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## Minor Protections: Best Practices for Representing Child Migrants

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# MINOR PROTECTIONS: BEST PRACTICES FOR REPRESENTING CHILD MIGRANTS

Laila L. Hlass\*

## NOTE FROM THE EDITOR

One source in the following article is an immigrant youth who elected to remain anonymous. Given the sensitive nature of juvenile removal proceedings, *New Mexico Law Review* will honor the author's interest in maintaining the individual's anonymity. Any interest in gaining information regarding the interview must be sought directly from the author, consistent with her approval.

## ABSTRACT

*In recent years, the number of Central American children fleeing violence and seeking protection in the United States has surged, and these children's cases have flooded the immigration courts. Children are treated virtually the same as adults in immigration court, and, because they are not provided government-appointed counsel, many must defend themselves from deportation pro se. In 2014, 80% of children—roughly 34,130—were unrepresented, and this lack of representation often has profound consequences: many of these children are eligible for protection from deportation, but, without access to attorneys, most will be deported anyway. Governments, nonprofits, and child advocates have taken action to address this justice gap, but these efforts have fallen short of a solution. In a recent case, *J.E.F.M. v. Lynch*, regarding the government's failure to provide counsel to defend children matched against federal prosecutors in immigration court, the Ninth Circuit implored the Executive and Congress to address the crisis: "[t]o give meaning to 'Equal Justice Under Law,' . . . to ensure the fair and effective administration of our immigration system, and to protect the interests of children who must struggle through that system, the problem demands action*

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\* Professor of the Practice and Director of Experiential Learning, Tulane University Law School. For their helpful insights and conversations at various stages of this project, the author wishes to thank Jason Cade, Lindsay M. Harris, David Koplow, Naomi Mann, Karen Pita Loor, Andrew I. Schoenholtz, Susan Schmidt, Ragini Shah, Sarah Sherman-Stokes, and the NYU Clinical Writer's Workshop. The author is particularly grateful for the individuals who were interviewed for this work and continue to fight for children every day: Jojo Annobil, Laura K. Demastus, Julie Flanders, Rebecca Wilson Heller, Raj Jadeja, Meghan Johnson, Golden McCarthy, Cristina Romero, Rebeca E. Salmon, Maureen Ketler Schad, Eve Stotland, Elizabeth Yaeger, and David Walding.

*now.” The Justice Department and some state and local governments and nonprofits have begun funding a limited number of temporary fellowship positions, usually for recent law graduates, to defend children from deportation. As these initiatives develop and expand, policy makers and philanthropic organizations will need to determine the most effective and efficient ways to provide counsel to so many migrant children. This article contemplates the best practices for high volume delivery of legal services for children in immigration court. Drawing on original, empirical data regarding recent Special Immigrant Juvenile Status (SIJS) applications and extensive interviews with organizations and individuals nationwide filing the most SIJS applications, this article considers emerging trends in the representation of child migrants, identifies common characteristics of effective high volume practices representing children, and offers recommendations to expand access to qualified counsel and to create a child-centered approach to youth in removal proceedings.*

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## INTRODUCTION

*My name is David, and I have no memory of coming to the United States. I only know stories. I was three years old when I came through land and through seas. Then, when I was four years old, I was ordered deported by an immigration judge. I didn't even know what a judge was, I was so little. I didn't know I was supposed to go to court, and I missed the hearing, so the judge ordered me legally deported. I didn't know my deportation order was a time bomb, meaning my life could be destroyed, and I could be deported, any time, any day, without ever stepping foot in a courtroom.*

*When I was seventeen, I met a lawyer, Tina, from the Legal Aid Society, and that changed everything. She told me I was eligible for a Special Immigrant Juvenile Status (SIJS) visa and if approved, I could apply for a green card. The visa was for kids like me who had a parent who abandoned, neglected, or abused them. My dad did all those things. He was violent. He would hit my mom, he even tried to kill her. Once I saw him as he strangled her until she could hardly breathe. Another time, he had her against a wall with a knife in his hand—my little sister was three, my brother was five, and I saw them watching, both scared to death. That was the worst, the helplessness. After my mom divorced my dad, he never supported us. It was like he didn't know us.*

*I'm so lucky I found Tina and the Legal Aid Society. She represented me in an important family court hearing, where a state judge found that my dad neglected and abandoned us, which was the first part of the SIJS process. Then, she reopened my old deportation order with the immigration court, and applied for my visa and residency before the immigration agency. Although I'm a confident person I wasn't able to defend myself. I didn't know where to start. With Tina's help, I'm on my way to getting my green card. I graduated near the top of my class in high school, got scholarships, and am going to college, which no one in my family has done before.<sup>1</sup>*

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1. This narrative is based on an interview with a formerly unauthorized migrant youth. David is a pseudonym that the young person chose to maintain his privacy. Cristina ("Tina") Romero continues to represent children at the Legal Aid Society of New York.

As the number of minors<sup>2</sup> fleeing Central America to the United States has risen to new heights,<sup>3</sup> peaking with almost 70,000 unaccompanied children arriving at the US-Mexico border in 2014,<sup>4</sup> a national debate has raged regarding these children's rights in the immigration system. Courts have long deplored the complexity of immigration law,<sup>5</sup> comparing it to the notoriously convoluted tax code, and noting a "lawyer is often the only person who could thread the labyrinth [of immigration court]."<sup>6</sup> Despite this, children are treated similarly to adults and, like adults, have no statutory right to an appointed lawyer.<sup>7</sup> In a recent class action lawsuit on behalf of eight named plaintiffs aged ten to seventeen, *J.E.F.M v Lynch*, civil rights groups have challenged the federal government's practice of deporting unrepresented children.<sup>8</sup> During a deposition, Assistant Chief Immigration Judge Jack H. Weil, who was, at the time, in charge of training immigration judges and had particular oversight over vulnerable populations in immigration court, defended the practice, explaining, "I've taught immigration law literally to 3 year olds and 4 year olds."<sup>9</sup> In reality, although a large number of children migrants are potentially eligible to stay and live in the United States as Special Immigrant Juveniles, asylees, or under other protection,<sup>10</sup> many will be ordered deported, just like David, because

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2. This refers to youths under the age of eighteen, although children in immigration law are defined as being unmarried and under the age of twenty-one. *See* 8 U.S.C. § 1101(b)(1) (2012).

3. Customs and Border Protection apprehended 38,833 children in 2013, representing a 58.6% increase from 2012, when 24,481 children were apprehended. *See Total Monthly UACs by Sector, FY10-FY16TD-Jan.*, U.S. Border Patrol, <https://www.cbp.gov/sites/default/files/documents/BP%20Total%20Monthly%20UACs%20by%20Sector,%20FY10-FY16TD-Jan.pdf> [hereinafter Customs and Border Patrol].

4. 68,631 unaccompanied children were arrested by Customs and Border Protection in fiscal year 2014. In Fiscal Year 2015, the number declined to 39,970 unaccompanied juveniles and 39,838 family units, which include one or more children per unit. *See* U.S. CUSTOMS AND BORDER PROTECTION, CBP BORDER SECURITY REPORT (2015), [https://www.dhs.gov/sites/default/files/publications/CBP%20FY15%20Border%20Security%20Report\\_12-21\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/CBP%20FY15%20Border%20Security%20Report_12-21_0.pdf).

5. *Castro-O'Ryan v. Dep't of Immigr. & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (comparing to tax code); *see also Yuen Sang Low v. U.S. Att'y Gen.*, 479 F.2d 820, 821 (9th Cir. 1973) ("[W]e are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean what they say.").

6. 847 F.2d at 1312.

7. *See* 8 U.S.C. § 1229(b)(4) (2012).

8. *See J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016) (finding that the district court has no jurisdiction over the indigent minor immigrants claims because all statutory and constitutional claims arising from immigration removal proceedings can only be brought through the petition for review process in federal court, instead of through a district court challenge).

9. Dep. of Hon. Jack H. Weil, *J.E. F.M. v. Lynch*, No. C14-1026 TSZ, at 69 (W.D. Wash. Oct. 15, 2015), available at <https://www.aclu.org/legal-document/jefm-v-lynch-deposition-honorable-jack-h-weil>.

10. OLGA BYRNE & ELISE MILLER, CTR. ON IMMIGR. AND JUST., THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS (2012), <http://archive.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>; *See generally* U.N. HIGH COMMISSIONER FOR REFUGEES, CHILDREN ON THE RUN (2014).

they do not have a lawyer to help them.<sup>11</sup> In fact, nine out of ten unrepresented children in immigration court are ordered deported, while about half of represented children are allowed to stay.<sup>12</sup>

Meanwhile, some federal agencies, as well as some state and local governments,<sup>13</sup> have moved forward in funding representation for immigrant children in recent years.<sup>14</sup> Furthermore, in February 2016, then Senate Minority Leader Harry Reid introduced sweeping legislation, “Fair Day in Court for Kids Act of 2016,” which requires appointed counsel for unaccompanied minors, in addition to other vulnerable immigrants, to ensure fair and efficient court proceedings.<sup>15</sup> While the legislation proposes to ensure appointed counsel are available to migrant children in deportation proceedings, there are no specifications about how to create a model of legal services to meet the needs of tens of thousands of children in removal proceedings, nor about what minimum requirements or characteristics said counsel must possess, despite the often inadequate representation of immigrant children.<sup>16</sup>

The surge of child migration into the United States and the record number of SIJS applications provide an instructive backdrop for an inquiry into best practices for high volume delivery of legal services to migrant children. While SIJS is not the only form of relief available for children, it has become widely used to protect the children of the surge. SIJS remains the only part of the federal immigration scheme that requires a state court to act before the federal government will consider an

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11. See 8 U.S.C. § 1362 (2012) (stating that right to counsel shall be at no expense to the government); Tom K. Wong et al., *Paths to Lawful Immigration Status: Results and Implications from the PERSON Survey*, 2 J. ON MIGRATION & HUM. SECURITY 287, 301 (2014) (discussing immigrants who may be eligible for relief but not know it or not have access to counsel).

12. TRAC IMMIGRATION, NEW DATA ON UNACCOMPANIED CHILDREN IN IMMIGRATION COURT (2014), <http://trac.syr.edu/immigration/reports/359/>.

13. See Announcement of the Award of Two Single-Source Program Expansion Supplement Grants to Support Legal Services to Refugees Under the Unaccompanied Alien Children’s Program, 79 Fed. Reg. 62,159 (Oct. 16, 2014); OFF. OF PUB. AFF., DEP’T OF JUST., JUSTICE DEPARTMENT AND CNCS ANNOUNCE \$1.8 MILLION IN GRANTS TO ENHANCE IMMIGRATION COURT PROCEEDINGS AND PROVIDE LEGAL ASSISTANCE TO UNACCOMPANIED CHILDREN (2014), <http://www.justice.gov/opa/pr/justice-department-and-cnsc-announce-18-million-grants-enhance-immigration-court-proceedings>; IMMIGRANT JUSTICE CORPS, <http://justicecorps.org/> (last visited Apr. 7, 2017) (N.Y. state); Niraj Chokshi, *California Will Give Undocumented Immigrant Children \$3 Million in Free Legal Services*, WASHINGTON POST (Sept. 29, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/09/29/california-will-give-undocumented-immigrant-children-3-million-in-free-legal-services/>; Liz Robbins, *New York to aid Immigrants amid Stalled National Reforms*, N.Y. TIMES (Dec. 14, 2015), <http://www.nytimes.com/2015/12/15/nyregion/new-york-city-to-aid-immigrants-amid-stalled-national-reforms.html>.

14. For example, required characteristics for Justice AmeriCorps fellows includes holding a JD and having Spanish fluency, with preferred but not mandatory qualifications of having experience in family or immigration law and working with children. See Justice Americorps, available at <https://joinjusticeamericorps.org/faq/applicants/>.

15. Fair Day in Court for Kids Act of 2016, S. 2540, 114<sup>th</sup> Cong. (2016).

16. See IMMIGRATION COURT OBSERVATION PROJECT, NATIONAL LAWYERS GUILD, FUNDAMENTAL FAIRNESS: A REPORT ON THE DUE PROCESS CRISIS IN NEW YORK CITY IMMIGRATION COURTS 23–25 (2011); PETER L. MARKOWITZ ET AL., STUDY GROUP ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS (2011), <https://www.ils.ny.gov/files/Accessing%20Justice.pdf>.

applicant's eligibility for the relief, highlighting the often critical role counsel plays in accessing relief. As the first step of the SIJS process requires a state court action, representatives must have expertise in both family and immigration law to best represent these children. After a state court makes the requisite findings regarding past abuse, abandonment and/or neglect, and the child's best interests, then the applicant may file a SIJS petition with U.S. Citizen and Immigration Services (USCIS), the benefits arm of the immigration agency tasked with determining if the child should be granted SIJS. Once approved, Special Immigrant Juveniles are eligible to apply for lawful permanent residence, as long as the numerical caps for their specific visa have not already been reached that year.<sup>17</sup> Although SIJS has been historically under-utilized, with just a few hundred applications per year,<sup>18</sup> numbers were so high in 2016 for SIJS seekers that for the first time, USCIS has stopped accepting lawful permanent resident applications from SIJS seekers from Honduras, El Salvador, Guatemala, Mexico, and India.<sup>19</sup>

As judges, bar associations,<sup>20</sup> states, federal agencies, and nonprofits have decried the growing crisis of representation for the immigrant poor in removal proceedings, a growing body of scholarship examines access to justice in immigration proceedings,<sup>21</sup> including the crisis of quality representation,<sup>22</sup>

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17. 8 U.S.C. § 1153 (2012); *see* U.S. CITIZENSHIP AND IMMIGR. SERV., DEP'T OF HOMELAND SECURITY, EMPLOYMENT-BASED FOURTH PREFERENCE (EB-4) VISA LIMITS REACHED FOR SPECIAL IMMIGRANTS FROM EL SALVADOR, GUATEMALA AND HONDURAS (2016), <https://www.uscis.gov/news/employment-based-fourth-preference-eb-4-visa-limits-reached-special-immigrants-el-salvador-guatemala-and-honduras>.

18. Laila L. Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266, 288 (2014).

19. 9 U.S. Dep't of St., Visa Bulletin for May 2016 92 (regarding El Salvador, Guatemala, & Honduras), <https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-may-2016.html>; 9 U.S. Dep't of St., Visa Bulletin for July 2016 94 (regarding Mexico), <https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-july-2016.html>.

20. A.B.A. TASK FORCE ON ACCESS TO CIVIL JUSTICE, REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION (2006), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_06A112A.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf).

21. Ingrid V. Eagley & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015); Peter L. Markowitz et al., *Accessing Justice: The Available and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357 (2011); Jennifer L. Colyer et al., *The Representational and Counseling Needs of the Immigrant Poor*, 78 FORDHAM L. REV. 461 (2009); Carla L. Reyes, *Access to Counsel in Removal Proceedings: A Case Study for Exploring the Legal and Societal Imperative to Expand the Civil Right to Counsel*, 17 UDC/DCSL L. REV. 131 (2014); Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3 (2008); David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177 (2015); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1301 (2011); Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461 (2011).

22. Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 604 (2009) ("For those who do receive representation, there is alarm about the quality of that representation in some instances. Concerns include unprofessional behavior on the part of some of the immigration attorneys and unscrupulous behavior of those engaged in the unauthorized practice of law."); Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 59 (2008) ("Low-quality representation is too often the case at the Immigration Court level."); Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of*

particularly for vulnerable populations like children.<sup>23</sup> Yet this scholarship has not examined best practices for the delivery of the high volume of legal services to children needed to meet the justice gap. Additionally, there has been very little empirical examination of the implementation of the Special Immigrant Juvenile Status statute, the unique immigration protection available solely to children,<sup>24</sup> while considering best practices for the delivery of high volume legal services to immigrant children, this article relies on and examines original data regarding nearly 4,000 SIJS applications received by the immigration agency in 2013.

