). (Also establishes process for requesting specific consent.)

On December 15, 2015, DHS stated, “DHS received comments on the proposed rule in 2011 and intends to issue a final rule in the coming year.” 80 Fed. Reg. 77709.

For now, 8 C.F.R. § 204.11 (2016) provides as it did pre-TVPRA.

### Adjustment Applications for SIJ Ordered Removed

The Settlement requires ICE to join motions to reopen removal proceedings filed by juveniles who have been granted SIJ status and are *prima facie* eligible to adjust their status, but who have been under order of removal for 90 days or more, which would generally bar their having an immigration judge adjudicate their adjustment applications.

It is likely that upon sunset of the Settlement OCC will refuse join motions to reopen filed by such applicants

### Best Guess – Post December 2016

ORR will likely continue to grant specific consent in accord with current policy and practice; CIS will likely require specific consent only if applicant seeks to alter placement or custody.

Age-out protection will continue until June 2018.

DHS will likely decline to join in motions to reopen, except where OCC decides to exercise discretion favorably.

## IV. Strategies and Possibilities in Representing Immigrant Children

### A. Right to Counsel

The right to be represented by counsel in removal proceedings is much more limited than in a criminal proceeding.

- “In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.” INA § 292.

With regards to minors, the TVPRA provides that the Department of Health and Human Services (HHS) shall ensure pro bono counsel, to the greatest extent practicable and consistent with section 292 of the INA, for all UACs who either are or have been in its custody or in DHS custody. Unfortunately, however, there is very little information available on the frequency with which actual representation is funded by the government.

#### *J-E-F-M- v. Lynch*

The general denial of a right to counsel as applied to immigrant children was recently the subject of legal challenge in the Western District Court of Washington. In *J.E.F.M. v. Lynch*, filed in July 2014 and later amended, the named plaintiffs were immigrant children subject to removal from the United States who seek to represent a larger class of similarly situated children and youth. The complaint alleged violations of the Fifth Amendment due process clause as well as the INA provisions pertaining to the requirement of a “full and fair hearing” before an Immigration Judge and sought to require the government to provide children with legal representation in their deportation hearings. Plaintiffs argued that given their capacities as children, the plaintiffs and the class that they purport to represent cannot have due process or a full and fair hearing without the assistance of a lawyer to skillfully navigate the complexities of the immigration laws and procedures.

Although the government argued that the District Court lacked jurisdiction because requests for counsel should be made before the Immigration Judge, the District Court found that it could properly exercise jurisdiction, reasoning that finding otherwise would eliminate the possibility of the claim being reviewed on the merits pursuant to the balancing of interests required by *Matthews v. Eldridge*. Specifically, the District Court found that because an Immigration Judge is not authorized to and thus would not conduct such a balancing test, the factual record on appeal would be wholly insufficient to evaluate the substance of the due process challenge. Moreover, given the ages of the named plaintiffs and the long duration of the administrative proceedings, the potential for aging out of the minor status upon which the claim is premised by the time the administrative and judicial process had lead to the development of the requisite factual

record, could put their claim at risk of mootness.

The District Court found that it had jurisdiction with regards to the constitutional due process right-to-counsel claim, but dismissed with regard to the statutory claim, finding that the channeling mechanism established in the REAL ID Act and IIRAIRA prevented the District Court from reviewing the plaintiffs' claim under the INA.

Through an order entered April 13, 2015 the District Court dismissed the plaintiffs' claim for class-wide injunctive relief. It relied on Ninth Circuit precedent in *Rodriguez v. Hayes*, 591 F.3d 1105, 1119 (9th Cir. 2009) interpreting 8 U.S.C. 1252(f)(1) which prevents any court (other than the Supreme Court) from enjoining or restraining the operation of the operative provisions of the INA, other than with regard to an individual alien against whom proceedings have been initiated. In *Rodriguez*, the 9th Circuit interpreted "enjoin" to refer to permanent injunctions, while "restrain" connotes temporary or preliminary injunctive relief. Applied to the instant case, the District Court found that while the INA does "not preclude the Court from granting a preliminary or permanent injunction as to 'an individual alien against whom proceedings . . . have been initiated,' it "deprives the Court of jurisdiction to provide injunctive relief to a class. If appropriate, the Court could enter a class-wide declaratory judgment, but the enforcement of such decision would have to be on a case-by-case basis."

