



Subcommittee on Best Interests of the
Interagency Working Group on Unaccompanied and Separated Children

FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN

MAY 2016

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PREPARED BY:



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This project was premised on collaboration between federal agencies and non-governmental organizations and would not have been possible without the stewardship of Professor Andrew Schoenholtz of the Georgetown University Law Center. Professor Schoenholtz moderated each of the Subcommittee meetings, lending a critical tone of neutrality and moderation to the discussions.

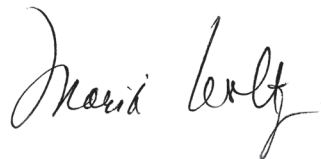
Participants in the Subcommittee included the Department of Homeland Security (DHS), Department of Justice (DOJ), Department of Health and Human Services (HHS), and Department of State (DOS); non-governmental organizations including American Friends Service Committee, Center for Gender and Refugee Studies at UC Hastings, International Social Service (ISS-USA), Kids in Need of Defense (KIND), Lutheran Immigration and Refugee Service, National Immigrant Justice Center, Public Counsel, South Texas Pro Bono Asylum Representation Project (ProBAR), U.S. Conference of Catholic Bishops, and the Women's Refugee Commission; law school-based immigration practitioners; and staff of the UNHCR Regional Office for the United States.

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I. SUBCOMMITTEE: PURPOSE AND METHODOLOGY

A. The Interagency Working Group on Unaccompanied and Separated Children

Interagency Working Group on Unaccompanied and Separated Children (“Interagency Working Group”) has summarized its role and responsibility as follows:

In April 2007, key U.S. Government representatives and experts from non-governmental organizations formed the Interagency Working Group on Unaccompanied and Separated Children to provide a forum for discussion on topics concerning refugee children, trafficked children, orphans, child soldiers, and children in U.S. immigration proceedings, as well as issues relating to repatriation. These discussions culminated in the October 2008 Conference on the Protection of Unaccompanied and Separated Children at George Mason University. More recently, the Working Group has met regularly to discuss topics relating to unaccompanied and separated alien children, including trends within this population, care and custody issues, and family reunification.¹

B. Subcommittee on Best Interests of the Interagency Working Group

In late 2011, the Interagency Working Group “invited members to participate on a subcommittee to develop a framework and recommendations for integrating the best interests of the child into decisions concerning [unaccompanied children].”² The Young Center for Immigrant Children’s Rights agreed to staff the Subcommittee, convene meetings of the Subcommittee members, and prepare recommendations for the full Interagency Working Group. In late 2012, the Young Center secured a grant from the John D. and Catherine T. MacArthur Foundation to undertake and complete the project. Participants in the Subcommittee included the Department of Homeland Security (DHS), Department of Justice (DOJ), Department of Health and Human Services (HHS), and Department of State (DOS); non-governmental organizations (NGOs) included American Friends Service Committee, Center for Gender and Refugee Studies at UC Hastings, International Social Service (ISS-USA), Kids in Need of Defense (KIND), Lutheran Immigrant and Refugee Service, National Immigrant Justice Center, Public Counsel, South Texas Pro Bono Asylum Representation Project (ProBAR), U.S. Conference of Catholic Bishops, and the Women’s Refugee Commission; law school-based immigration practitioners; and staff of the UNHCR Regional Office for the United States.

From 2012 to 2014, Subcommittee members communicated and exchanged ideas at three in-person meetings, written correspondence, and telephone conversations. Prior to each meeting, the Young Center circulated ideas, questions, concerns, best practices, and recommendations proposed by members of the Subcommittee. Members had an opportunity to participate and comment on this exchange of ideas before, during and after each meeting, after which the draft framework and factors were further modified. Each of the meetings was moderated by Professor Andrew Schoenholtz of Georgetown University Law Center.

In February 2015, the full Interagency Working Group met to review and discuss a final draft of the Subcommittee’s recommendations. Everyone who attended the meeting as well as those who attended prior meetings of the Working Group or the Subcommittee were invited to provide final recommendations and comments before this report was completed.

C. Scope and Purpose of this Document

The *Framework for Considering the Best Interests of Unaccompanied Children* (“Framework”) is the result of this extended exchange of ideas. It is intended to be a practical guide for considering a child’s best interests as part of any decision about that child, in a manner that is consistent with existing immigration law.³

The document envisions that each decision maker would consider a child’s best interests as part of each decision along the continuum of a child’s care—from apprehension, to custody, to release, to a decision on the child’s legal claim, including the possibility of repatriation—and articulates specific factors to address as part of those decisions.