Part I of this article will overview the treatment of children in the immigration system and the process of seeking immigration relief, focusing on SIJS. Part II will take a first look at the original data regarding all SIJS seekers in 2013, examining characteristics including the number of applications, average age, average processing time, country of origin, states and cities of residence, as well as trends of representation.<sup>25</sup> This section shows that while the 2013 SIJS seekers, who mark the beginning of the surge, are similar to SIJS applicants from prior years, there is a greater share of SIJS seekers originally from Honduras, Guatemala, and El Salvador, where children have often been exposed to trauma and violence. There continue to be geographic disparities in which states SIJS seekers hail from, which may be due to varying levels of access to nonprofit attorneys throughout the US. This section also identifies trends in representation, finding that most SIJS applications are submitted by “repeat player” representatives – those who represent multiple SIJS seekers. Part III will outline key characteristics and practices that child immigration law advocates employ to deliver high volume legal services to migrant children, drawing from interviews with organizations and individuals who have the highest volume SIJS practices.<sup>26</sup> Finally, Part IV will offer recommendations on best practices for high volume delivery of legal services to immigrant children, finding that representation is ideally provided by or under the supervision of experienced attorneys who (1) have specialized knowledge of child welfare principles, family law and immigration practice; and (2) work as part of a youth project at a nonprofit organization providing holistic, vertical representation of youth before state courts, immigration courts, and immigration agencies. This section also offers suggestions

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*Legal Representation*, 63 STAN. L. REV. 317, 330 (2011) (“The judge groups . . . agreed that immigration was the area in which the quality of representation was lowest.”).

23. M. Aryah Somers, *Zealous Advocacy for the Right to Be Heard for Children and Youth in Deportation Proceedings*, 15 CUNY L. REV. 189(2011); Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. ON LEGIS. 331 (2013); Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41 (2011); Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247 (2010); LaJuana Davis, *Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings*, 58 DRAKE L. REV. 123 (2009).

24. Jacqueline Bhabha & Susan Schmidt, *From Kafka to Wilberforce: Is the U.S. Government’s Approach to Child Migrants Improving?*, 11-02 IMMIGR. BRIEFINGS 1 APP. 1 (Feb. 2011) (examining SIJS application data from 2004-2010); Laila L. Hlass, *States and Status: A Study of Geographic Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266 (2014) (examining SIJS application trends from 1992-2012, particularly geographic disparities).

25. Although the surge continued in FY 2014, FY 2013 data was the most recent surge data available at the time of the writing of this article.

26. These applications were overwhelmingly successful in achieving SIJS protection.

for a more child-friendly approach in removal proceedings and to encourage ICE prosecutors to develop child-friendly guidance about child cases.

## I. CHILDREN IN THE IMMIGRATION SYSTEM

In the last several years, increasing numbers of children—both unaccompanied and accompanied by a parent—have fled to the United States.<sup>27</sup> According to studies from humanitarian and child refugee-focused entities, children have been migrating in increased numbers in large part due to violence targeting youth, particularly in Honduras, El Salvador, and Guatemala.<sup>28</sup> Children are also migrating to the U.S. because of extreme poverty, educational deprivation, lack of access to food and medicine, and discrimination.<sup>29</sup> Once an unaccompanied immigrant child is apprehended, she is transferred to the Office of Refugee and Resettlement<sup>30</sup> until the child can be released to an appropriate adult sponsor.<sup>31</sup> In the meantime, the child is also placed into removal proceedings, where an immigration judge decides whether to deport her, and her chance of being able to prevail depends greatly on whether she can secure an attorney.<sup>32</sup> Most children are not able to obtain lawyers, and most unrepresented children are deported.<sup>33</sup> Yet many children in removal proceedings—as well as children who have been living in the U.S. undetected by immigration enforcement agents—are eligible for protection in the form of Special Immigrant Juvenile Status.<sup>34</sup> This section will explore the surge in child migration to the United States and the immigration system children must navigate once they arrive.

### A. Migration to the United States

In recent years, there has been nearly a tenfold growth in child migration through the Central America/Mexico-United States corridor,<sup>35</sup> and the children coming are increasingly younger and female.<sup>36</sup> As the number of refugee and

27. Customs and Border Protection, *supra* note 4.

28. U.N. HIGH COMMISSIONER FOR REFUGEES, CHILDREN ON THE RUN, *supra* note 10, at 16; KAREN MUSALO ET AL., CTR. FOR GENDER & REF. STUDIES, CHILDHOOD AND MIGRATION IN CENTRAL AND NORTH AMERICA: CAUSES, POLICIES, PRACTICES AND CHALLENGES (Feb. 2015), [http://cgrs.uchastings.edu/sites/default/files/Childhood\\_Migration\\_HumanRights\\_English\\_1.pdf](http://cgrs.uchastings.edu/sites/default/files/Childhood_Migration_HumanRights_English_1.pdf).

29. MUSALO ET AL., *supra* note 28.

30. The Office of Refugee Resettlement is part of the Department of Health and Human Services. This agency is responsible for unaccompanied immigrant children by statute, and also after a class action lawsuit challenged the immigration agency's mistreatment of children in their care.

31. 8 C.F.R. § 236.3 (2002); 8 C.F.R. § 1236.3 (2002); Stipulated Settlement Agreement at 6, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (CD Cal. May 25, 1988).

32. TRAC IMMIGRATION, *supra* note 12, at 2; LISA FRYDMAN ET AL., CTR. FOR GENDER & REFUGEE STUDIES, KIDS IN NEED OF DEF., A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM iii-iv (Feb. 2014).

33. TRAC IMMIGRATION, *supra* note 12, at 2; Politico FOIA (on file with the author).

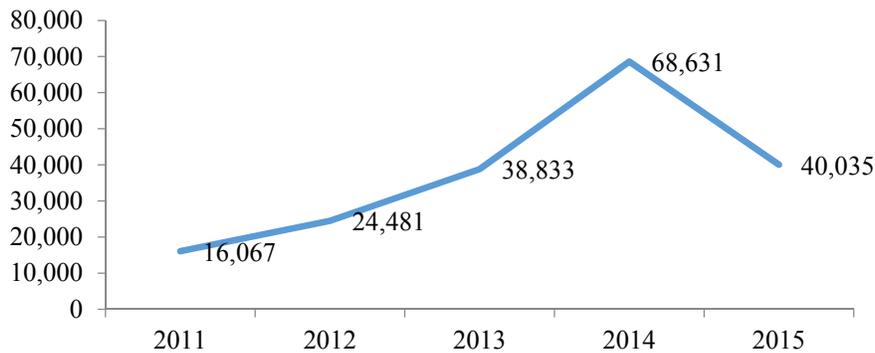
34. Byrne, *supra* note 11, at 26.

35. MUSALO ET AL., *supra* note 28, at i.

36. U.S. DEPT. OF HEALTH AND HUMAN SERV., OFFICE OF REFUGEE RESETTLEMENT ANNUAL REPORT TO CONGRESS 69 (FY 2013) (regarding gender); U.N. HIGH COMMISSIONER FOR REFUGEES, CHILDREN ON THE RUN, *supra* note 10, at 28.

displaced children has increased, state and international bodies have grappled with child migration as a pressing global issue.<sup>37</sup> The child migration surge began in 2012 when the number of unaccompanied children apprehended by border patrol shot up from 16,067 in 2011 to 24,481 in 2012.<sup>38</sup> Numbers continued to climb to 38,833 in 2013, finally reaching a height of 68,631 in 2014.<sup>39</sup> The number of children migrating in 2015 and 2016 has stalled, although that is due to vastly increased efforts by Mexican authorities, under U.S. pressure, to deport Central American children.<sup>40</sup>

Figure 1. Number of Unaccompanied Children Apprehended



Although some pundits have suggested that the recent wave of child migration was linked to President Obama's use of prosecutorial discretion for high-achieving undocumented youth as part of the Deferred Action for Childhood Arrivals (DACA) program, studies have shown there is no statistical correlation.<sup>41</sup>

37. Press Release, Organization of American States, Declaration of Central American Unaccompanied Child Migrations (July 23, 2014) (Dec. S-008/14); U.N. HIGH COMMISSIONER FOR REFUGEES, CHILDREN ON THE RUN, *supra* note 10, at 4; Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. ¶¶ 127–28 (Aug. 19, 2014).

38. Customs and Border Protection, *supra* note 4.

39. Customs and Border Protection, *supra* note 4.

40. Mexico's National Migration Institute deports more than 85% of unaccompanied children from Central America—failing to abide by its own laws in having a procedure to determine best interest prior to repatriation. MUSALO ET AL., *supra* note 28, at xi. In fact, Mexico has stepped up its own deportations of unaccompanied Central American children so that fewer are reaching the US border: a 56% increase in deportations of Central American children in Mexico from the prior year corresponds with a decrease in those children entering the US. ANA GONZALES-BARRERA & JENS MANUEL KROGSTAD, WITH HELP FROM MEXICO, NUMBER OF CHILD MIGRANTS CROSSING U.S. BORDER FALLS, PEW RESEARCH. CTR., Apr. 28, 2015, [http://www.pewresearch.org/fact-tank/2015/04/28/child-migrants-border/?utm\\_source=Pew+Research+Center&utm\\_campaign=eb3072cbaa-Hispanic\\_newsletter\\_3\\_27\\_2015&utm\\_medium=email&utm\\_term=0\\_3e953b9b70-eb3072cbaa-399408985](http://www.pewresearch.org/fact-tank/2015/04/28/child-migrants-border/?utm_source=Pew+Research+Center&utm_campaign=eb3072cbaa-Hispanic_newsletter_3_27_2015&utm_medium=email&utm_term=0_3e953b9b70-eb3072cbaa-399408985). See also Kate Swanson et al., *A Year After Obama Declared a "Humanitarian Situation" at the Border, Child Migration Continues*, NACLA, (Aug. 27, 2015), <https://nacla.org/news/2015/08/27/year-after-obama-declared-%E2%80%99Humanitarian-situation%E2%80%99D-border-child-migration-continues>.

41. DAVID BIER, NISKANEN CTR., EXAMINING THE UAC-DACA LINK 2-5 (2015), <http://niskanencenter.org/wp-content/uploads/2015/02/Examining-the-UAC-DACA-Link2.pdf>.

Instead, these children are on the run because they are witnesses to or suffering directly from violence, experiencing human rights violations, suffering discrimination, and/or deprived of education, medical services and food.<sup>42</sup> In a recent study, 65% of Honduran children interviewed indicated violence was main reason they migrated.<sup>43</sup> Honduras has the world's highest murder rate in a non-war zone, with violence perpetrated by both powerful transnational criminal organizations, known as "maras" or "gangs," as well as by family members.<sup>44</sup> In fact, San Pedro Sula was the murder capital of the world in 2013 with 187 murders for every 100,000 residents.<sup>45</sup> Between 2005 and 2012, there was a 246% increase in the number of femicides (gender-based killings) of Honduran women and girls.<sup>46</sup> This may be why the portion of girl migrants has grown in recent years, from 23% to 27% between 2012 and 2013. The top reasons for child migration from El Salvador are violence and threat of violence, poverty, deprivation of human rights, and the need to reunify with family members.<sup>47</sup> For example, seven out of ten Salvadoran children suffer physical violence at home.<sup>48</sup>

Almost 60% of children interviewed in a United Nations report explained they had suffered types of harm that raised a potential need for international protection.<sup>49</sup> More specifically, 21% of children suffered domestic violence, 11% of children suffered violence at home and violence from society, and 48% feared violence from organized armed criminal actors including drug cartels, gangs and even state actors.<sup>50</sup> This level of harm experienced and feared by the children may make them eligible for certain protection under US law including asylum, SIJS, and nonimmigrant status for trafficking and crime survivors.<sup>51</sup>

Not only are children subject to extreme and growing violence in their home countries, but once they leave, they often are subject to even more trauma on their journey to the United States. The journey for Central American children is particularly dangerous, involving traveling on top of freight trains through Mexico, where it is common for children to be kidnapped, raped, or killed along the way to the U.S.<sup>52</sup>

## B. Journey Through the Immigration and State Court Labyrinths

Migrant children are often eligible for multiple types of immigration protection in the US, including Special Immigrant Juvenile Status (for abandoned,

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42. MUSALO ET AL., *supra* note 28, at ii.

43. MUSALO ET AL., *supra* note 28, at iii.

44. MUSALO ET AL., *supra* note 28, at iii.

45. MUSALO ET AL., *supra* note 28, at iii.

46. MUSALO ET AL., *supra* note 28, at iii.

47. MUSALO ET AL., *supra* note 28, at v.

48. MUSALO ET AL., *supra* note 28, at v.

49. U.N. HIGH COMMISSIONER FOR REFUGEES, CHILDREN ON THE RUN, *supra* note 10, at 6.

50. U.N. HIGH COMMISSIONER FOR REFUGEES, CHILDREN ON THE RUN, *supra* note 10, at 25.

51. MUSALO ET AL., *supra* note 28, at 28; OFFICE OF REFUGEE RESETTLEMENT, *supra* note 36, at 72.

52. WHICH WAY HOME (Home Box Office Films 2009) (interview with Mexican border agent); U.N. HIGH COMMISSIONER FOR REFUGEES, CHILDREN ON THE RUN, *supra* note 10; U.N. HIGH COMMISSIONER FOR REFUGEES, WOMEN ON THE RUN (2015), <http://www.unhcr.org/en-us/about-us/background/56fc31864/women-on-the-run-full-report.html>.

abused, or neglected children), asylum (for those who fear persecution based on a protected class), and T nonimmigrant status (for survivors of human trafficking).<sup>53</sup> SIJS was identified by attorneys representing immigrant youth as one of the most common types of protection for children in removal proceedings.<sup>54</sup> Special Immigrant Juveniles are youth who have been determined to be under twenty-one, unmarried, placed in the care of an individual or entity due to abuse, abandonment, neglect or a similar basis from one or both parents, and whose best interest a state court has determined would not be served by returning to their home country.<sup>55</sup> Because of the interaction between state and federal law, SIJS seekers may come into contact with a variety of state, local, and federal government actors. This section will track the path of SIJS seekers, and identify the numerous agencies that may be involved in the SIJS process, as well as the child-centered protections that exist.

News reports focus on child migrants recently apprehended by immigration enforcement agencies—Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE). Some of these children may be eligible for SIJS and if they seek the status, they will do so “defensively,” as they are in deportation, or “removal,” proceedings before an immigration judge. But other unauthorized immigrant children are living in the US without having yet been encountered or arrested by immigration agencies, and these children may apply for SIJS “affirmatively.” Both affirmative and defensive applicants must engage with the immigration agency, but defensive applicants must also appear before an immigration court. Regardless of whether the case is affirmative or defensive, children must first fall under the jurisdiction of a state court due to a custody, guardianship, adoption, delinquency or other similar proceeding, and then if the state court process is successful, SIJS seekers submit applications to US Citizen and Immigration Services (USCIS).

Children in the defensive posture have usually been arrested by immigration officials within CBP or ICE. Once that occurs, the agent will make a determination regarding the child’s age and status as accompanied or unaccompanied; a child classified as an Unaccompanied Alien Child (UAC) is owed certain rights and treatment conditions.<sup>56</sup> Unaccompanied children are then transferred to the care of Health and Human Services’ Office of Refugee

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53. AMERICAN IMMIGRATION COUNCIL, CHILDREN IN DANGER: A GUIDE TO THE HUMANITARIAN CHALLENGE AT THE BORDER 4 (2014), <http://www.immigrationpolicy.org/special-reports/children-danger-guide-humanitarian-challenge-border>.