The Court dismissed, on ripeness grounds, the claims of those named plaintiffs who had not yet been formally placed in removal proceedings, finding that such proceedings might never be commenced and as such, any challenge regarding a right-to-counsel in those speculative proceedings would be premature. The Court also found that it lacked jurisdiction as to one named plaintiff against whom an order of removal had been entered, albeit in absentia, as the channeling provisions required such a matter to be reopened pursuant to the appropriate administrative avenues.

In April 2016, the District Court rejected most of the government's arguments in favor of dismissal, finding that the complaint clearly set forth procedural due process claims. In its decision, the District Court tentatively certified a class of all individuals under the age of eighteen who are in removal proceedings on or after July 9, 2014 within the boundaries of the Ninth Circuit who are without legal representation and financially unable to obtain such representation, and potentially eligible for asylum, withholding of removal, or protection under the Convention Against Torture, or potentially able to make a claim of United States citizenship. The District Court also defined four tentative subclasses: (1) Class members under the age of fourteen, (2) Class members who have not been admitted to the United States and are allegedly "inadmissible" under the INA, (3) Class members who have been admitted to the United States and are allegedly "deportable" under the INA, and (4) Class members who qualify as unaccompanied alien children. In its order tentatively certifying the class and subclasses, the Court invited the parties to submit arguments as to whether the class and subclasses satisfy the requirements of the FRCP and assigned a briefing schedule ending May 20, 2016. The matter remains pending a definitive class certification and substantive resolution of the claim.

Plaintiffs have taken an interlocutory appeal on the dismissal of the complaint as to particular named plaintiffs and the government took a counter-appeal on other aspects of the District Court's decision. Among other points of contention, the government continues to contest that those named plaintiffs who were paroled into the United States for the purposes of immigration proceedings have "entered" the country, such that they might have due process rights under the Fifth Amendment.

The Court issued an order on June 24, 2016, certifying a class of "[a]ll individuals under the age of eighteen (18) who: (1) are in removal proceedings, as defined in 8 U.S.C. § 1229a, within the boundaries of the Ninth Judicial Circuit, on or after the date of entry of this Order; (2) were not admitted to the United States and are alleged, in such removal proceedings, to be 'inadmissible' under 8 U.S.C. § 1182; (3) are without legal representation, meaning (a) an attorney, (b) a law student or law graduate directly supervised by an attorney or an accredited representative, or (c) an accredited representative, all as defined in 8 C.F.R. § 1292. 1; (4) are financially unable to obtain such legal representation; and (5) are potentially eligible for asylum under 8 U.S.C. § 1158, withholding of removal under 8 U.S.C. § 1231(b)(3), or protection under the Convention Against Torture, or are potentially able to make a colorable claim of United States citizenship." The order also certified the Subclass of "[a]ll individuals in the Class who are under the age of fourteen (14)." In adopting this order, the Court agreed that different rights could be due to non-admitted versus deportable aliens (i.e., persons who did not execute an official entry into the country versus those who did).

On September 20, 2016, the Ninth Circuit issued its decision on the Plaintiffs' interlocutory appeal, affirming the District Court's dismissal for lack of jurisdiction on the statutory claims for court-appointed counsel, reasoning that because the right to counsel is being claimed in the context of removal proceedings, it must be raised through an administrative process for review. Moreover, the panel reversed the District Court's finding of jurisdiction over the constitutional claims, holding that the District Court had erred when it found an exception to the INA's exclusive review process. The panel found that the District Court erred in considering that the plaintiffs' claims challenged a policy or practice collateral to the substance of removal proceedings, and disagreed that because an Immigration Judge was unlikely to conduct the requisite due process balancing the administrative record would not provide meaningful judicial review. The full text of the Court's ruling can be found here: <https://www.aclu.org/legal-document/jefm-v-lynch-ruling>.