The Framework also contemplates systemic changes that would require adaptations to agency-wide policies, procedures and training.

What follows in this report is:

- a **Framework** for considering children’s best interests, which is envisioned as a continuum of decisions from the moment of apprehension until a child’s immigration case is fully resolved;
- **factors** to be applied in considering the best interests of a child within this framework, applying universally accepted best interests principles.

The Framework and factors are presented from two perspectives. The first considers possible agency-wide changes in procedure or policy. For example, Subcommittee members discussed whether DHS could create a centralized office or mechanism for permitting a “best interests” review of cases in which children were unsuccessful in pursuing relief but who expressed a fear of return to their countries of origin. The centralized review would allow a child, through counsel, to petition DHS officials to consider specific best interests factors before deciding whether to exercise discretion in the child’s case.

The second perspective centers on individual actors. Subcommittee members repeatedly expressed the concern, “what would a decision maker do in an individual case?” The final pages of this document offer specific questions for decision makers considering a child’s best interests as part of a decision, in the form of questions and agency- and action-specific checklists.

Some recommendations in the Framework already exist, whether on an agency-wide level, or as a part of formal or informal procedures adopted by individual offices within an agency or individual decision makers. Notwithstanding the different mandates of the governmental members of the Subcommittee—law enforcement (DHS), adjudication (DOJ and DHS), custody, care and release (HHS and DHS), safe repatriation (DHS, DOJ, HHS, DOS)—all of the agencies recognize that children are different from adults, and each agency has already established some procedures that recognize these differences. One goal of the Subcommittee was to place these existing procedures within a comprehensive and rigorous, child-protective Framework for considering the best interests of vulnerable children in all decisions along the continuum.

Of note, the inclusion of any recommendation in this document does not indicate that it received support from all members, or any particular member of the Subcommittee. The recommendations reflect the range of ideas proposed and discussed over a multi-year period. Some garnered wide support; some reflect existing practices; some were identified as easily-implementable; others garnered support from NGOs but met resistance from an agency or agencies, often due to resource allocation, capacity concerns, or conflicting mandates (e.g., law enforcement); and in some cases, there was debate over which agency or agencies could or should have responsibility if the recommendation was implemented. The authors of this report endeavored to include the broadest possible range of recommendations, so long as they could be implemented under existing law. Concerns about any given recommendation based solely on cost or available resources did not preclude its inclusion in this document.

D. Moving Forward

This Framework is intended to offer concrete and implementable ideas for public and private actors. Participants in the process consistently voiced an expectation that the Framework would serve as a resource in subsequent efforts to craft policies and procedures for the treatment of, and decision-making about unaccompanied children. We hope that in answering the questions, “What does it mean to consider a child’s best interests?” and “How can best interests factors be part of decisions about a child’s apprehension, custody, release, legal relief or repatriation?” we have demonstrated that it is both possible and practical to thoughtfully consider children’s safety and well-being in every decision. As practice and policies develop based on this Framework, we will be better able to ensure that unaccompanied children receive the treatment they deserve.

II. FRAMEWORK FOR CONSIDERING CHILDREN'S BEST INTERESTS

The best interests principle has deep roots in U.S. law. Every state has laws requiring courts to consider the best interests of children separated from their parents or legal guardians. These laws are applied in courts designed to consider and protect the particular vulnerabilities of children. In large part, the work of this Subcommittee is to bring these well-established U.S. norms to bear in decisions affecting immigrant children, where there is often no explicit requirement to consider best interests, but where children are no less deserving of protection and solicitude.

As a signatory to the UN Convention on the Rights of the Child (CRC),⁴ the U.S. government cannot act in contravention of the principles articulated in the CRC. All other nations, now including Somalia, have ratified the Convention and are state parties. The CRC establishes that the “best interest of the child” shall be a primary consideration in all actions regarding children, including unaccompanied children.⁵ The CRC imposes this obligation on governments as well as private entities, courts of law and administrative authorities.⁶

Although the Immigration and Nationality Act (INA) does not contain an explicit obligation for federal decision makers to consider the best interests of immigrant children in every decision, members of the Interagency Working Group recognized that consideration of a child’s best interests was both important and could be consistent with the requirements of the INA. With the passage of the 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), the “best interests” principle now appears multiple times in immigration law, both with respect to placement decisions by the Office of Refugee Resettlement,⁷ an agency within HHS, and with respect to the role of the child advocate, which is to advocate for the best interests of the child.⁸ The INA also applies the “best interest” standard in its definition of a special immigrant juvenile.⁹ The TVPRA thus clearly envisions consideration of the best interests of the child when making decisions about vulnerable, unaccompanied children.