54. Telephone Interview with Cristina Romero, Staff Attorney, Immigration Law Unit, Legal Aid Soc’y (Aug. 17, 2015); Telephone Interview with Julie Flanders, Legal Dir., Justice for Our Neighbors, Former Staff Attorney, Refugee and Immigration Ctr. for Educ. and Legal Serv. (RAICES) (Dec. 28, 2015); Telephone Interview with Maureen Ketler Schad, Pro Bono Counsel, Chadbourne & Parke LLP (Aug. 28, 2015); Telephone Interview with Rebecca Wilson Heller, Supervising Attorney and Pro Bono Coordinator, The Door (Sept. 9, 2015); Telephone Interview with David Walding, Executive Director, Bernardo Kohler Center (Aug. 17, 2016 & Aug. 25, 2016); Telephone Interview with Rebeca E. Salmon, Managing Partner, A Salmon Firm, LLC (June 27, 2016); Telephone Interview with Laura K. Demastus, Senior Assoc., JadejaCimone (Dec. 8, 2015); Telephone Interview with Elizabeth Yaeger, Immigrant Youth Advocacy Project Supervising Attorney, HIAS Pa. (June 25, 2016). Interviews on file with the author.

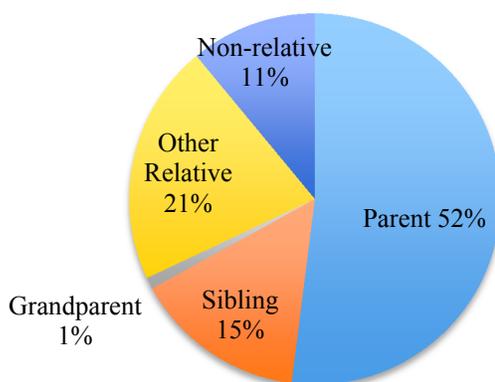
55. 8 U.S.C. § 1101(a)(27)(J) (2012).

56. 6 U.S.C. § 279 (2012).

Resettlement (ORR), which is tasked with incorporating child welfare principles when making placement, clinical, case management and release decisions for unaccompanied children.<sup>57</sup> Congress has directed Health and Human Services to “ensure, to the greatest extent practicable . . . that all unaccompanied alien children . . . have counsel to represent them in legal proceedings,”<sup>58</sup> which has resulted in HHS appropriating money for attorneys to screen children in their care to provide referrals, as well as some funding for direct representation, although a large portion of children are still unrepresented.

The vast majority of children in ORR care are eventually released to family or friends in the United States, and a smaller number are placed into long-term foster care. Meanwhile, since the summer of 2014, children of the surge who arrived with family members continue to be detained in ICE detention centers, despite a federal judge finding that the practice violated children’s rights under a 1997 class action lawsuit settlement.<sup>59</sup>

Figure 2. Sponsor Relationship (FY 2013)<sup>60</sup>



After a SIJS-eligible child is released from detention, an adult caretaker may find representation and begin the SIJS process. The first step is to initiate state court proceedings to formalize the child’s placement and request the court make findings that reunification with a parent is not viable due to abandonment, abuse, neglect or a similar reason, and that it is not in the best interest of the child to be returned to the home country.<sup>61</sup> These findings, which the judge makes in the form of an order, are often informally referred to as the SIJS “predicate order” by child

57. Homeland Security Act of 2002, § 462, 6 U.S.C. § 279 (2012).

58. 8 U.S.C. § 1232(c)(5) (2012).

59. *Flores v. Johnson*, No. CV 85-4544 DMG (AGR<sub>x</sub>), 2015 WL 13049844 (D.D.C. Cal. 2015).

60. OFFICE OF REFUGEE RESETTLEMENT, *supra* note 36, at 71.

61. Hlass, *supra* note 18, at 279-280.

advocates, as it is required in order to seek SIJS status from the immigration agency.<sup>62</sup>

Meanwhile, the child will also have to report to immigration court, which is part of the Department of Justice's Executive Office of Immigration Review (EOIR), as part of ongoing removal proceedings. Immigration Courts vary regionally in accommodations that are made for children. According to an EOIR memorandum, immigration judges should implement child-friendly procedures with unaccompanied juvenile respondents such as providing a court orientation for children, providing booster seats for small children, allowing children to carry toys in the courtroom, and not wearing a judge's robe;<sup>63</sup> there is no guidance regarding children outside of the "unaccompanied minor" definition—those who are either accompanied or aged 18 to 21.

As part of these efforts, some courts have also designated "juvenile dockets," where a dedicated immigration judge—and sometimes designated Immigration and Customs Enforcement (ICE) prosecutors—see unaccompanied juveniles all on the same day. Court guidance indicates that that juvenile cases are outside of immigration judges' case completion goals, implicitly encouraging them to allow continuances.<sup>64</sup> From September 2014 until January 31, 2017, some cities had "surge" dockets for children and families who arrived recently from Central America. These surge dockets were created when the Chief Judge of the Executive Office for Immigration Review instructed courts to expedite the cases of unaccompanied children as well as children accompanied by adults, so that the cases were scheduled within twenty-one days of their arrest.<sup>65</sup> In some cities, nonprofits staff the juvenile and surge dockets to conduct intake interviews of children.<sup>66</sup>

Unrepresented children are provided a list of free legal service providers, and are often given a continuance in order to find counsel.<sup>67</sup> However, large numbers of children in deportation proceedings do not have attorneys; for example, of the 63,721 unaccompanied children cases pending in Immigration Court by the end of fiscal year 2014, only about one third secured representation.<sup>68</sup>

Affirmative SIJS seekers differ from defensive seekers only in that they are not in deportation proceedings; they must still go through the same state court proceedings to convince a judge that staying in the United States is in their best

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62. *Id.* at 291.

63. DAVID L. NEAL, OPERATION POLICIES MEMORANDUM 07-01: GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING UNACCOMPANIED ALIEN CHILDREN, U.S. DEP'T OF JUST., at 5–6 (2007).

64. *Id.*

65. BRIAN M. O'LEARY, DOCKETING PRACTICES RELATION TO UNACCOMPANIED CHILDREN CASES AND ADULTS WITH CHILDREN RELEASED ON ALTERNATIVES TO DETENTION CASES IN LIGHT OF NEW PRIORITIES, U.S. DEP'T OF JUST., 1-2 (2015); *see generally*, Mary Beth Keller, *Case Processing Priorities*, U.S. Dep't of Just. (2017) (eliminating surge dockets).

66. For example, in New York City, The Door, Safe Passage Project, Kids in Need of Defense, Make the Road, Catholic Charities, and Legal Aid Society of New York along with Chadborne & Parke staff the juvenile docket and/or the surge dockets. Email from the author to Maureen Ketler Schad, Pro Bono Counsel, Chadbourne & Parke LLP (Aug. 8, 2016). Email on file with the author.

67. *Id.*

68. REPRESENTATION FOR UNACCOMPANIED CHILDREN IN IMMIGRATION COURT, TRAC REPORTS, INC., (Nov. 25, 2014), <http://trac.syr.edu/immigration/reports/371/>. In fact, of the 21,588 children's cases that were filed and completed from 2012-2014, only 41% had representation.

interest, and that they have been abandoned, abused, or neglected. If a judge agrees and issues a predicate order, they may submit their SIJS application to USCIS for adjudication.<sup>69</sup> Some affirmative SIJS seekers may be in a state or city's foster care or juvenile delinquency system, so these children will additionally come in contact with state or city case workers, attorneys, and other staff. To be eligible for SIJS, as part of the state court process, the child must be declared dependent on the state court, or placed into the custody of an individual or entity, which is typically accomplished through a delinquency, adoption, guardianship, custody, or foster care proceeding. Furthermore, the court must make two findings regarding the child: (1) that reunification with one or both parents is not in their best interest due to abuse, abandonment, neglect, or a similar basis and (2) it is not in the child's best interest to be returned to their home country. Once a child obtains this order, they can fill out a SIJS application<sup>70</sup> and submit it to USCIS. Historically, regional USCIS offices adjudicate SIJS applications, with a variety of differing local practices, such as whether they require an interview and what documents they require.<sup>71</sup> USCIS offices had been denying applications of SIJS seekers with valid state court orders when the child was no longer subject to the order due to age, but as part of the *Perez-Olano* class action settlement, they no longer could not.<sup>72</sup> In 2013, SIJS seekers faced more obstacles from USCIS than in the past, with the overall number of USCIS notices requesting further evidence in SIJS cases doubling from 2012 to 2013.<sup>73</sup> After complaints about disparities in adjudications, USCIS began to centralize decision-making on SIJS cases in November of 2016.<sup>74</sup>

## II. SIJS-SEEKERS IN 2013: NUMBER OF APPLICATIONS, AVERAGE AGE, PROCESSING TIMES, COUNTRY OF ORIGIN, STATES OF RESIDENCE AND TRENDS OF REPRESENTATION OF SIJS APPLICANTS

This section provides a snapshot of SIJS seekers using an original, never before published dataset of 2013 SIJS applications, outlining some broad trends in SIJS applications and SIJS seekers since the beginning of the surge. It considers the number of applications, average age, average processing time, country of origin, states and cities of residence, as well as trends of representation. While numbers of

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69. Once a SIJS application is approved, defensive and affirmative SIJS applicants may diverge in the next part of process of applying for legal permanent residence. SIJS seekers in deportation proceedings may ask an immigration judge to adjudicate their legal permanent residence, or "green card," while affirmative seekers must have their applications adjudicated by Citizen and Immigration Services.

70. CITIZENSHIP AND IMMIGR. SERV., DEP'T OF HOMELAND SEC., FORM I-360, PETITION FOR AMERASIAN WIDOW(ER), OR SPECIAL IMMIGRANT.

71. See generally, JANUARY CONTRERAS, SPECIAL IMMIGRANT JUVENILE ADJUDICATIONS: AN OPPORTUNITY FOR ADOPTION OF BEST PRACTICES, DEP'T OF HOMELAND SEC. (Apr. 15, 2011).

72. *Perez-Olano v. Holder*, No. CV 05-3604 DDP (RZx), 248 F.R.D. 248, \*271 (2008). This provision of the settlement agreement sunset on December 13, 2016.

73. Katrina Quillen et al., *Special Immigrant Juvenile Status Adjudication: 2009-2013, A Study for the National Immigrant Justice Center*, Valparaiso University Law School (April 27, 2015) (on file with the author).

74. U.S. Citizenship and Immigration Services, *UCIS to Centralize Processing of Special Immigrant Juvenile Cases*, <https://www.uscis.gov/news/alerts/uscis-centralize-processing-special-immigrant-juvenile-cases>.

SIJS applications have sharply increased in recent years, the average age of SIJS applicants and average processing time have remained steady. Countries of origin remain generally the same, although there is a larger share of children hailing from Honduras, El Salvador and Guatemala. While there was at least one SIJS applicant from 47 of the 50 states as well as Puerto Rico in 2013, 80% of all SIJS applications were concentrated in the top ten states, and at least 15% of all SIJS applicants hailed from New York City or Los Angeles. This is in line with my prior study of SIJS applications using data from 1992 to 2012, where I found vast regional disparities in where applicants hailed from; specifically, states with higher SIJS application rates<sup>75</sup> tended to have greater availability of representation with specialization in immigration and family law.<sup>76</sup> This paper finds that representation tended to come from nonprofit organizations as well as from “repeat players,” with only one of five SIJS applications submitted by an attorney who had submitted no other SIJS applications that year.<sup>77</sup>

### A. Methodology

I made a request on April 22, 2014 to the Department of Homeland Security’s (DHS) USCIS division for the data set of SIJS applications for fiscal year 2013.<sup>78</sup> I received the data set of 3,994 SIJS applications<sup>79</sup> on May 22, 2014 from the Data Analysis and Reporting Branch of the Office of Performance and Quality (OPQ).<sup>80</sup> OPQ searched their database using a query to pull the data set for fiscal year 2013 regarding Form Number I-360 where option “C – Special Immigrant Juvenile” was selected for Part 2.1, which asks the basis of the petition.<sup>81</sup> The fields pulled included the date of birth of the applicant, the service center where the form was adjudicated, the state and city of residence for the applicant, the date of receipt of the application, the final status of the application, the date of the decision, the fiscal year the form was received, the name of the representative and organization,

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75. Application rates were determined by looking at the number of SIJS applications compared to the unauthorized migrant population in the state.

76. Hlass, *supra* note 18, at 302.

77. Data Set (on file with the author).

78. I requested the following fields: Service Center, Receipt Number, Status, Status Description, Status Date, Receipt Date, Sex, Country of Origin, Beneficiary Date of Birth, State of Residence, Fiscal Year, City of Residence, whether the applicant was represented with a G-28 on file, and whether the applicant is in removal proceedings. The data set does not include information regarding Sex and whether the applicant was in removal proceedings.

79. E-mail from Kevin Shinaberry, Management/Program Analyst, Office of Performance and Quality, U.S. Citizenship and Immigration Services (May 22, 2014) (on file with the author).

80. The Office of Performance and Quality is responsible for analyzing data to report on immigration statistics, calculating processing times for various USCIS applications, and overseeing monthly national quality assurance reviews.

81. CITIZENSHIP AND IMMIGR. SERV., DEP’T OF HOMELAND SEC., FORM I-360, PETITION FOR AMERASIAN WIDOW(ER), OR SPECIAL IMMIGRANT.

country of origin of the applicant.<sup>82</sup> I cleaned the data, inserting “none” for blank entries.<sup>83</sup>

I conducted a total of 13 qualitative interviews including the individuals who submitted the most SIJS applications in 2013, and leaders of the organizations with the highest volume SIJS practices. In these interviews, I asked about the individual and organizational practices for representing child migrants, as well as general practices of their local immigration courts, state courts, and ICE attorneys relating to children and SIJS.

## B. The Surge of SIJS Applications

**Number of SIJS Applications.** The number of SIJS seekers has steadily increased in the past decade, after a number of years of hovering around several hundred.<sup>84</sup> This trend continued in 2013, with a 35% increase from the prior year, which is a net increase of 1,035 SIJS applications. This increase may be a result of the increased numbers of juveniles arriving in the U.S., as unaccompanied childhood arrivals almost doubled from 2011 to 2012, and then again from 2012 to 2013.<sup>85</sup> According to interviews conducted with organizations and individuals with the most SIJS applications, the number of reported SIJS applications attributed to them as the representative by USCIS was generally accurate, although a couple of people said the number seemed low.<sup>86</sup>

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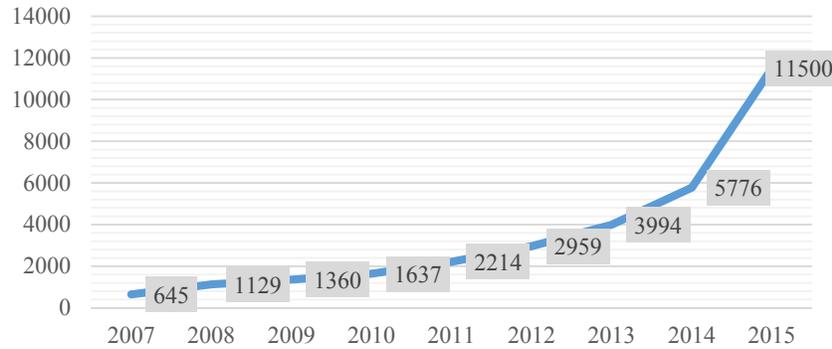
82. I requested information regarding whether the applicant was in removal proceedings, OPQ stated that they did not maintain that information.