## B. Right to Apply for Immigration Benefits

Minors have the right to apply for other immigration benefits in the United States, and are generally subject to the same grounds of ineligibility for relief arising from immigration violations or criminal history. Notably, however, juveniles under the age of 18 do not accumulate any unlawful presence. Instead, unlawful presence begins to accrue on a youth's eighteenth birthday. Additionally, dispositions of juvenile delinquency are not considered to be convictions for the purposes of immigration law. Nonetheless, conduct

alone may be sufficient to trigger deportability or ineligibility for relief. Similarly, unlawful presence not formally accrued may be considered a discretionary factor weighing against the grant of relief.

Below we review current issues affecting the main forms of immigration relief available to children.

### Special Immigrant Juvenile Status

Beyond the basic requirements and specific protections discussed above in the context of the *Perez-Olano* litigation, successfully obtaining a state court-issued predicate order of dependency is a complicated element of the SIJS process. This first step is a prerequisite to USCIS or an Immigration Judge even considering eligibility for SIJ classification, and is subject to the state law definitions and procedures in place in each state.

Specifically, SIJ status cannot be granted unless a state court finds, among other things, that a petitioner cannot reunify with “1 or both” of his parents due to abuse, neglect, or abandonment, and that it would not be in the petitioner's best interest to return to his home country. ([§ 1101\(a\)\(27\)\(J\)\(i\)–\(ii\)](#).)

#### *California*

California courts, for example have held that this is satisfied when a showing of abuse, abandonment or neglect is made with regards to a single parent. In *Eddie E v. Superior Court*, 234 Cal. App. 4th 319 (Cal. Ct. App. 2015), the trial Court had refused the predicate order, reasoning that even though Eddie’s mother had abandoned him, he was living with his father and thus reunification was possible with his father. It also held that mother's subsequent death meant Eddie’s inability to reunify with her was due to death, not abandonment. It further found that a “fresh start” in Mexico would be good for Eddie, and thus returning him to Mexico was in his best interest.

The Court of Appeals rejected this reasoning, finding instead that the plain language of the statute was such that a “petitioner can satisfy this requirement by showing an inability to reunify with *one* parent due to abuse, neglect, abandonment, or a similar basis under state law.” It also disagreed that the death of Eddie’s mother prevented his abandonment, finding the fact “that she died only cemented the permanent abandonment already in place.”

Moreover, California courts have held that a state court may not deny a predicate order based on discretionary considerations that the juvenile broke the law and was unworthy of receiving benefits. In *Leslie H v. Superior Court*, 224 Cal. App. 4th 340 (Ca. Ct. of Appeal 2014), the petitioner presented evidence of statutory eligibility but also had a record of juvenile delinquency. Leslie had been arrested after she and two teenage girlfriends attempted to steal two alcoholic beverages and some cigars from a liquor store. The store clerk confronted the girls, who knocked him to the ground, and assaulted him. In the ensuing melee outside the store, Leslie reportedly grabbed a shoe from a



neighboring store display and struck the clerk in the face. At her juvenile court adjudication in May 2013, Leslie entered a plea admitting guilt to assault with force likely to produce bodily injury and second degree commercial burglary, and the juvenile court declared her a ward of the court and committed her to juvenile hall for 120 days, with probation terms and supervision upon her release. Once it became clear that her case would be referred to ICE, Leslie began the process of seeking SIJ classification as defense to removal.