The Framework developed by the Interagency Working Group seeks to ensure consideration of the best interests of unaccompanied immigrant children¹⁰ while recognizing the government’s interests in protecting public safety and ensuring the fair and just application of the law. It is important to note that the Framework sets forth a practical guide for taking into *consideration* the best interests of the child. It does not in any way prohibit government officials from considering other important factors, for example safety to the community or national security concerns. Those and many other factors are, and will continue to be, incorporated into the decision-making process.

The Framework is primarily focused on the government actors who have authority over most decisions made regarding unaccompanied immigrant children. However, the Framework also is intended to guide the decisions of non-government actors to the extent they are responsible for the care or custody of, or delivery of services to, unaccompanied children, with the exception of attorneys for the child, who represent the child’s expressed interests.¹¹

A. Best Interests Factors: Universally Accepted Best Interests Principles

The “best interests of the child” is the foundational principle of child protection and is central to all U.S. state court proceedings involving children, particularly when separation from family is at issue. Similarly, the CRC requires all public and private institutions, courts and administrative bodies to consider the best interests of the child.¹²

Best interests is a term of art that is sometimes, but not often, defined as a matter of law. The most widely accepted elements of best interests include:

- **safety and well-being;**¹³
- **the child’s expressed interests,** in accordance with the child’s age and maturity;¹⁴
- **health;**¹⁵
- **family integrity;**¹⁶
- **liberty;**¹⁷
- **development** (including education);¹⁸ and
- **identity.**¹⁹

Consideration of the child’s views, even in the context of adversarial immigration proceedings, is an integral element of any best interests analysis.

Any decision that does not take into account the child’s views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.

The fact that the child is very young or in a vulnerable situation (e.g., has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views, *nor reduces the weight given to the child’s views in determining his or her best interests.*²⁰

Finally, children should at all times be treated with “dignity, respect, and special concern for their particular vulnerability” as children.²¹ They should also be protected at all times from discrimination.²² Authorities must recognize and address the long-accepted principle that children experience situations differently from adults.²³

WIDELY ACCEPTED BEST INTERESTS PRINCIPLES:

Safety and Well-being
Child’s Expressed Interests
Health
Family Integrity
Liberty
Development
Identity

B. The Framework: Decision Making Continuum

This Framework envisions consideration of the best interests of the child from the moment the child is identified by federal officials as unaccompanied until there is a durable solution, *i.e.*, the child is granted the right to remain permanently in the United States or is safely repatriated to the child's country of origin. The Subcommittee found it helpful to think about consideration of children's best interests by using this decision-making continuum, which identifies the points at which federal agencies make "particularly important decisions"²⁴ about unaccompanied children. These include:

- **apprehension;**
- **placement, transfer and services within government custody;**
- **release from government custody;**
- **proceedings in immigration court and before USCIS;**
- **substantive relief; and**
- **safe repatriation and reintegration.**

Some federal agencies have exclusive control over certain decisions along this continuum: for example, the Department of Homeland Security has exclusive authority over decisions to apprehend unaccompanied children. Other decisions are the responsibility of multiple agencies: for example, both DHS and the Department of Health & Human Service's Office of Refugee Resettlement (ORR) make decisions about children's custody, transfer and release. What follows is a brief summary of the agencies' roles along the continuum of decision making.

1. APPREHENSION

The majority of unaccompanied children continue to be apprehended by the Department of Homeland Security (DHS) Customs and Border Protection (CBP) along the U.S.-Mexico border.²⁵ In general, the facilities at which these children are initially processed are not designed for children and are not staffed by law enforcement officials with specialized training in working with children, child welfare, or trauma.