83. I also inserted some omitted G-28 information, when it was clear what was missing. For example, one attorney, Maureen Schad, completed 39 SIJS applications in 2013, but her organization’s name was omitted at times, so I populated the rest of the applications with her organization’s name.

84. Hlass, *supra* note 18, at 287.

85. Customs and Border Protection, *supra* note 4.

86. Telephone Interviews with Rebecca Wilson Heller, Julie Flanders, Elizabeth Yaegar, Maureen Ketter Schad, Laura K. Demastus, Rebeca E. Salmon, and David Walding, *supra* note 54; Telephone Interview with Eve Stotland, Legal Dir., The Door (Aug. 26, 2015); Telephone Interview with Jojo Annobil, Attorney-in-Charge, Immigration Unit, Legal Aid Soc’y (Aug. 18, 2015); Telephone Interview with Meghan Johnson, Managing Attorney, ProBAR Children’s Project (Oct. 19, 2015); Telephone Interview with Golden McCarthy, Program Dir., Children’s Program, Florence Immigrant and Refugee Rights Project (Jan. 21, 2016). Rebecca Wilson Heller and Rebeca E. Salmon noted that these numbers seemed low. Telephone Interviews with Rebecca Wilson Heller and Rebeca E. Salmon, *supra* note 54.

Figure 3. Number of SIJS Applications (2007-2015)<sup>87</sup>

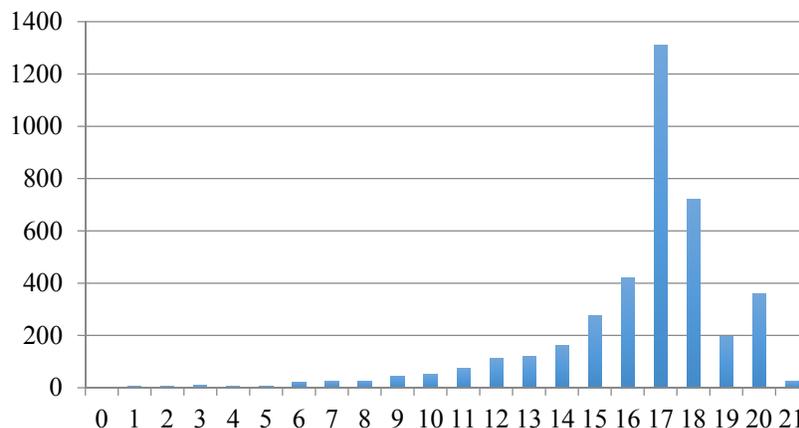
**Age of SIJS Applicants.** The mean age of applicant is 16.371 in 2013, down from 17.4 from years 1999–2012, while the median remains 17.<sup>88</sup> This slightly younger average age may relate to the trend of younger children arriving as part of the surge.<sup>89</sup> As with prior data, there are spikes with applicants aged 17 and 20 which correlate with common state jurisdictional age cutoffs of 18 and 21 years old, when state courts lose jurisdiction over youth for the types of proceedings needed to make findings for SIJS seekers. Furthermore, many representatives noted that their organizations prioritize age-out cases, where youth are on the brink of losing their opportunity to seek SIJS status due to their age.

87. U.S. CITIZENSHIP AND IMMIGRANT SERVICES, NUMBER OF I-360 PETITIONS FOR SPECIAL IMMIGRANT WITH A CLASSIFICATION OF SPECIAL IMMIGRANT JUVENILE (SIJ) BY FISCAL YEAR AND CASE STATUS (2015).

88. Data set (on file with the author); Hlass, *supra* note 18, at 290.

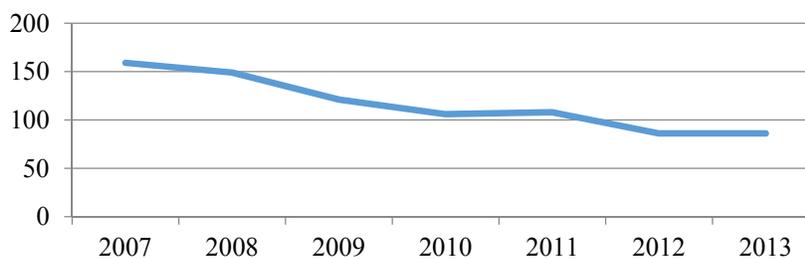
89. U.N. High Commissioner for Refugees, *supra* note 11.

Figure 4. Age of SIJS Applicants (2013)



**Processing Times.** USCIS processing times of SIJS applications remained low in 2013. The median number of days for adjudication was 86, which is the same as in 2012, with the mean at 108.6 days, just one day shy of 2012's 107.5 days.

Figure 5. Median Processing Times (Days)



**Country of Origin of SIJS Applicants.** Increasing numbers of children seeking SIJS protection are coming from Guatemala, Honduras, and El Salvador. There has also been as a dramatic decrease in the share of Mexican SIJS seekers in 2013 as compared to composites of 1999–2012. In 2013, the share of SIJS applicants from Guatemala, El Salvador and Honduras shot up to 53% of all SIJS applicants from a 34% share of all SIJS applicants in prior years.<sup>90</sup> The top nine countries of residence remain largely the same, except that India overtook China in 2013.

90. From 1999–2012, USCIS data shows that 34% of SIJS applicants were from El Salvador, Guatemala, and Honduras.

Figure 6. Country of Origin of SIJS Applicants (2013)

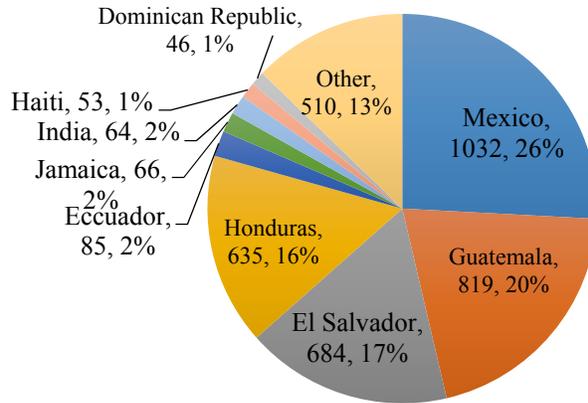
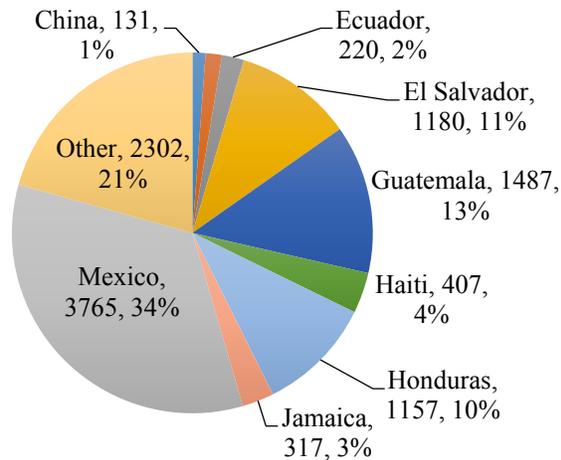


Figure 7. Country of Origin of SIJS Applicants (1999-2012)



**States of Residence.** Eighty percent of all SIJS applications in 2013 hailed from ten states: New York, Texas, California, Massachusetts, Maryland, Florida, Virginia, New Jersey, Georgia and Arizona. While these states host the vast majority of SIJS applicants, all states were better represented in 2013 than in past years. In 2013, forty-eight of the fifty states were represented, in addition to Puerto Rico and the District of Columbia as “states” of residence for SIJS applicants. Only three states that had zero SIJS applications in 2013: Montana, North Dakota, and West Virginia. Unsurprisingly, both states also have some of the lowest numbers of

unauthorized immigrants.<sup>91</sup> This is an increase of overall state representation from prior years, where between five to nine states<sup>92</sup> had zero SIJS applications.<sup>93</sup>

Geographic disparities in the states where SIJS applicants hail from continue to exist, just as reported in my last study of SIJS application trends up to 2012.<sup>94</sup> Although sixty percent of all unauthorized immigrants live in six states—California, Florida, Illinois, New Jersey, New York and Texas<sup>95</sup>—not all of these states made it into the top ten states for SIJS applications. Notably, Illinois is ranked 15<sup>th</sup> for total SIJS applications, despite having the sixth largest population of unauthorized immigrants.<sup>96</sup> I also compared the top ten states' SIJS applications rankings<sup>97</sup> to their rankings for population of unauthorized immigrants; while some states' SIJS numbers did closely mirror their unauthorized population rankings, like Texas and Arizona, others performed much better with a higher SIJS ranking and some states fared much worse.<sup>98</sup> Massachusetts and Maryland had significantly higher SIJS application rankings than their unauthorized immigrant population rankings, with Massachusetts ranking 4<sup>th</sup> for raw numbers of SIJS applications while only ranking 16<sup>th</sup> for unauthorized population. Maryland ranked 5<sup>th</sup> for SIJS applications while only ranking 11<sup>th</sup> for population.

It is not surprising that all of the top ten states for raw numbers of SIJS applications are home to nonprofits focusing on representing immigrant youth. For example, Kids in Need of Defense (KIND) is a national organization dedicated to representing unaccompanied children who enter the US immigration system, and they have offices serving eight of the top ten SIJS states, including New York, Texas, California, Massachusetts, Maryland, New Jersey, Virginia (through its Washington, D.C. office), and Georgia. For a full list of states' SIJS application numbers, see Appendix.

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91. Jeffery Passel, Testimony before U.S. Senate Committee on Homeland Security and Governmental Affairs, available at Pew Research Center, at 7, <http://www.pewhispanic.org/2015/03/26/testimony-of-jeffrey-s-passel-unauthorized-immigrant-population/> (March 26, 2015).

92. For the purposes of this discussion, the District of Columbia and Puerto Rico are considered "states," as that is how they are identified in the data set.

93. Data Set (on file with the author). In 2010, nine states had zero applications: HI, ME, MT, NH, ND, VT, WV and WY. In 2011, five states had no applications: ME, ND, SD, VT, and WV. In 2012, seven states had zero applications: AK, HI, MT, ND, PR, VT, and WV.

94. Hlass, *supra* note 18, at 287.

95. Testimony before U.S. Senate Committee on Homeland Security and Governmental Affairs, *supra* note 91, at 3.

96. JEFFERY S. PASSEL & D'VERA COHN, UNAUTHORIZED IMMIGRANT TOTALS RISE IN 7 STATES, FALL IN 14 11 (Claudia Deane & Mark Hugo Lopez eds., 2014).

97. For fiscal year 2013. Data Set (on file with the author).

98. This test relies on the assumption that the unauthorized abandoned, abused, and neglected youth population is evenly distributed among the general unauthorized immigrant population.

Figure 8. Top Ten States for SIJS Applications (2013)

SIJS Rank (Raw No.)	State of Residence	% of Total SIJS Applications	Unauthorized Immigrant Population Rank, (Raw No.) <sup>99</sup>	Difference of SIJS & Unauthorized Immigrant Pop. Rank
1 <sup>st</sup> (865)	New York	21.7%	4 <sup>th</sup> (750,000)	+3
2 <sup>nd</sup> (725)	Texas	18.2%	2 <sup>nd</sup> (1,650,000)	0
3 <sup>rd</sup> (636)	California	15.9%	1 <sup>st</sup> (2,450,000)	-2
4 <sup>th</sup> (227)	Massachusetts	5.7%	16 <sup>th</sup> (150,000)	+12
5 <sup>th</sup> (157)	Maryland	3.9%	11 <sup>th</sup> (250,000)	+6
6 <sup>th</sup> (148)	Florida	3.7%	3 <sup>rd</sup> (925,000)	-3
7 <sup>th</sup> (136)	Virginia	3.4%	10 <sup>th</sup> (275,000)	+3
8 <sup>th</sup> (122)	New Jersey	3.1%	5 <sup>th</sup> (525,000)	-3
9 <sup>th</sup> (108)	Georgia	2.7%	7 <sup>th</sup> (400,000)	-2
10 <sup>th</sup> (101)	Arizona	2.5%	9 <sup>th</sup> (300,000)	-1

**Cities of Residence.** There were 968 cities identified in the data set of SIJS applicants, but only a handful of cities were home to significant numbers of SIJS applications. In fact, only 10 cities<sup>100</sup> had more than 50 SIJS applications in 2013. Nine of the ten top cities are clustered in just three states: New York (ranked 1<sup>st</sup>), Texas (ranked 2<sup>nd</sup>), and California (ranked 3<sup>rd</sup>, falling from ranking 2<sup>nd</sup> in 2012). In fact, the “cities” where SIJS applicants were clustered in New York and California are often just parts of a larger metropolitan area. For example, the three New York “cities of residence” which placed in the top ten were New York, NY, as well as Brooklyn (ranked 7<sup>th</sup>), and the Bronx (ranked 10<sup>th</sup>). In fact, New York City’s

99. These are from Pew Research Center’s 2012 estimates, which are the most recent published, available at <http://www.pewhispanic.org/2014/11/18/chapter-1-state-unauthorized-immigrant-populations/>.

100. Cities are identified by applicants/representatives on the Form I-360, so suburbs, boroughs, or neighborhoods may be listed as the “city of residence,” even though there is a larger associated metropolitan area. Also, an applicant might include a “safe” address of the representative’s organization that is not the physical residence of the applicant.

applications from the five boroughs<sup>101</sup> makes up at least 11% of all SIJS applications<sup>102</sup> nationally, and more than half of New York state's SIJS applications.<sup>103</sup> Similarly, in California, Commerce, CA (ranked 3<sup>rd</sup>) is a city in Los Angeles County (Los Angeles is ranked 6<sup>th</sup>).

Interestingly, Commerce, CA, with a total population of only 12,993 in 2013 is ranked third overall for SIJS applications, standing out among other much larger cities. One likely explanation is that the Los Angeles Department of Children and Family Services (DCFS) has long had its office in Commerce. This office has a nationally known Immigration Unit, where caseworkers have been helping the unauthorized immigrant children of Los Angeles' foster care system seek immigration status for decades.<sup>104</sup> Harlingen, TX, is another smaller city that ranked in the top ten, which may be because it is home to ProBAR, the organization with the third highest number of SIJS applications in 2013. These findings bolster prior findings of how access to counsel may relate to geographic disparities in SIJS applications.<sup>105</sup>

Figure 9. Top Ten Cities of Residence for SIJS Applicants

Rank	City of Residence	Population Estimate <sup>106</sup>	No. of Applications	% of Total SIJS Applications
1	New York, NY	1,626,159	278	6.9%
2	San Antonio, TX	1,409,019	210	5.2%
3	Commerce, CA	12,993	152	3.8%
4	Austin, TX	885,400	99	2.5%
5	Brooklyn, NY	2,592,149	89	2.2%
6	Harlingen, TX	65,665	82	2%
6	Houston, TX	2,159,914	82	2%
6	Los Angeles, CA	3,884,307	82	2%
9	Phoenix, AZ	1,513,367	69	1.7%
10	Bronx, NY	1,418,733	55	1.4%

101. This includes applications that listed the "city of residence" as "New York," "Bronx," "Brooklyn," "Queens," and "Staten Island," totaling 442 applications.

102. However, this is probably under-representative of actual numbers, because Queens, where many New York advocates represented children, only had 3 applications listed, and there were some "neighborhoods" of Queens listed as addresses.