The juvenile “court concluded Congress could not have intended juvenile wards may qualify for SIJ status because Leslie ‘broke the law,’ and ‘rewarding’ her illegal conduct might motivate other undocumented alien children to commit offenses to gain eligibility for SIJ status and eventual nationalization.” (sic) The Appellate Court found this reasoning to be in error, explaining that “A state court’s role in the SIJ process is not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely returned in their best interests to their home country. As *Mario S.* aptly observed, the SIJ statute and accompanying regulations “commit ... specific and limited issues to state juvenile courts. The juvenile court need not determine any other issues, such as what the motivation of the juvenile in making application for the required findings might be [citations]; whether allowing a particular child to remain in the United States might someday pose some unknown threat to public safety [citation]; and whether the USCIS, the federal administrative agency charged with enforcing the immigration laws, may or may not grant a particular application for adjustment of status as a SIJ.” (*Mario S.*, 954 N.Y.S.2d at pp. 852–853.)... State courts play no role in the final determination of SIJ status or, ultimately, permanent residency or citizenship, which are federal questions. Indeed, far from incentivizing illegal conduct as the juvenile court speculated, an alien minor’s chance for a permanent home in the United States may inspire his or her reform, but these are matters for immigration authorities to evaluate.”

### *Florida*

Notably, not all state courts are interested in granting predicate orders for the purposes of obtaining special immigrant juvenile cases. In Florida, for example, the Third District Court of Appeals issued a series of decisions in 2015 refusing to find unaccompanied minors dependent for the sole purpose of facilitating access to SIJS, mostly in cases where the minor had some other form of *de facto* support and did not require real assistance from the state such that he or she could be considered “dependent.” See, e.g. *In the Interest of F.J.G.M.*, 2015 Fla. App. LEXIS 11935, 40 Fla. L. Weekly D1908 (Fla. 3d DCA Aug. 12, 2015); *D.A.O.L. v. Dep’t of Children & Families*, 170 So. 3d 927 (Fla. 3d DCA 2015); *In re J.A.T.E.*, 170 So. 3d 931 (Fla. 3d DCA 2015); *M.J.M.L. v. Dep’t of Children & Family Servs.*, 170 So. 3d 931, 932 (Fla. 3d DCA 2015); *In re B.Y.G.M.*, 176 So. 3d 290 (Fla. 3d DCA 2015); *In re K.B.L.V.*, 176 So. 3d 297 (Fla. 3d DCA 2015).

Judicial challenge to the refusal to provide predicate orders has proven slow in Florida, particularly in the face of decisions finding the claims to be moot after the petitioner reaches eighteen years of age. In *O.I.C.L. v. Fla. Dep’t of Children & Families*, 2016 Fla.

Lexis 2072, the trial court had denied the petition for child dependency that would have produced the required predicate order, because the petitioner had “left his Mother in Guatemala and he now resides with and is cared for by his Uncle, against whom there are no allegations of abandonment, abuse, or neglect.” The case was affirmed on appeal, but challenged before the state Supreme Court which held that “Florida courts simply cannot declare an individual over 18 years of age to be a dependent child under current Florida law.” While the petition for child dependency was filed approximately two months before O.I.C.L.'s 18th birthday, O.I.C.L. reached majority age in 2015. According to the Supreme Court, now that O.I.C.L. is over 18 years old the question of whether O.I.C.L. should be deemed a dependent child pursuant to Florida law is no longer an issue. While a dissenting opinion argued in favor of jurisdiction on the basis that these types of claims of “capable of repetition, yet evading review” the Court pointed to a separate, pending case of an individual who remains a minor. “In fact, the Third District Court of Appeal's decision in *In re B.R.C.M.*, 182 So. 3d 749 (Fla. 3d DCA 2015) (pending review in the same court, SC16-179), addresses an issue that is very similar to the issue in this case, but the Third District's decision involves a child who is currently less than 18 years of age. Therefore, the legal questions raised are not likely to evade appellate review, and we cannot ignore the mootness of this particular case.” It remains to be seen in the Supreme Court of Florida will take the opportunity to resolve the issue and if so, whether it will simply ratify the lower state courts' very limited reading of the statute, or if it will engage in an analysis more in line with that of other state courts.