Children are also apprehended internally, after living for a period of time (days, weeks, months or years) in the United States. Typically, these children come into the custody of DHS's Immigration & Customs Enforcement (ICE) after an encounter with local law enforcement; for example, after an arrest, after a juvenile delinquency proceeding, or upon release from a state juvenile detention center. Officials within ICE must decide whether to take custody of the child from a state agency, release the child directly to a parent or legal guardian, designate the child as an unaccompanied minor and arrange for the child's safe transfer to the Office of Refugee Resettlement (ORR), and issue and serve a Notice to Appear (NTA), a document charging the child with being in the country without permission and requiring the child to appear in immigration court.

Children apprehended by DHS are entitled to due process, including the right to know the reasons for their apprehension and detention. Federal law requires DHS to provide each child with a Notice of Rights and Request for Disposition through Form I-770 (hereinafter the "Form I-770 Notice of Rights").²⁶ If a child is less than 14 years of age or unable to understand the notice, the notice must be read and explained to the child in a language he or she understands.²⁷

The current version of the Form I-770 Notice of Rights requires that the arresting officer explain three basic rights to the apprehended child: the right to use the telephone to call a parent, adult relative or adult friend; the right to be represented by an attorney who can fully explain the child's rights; and the right to a hearing before the immigration judge who will decide whether the child must leave or whether the child may stay in the United States.²⁸ DHS regulations require that the rights must be explained to the child in a language he or she understands in order to waive rights.²⁹

Pursuant to Section 235(a)(2) of the TVPRA, DHS must also individually screen unaccompanied Mexican children within 48 hours of apprehension to determine that they are not victims of trafficking or at risk of being trafficked, do not have credible fear of persecution, and are able to make an independent decision to withdraw admission (i.e., are to make an independent decision to return to Mexico).³⁰

DHS is also responsible for identifying unaccompanied alien children. Pursuant to federal law, an unaccompanied alien child is any child who is: 1) under the age of 18; 2) has no parent or legal guardian in the United States available to provide care and physical custody; and 3) has no lawful immigration status in the United States.³¹ Children identified as unaccompanied alien children must be transferred to the care and custody of ORR, within HHS, within 72 hours of that determination.³²

2. PLACEMENT AND TRANSFER WITHIN CUSTODY

The Office of Refugee Resettlement (ORR) has responsibility for the care and custody of unaccompanied immigrant children and is required to care for them in the least restrictive setting while in government custody.³³ ORR has developed a hierarchy of placements for unaccompanied children, ranging from the least restrictive (short-term, community-based foster care) to the most restrictive (state juvenile detention facilities). ORR also contracts with therapeutic and residential treatment facilities to serve children with special needs. Children are entitled to all of the following services, pursuant to the *Flores v. Reno* settlement agreement.³⁴

- Proper physical care and maintenance
- Appropriate routine medical and dental care, family planning services, and emergency health care services, appropriate immunizations and appropriate mental health interventions
- An individualized needs assessment
- Educational services
- Daily outdoor activity, daily large-muscle activity, and daily structured leisure time
- Weekly individual counseling sessions by trained social work staff
- Group counseling sessions
- Acculturation and adaptation services
- Comprehensive orientation
- Access to religious services of the child's choice
- Visitation and contact with family members, with respect for the child's privacy
- Right to privacy, including the right to wear his or her own clothes when available; a private space for the storage of personal belongings; private conversations on the phone; private visitation with guests; and uncensored mail
- Family reunification services
- Legal services information

Additionally, the TVPRA directs HHS to “ensure, to the greatest extent practicable” and consistent with provisions of the Immigration and Nationality Act that all unaccompanied children in the custody of HHS or DHS “have counsel to represent them in legal proceedings or matters and to protect them from mistreatment, exploitation, and trafficking.”³⁵ The TVPRA also authorizes HHS to appoint “independent child advocates” to advocate for the best interests of child trafficking victims and other vulnerable, unaccompanied children.³⁶

3. RELEASE FROM GOVERNMENT CUSTODY

Pursuant to federal law, children shall be released to sponsors with preference given to: 1) a parent; 2) a legal guardian; 3) an adult relative; 4) an adult individual or entity designated by the parent or legal guardian; 5) a licensed program willing to accept legal custody; or 6) an adult individual or entity seeking custody when it appears there is no other likely alternative to long-term detention.³⁷

ORR follows specific procedures to determine whether a child may be released. The agency “takes into consideration the unique nature of each child’s situation and incorporates child welfare principles when making placement, clinical, case management, and release decisions that are in the best interest of the child.”³⁸ The TVPRA requires that ORR conduct a home study prior to the release of certain children in ORR custody.³⁹ Home studies allow ORR to obtain more information about a prospective sponsor and the child’s safety upon release. Additionally, children who undergo a home study prior to release are eligible for “post-release services” after their release, which vary based on the child’s and sponsor’s needs.