103. SIJS applicants from the five boroughs make up 51% of New York state's total SIJS applications.

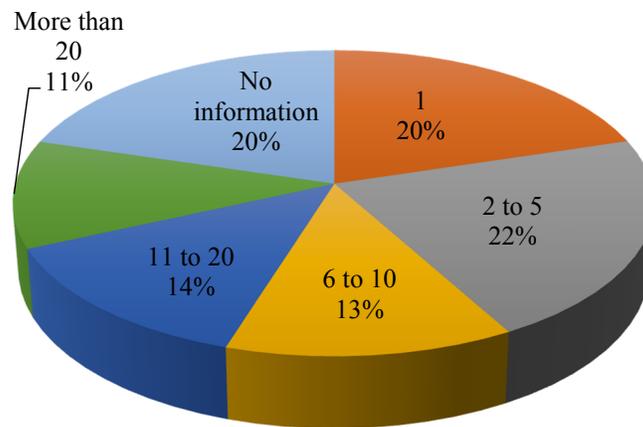
104. Hlass, *supra* note 18, at 304. Commerce also has the distinction of the city with the largest share of applicants with no G-28 information. This likely may be because the Department of Children and Family Services does not always submit G-28 information. See Email from Kristen Jackson, Public Counsel (Aug. 31, 2016) (on file with the author).

105. See Hlass, *supra* note 18.

106. These are 2013 census population estimates. For New York, Brooklyn and Bronx, county estimates were used; for all others, the city estimates were used. There are not estimates of unauthorized immigrant populations by city available, so these population figures only reflect the city's total population and should not be considered a proxy or proportionate reflection for the potential SIJS population or unauthorized immigrant population.

**Type of Representation.** SIJS applications tend to be submitted by nonprofits or representatives who are “repeat players” – attorneys who submit more than one SIJS application during a single year. One reason for this might be because the applications require a certain amount of specialization in immigration and family law. The vast majority of SIJS applications in 2013 were completed by repeat players, and in fact, one out of every four SIJS applications were completed by a representative who submitted eleven or more applications.<sup>107</sup>

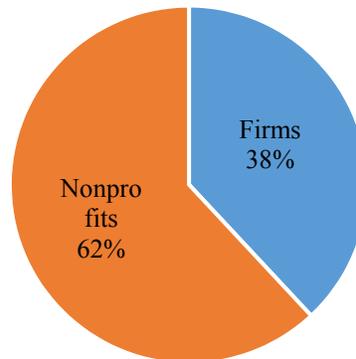
Figure 10. SIJS Applications per Representative



Furthermore, most representatives with organizations listed come from nonprofit organizations. All of the top ten organizations that submitted SIJS applications were nonprofits,<sup>108</sup> and 9 out of the 11 top representatives worked at nonprofits, with a tenth at a pro bono project at a private law firm.

107. Data Set (on file with the author).

108. The organizations with the most SIJS applications are RAICES (1<sup>st</sup>), The Door (2<sup>nd</sup>), ProBar (3<sup>rd</sup>), Legal Aid Society (4<sup>th</sup>), Florence Project (5<sup>th</sup>), Ayuda (6<sup>th</sup>), Bernardo Kohler Center (7<sup>th</sup>), Greater Boston Legal Services (8<sup>th</sup>), KIND (8<sup>th</sup>) and MSU Immigration Clinic (8<sup>th</sup>). Note that KIND’s numbers are likely very under-representative, as they utilize many pro bono attorneys and fund fellows at other organizations, such that the KIND organization might not be listed on many of the cases that their advocates submit.

Figure 11. Repeat Player Representatives: Nonprofits v. Firm<sup>109</sup>

Of the SIJS applications submitted by repeat player representatives, the overwhelming majority (62%) were affiliated with nonprofits. In fact, the share of children being represented pro bono is probably even higher, as this figure did not distinguish between firms that were providing services pro bono.<sup>110</sup> Regardless, the large share of pro bono representation of children is quite striking given the low rate at which immigrants in general receive pro bono help: one leading study found that only about 2% of immigrants in removal proceedings are represented by organizations that provide exclusively or mostly pro bono or low bono services.<sup>111</sup>

### III. SIJS SEEKERS AND ACCESS TO COUNSEL

Representation is critical for children's success in immigration court or before the immigration agency,<sup>112</sup> although it is not the only important factor.<sup>113</sup> A vast majority of represented children are allowed to stay in the U.S.—about three out of four.<sup>114</sup> The opposite is true for unrepresented children—four out of five are ordered deported.<sup>115</sup> For example, from July 2014 to April 2015, 352 children without lawyers succeeded in having their removal proceedings terminated or administratively closed (potentially to pursue asylum or SIJS), while 4,711

109. This graph uses the subset of 2,005 SIJS applications including representatives that had a listed "Organization" and submitted more than one SIJS application in 2013. It does not include 812 applications which had all blank information, the 809 applications which had unique representatives who submitted only one SIJS application, or 368 applications that had a representative's name, but no organization information. The author coded each of these repeat organizations as nonprofit or law firm, depending on the name.

110. See Hlass, *supra* note 18.

111. See Ingrid V. Eagley & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 8.

112. TRAC IMMIGRATION, *supra* note 12; Politico FOIA (on file with the author); Ingrid V. Eagley & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 76.

113. Clearly the strength of the underlying claim is also a critical factor.

114. TRAC IMMIGRATION, *supra* note 12.

115. *Id.*

unrepresented children were ordered deported.<sup>116</sup> This consistent disparity in outcomes for children based on whether they have representation is in keeping with findings regarding national trends for immigration representation.<sup>117</sup> Ingrid Eagley and Steven Shafer's leading study on access to counsel in immigration court found that immigrants in removal proceedings with attorneys were fifteen times more likely to pursue a defense to deportation as compared to those without, and five-and-a-half times more likely to obtain relief from removal.<sup>118</sup> Studies of asylum adjudication at the asylum office and court-level have similarly found represented asylum seekers three times more likely to win their case than their unrepresented counterparts.<sup>119</sup>

Representation is also critical for affirmative applications for immigration protection, as immigrants otherwise may not realize they may be eligible to receive an immigration benefit. There is evidence that significant numbers of unauthorized immigrants, including children, are actually eligible for protection under immigration laws, but simply are unaware.<sup>120</sup> In fact, after massive nation-wide screenings of young people for the Deferred Action for Childhood Arrivals (DACA) program, advocates found many young immigrants were eligible for SIJS as well as other relief.<sup>121</sup>

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116. David Rogers, *Child Migrants Without Lawyers Pay a High Price*, POLITICO (Apr. 27, 2015, 7:22 PM), <http://www.politico.com/story/2015/04/child-migrants-deportation-117402.html> (last visited Mar. 26, 2017).

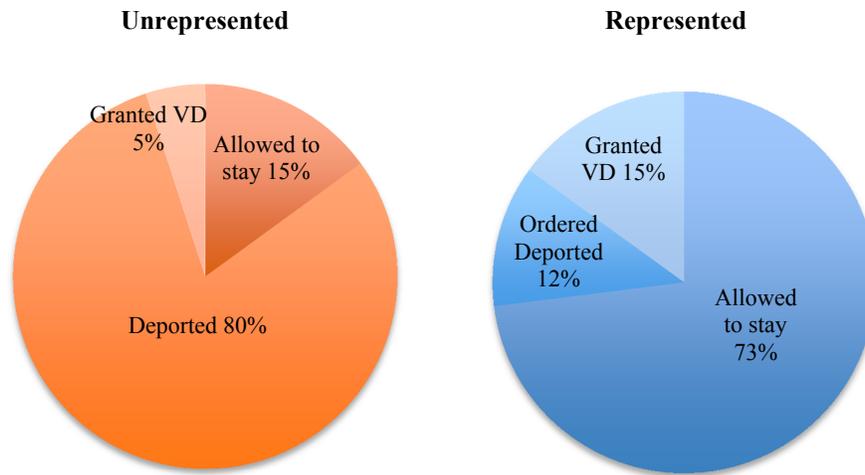
117. One complicating factor is the suggestion that those with stronger claims are more likely to be represented, thus explaining the disparity in outcomes. However, reports have found that due to the sheer power of the representation variable, it is unlikely that the strength of the claim is the only causal factor for outcomes. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007); see also Peter L. Markowitz et al., *Assessing Justice: The Available and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 384–86 (2011).

118. Ingrid V. Eagley & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 76. “14.3 percent of those found to be eligible for DACA were also found to be eligible for some other form of immigration relief.” In fact 12.6% were found to be eligible for Special Immigrant Juvenile Status. See Wong et al., *supra* note 11, at 289, 292.

119. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340.

120. Wong et al., *supra* note 11.

121. Wong et al., *supra* note 11, at 287–304 (finding 14.3% of those eligible for DACA were eligible for another form of immigration relief, such as family based petitions, U-Visas and Special Immigrant Juvenile Status); Kirk Semple, *Young Immigrants Seeking Deferred Action Help, Find Unexpected Path*, N.Y. TIMES (March 22, 2013), [http://www.nytimes.com/2013/03/23/nyregion/immigrants-seeking-deferred-action-help-find-unexpected-relief.html?\\_r=0](http://www.nytimes.com/2013/03/23/nyregion/immigrants-seeking-deferred-action-help-find-unexpected-relief.html?_r=0).

Figure 12. Outcomes for Unrepresented Children vs. Represented Children<sup>122</sup>

While many studies have shown that access to representation is critical for a successful outcome,<sup>123</sup> and in fact, it may be the single most important factor in a case. Less has been written about access to *qualified* representation.<sup>124</sup> A leading study on access to qualified counsel found that in nearly half of cases in New York’s immigration courts, representation did not even meet basic standards of adequacy, which may result in deportation despite a meritorious claim.<sup>125</sup> Building upon these findings, this article probes into best practices of high volume delivery of legal services to child migrants, particularly in light of the acute crisis in child migrant representation. According to interviews, the organizations that have high volume SIJS practices are all nonprofits<sup>126</sup> that provide pro bono or low bono services to

122. See TRAC IMMIGRATION, REPRESENTATION FOR UNACCOMPANIED CHILDREN IN IMMIGRATION COURTS (2014), <http://trac.syr.edu/immigration/reports/371>.

123. TRAC IMMIGRATION, *supra* note 12; Politico FOIA (on file with the author); Ingrid V. Eagley & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 76 (2015); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340. “Successful” is used here from the perspective of the Respondent, so that a successful outcome is winning immigration relief, and a negative outcome is being denied immigration relief and receiving a judgment of deportation/removal.

124. The leading study in this area is the New York Immigrant Representation Study’s *Accessing Justice, The Availability and Adequacy of Counsel in Immigration Proceedings*, which looks at crisis in quality and quantity of attorneys representing individuals in immigration removal proceedings in New York Immigration courts. Peter L. Markowitz et al., *Accessing Justice: The Available and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357 (2011); see also, NAT’L LAWYERS GUILD, IMMIGRATION COURT OBSERVATION PROJECT, FUNDAMENTAL FAIRNESS: A REPORT ON THE DUE PROCESS CRISIS IN NEW YORK CITY IMMIGRATION COURTS 23–25 (Conor Gleason et al. eds., 2011).

125. NAT’L LAWYERS GUILD, IMMIGRATION COURT OBSERVATION PROJECT, FUNDAMENTAL FAIRNESS: A REPORT ON THE DUE PROCESS CRISIS IN NEW YORK CITY IMMIGRATION COURTS 23 (Conor Gleason et al. eds., 2011).

126. These nonprofits are primarily government-funded, although some receive private grants and individual donations.

children, with a corps of attorneys that work solely with child clients, having been trained in working with children. Almost all attorneys are bilingual, generally in English and Spanish, and these high performing representatives work collaboratively with non-lawyers including law students and paralegals, as well as interpreters. They have systemized their representation with tailored intake forms and work in regions that have juvenile dockets in their local immigration courts, which are generally child-friendly. There are some differences between organizations in sources of funding, including whether they rely on government grants, foundations and/or private funding, case prioritization and restrictions, including age limits and often prioritizing children in removal proceedings, and the practices in jurisdictions they are operating within, including whether the courts have juvenile dockets and whether ICE prosecutors have adopted any informal child-friendly practices.

#### A. The Representatives and Organizations

The Refugee and Immigrant Center for Education and Legal Services (RAICES), which topped the list for SIJS applications in 2013, is illustrative of the types of organizations who represent immigrant youth. RAICES was founded three decades ago in San Antonio to provide food, housing, and other critical services to Central Americans fleeing civil wars and social upheavals Nicaragua in the 1980's. Since then, the organization has focused primarily on providing legal assistance, and expanded to seven branches in five cities to help vulnerable members of the immigrant community, including asylum seekers, unaccompanied minors, immigration detainees, and survivors of crime.<sup>127</sup>

The top five SIJS organizations in fiscal year 2013 include RAICES, with its seven branches in Texas; The Door (The Door), located in New York City; the South Texas Pro Bono Asylum Representation Project (ProBAR) located in Harlingen Texas;<sup>128</sup> the Legal Aid Society of New York (LAS), located in New York City, and the Florence Immigrant and Refugee Rights Project (the Florence Project),<sup>129</sup> located in Florence, Arizona.

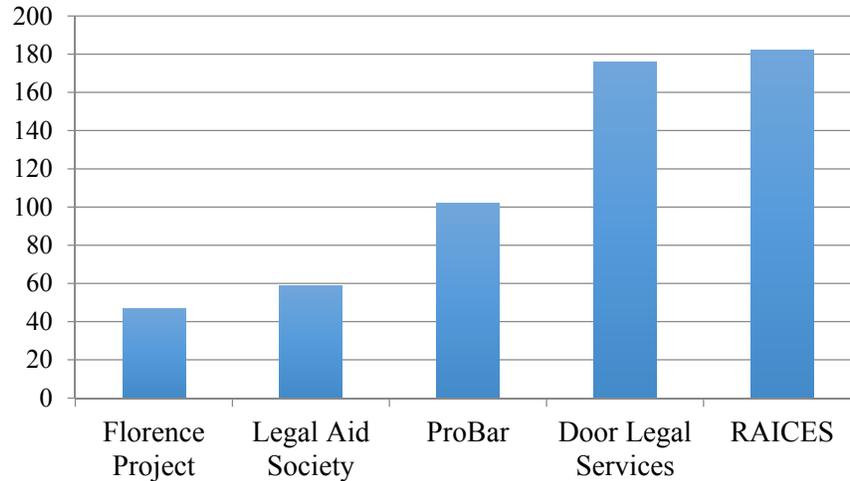
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127. *Who We Are*, RAICES, <https://www.raicestexas.org/pages/about> (last visited Mar. 26, 2017).

128. ProBAR is a joint project of the American Bar Association, the State Bar of Texas and the American Immigration Lawyers Association. *Immigrant Children's Assistance Project (ICAP)*, AMERICAN BAR ASSOCIATION, [http://www.americanbar.org/groups/public\\_services/immigration/projects\\_initiatives/south\\_texas\\_pro\\_bono\\_asylum\\_representation\\_project\\_probar/immigrant\\_childrens\\_assistanceprojecticap.html](http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/south_texas_pro_bono_asylum_representation_project_probar/immigrant_childrens_assistanceprojecticap.html) (last visited Mar. 26, 2017).

129. THE FLORENCE PROJECT, <https://firrp.org/> (last visited Mar. 26, 2017).

Figure 13. Organizations with the Most SIJS Applications



Organization	State	Number of Applications	Organization Type	Number of Attorneys <sup>130</sup>	Applications per Attorney
RAICES	TX	182	Nonprofit	12	15
The Door	NY	176	Nonprofit	6	29
ProBar	TX	102	Nonprofit	10	10
Legal Aid Society	NY	59	Nonprofit	3	20
Florence Project	AZ	47	Nonprofit	4	12

These organizations' total SIJS applications in 2013 ranged from 182 at RAICES, ranked first, to forty-seven, at the Florence Project, ranked fifth. The Door had the highest rate of SIJS applications per attorney, with an arithmetic average of almost 30 applications per attorney.<sup>131</sup> There is significant overlap between the organizations with the most SIJS applications and the individual representatives—four of the five organizations with the most SIJS applications are employers of attorneys within the top eleven.