### Asylum

Minors are eligible to seek asylum in a manner equal to adults. Although many times the claims of children are grouped with those of their parents, each individual person is entitled to make an independent claim for relief, notwithstanding their age. To apply for asylum as an unaccompanied minor, an applicant must be under 18 years of age and have no parent or legal guardian in the United States who can provide care or custody. Unaccompanied children seeking asylum have the right to begin the process in a non-adversarial setting.

To qualify for asylum, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant. INA § 208(b)(1)(B)(i).

Within the statutory definition of a refugee at INA § 101(a)(42)(A), Congress has explicitly specified that “a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.”

Beyond these express examples, however, claims for recognition as a refugee and asylum or withholding protection are considered on a case-by-case basis to determine whether the particular applicant has suffered or is sufficiently likely to suffer a type of harm that is serious enough to be considered persecution.

The level of harm required to constitute persecution is reduced in children's cases. According to the UNHCR and U.S. Guidelines, and as upheld by several U.S. Courts of Appeals, "[t]he harm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution." U.S. Guidelines at 19; UNHCR 2009 Guidelines at ¶ 10; see also *Hernandez-Ortiz*, 496 F.3d 1042 (9th Cir. 2007); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006); *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Abay v. Ashcroft*, 369 F.3d 634, 640 (6th Cir. 2004) The applicable question is whether the harmful act(s) constitute persecution when considered from the perspective of a child. See, e.g., *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006). This is the case even if the applicant is no longer a child at the time of applying for asylum; the age of the applicant at the time the persecution occurred is what matters. Whether harm suffered or feared by the child constitutes persecution should be assessed with regard to the "individual circumstances of the child," including age, developmental stage, vulnerability, psychological factors, for example, inappropriate sexual touching, not involving rape, of an eight-year-old girl should rise to the level of persecution given her young age and any lasting psychological impact, even though such acts might not constitute persecution in the case of an adult. See UNHCR 2009 Guidelines at ¶ 15–16.

An application for asylum will be prima facie eligible, only if the persecution is based on one of the five statutorily recognized protected grounds: race, religion, nationality, membership in a particular social group or political opinion. The REAL ID Act of 2005 requires the applicant for asylum to establish that a protected ground was or will be at least one central reason for persecution. The Ninth Circuit has interpreted a "central reason" as "a reason of primary importance to the persecutors, one that is essential to their decision to act." *Parussimova v. Mukasey*, 533 F.3d at 1134 (9th Cir. 2008). The fact that persecutors have a personal or criminal motive does not preclude nexus to a protected ground. *Tapia-Madrigal v. Holder*, 2013 WL 1983882 (9th Cir. May 15, 2013).

While race, religion, and nationality can be important elements of many asylum cases, they are unlikely to be the main issues facing many of the minors that are currently facing removal proceedings. Instead, particular social group, and to a lesser extent, political opinion, are likely to be the main bases on which asylum is granted to children.

#### Particular Social Group

There have been many different definitions for a social group. The BIA has defined it as "persons all whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as military leadership or land ownership." For its part, the Seventh Circuit recognized as a social group, "discrete, homogenous groups targeted for persecution because of assumed disloyalty to the regime." *Bastanipour v.*

*INS*, 980 F.2d 1129, 1132 (7th Cir. 1992). The First Circuit states that it is, “a characteristic that either is beyond the power of an individual to change or that it ought not be required to be changed.” *Ananeh-Firempong v. INS*, 766 F.2d 621, 626, (1st Cir. 1985).

A social group will rarely be found when it is applicable to a large section of the nation. For example, the Board of Immigration Appeals has frequently denied asylum application based on violence in El Salvador directed against the social group of working-class males of military age who had not demonstrated support for the government.