4. PROCEEDINGS IN IMMIGRATION COURT AND BEFORE USCIS

Multiple agencies have a role in identifying and considering the best interests of children in their individual immigration proceedings. Children placed in removal proceedings appear in the immigration courts of the Executive Office for Immigration Review (EOIR), within the Department of Justice. In these adversarial proceedings, the government is represented by trial attorneys from the Office of the Chief Counsel of Immigration and Customs Enforcement, within the Department of Homeland Security. Some children may pursue relief from removal by applying for immigration benefits from U.S. Citizenship and Immigration Services (USCIS), a separate agency within the Department of Homeland Security.

The 2008 TVPRA established the right of children seeking asylum to apply first with USCIS, rather than before the immigration judge, despite being placed in removal proceedings prior to their application.⁴⁰ Thus USCIS has initial jurisdiction over children’s asylum claims, and also adjudicates children’s petitions for Special Immigrant Juvenile Status (SIJS, for abused, neglected, or abandoned children), T and U nonimmigrant statuses (for crime victims and victims of trafficking, respectively), self-petitions under the Violence Against Women Act (VAWA), and in some cases, children’s petitions to adjust to lawful permanent resident status.

Nevertheless, most children continue to appear in immigration court. Recently, EOIR established juvenile dockets for unaccompanied children, both detained and released, so that children’s cases are now, for the most part, heard separately from adult cases. In some jurisdictions, EOIR has allowed immigration practitioners to establish programs in the building where children and sponsors can participate in a “Know Your Rights” session, be screened for legal relief, and secure a “friend of the court” representative for a single proceeding, or even secure legal representation. EOIR also provides a legal orientation program (an “LOPC”) for the sponsors of unaccompanied children in several locations and offers access to a national call center for children’s sponsors in other locations.

5. SUBSTANTIVE RELIEF

In almost every case, decisions by an immigration judge or a USCIS official to grant or deny relief are discretionary. While children must establish the required statutory criteria to demonstrate their eligibility for relief, considerations of the child's best interests—safety, expressed interests, family integrity, liberty, and ability to develop (as described below)—may be relevant *both* to statutory factors and to the exercise of discretion. Information about a child's best interests—for example, the lack of a place where she could live in safety upon return to her country—could inform multiple elements of an asylum claim, from the state's ability or willingness to protect her, to her ability to safely relocate. Similarly, the likelihood that a child's repatriation would separate her from her only caregiver—for example, a grandparent with temporary protected status residing in the United States—and put her at risk of homelessness and living on the streets in her home country, could be relevant to an application for Special Immigrant Juvenile Status or asylum. Alternatively, consideration of the child's best interests may provide an important counter to negative discretionary factors. Finally, best interests considerations could also inform an immigration judge's decision to ask the government to exercise prosecutorial discretion, or to administratively close a child's case.

In those cases where a child cannot establish eligibility for relief from removal, consideration of the child's best interests may be particularly relevant to the decision to order the child removed, or for DHS to consider exercising discretion in favor of the child.

Within the last year, both DOJ and HHS have established programs to significantly expand the number of children receiving government-funded representation in immigration proceedings. Additionally, HHS has increased funding for, and the number of, child advocate programs to identify and advocate for the best interests of particularly vulnerable children. It is important to note that the role of the attorney in immigration proceedings is to represent the *expressed interests* of the child. When an attorney believes that a child's desire threatens the child's safety, the attorney may counsel the child as to his or her options, but ultimately, the attorney must represent the child's expressed interests. The role of the child advocate is to identify and advocate for the child's *best interests*.⁴¹

6. SAFE REPATRIATION AND REINTEGRATION

The TVPRA creates a clear expectation that vulnerable children not be returned to unsafe or inhumane situations in their countries of origin. The TVPRA calls upon federal agencies to “Ensur[e] the Safe Repatriation of Children” as part of the statute’s stated goal of combating child trafficking.⁴² The Secretaries of State, Health and Human Services and Homeland Security, together with nongovernmental organizations, are required to create a pilot program to “develop and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied immigrant children.”⁴³ The Secretary of Homeland Security is required to “consult the Department of State’s Country Reports on Human Rights Practices and the Trafficking in Persons Report in assessing whether to repatriate an unaccompanied alien child to a particular country.”⁴⁴ Congress also required the same federal agencies to report on how, when and why children are repatriated, with particular attention to “the steps taken to ensure that such children were safely and humanely repatriated,” and a description of the immigration relief sought and denied to such children.”⁴⁵