Who are the individuals topping the list? Rebeca Salmon of Access to Law, Inc. in Georgia, ranked as the seventh most prolific SIJS attorney. She came to law

130. This references the number of attorneys at the organization who submitted SIJS applications in Fiscal Year 2013, according to the data set.

131. Data Set (on file with the author). Note that to determine this figure, I only included the number of attorneys at the organization who submitted SIJS applications according to the data set, which is not necessarily the total number of attorneys at the organization, as many organizations have attorneys who only focus on adult clients.

school as a second career after serving as a CASA, driven by a desire to use the law to forward social change and improve children's lives.<sup>132</sup> With funding from an Equal Justice Works fellowship, she created the Immigrant Children Advocacy Project to advocate on behalf of abandoned, abused and neglected immigrant children living in the Deep South.<sup>133</sup> Then, in September 2011, Ms. Salmon began as the Executive Director of Access to Law, Inc. a nonprofit foundation dedicated to ensuring no vulnerable person goes without counsel, simply because of an inability to afford one.<sup>134</sup> She is just one of the top eleven SIJS attorneys from 2013, but many share her commitment for working with young people. In fact, the vast majority of the top eleven attorneys work at youth organizations, or youth projects within a larger nonprofit organization. Of the top eleven SIJS attorneys, six are located in New York, three in Texas, one in Georgia, and one in Pennsylvania. The Door has the distinction of having the most attorneys topping the list, with three within the top eleven.

Figure 14. Representatives with the Most SIJS Applications

Name	Applications	Name	State	NGO/Firm
Rebecca Heller	59	The Door	NY	NGO
Eduardo Flores	40	RAICES	TX	NGO
Maureen Schad	39	The Door <sup>135</sup>	NY	NGO
Raj Jadeja	36	Jadeja and Cimone LLP	NY	Firm/ Pro Bono
Cristina Romero	33	Legal Aid Society	NY	NGO
Julie Flanders	30	RAICES	TX	NGO
Rebeca Salmon	29	Access to Law INC	GA	NGO
Elizabeth Yaeger	28	HIAS Pennsylvania	PA	NGO
Lauren Lee	25	The Door	NY	NGO
Genet Getachew	24	Law Office of Genet Getachew	NY	Firm
David Walding	24	Bernardo Kohler Center	TX	NGO

132. 2007 *Equal Justice Works Fellow, Rebeca Ellen Salmon*, EQUAL JUSTICE WORKS, <http://equaljusticeworks.org/node/1792> (last visited Mar. 26, 2017).

133. *Id.*

134. See generally Access to Law Found., *Who We Are*, ACCESS TO LAW (2016), <http://accesstolawfoundation.org/who-we-are/>; A SALMON FIRM, LLC, *About: Rebeca E. Salmon, Esq.* (2016), <http://asalmonfirm.com/about/>.

135. Ms. Schad switched positions to become the Pro Bono Counsel of Chadbourne & Parke LLP during this fiscal year, so some of her SIJS applications were submitted in that capacity.

## B. Characteristics for Best Practices

Although calls for appointed counsel for children have been strong and widespread, little has been written about models of high volume delivery of legal services to children, which would be needed to meet the justice gap.<sup>136</sup> Through qualitative interviews with high volume SIJS practice individuals and organizations, I found trends regarding the organizations and individuals' models of representation, although the culture of the courts and regional immigration agencies vary greatly.

First, represented children are much more likely to obtain free legal counsel than represented adults.<sup>137</sup> In Professors Eagley and Shafer's leading article on access to counsel, 29% of represented children, compared to only 6% of represented adults, were represented by free representation from nonprofit organizations, law school clinics, or large firms providing pro bono representation.<sup>138</sup> In fact, in my research, I found that the individuals and organizations with the highest volume of SIJS applications were almost exclusively providing pro or low bono representation. Secondly, the organizations and individuals also nearly always provided holistic, vertical representation before state courts, immigration agencies and immigration courts. They also nearly all were moderately to highly experienced representatives who were Spanish-English bilingual and often worked as part of team with paralegals, law students, and, at times, social workers. Thirdly, organizations and individuals interviewed tend to triage cases in similar ways, prioritizing the oldest children, and many noted they could not represent all of the children referred their way. Fourthly, individuals interviewed noted wide jurisdictional variances in immigration court culture, USCIS adjudication, and family court practices.

### *1. Organizational structure: predominantly nonprofits or pro bono projects that charge no or low fees.*

Most immigrants do not obtain representation in removal proceedings, and immigrants overwhelmingly must pay for this counsel, as nonprofits lack resources to serve the overwhelming numbers of indigent immigrants in deportation. In fact, 37% of all immigrants, and only 14% of detained immigrants, secured representation in immigration court between 2007 and 2012.<sup>139</sup> Furthermore, 98% of this representation was paid counsel. In stark contrast, Special Immigrant Juveniles are

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136. One notable exception is *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, wherein Professor Elizabeth Keyes outlines a number of key characteristics for children including the following: the ability to interview and counsel traumatized children; understanding the ethical challenges with children and prospective custodians; Spanish fluency or proficiency in working with interpreters; familiarity with immigration and state-specific family laws; court rules and general practices; knowledge of particular judges' views on SIJS and those judges' litigation styles; familiarity with FOIA and ORR processes for obtaining complete children's records; and the ability to work with other professionals like guardians-at-litem, social workers and psychologists. See Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINO L. REV. 33, 82 (2016).

137. Eagley & Shafer, *supra* note 21, at 24.

138. Eagley & Shafer, *supra* note 21, at 24 n.99.

139. Eagley & Shafer, *supra* note 21, at 2.

largely represented by pro bono or low bono counsel. In fact, all of the top five organizations are nonprofits, and nine of the top eleven attorneys worked at nonprofits. One of the two firm attorneys in the top eleven was running a low and pro bono project at a law firm that is now associated with the Safe Passage Project, a nonprofit created “to address the unmet legal needs of indigent immigrant youth in New York.”<sup>140</sup> As a result, none of the top five organizations charge fees to clients, and the individual attorneys interviewed either charged no fees, or had a very low sliding scale.<sup>141</sup> Of attorneys interviewed, about half are always completely pro bono,<sup>142</sup> and the other half perform a mixture of pro bono and low bono with sliding scale.<sup>143</sup> This representation trend was also observed by the New York Immigrant Representation project which observed that a high percentage of attorneys representing immigrants seeking humanitarian forms of relief, including SIJS and protections under the Violence Against Women Act, were often providing services pro bono, and were often highly specialized in the field.<sup>144</sup>

There is significant overlap between the top organizations and top individual attorneys; in fact, three of the five organizations—The Door, LAS and RAICES—had one or more attorneys among the top eleven. These organizations are often largely funded by grants, with three<sup>145</sup> of the five receiving federal government grants through ORR sub-contractor the Vera Institute.<sup>146</sup> Since, 2005, the Vera Institute, whose mission is to “build and improve justice systems that ensure fairness, promote safety, and strengthen communities,” has contracted with ORR to manage a national network of legal service providers for unaccompanied children. Currently, the program supports 34 legal services organizations that provide assistance nationally to migrant children.<sup>147</sup> The two non-Vera funded organizations—The

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140. SAFE PASSAGE PROJECT (2017), <http://www.safepassageproject.org>; see also Press Release, Jadeja & Simone, LLP, Free Legal Assistance Provided to Unaccompanied Immigrant Children (Feb. 7, 2015), <https://www.safepassageproject.org/wp-content/uploads/2015/02/jadejapress.pdf>.

141. The Door, Legal Aid Society, RAICES, ProBAR, and Florence Project charge no fee. Telephone Interviews with Jojo Annobil, Meghan Johnson, and Golden McCarthy, *supra* note 86; Telephone Interview with Fátima Menéndez, Senior Staff Attorney, Refugee and Immigration Ctr. for Educ. and Legal Serv. (RAICES) (Dec. 28, 2015). HIAS Pennsylvania often charges no fee for SIJS cases and in a few cases has a low sliding scale, and Access to Law, JadejaCimone, and Bernardo Kohler Center charge a low bono or sliding scale. Telephone Interviews with Rebeca E. Salmon, Laura K. Demastus, and David Walding, *supra* note 54. The only organization for the top eleven which was not interviewed was the Law Office of Genet Getachew, which is a private firm.

142. Cristina Romero, Julie Flanders, Maureen Ketler Schad, and Rebecca Wilson Heller represented all clients completely pro bono. Telephone Interviews with Cristina Romero, Julie Flanders, Maureen Ketler Schad, and Rebecca Wilson Heller, *supra* note 54.

143. David Walding, Rebeca E. Salmon, Laura K. Demastus and Elizabeth Yaeger worked in offices that had pro bono and low bono practices. Telephone Interviews with David Walding, Rebeca E. Salmon, and Laura K. Demastus, and Elizabeth Yaeger, *supra* note 54.

144. See PETER L. MARKOWITZ ET AL., STEERING COMM. OF THE N.Y. IMMIGRANT REPRESENTATION STUDY REPORT, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS 25–26 (2011), <https://www.ils.ny.gov/files/Accessing%20Justice.pdf>.

145. RAICES, ProBAR, and the Florence Project all receive ORR/Vera funding.

146. See generally VERA INST. OF JUST., *Legal Services for Unaccompanied Children: Overview* (2017), <https://www.vera.org/projects/legal-services-for-unaccompanied-children>.

147. VERA INST. OF JUST., *Legal Services for Unaccompanied Children: Learn More* (2017), <https://www.vera.org/projects/legal-services-for-unaccompanied-children/learn-more>.

Door and LAS—both receive a variety of local government funds as well as private foundation grants.<sup>148</sup> The Door in particular also often relies on attorney fellowships, including an annual Chadborne & Parke fellow, formerly receiving a KIND fellow, occasionally hosting a Skadden Fellow, and now hosting an Immigrant Justice Corps fellow.<sup>149</sup>

*2. Vertical and Holistic Representation: Provided by Experienced, Bilingual Attorneys, Working in Youth-focused Programs.*

The predominant model of representation of the high volume SIJS attorneys includes holistic, vertical representation, where the same attorney represents the youth client in state court and before the immigration agency, and, when applicable, in immigration court.<sup>150</sup> The attorneys systemize their practice through the use of comprehensive intake forms. Furthermore, nearly all of the top eleven individuals are part of a team of colleagues who specialize in representing youth. This allows them to seek advice and strategize with a group of colleagues in the same field. All of the top five organizations also either exclusively represent young people, or have a specific youth project where attorneys only represent youth, although the number of representatives working with youth at each organization varied between only two at the LAS's Youth Project<sup>151</sup> to as many as eleven at RAICES.<sup>152</sup>

Not only do the attorneys work in offices where colleagues are focused on the youth population, but they also receive youth-specific and SIJS training, which includes shadowing more experienced attorneys in family and immigration court, and observing intakes. Of eight individuals interviewed, all mention organizational one-on-one training, and some training involves shadowing experienced attorneys.<sup>153</sup> Other training techniques include providing a packet with sample pleadings or model cases,<sup>154</sup> as well as model packets on topics like sexual assault and mental health counseling.<sup>155</sup> As the child welfare context involves a “whole

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148. Telephone Interviews with Jojo Annobil and Eve Stotland, *supra* note 86.

149. Telephone Interview with Eve Stotland, *supra* note 86.

150. The exceptions tend to be in cases where the child already had an attorney for the child welfare proceeding, which is the case usually with foster care children, or if the representative was a non-lawyer and therefore could not appear in state court.

151. Two representatives work with one paralegal. Telephone Interview with Jojo Annobil, *supra* note 86.

152. RAICES – nine lawyers and two accredited representatives. Telephone Interview with Fátima Menéndez, *supra* note 141. The Door varies from five to eight lawyers. By fall 2013, The Door had eight attorneys, although the managing attorney does not carry a caseload and another attorney almost never covers immigration issues. Telephone Interview with Eve Stotland, *supra* note 86. ProBar had five attorneys, but one was managing and did not have cases; by the end of the year, ProBar had seven attorneys. Telephone Interview with Meghan Johnson, *supra* note 86. Legal Aid Society had two lawyers and a paralegal in youth project, but in a larger, general immigrant unit there were twenty-two lawyers, three supervisor lawyers, five paralegals and one social worker. Telephone Interview with Jojo Annobil, *supra* note 86. Florence had four attorneys, including a managing attorney who has a caseload. Telephone Interview with Golden McCarthy, *supra* note 86.

153. Telephone Interviews with Rebecca Wilson Heller, Julie Flanders, Maureen Ketler Schad, and Laura K. Demastus, *supra* note 54.

154. Telephone Interview with Fátima Menéndez, *supra* note 141; Telephone Interview with Cristina Romero, *supra* note 54.

155. Telephone Interview with Laura K. Demastus, *supra* note 54.

different language”<sup>156</sup> than the immigration field, there is a formal child welfare training at several of the organizations. The LAS Immigrant Youth Project and The Door attorneys are invited to attend the Juvenile Rights Division of Legal Aid Society’s child welfare training, and at the Florence Project, guardians ad litem help train the immigrant youth attorneys.<sup>157</sup> All individuals interviewed also note receiving periodic training on emerging issues,<sup>158</sup> as well as trainings on substantive law, interviewing skills, ethics, and local practice.<sup>159</sup> They all became familiar with SIJS mostly in law school through clinic or classes<sup>160</sup> or while on the job.<sup>161</sup> Rebecca Salmon, an attorney with Access to Law, Inc., noted that it “[f]eels like an information explosion” in last few years, because when she first started her practice, no one knew about the SIJS law.<sup>162</sup>

The vast majority of attorneys spoke both English and Spanish, and some attorneys within their organizations spoke up to six languages.<sup>163</sup> Three of the five organizations required *all* attorneys in the unit to be fluent in Spanish, and the two that did not made use of bilingual law students and interpreters.<sup>164</sup> Of individual attorneys interviewed, seven of the eight speak Spanish, and the one non-Spanish speaking attorney<sup>165</sup> always had a Spanish or French-speaking legal intern assisting her. Advocates state that Spanish language proficiency is “critical,”<sup>166</sup> or even “necessary,”<sup>167</sup> because of the volume of Spanish speakers, and as Ms. Schad notes it saves time as not only the client but often other individuals, including guardians and family members are exclusively Spanish speakers. Language proficiency allows direct communication with clients which builds the trust critical for the success of a case which involves sensitive and traumatic details. As Ms. Salmon states, a “child must be able tell their story in language they’re comfortable.”<sup>168</sup> All advocates also worked with interpreters at times as well, which is a critical skill for working in communities who speak a variety of languages.

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156. Telephone Interview with Golden McCarthy, *supra* note 86.

157. Telephone Interviews with Maureen Ketler Schad and Cristina Romero, *supra* note 54.

158. *Id.*

159. Telephone Interview with Meghan Johnson, *supra* note 86.

160. Rebecca Wilson Heller, Julie Flanders, and Maureen Ketler Schad became familiar through clinics or classes. Telephone interviews with Rebecca Wilson Heller, Julie Flanders, and Maureen Ketler Schad, *supra* note 54.

161. Cristina Romero, Elizabeth Yaeger, Rebeca E. Salmon, and David Walding became familiar on the job. Telephone Interviews with Cristina Romero, Elizabeth Yaeger, Rebeca E. Salmon, David Walding, *supra* note 54.