Children are considered a social group under immigration law, and their youth maybe helpful in the application process. However, case law in this area has been mixed. For example, in *Matter of Kasinga*, the BIA found that the child had a well-founded fear of persecution because of the threat of female genital mutilation. The social group was found to be, young women of the tribe who had not under gone the mutilation and opposed the practice. However, in *Matter of Luna-Lorezano*, the court found that there was an identifiable social group of underage males forcibly recruited and illegally placed into the military who have been subjected to physical, social and emotional abuse.

According to the BIA, a PSG cannot be defined by language commonly used in society (such as “wealth” or “young”) if the language would not define the group with precision. *W-G-R-*, 26 I&N Dec. at 221-22. For example, “young” does not say how young; “wealthy” does not say how wealthy. Even “former gang member” does not pass the particularity test – says the BIA – because a variety of people from different backgrounds and levels of gang involvement could be former gang members. *Id.* However, the BIA simultaneously requires the definition to capture a concept which is “distinct” in the eyes of the society from whence the claim arises. That is, if the group is defined as “18 to 25 year olds,” the applicant would need to demonstrate that society views that group as distinct from, e.g., 26 year olds. Thus, the particularity requirement, as defined in *M-E-V-G-* and *W-G-R-*, effectively precludes the use of common parlance labels to describe a PSG, even as the social distinction test requires that a PSG be limited by parameters a society would recognize.

### *Derivative Asylum*

Notably, the statute does not expressly recognize derivative asylum possibilities for anyone other than the spouse or unmarried, minor children of an asylee. However the regulations at 8 CFR § 207.7 delineates specific categories of persons excluded from derivative grants but does not list parents. Thus there is some basis for arguing, although it has yet to be recognized, that a grant of asylum to a child should result in derivative status for the parent. More likely, though still difficult, is a finding that the probability of persecution of the child can also be imputed to the parent. Precedent for this exists in the Ninth Circuit.

### *Ninth Circuit*

In its 2010 decision in *Al Bustami v. Holder*, 385 F. App'x 719 (9th Cir. 2010), the Ninth Circuit recalled its previously decisions that “even if derivative asylum is unavailable, harms to family members should be assessed cumulatively, see *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1190-91 (9th Cir. 2005), *vacated on other grounds by* 549 U.S. 801, 127 S. Ct. 57, 166 L. Ed. 2d 7 (2006), and that physical violence towards close family members can substantiate a petitioner's fear of persecution. See, e.g., *Baballah v. Ashcroft*, 367 F.3d 1067, 1074-75 (9th Cir. 2004) (“The treatment of Baballah's brother demonstrated that these threats were not idle.”); *Gonzalez v. INS*, 82 F.3d 903, 909 (9th Cir. 1996) (“The violence actually committed against other members of [petitioner's] family, and repetition of threats to her, made her fear of violence well founded.”)”

In *Tchoukhrova*, the Ninth Circuit held “that disabled children and their parents constitute a statutorily protected group and that a parent who provides care for a disabled child may seek asylum and withholding of removal on the basis of the persecution the child has suffered on account of his disability.” 404 F.3d 1181, 1182. In that case, the child was born with cerebral palsy, as a direct result of the staff of the Russian state-owned hospital, and suffered terrible treatment, both as an infant and later in life when he was denied medical care, subjected to horrific conditions and treatment, and prevented from accessing public school. *Id.* at 1183. His parents were regularly directed to abandon him and were pressured to have him institutionalized. They became activists around disability rights issues, and received additional harassment, rebuke, and diminished job possibilities as a result. The Immigration Judge and Board of Immigration Appeals had found a cognizable social group and mistreatment on that basis, but had found (and sustained) that it did not rise to the level of persecution. *Id.* at 1190. In reviewing those findings, the Ninth Circuit agreed not only that “disabled children in Russia” constitute a distinct and identifiable group, but also that “Russian parents who provide care for their disabled children are properly included in the particular social group.” The Ninth Circuit reasoned that “[t]he family interest in preserving the rights and protecting the welfare of a disabled child welds the parents (or those in *loco parentis*) together with the disabled child in a manner that qualifies all of them as members of a social group of purposes of our immigration laws.”