THE SUBCOMMITTEE HAS RECOGNIZED
THAT ENSURING A CHILD’S SAFE REPATRIATION
AND REINTEGRATION REQUIRES:

- *inquiry* into the child’s best interests;
- *disclosure* to the decision maker of information relevant to the best interests inquiry; and
- *consideration* of the information gathered during the best interests inquiry as part of the decision whether to grant voluntary departure or to order removal, and as part of the actions taken to effectuate the child’s removal or voluntary departure.

Subcommittee members repeatedly raised concerns about the lack of sufficient and sufficiently-funded programs in countries of origin to facilitate children’s safe reintegration, as well as the need for more sustained, interdisciplinary and intra-governmental collaborations to develop such programs.⁴⁶

C. Precedent for Considering Best Interests in Removal Proceedings

No fewer than three federal agencies are responsible for making decisions about unaccompanied children. Each agency has developed some policies and procedures specific to children. Whether implicit or explicit, a concern for children's safety, their ability to express themselves, their separation from family, their liberty interests, and their ability to develop—in other words, their best interests—underlies these existing policies.

For nearly 20 years, DHS (and its predecessor agency, the Immigration and Naturalization Service or INS), has recognized the unique situation of children appearing in immigration proceedings designed for adults. In 1998, the INS promulgated Guidelines for Children's Asylum Claims which adopt the "best interests of the child" as a "useful measure" for appropriate interview procedures for child asylum seekers.⁴⁷ The Guidelines establish procedures for children that closely track well-established best interests principles in the adjudication of children's claims, such as permitting the presence of a trusted adult;⁴⁸ requiring interviews conducted by Asylum Officers with "specialized training in child refugee issues;"⁴⁹ facilitating awareness of the emotions or cultural considerations that may affect certain responses from children;⁵⁰ and engaging in "child-sensitive questioning" that is "tailored to the child's age, stage of language development, background, and level of sophistication."⁵¹ More recently, in 2011, DHS addressed the exercise of prosecutorial discretion with respect to children, by its agents.⁵² ICE Deputy Assistant Secretary John Morton indicated that "minors" and "individuals present in the United States since childhood" require "prompt particular care and consideration" in the exercise of prosecutorial discretion.⁵³ The Obama administration's program for the Deferred Action of Childhood Arrivals (DACA) reinforces the idea that it is not always in the best interests of a child to be placed in removal proceedings.

As noted *supra*, pursuant to federal law, ORR is required to place unaccompanied children in their custody in "the least restrictive setting that is in the best interest of the child."⁵⁴ The statute then prescribes "best interests" as the standard for child advocacy, requiring that "[a] child advocate shall be provided access to materials necessary to effectively advocate for the best interest of the child."⁵⁵ ORR's interpretation of that statute with regard to age determination procedures indicates a similar orientation toward the best interests of the child, requiring the resolution of "[a]mbiguous, debatable, or borderline results" from medical age determination procedures "in favor of determining the alien as a minor."⁵⁶

In recent years, federal agencies have considered the "best interests of the child" standard through a wide lens. In its 2013 Parental Interest Directive, the Department of Homeland Security specifically addressed the need for special measures when persons subject to removal proceedings are the parents of minor children.⁵⁷ This policy directs DHS agents to consider how their decisions will impact the parent-child relationship and requires affirmative steps to ensure that removal proceedings do not lead to the termination of that relationship.⁵⁸

Consideration of the best interests of the child also appears in Department of Justice memoranda. In 2007, EOIR issued guidelines for unaccompanied children in immigration courts.⁵⁹ The agency describes the "best interest" principle as a factor that relates to the immigration judge's discretion in taking steps to ensure that a "child-appropriate" hearing environment is established, allowing a child to discuss freely the elements and details of his or her claim.⁶⁰ In its memo, EOIR contemplated a framework in which the INA and its regulations can be exercised with best interest considerations in mind:

By carefully controlling how the proceedings are conducted, immigration judges can effectively discharge their obligation under the INA and the regulations in a way that takes full account of the best interest of the unaccompanied alien child.⁶¹