162. Telephone Interview with Rebeca E. Salmon, *supra* note 54.

163. *Id.*

164. The Door and the Legal Aid Society did not have all bilingual attorneys. Telephone Interviews with Jojo Annobil and Eve Stotland, *supra* note 86.

165. Rebecca Wilson Heller is the only non-Spanish speaker. Telephone interview with Rebecca Wilson Heller, *supra* note 54.

166. Telephone Interview with Maureen Ketler Schad, *supra* note 54.

167. Telephone Interview with Julie Flanders, *supra* note 54.

168. Telephone Interview with Rebeca E. Salmon, *supra* note 54.

Level of experience in the immigration field varies from a minimum of four years to as many as nine years.<sup>169</sup> Interestingly, all of the attorneys' family law experience began at basically the same time as their immigration experience, likely because they all were doing Special Immigrant Juvenile cases.<sup>170</sup> The attorneys had all been at their organizations for at least a couple years—ranging from two to twelve years,<sup>171</sup> and three representatives were actually founders of their organizations.<sup>172</sup>

Immigration law allows for non-lawyers with particular training who work at nonprofits to be accredited by the Board of Immigration Appeals to allow them to have the same authority as attorneys before immigration court and the immigration agency.<sup>173</sup> Two of the five top SIJS organizations noted reliance on these accredited representatives. Four of the organizations utilize paralegals and all five mentioned using law student interns, sometimes to help prepare statements, sometimes as interpreters, and sometimes to assist in accompanying clients to appointments. In addition to paralegals and law students, some organizations discussed the use of social workers as part of the team to assist young people in critical non-legal issues. LAS has social workers as an integral part of the legal department, and The Door has in-house counselors who can provide services and consult on client cases.

### 3. Triage of caseload: Oldest First

“A majority of our cases are emergencies,”<sup>174</sup> states one advocate because of the sheer number of children aging out of protection, who are also often in expedited removal proceedings. In fact, representatives universally explained how they were forced to triage cases in the aftermath of the surge, and that they couldn't represent everyone.<sup>175</sup> At the Florence Project, which exclusively represents detained children in ORR facilities, Ms. McCarthy explained that there are

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169. Experience was calculated from when they started until fiscal year 2013, when the data set originated. Ms. Romero and Ms. Flanders began immigration practice in 2009. Telephone Interviews with Cristina Romero and Julie Flanders, *supra* note 54. Ms. Yaeger began in 2010. Telephone Interview with Elizabeth Yaeger, *supra* note 54. Ms. Schad began in 2007. Telephone Interview with Maureen Ketler Schad, *supra* note 54. Raj Jadeja began in 2006. Telephone Interview with Laura K. Demastus, *supra* note 54. Mr. Walding, a BIA accredited representative, began in 2004. Telephone Interview with David Walding, *supra* note 54.

170. Most do both at the same time. Telephone Interviews with Cristina Romero, Rebecca Wilson Heller, Julie Flanders, Elizabeth Yaeger, Maureen Ketler Schad, Rebeca E. Salmon, *supra* note 54. Two do not practice family law. Telephone Interviews with Laura K. Demastus and David Walding, *supra* note 54. Rebeca E. Salmon was first exposed family law before practice as CASA in 2002. Telephone Interview with Rebeca E. Salmon, *supra* note 54.

171. Mr. Walding began in 2001, Ms. Schad began in 2007, Mr. Jadeja in 2008, and Ms. Romero in 2009. Telephone Interviews with David Walding, Maureen Ketler Schad, Laura K. Demastus, and Cristina Romero, *supra* note 54. Ms. Salmon, Ms. Flanders, Ms. Yaeger, and Ms. Heller began in 2011. Telephone Interviews with Rebeca E. Salmon, Julie Flanders, Elizabeth Yaeger, Rebecca Wilson Heller, *supra* note 54.

172. Telephone Interviews with Laura K. Demastus, Rebeca E. Salmon, and David Walding, *supra* note 54.

173. U.S. DEP'T OF JUSTICE, *Recognition & Accreditation (R&A) Program*, (last visited Feb. 27, 2017), <https://www.justice.gov/eoir/recognition-and-accreditation-program>.

174. Telephone Interview with Rebeca E. Salmon, *supra* note 54.

175. Telephone Interviews with Meghan Johnson and Eve Stotland, *supra* note 86; Telephone Interview with Fátima Menéndez *supra* note 141.

“[t]housands of kids we see that we don’t have capacity to represent.” She estimates that the Florence Project only represents about 2% of the children that they screen, but the overwhelming majority of those screened would be SIJS eligible under some state laws;<sup>176</sup> furthermore, many are released from ORR too quickly to begin representation, and then the children do not necessarily find counsel in the states where they’re released.<sup>177</sup>

All five organizations noted that a majority of their caseloads is SIJS,<sup>178</sup> although asylum is often a secondary form of relief. Of individuals interviewed, they ranged from having a caseload of SIJS at 90% or more,<sup>179</sup> to 40–50%<sup>180</sup> of their docket, and the law firm noted it was significantly less, probably about 10%.<sup>181</sup> The organizations noted that clients predominantly come from juvenile or surge dockets,<sup>182</sup> federal government referrals through ORR or the Unaccompanied Refugee Minor program,<sup>183</sup> word of mouth,<sup>184</sup> foster care agencies,<sup>185</sup> youth or community organizations/nonprofits<sup>186</sup> or school guidance counselors. The organizations did not tend to engage in much affirmative outreach because they had reached capacity primarily with children in deportation proceedings.<sup>187</sup>

“There are definitely children who fall through the cracks,” Mr. Annobil, the attorney-in-charge of LAS’ Immigration Unit.<sup>188</sup> Children aging out of eligibility for SIJS relief are given priority at all organizations, which corresponds with the spikes in SIJS applications at age 17 and age 20, as under various state laws children

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176. Telephone Interview with Golden McCarthy, *supra* note 86.

177. *Id.* For further discussion of disparities in SIJS application rates, see Laila L. Hlass, *States and Status: A Study of Geographic Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266 (2014).

178. RAICES (majority), Telephone Interview with Fátima Menéndez, *supra* note 141; Door (90%+), Telephone Interview with Eve Stotland *supra* note 86; ProBar (majority), Telephone Interview with Meghan Johnson, *supra* note 86; LAS (90%), Telephone Interview with Jojo Annobil, *supra* note 86; Florence (60-70%), Telephone Interview with Golden McCarthy, *supra* note 86.

179. Telephone Interviews with Cristina Romero, Rebecca Wilson Heller, Julie Flanders, and Maureen Ketler Schad, *supra* note 54.

180. Elizabeth Yaeger (probably at least half); Rebeca E. Salmon (about 40%); David Walding (50%). Telephone Interviews with Elizabeth Yaeger, Rebeca E. Salmon, David Walding, *supra* note 54.

181. Telephone Interview with Laura K. Demastus, *supra* note 54.

182. Telephone Interviews with David Walding and Maureen Ketler Schad, *supra* note 54.

183. Julie Flanders (all through ORR) and Elizabeth Yaeger (ORR and URM). Telephone Interviews with Julie Flanders and Elizabeth Yaeger, *supra* note 54.

184. Telephone Interviews with Rebecca Wilson Heller, Elizabeth Yaeger, Rebeca E. Salmon, David Walding, and Maureen Ketler Schad, *supra* note 54.

185. Elizabeth Yaeger is on contract with City of Philadelphia child welfare agency. Telephone Interview with Elizabeth Yaeger, *supra* note 54. Also, The Door and Legal Aid Society work with foster youth. Telephone Interview with Eve Stotland, *supra* note 86; Telephone Interview with Jojo Annobil, *supra* note 86.

186. Telephone Interviews with Rebecca Wilson Heller, Elizabeth Yaeger, and Maureen Ketler Schad, *supra* note 54.

187. The Door and Legal Aid Society have robust affirmative SIJS practices because they receive referrals from within their own agencies which work with large numbers of children, in addition to assisting with cases identified by the Administration for Children Services, NYC’s child welfare agency. Telephone Interviews with Jojo Annobil and Eve Stotland, *supra* note 86.

188. Telephone Interview with Jojo Annobil, *supra* note 86.

may age out at 18 or 21.<sup>189</sup> At one point, Ms. Schad reported that The Door was only taking 20½ year olds as clients, because there were so many immigrant children on the brink of losing eligibility. In addition to age, organizations prioritize children in removal proceedings, and children with particular vulnerabilities. For example, Ms. Stotland of The Door noted they also prioritized foster care youth, homeless youth, and children with medical issues. Many organizations also noted they had geographic restrictions due to funding or other funding priorities which limited representation.

One unintended consequences of triaging children in removal proceedings is that organizations do not have capacity to do extensive outreach, and affirmative SIJS seekers are often neglected or not even identified. As noted earlier, when there was extensive outreach and screening for DACA, many youth turned out to be eligible for SIJS and other relief.<sup>190</sup> Ms. Flanders of HIAS Pennsylvania laments that there are “[t]ons of affirmative cases that we know are out there, but we can’t even meet the removal defense capacity.”<sup>191</sup>

#### 4. *Juvenile Dockets are Best*

Four of the eight individual representatives interviewed practiced in New York, either at 26 Federal Plaza and or Varrick Street courts, the other half practiced in places including San Antonio,<sup>192</sup> Atlanta,<sup>193</sup> North Carolina,<sup>194</sup> Tennessee,<sup>195</sup> New Orleans,<sup>196</sup> New Jersey,<sup>197</sup> Buffalo,<sup>198</sup> and Philadelphia.<sup>199</sup> Most noted that there were juvenile dockets in their region, and they praised this model, particularly in comparison to the more recently created surge dockets which expedited the cases of Central American families under a 2014 order from the Chief Immigration Judge, regardless of whether immigrants have counsel or not. Unlike the surge docket, juvenile docket judges often volunteer themselves, as they have an interest in working with the child population. Furthermore the juvenile docket is outside of regular EOIR case completion goals, so Judges are more able to exhibit flexibility and patience with the children before them.<sup>200</sup> Juvenile docket judges are likely to be more familiar with child-friendly practices, and understand the timing of state courts for the SIJS process, particularly the likelihood of delays.<sup>201</sup> For example, many state courts take several months to schedule a hearing regarding a SIJS factual

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189. For example, the jurisdictional cutoff for a child seeking a guardian in New York State is N.Y. FAM. CT. ACT § 661(a) (McKinney 2011).

190. Telephone Interview with Maureen Ketler Schad, *supra* note 54.

191. Telephone Interview with Julie Flanders, *supra* note 54.

192. Telephone Interviews with David Walding and Julie Flanders, *supra* note 54.

193. Telephone Interview with Rebeca E. Salmon, *supra* note 54.

194. *Id.*

195. *Id.*

196. *Id.*

197. Telephone Interview with Laura K. Demastus, *supra* note 54.

198. Telephone Interview with Maureen Ketler Schad, *supra* note 54.

199. Telephone Interview with Elizabeth Yaeger, *supra* note 54.

200. Telephone Interviews with Cristina Romero, Julie Flanders, and Elizabeth Yaeger, *supra* note 54.

201. Telephone Interview with Cristina Romero, *supra* note 54.

findings motion, and often these courts will reschedule and delay hearings, so that children may need 6 months or even a year to obtain the state court findings needed to apply for SIJS. Ms. Schad praised New York's court, noting that its immigration judges work closely with pro bono providers, facilitate children's access to counsel, provide generous adjournments, and are willing to waive children's presence to allow them to attend school, understand varying practices in family court, have an interest in children's wellbeing, and are well-versed in understanding trauma and how it impacts children.<sup>202</sup> Ms. Salmon noted difficulties with the expedited timing of the surge docket: "for 18 months we were going to court daily and writing appeals nightly."<sup>203</sup> Similarly, advocates note that ICE prosecutors on the juvenile dockets are often helpful, as opposed to surge dockets, where the culture is less accommodating.<sup>204</sup>

Ms. Salmon, who regularly appears in six different immigration courts, notes that there are really wide divergences in immigration court practices—some courts have opposed even transferring venue in children's cases, and she has had some pending motions to terminate that were joined by the ICE prosecutors that the Judge has not ruled on for years. That said, most attorneys note that historically ICE prosecutors have been generally willing to either administratively close or terminate juvenile cases to allow USCIS to adjudicate the SIJS petition.<sup>205</sup> However, in light of recent backlogs in adjudications of SIJS legal permanent residency applications, ICE has shown greater opposition to terminating or closing children's cases.

Family court cultures vary regionally as well; in particular, advocates have noted some hostility from the family court bench if SIJS cases take up a large portion of docket. Advocates universally note that appearing in family court is a bit like playing roulette, with a lot depending on which judge is assigned to a case. Some family law judges worry that SIJS is a "loophole" or that they are being asked to grant immigration status,<sup>206</sup> although attitudes towards SIJS findings run the gamut.<sup>207</sup> Some courts are quite accommodating to the needs of SIJS seekers, and try to help make calendaring more efficient, assigning cases to a particular judge familiar with SIJS and sensitive to the population.<sup>208</sup> In Pennsylvania, family courts' knowledge and receptivity to SIJS-related proceedings are "really all over the map."<sup>209</sup> Ms. Salmon, who practices in a number of states, noted that some family courts are "tough," some are friendly, and in some counties judges refuse to even rule on motions.<sup>210</sup> Ms. Flanders noted there didn't seem to be any formal policies

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202. Telephone Interview with Maureen Ketler Schad, *supra* note 54.

203. Telephone Interview with Rebeca E. Salmon, *supra* note 54.

204. Telephone Interviews with Cristina Romero, Julie Flanders, Maureen Ketler Schad, Rebecca Wilson Keller, David Walding, Rebeca E. Salmon, Laura K. Demastus, and Elizabeth Yaeger, *supra* note 54.

205. *Id.* Practices have changed now with SIJS backlog and ICE attorneys are less willing to jointly move to terminate cases.

206. Telephone Interview with Rebecca Wilson Heller, *supra* note 54.

207. Telephone Interview with Elizabeth Yaeger, *supra* note 54.

208. *Id.*

209. *Id.*

210. Telephone Interview with Rebecca E. Salmon, *supra* note 54.

regarding treatment of SIJS cases in the jurisdictions in Texas where she practiced.<sup>211</sup> Some counties of New York outside of New York City have been historically hostile to SIJS cases.<sup>212</sup> Meanwhile, in New York City, advocates note that the Chief Judge of the Family Court has created a positive culture around immigrant children.<sup>213</sup> Furthermore, the Administration for Children Services, NYC's child welfare agency, has made strides and is generally adequate at screening immigrant children in foster care, as well as children in guardianship proceedings also have right to appointed counsel from attorney on a panel who is supposed to receive special training including SIJS;<sup>214</sup> the New York City Bar has worked closely with nonprofit organizations to make sure panel attorneys are trained on immigration relief and the interplay with family law.<sup>215</sup> That said, advocates note that practices vary by borough in New York, and the pendulum has swung between friendless and hostility to SIJS cases.<sup>216</sup>

Meanwhile, another challenge is when a large numbers of court appointed family law attorneys aren't trained regarding SIJS and don't think to ask for the predicate order required to apply for SIJS, and also might not be bilingual or have access to interpreters.<sup>217</sup> Individuals interviewed also noted problems with other counsel who are not "knee-deep" in practice, who may obtain predicate SIJS orders with inadequate language, resulting in a denial or delay in a child's case.<sup>218</sup>

#### IV. A PATH FORWARD FOR CHILD MIGRANTS

Advocates describe the current system as a perfect storm for surging numbers of SIJS seekers: children are aging out, while family courts are becoming increasingly hostile to growing numbers of older children,<sup>219</sup> and immigration courts are speeding up surge dockets, which may prevent children from seeking relief or obtaining representation at all. The inevitable result is that some children who are eligible for protection are nonetheless deported.<sup>220</sup> There are not enough attorneys available to represent all immigrant children facing removal proceedings—nor all the children who could apply affirmatively—and the attorneys who do end up representing these children may be inexperienced<sup>221</sup> or unqualified.<sup>222</sup> Even worse, advocates report that regional inconsistencies in state and immigration adjudications

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211. Telephone Interview with Julie Flanders, *supra* note 54.

