

YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS

Comments to the 2nd Draft

Joint General Comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 21 of the Committee on the Rights of the Child on the Human Rights of Children in the Context of International Migration

Submitted June 28, 2017

The Young Center for Immigrant Children Rights is a champion for the best interests of children who arrive in the United States on their own, from all corners of the world. We serve as trusted allies for these children by accompanying them through court proceedings, advocating for their best interests, and standing for the creation of a dedicated juvenile immigrant justice system that ensures the safety and well-being of every child. Our mission is to promote the best interests of unaccompanied immigrant children with due regard to the child's expressed wishes, according to the Convention on the Rights of the Child and United States law.

We have served as Child Advocate—best interests guardian *ad litem*—for thousands of unaccompanied children seeking protection in the United States. In that capacity, we make recommendations regarding the best interests of individual children to each of the federal agencies responsible for unaccompanied children. We have also worked with those federal agencies—including the Department of Justice, Department of Homeland Security, Department of Health and Human Services and Department of State—to create and implement policies that facilitate the consideration of each child's best interests. For example, between 2012 and 2015 the Young Center facilitated the work of the Subcommittee on Best Interests of the Interagency Working Group on Separated in Unaccompanied Children, which in 2016 released its *Framework for Considering the Best Interests of Unaccompanied Children*, a guide for incorporating best interests considerations into all decisions along the continuum of a child's case, from the time of apprehension through the final decision about whether the child will remain in the U.S. or return to home country.

With that context in mind, we have reviewed the comprehensive and detailed 2nd draft of the Joint General Comments and offer the following discrete recommendations.

1. ¶29: Best interests assessments and determinations

We recommend that the Joint Committee consider language that would require or encourage best interests assessments and determinations be conducted by independent entities—those not tasked with other obligations, such as enforcement of immigration laws. In the United States, federal law permits the appointment of “independent child advocates” for unaccompanied children. (*See* 8 U.S.C. 1232(c)(6).) The Young Center, appointed as Child Advocate for the most vulnerable unaccompanied children, is an independent non-profit organization; Child Advocates are not employed by the government and do not work under the supervision of any other stakeholder. Their recommendations focus solely on the best interests of the child. We recommend that any entity charged with making best interests assessments or determinations be truly independent of government enforcement agencies.

2. ¶¶45-46: Age

We commend the Joint Committee for emphasizing the needs of adolescents, particularly those between the ages of 16-18. Recognizing that the Convention provides rights and protections to children until 18 years of age, we nevertheless want to emphasize the harm that often takes place on a child’s 18th birthday, when (in the United States) a detained, migrant child is transferred directly from protective custody to adult immigration detention. These youth, many of whom have experienced trauma, continue to be particularly vulnerable, and it is detrimental to their health and well-being to be placed in adult immigration detention. “Children who turn 18 years old while in Custody, although legally adults, are still considered from a child welfare perspective to be children transitioning to adulthood.”¹ For this reason, we urge the Joint Committee to add language in this section urging States to ensure that migrant children in protective government custody are reunified with family members or placed in long-term, community-based placements before they turn 18, so that they are not subject to adult immigration detention on their 18th birthday.

¹ ABA Standards for the Custody, Placement, Care; and Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States, Section G. III. https://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf (last viewed June 28, 2017).

3. ¶¶57-61: Due Process guarantees and access to justice

Recognizing that formal court proceedings can be traumatic for children, but that children are entitled to fair and just proceedings, we encourage the Committee to emphasize that when any State uses court proceedings to make decisions about migrant children, they ensure that those proceedings are specifically and specially tailored to the unique strengths, vulnerabilities, and capacities of children. We believe that in general, this requires proceedings that are separate from (in location, in timing, and in design) comparable proceedings for unrelated adults. We are not certain that the language of “child-sensitive procedures” in paragraph 57 (notwithstanding the reference to CRC Committee General comment No. 5) is sufficient to convey the need to treat any legal cases for migrant children in a manner that is fundamentally different from cases for adults—in light of children’s strengths, capacities, and developmental needs.

Separately, we commend the Joint Committee for ¶59, and in particular the 11th bullet, which may become particularly important for migrant children fleeing to the United States. ¶59 provides that children should be guaranteed due process with respect to immigration and asylum proceedings, and the 11th bullet states that the child must have access to the territory as a prerequisite to procedural safeguards and best interest determination. The federal government is now considering plans to deny entry to unaccompanied children seeking protection at the U.S.-Mexico border. The children would instead be held in detention facilities in Mexico while undergoing legal proceedings in the United States—which they would “participate in” via videoconference or telephone, but not in person. Such a system would not only endanger children’s safety, but would thwart access to counsel and children’s ability to participate in legal proceedings in a meaningful way that ensures due process.

Finally, we urge the Joint Committee to add a paragraph to this section reminding all States that taking punitive action against a child or a child’s family to deter other families from migrating is a violation of due process, equal protection principles of fundamental fairness as well as the Convention. Within the last few years, the U.S. government has twice tried to impose punitive measures against migrant children and their families with the stated goal of deterring the migration of other families from Central America. In 2015, a federal court struck down as unlawful the government’s use of a general deterrence rationale to justify the large-scale detention of migrant families; more recently, federal authorities retracted a plan to forcibly separate migrant babies and children from their mothers to deter other families from migrating. We do not believe the use of a deterrence rationale by the United States or other governments will disappear anytime soon, and hope the Joint Committee will specifically address this

concern.

4. ¶¶68-73: Right to family life

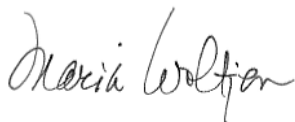
We urge the Committee to add a paragraph discouraging or prohibiting States from criminalizing or penalizing parents or family members when they assist a child in migrating in order to protect that child. Since January 2017, federal authorities in the United States have indicated that they will attempt to “disrupt” the migration of children by prosecuting parents and family members—for smuggling, for trafficking, for child endangerment—if they assist in their child’s efforts to seek protection in the United States. Whether or not these charges would ever be sustained in a court of law, they could have an extraordinary chilling effect, forcing parents or family members living in the United States to abandon plans to help a child in danger in home country, or putting their US-based children at risk of losing a parent to incarceration and deportation in order to help a child facing persecution, abuse, or trafficking in home country.

5. ¶¶96-100: Right to health

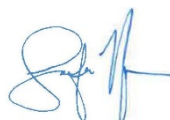
We urge the Joint Committee to add language requiring that States ensure that any child held in immigration detention or protective custody, whether the child is with family or separated from family—receive access to the same medical care provided to citizen children, and that this care address both physical and mental health. Notably, in 2016, a Committee appointed by the U.S. Department of Homeland Security to provide recommendations on the care of children and families held in U.S. “family detention” facilities found significant gaps in the medical care provided children detained with their parents.

We thank the Joint Committee for its consideration of these recommendations and commend the members and other contributors for an excellent draft document.

Sincerely,



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Executive Director



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