212. Telephone Interview with Maureen Ketler Schad, *supra* note 54.

213. Telephone Interview with Cristina Romero, *supra* note 54.

214. *Id.*

215. Telephone Interview with Maureen Ketler Schad, *supra* note 54.

216. Telephone Interview with Rebecca Wilson Heller, *supra* note 54.

217. Telephone Interview with Maureen Ketler Schad, *supra* note 54.

218. Telephone Interview with Jojo Annobil, *supra* note 86.

219. Telephone Interview with Julie Flanders, Laura K. Demastus, and Rebeca E. Salmon, *supra* note 54.

220. Immigration Judges on surge docket force kids to plead pro se, and get removed before they can get SIJS. Telephone Interview with Maureen Ketler Schad, *supra* note 54.

221. Telephone Interviews with Jojo Annobil and Meghan Johnson, *supra* note 86.

222. Telephone Interview with Fátima Menéndez, *supra* note 141; Telephone Interview with Eve Stotland, *supra* note 86.

coupled with USCIS demanding more and more evidence in SIJS cases<sup>223</sup> severely impedes advocates' capacity to represent children.<sup>224</sup>

### A. Legal and Practical Challenges for Child Migrants

Even after infusion of millions of dollars for representation, there are thousands of children who cannot access representation. The need for access to counsel has become more dire with growing numbers of children in immigration courts,<sup>225</sup> particularly those on the brink of aging out of SIJS eligibility.<sup>226</sup> Representation is critical for SIJS seekers, because as Ms. Johnson of ProBAR stated, "there's a zero percent chance that a child could do [their SIJS] case pro se. . . . I don't know of any child who knows how to go to state court and file pleadings and even if they did, they'd need representation there anyway."<sup>227</sup> Other advocates note it would be "preposterous"<sup>228</sup> or "impossible"<sup>229</sup> to imagine a child seeking SIJS pro se because of the complex relationships between state and federal systems.

While recent government efforts to fund attorneys and legislation like "A Fair Day in Court for Kids Act of 2016," begin to address this need, these efforts fail to define how to create a model of high volume delivery of legal services. Because of the need for specialization in removal defense, immigration practice, and state family law, a certain level of expertise is required, which "can't be sustained without adequate funding and training."<sup>230</sup> There is a huge learning curve for new attorneys, and many nonprofits cannot sustain the salary of a supervisory attorney with many years of experience.<sup>231</sup> In particular, AmeriCorps funding has been a challenge for many organizations because of extensive reporting requirements and restrictions on representing youth over sixteen.<sup>232</sup>

Lack of awareness of SIJS continues to be a problem, as adult caretakers, state courts, and even lawyers close to children do not know about SIJS. As a result, kids are aging out of foster care and family members are getting custody over children, but no one is telling them about SIJS so they are losing their opportunity to seek SIJS protection.<sup>233</sup> Although there has been growing attention to SIJS, some

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223. Telephone Interviews with Golden McCarthy and Fátima Menéndez, *supra* note 86.

224. Telephone Interview with Golden McCarthy, *supra* note 86; Telephone Interview with Fátima Menéndez, *supra* note 141; Telephone Interview with Meghan Johnson, *supra* note 86 ("Disparities of state court practices and substantive law and the way it varies across the country effects the individual children. It's a strange thing for immigrants, but it depends on where you live if you can access SIJS.").

225. Telephone Interviews with Cristina Romero, Julie Flanders, Elizabeth Yaeger, and Maureen Ketler Schad, *supra* note 54; Telephone Interview with Laura K. Demastus, *supra* note 54 (stating that "lots of unrepresented kids in court" and "court-appointed contract attorneys in family court are not aware of SIJS"); Telephone Interview with David Walding, *supra* note 54 ("[A]gencies can't handle that all kids might be eligible.").

226. Telephone Interview with Julie Flanders, *supra* note 54.

227. Telephone Interview with Meghan Johnson, *supra* note 86.

228. Telephone Interview with Cristina Romero, *supra* note 54.

229. Telephone Interview with Julie Flanders, *supra* note 54.

230. Telephone Interview with Maureen Ketler Schad, *supra* note 54.

231. *Id.*

232. Telephone Interview with Rebeca E. Salmon, *supra* note 54.

233. Telephone Interview with Julie Flanders, *supra* note 54.

truly incompetent attorneys are representing children, messing up their cases<sup>234</sup> and attorneys are appearing in family court without requisite training, generating backlash from the judges against the kids.<sup>235</sup> Furthermore, family courts are completely overwhelmed.<sup>236</sup>

## B. Recommendations for Qualified Representation

The historic levels of funding for counsel for migrant children are laudable but still are not closing the justice gap for children in removal proceedings. Some funding has restrictions unresponsive to the population, such as AmeriCorps restriction on representation of children 16 and older which doesn't take into account the current crisis of children aging out of protection.<sup>237</sup> A best practices model for high volume delivery of legal services to this vulnerable population of children should address a variety of factors unique to child removal proceedings, including the often long lives of the cases, severe court backlogs, the need for attorneys to have training in certain practice areas, and the characteristics of the child immigrant population (including the need for services for those aged 18 to 21 and the high levels of trauma within the population). As initiatives to expand counsel for migrant children grow, policymakers and organizations should adopt the following recommendations to ensure qualified, high volume representation:

**1. Funding Youth-Centered Projects and Organizations:** Funding should go to programs that employ an immigrant youth defender model, where a project or office of specialized nonprofit attorneys can focus on immigrant youth work.<sup>238</sup> In the case of immigrant children, all of the high volume SIJS representatives work in offices or projects solely devoted to working with youth. As children are a unique population with particular vulnerabilities and a wide range of mental and developmental abilities, youth-focused and youth-centered organizations are best suited to meet these needs. This child-centric approach is similar to approaches taken in the child welfare programs, where about forty-six states, plus the District of Columbia and the Virgin Islands, require certain qualifications for those representing children in neglect or abuse proceedings.<sup>239</sup>

**2. Funding experienced or well-supervised attorneys trained in child welfare to provide holistic, vertical representation:** Because of the need to practice in multiple legal contexts, funding to expand counsel for children should

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234. *Id.*

235. Telephone Interview with Maureen Ketler Schad, *supra* note 54.

236. Telephone Interview with Maureen Ketler Schad, *supra* note 54; *see also* Liz Robbins, *Immigration Crisis Shifts from Border to Courts*, N.Y. Times (Aug. 23, 2015), <https://www.nytimes.com/2015/08/24/nyregion/border-crisis-shifts-as-undocumented-childrens-cases-overwhelm-courts.html>.

237. Telephone Interview with Maureen Ketler Schad, *supra* note 54.

238. This approach is similar to models that have been recommended for indigent immigrant removal defense in New York. *Cf.* Markowitz et al., *supra* note 16. Accessing Justice, New York Immigrant Representation Project.

239. Child Welfare Info. Gateway, *Representation of Children in Child Abuse and Neglect Proceedings*, CHILDWELFARE.GOV at 3 (August 2014), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/represent/.pdf>.

also support senior and mid-level attorneys or at least require that the organization have such attorneys on staff to provide close supervision to newer attorneys. Attorneys should be trained in child welfare principles,<sup>240</sup> and have familiarity with the multiple systems migrant children often confront—state family courts,<sup>241</sup> immigration court, and the variety of protections under immigration law, so they can provide holistic, vertical representation.<sup>242</sup> Because of the language needs of most immigrant children, representatives should generally be bilingual, or at least have experience working with interpreters.

**3. Abolish Age Restrictions:** Funding should not prohibit representing older children, as there is a crisis of representation for children aged 18 to 21.<sup>243</sup>

In order to best meet the growing need for migrant children representation in immigration proceedings, government entities like immigration courts, ICE prosecutors, and immigration agencies should also take steps to achieve a more youth-centered approach, complementing efforts to expand access to qualified counsel:

**1. Expand child-friendly immigration court procedures:** The Immigration Courts, which are part of the Executive Office for Immigration Review, should revise their policy memorandum to apply child-friendly court procedures for unaccompanied alien minors under 21, not only for immigrants under 18 (as its current policy dictates).<sup>244</sup> Data show that there are high numbers of children seeking protection aged 18 to 21. EOIR should issue new policy to ensure child-friendly court procedures for all children up to the age of 21, including those identified as “accompanied.” Extending this policy to immigrants under 21 would allow their cases to be processed on juvenile dockets, without the case completion deadline goals that inhibit judges in granting needed continuances.<sup>245</sup> With a January 2017 memorandum, EOIR effectively abolished “surge dockets” that expedite cases for both unaccompanied and accompanied immigrant children.<sup>246</sup> This was a child-friendly move, which hopefully will be permanent, as speeding up cases of children only makes the crisis for qualified representation more acute since nonprofits are stretched thin and immigrants do not

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240. Musalo et al., *supra* note 28, at xv, 50–52; Andrew I. Schoenholtz, *Developing the Substantive Best Interests of Child Migrants: A Call for Action*, 46 VAL. U.L. REV. 991, 1005 (2012); Jennifer Nagda and Maria Woltjen, *Best Interests of the Child Standard: Bringing Common Sense to Immigration Decisions*, <https://firstfocus.org/wp-content/uploads/2015/04/Best-Interests-of-the-Child-Standard.pdf>.

241. Telephone Interviews with Cristina Romero and Maureen Ketler Schad, *supra* note 54.

242. Telephone Interview with Cristina Romero, *supra* note 54; Telephone Interview with Mary Wilson Heller, *supra* note 154.

243. Telephone Interviews with Maureen Ketler Schad and David Walding, *supra* note 54.

244. Memorandum from David L. Neal, Office of the Chief Immigration Judge, to All Immigration Judges at 3, (May 22, 2007) (on file with the author).

245. Currently policies are oriented around “juveniles,” defined as under age 18, while there are not policies for “children,” defined as under 21 in the Immigration and Nationality Act.

246. Memorandum from Mary Beth Keller, Office of the Chief Immigration Judge, to All Immigration Judges at 1 (Jan. 31, 2017) (on file with the author); *see also* Memorandum from Brian O’Leary, Office of the Chief Immigration Judge, to All Immigration Judges (March 24, 2015) (on file with the author) (discussing EOIR guidance regarding creation of surge dockets).

have sufficient time to find counsel. Juvenile dockets should be staffed by immigration judges who have expressed an interest in working with children, and who are trained on child welfare principles. EOIR policy should favor terminating proceedings for children who have approved SIJS petitions, and encourage immigration judges to give sufficiently long continuances while the state court process is ongoing.<sup>247</sup> Expanding access to juvenile docket to accompanied and 18–21 year olds will increase efficiencies in helping children access qualified representation, as the youth organizations that staff juvenile and surge dockets do not limit representation to only the “unaccompanied minor” population, but also serve children up to age 21, regardless of whether they are classified as unaccompanied or not.

**2. ICE should issue child-friendly guidance:** Immigration and Customs Enforcement, tasked with arrested and prosecuting children for immigration violations, should issue policy guidance on prosecuting cases against children to support a more efficient and child-friendly courtroom. Currently ICE does not have published policy regarding prosecuting children’s cases, and practices vary nationally. ICE policy should encourage trial attorneys to join in motions for termination and administrative closure so that children can pursue SIJS and adjustment before USCIS, to increase efficiencies and advance justice. Furthermore, the guidance should encourage trial attorneys to be flexible with scheduling and encourage joining in motions for continuances to allow for case adjudication, which is particularly important in the SIJS context.

**3. Determine the scope of the migrant child representation crisis:** Furthermore, to determine the scope of the child representation crisis, the immigration agency’s policy division should fund a study using a skilled demographer to determine the scope of unauthorized migrant children population who may be eligible for immigration protection in the U.S.—both those in removal proceedings and those who are not. As governments move towards expanded or even mandatory access to counsel for children, it will be imperative to understand the dimensions of the population.

## CONCLUSION

With child migration on the rise, rates of representation for children in immigration court have dropped below 20%.<sup>248</sup> With approximately 80% of children unrepresented, governments and child advocates should consider best practices for the delivery of high volume legal services to children. Unrepresented children, particularly those seeking SIJS, are simply unable to navigate the labyrinth of state courts, immigration courts, and the immigration agency. Furthermore, unqualified representation may be just as dangerous, leading to case delays or even deportation for otherwise eligible children. To expand access to qualified counsel for children, a new defender model should be considered, where attorneys working as part of a

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247. Telephone Interviews with Maureen Ketler Schad and Laura K. Demastus, *supra* note 54.

248. See TRAC IMMIGRATION, REPRESENTATION FOR UNACCOMPANIED CHILDREN IN IMMIGRATION COURTS (2014), <http://trac.syr.edu/immigration/reports/371>.

youth-focused team, trained in child welfare principles, can provide holistic and vertical representation to this growing, vulnerable population. Furthermore, to bolster this expanded access to justice for children, the federal government should consider issuing guidance to immigration judges and prosecutors to adopt a child-friendly approach for all migrant children.

Appendix: SIJS Applications State by State

<b>State</b>	<b>SIJS Applications</b>	<b>Percent of Total</b>
NULL	3	0.1
ALABAMA	28	0.7
ALASKA	2	0.1
ARIZONA	101	2.5
ARKANSAS	32	0.8
CALIFORNIA	636	15.9
COLORADO	34	0.9
CONNECTICUT	19	0.5
DELAWARE	10	0.3
DISTRICT OF COLUMBIA	15	0.4
FLORIDA	148	3.7
GEORGIA	108	2.7
HAWAII	2	0.1
IDAHO	5	0.1
ILLINOIS	42	1.1
INDIANA	18	0.5
IOWA	11	0.3
KANSAS	6	0.2
KENTUCKY	22	0.6
LOUISIANA	6	0.2
MAINE	11	0.3
MARYLAND	157	3.9
MASSACHUSETTS	227	5.7
MICHIGAN	58	1.5
MINNESOTA	28	0.7
MISSISSIPPI	9	0.2
MISSOURI	15	0.4

<b>State</b>	<b>SIJS Applications</b>	<b>Percent of Total</b>
MONTANA	0	0
NEBRASKA	28	0.7
NEVADA	15	0.4
NEW HAMPSHIRE	4	0.1
NEW JERSEY	122	3.1
NEW MEXICO	33	0.8
NEW YORK	865	21.7
NORTH CAROLINA	76	1.9
NORTH DAKOTA	0	0
OHIO	30	0.8
OKLAHOMA	10	0.3
OREGON	9	0.2
PENNSYLVANIA	57	1.4
PUERTO RICO	1	0
RHODE ISLAND	22	0.6
SOUTH CAROLINA	15	0.4
SOUTH DAKOTA	1	0
TENNESSEE	12	0.3
TEXAS	725	18.2
UTAH	18	0.5
VERMONT	1	0
VIRGINIA	136	3.4
WASHINGTON	45	1.1
WEST VIRGINIA	0	0
WISCONSIN	12	0.3
WYOMING	4	0.1
<b>Total</b>	<b>3994</b>	<b>100</b>