III. APPLYING THE BEST INTERESTS FRAMEWORK IN AGENCY DECISION MAKING

A. Opportunities to Incorporate Best Interests Considerations into Agency Policy

In its meetings and discussions to develop this Framework, the Subcommittee on Best Interests shared ideas, discussed existing agency practices, reviewed current law, regulations and policies as well as resource limitations, and explored policies and practices from domestic child welfare and law enforcement systems. One outcome of this process was the identification of *opportunities to develop agency-wide policies and practices that would ensure individual decision makers have the authority and tools to apply the best interests Framework and factors*. What follows in this section are strategies—some of which already exist, others which have been tried in discrete locations, others which are common practice in juvenile courts, and some of which are necessary because of existing failures to consider best interests in all decisions involving unaccompanied children.

1. DEPARTMENT OF HOMELAND SECURITY

Multiple components within DHS make decisions about children. The Subcommittee directed its attention to U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) officials with regard to the apprehension and custody of children; to attorneys within Immigration and Customs Enforcement’s Office of Chief Counsel, who pursue removal proceedings against children; and to asylum officers and other officials within U.S. Citizenship and Immigration Services (USCIS) who adjudicate children’s petitions for affirmative asylum and other immigration benefits.

It is in children’s best interests to be safe at all times.

It is in children’s best interests for CBP and ICE officers apprehending, detaining, questioning, transporting, or otherwise interacting with children to ensure that children are safe at all times and have their physical, medical and psycho-social needs attended to and met. Children should not be subjected to procedures or facilities designed for adults when those procedures or facilities put their safety or well-being at risk.

It is in children’s best interests for ICE trial attorneys to promote fundamentally fair proceedings for children, which take into account the particular age, vulnerability and developmental abilities of children; to refrain from proceeding with a child’s case while barriers exist to the child’s ability to understand the proceeding or to express his or her interests; and to ask questions about and consider the child’s safety and well-being during and after the proceedings, before making any requests of the immigration judge or any decision about the child. Additionally, before making any decision relevant to a child’s request for relief—including whether to file a “Notice to Appear,” whether to challenge or join a child’s claim for relief, and whether to grant a child’s request for the exercise of discretion—DHS officials should consider the child’s best interests, as an element of determining how to exercise agency discretion.

It is in children’s best interests for USCIS officials to ensure fair proceedings, in which barriers to a child’s ability to understand the proceedings and to express his or her interests are resolved before the child’s claim(s) for relief is considered, and in which the agency—through asylum officers, other adjudicators, and supervisory officials—considers the child’s safety and well-being before making any decision. USCIS officials, before making any decision on an affirmative application but in a timely manner, should consider the child’s best interests in deciding whether to exercise the agency’s discretion to provide the requested benefit.

When a child requests voluntary departure or removal, it is in a children’s best interests for DHS officials to disclose to the immigration judge any information indicating that a child has expressed a fear of return to home country, or indicating that the child would be unsafe upon repatriation; such disclosures are also necessary elements of a fundamentally fair proceeding. When a child is granted voluntary departure or ordered removed, DHS must ensure the child’s safety. DHS officials should take affirmative steps to ensure that a child returning to his or her country of origin will be safely and humanely transported and received by an adult who is willing and capable of caring for the child. These actions serve to protect children, but they can also promote re-integration instead of re-migration.

GENERAL RECOMMENDATIONS

- Designate a senior official within DHS Headquarters, along with a point person from each of the three components—CBP, USCIS, and ICE—to review all policies and procedures affecting unaccompanied children.
- Issue the regulations required by the TVPRA.

RECOMMENDATIONS FOR APPREHENSION AND CUSTODY

- Ensure children are not separated from parents in DHS custody, such that DHS action renders the children “unaccompanied.”
- Establish designated areas in all CBP facilities where children can be screened or interviewed in a safe, private and child-appropriate manner; alternatively, create child-appropriate spaces in designated facilities, where children can be moved in a safe and timely manner.
- Create safe spaces (in individual facilities, or at designated, regional facilities) in which children: can remain with siblings or other family members (for family integrity purposes); are separated from unrelated adults (for child protection purposes); are provided with privacy for purpose of medical evaluations; and have privacy in using the bathroom.
- Collaborate with child welfare experts to develop revised tools to aid CBP and ICE when screening children, training officers, and developing pilot or model projects.
- Contract with child welfare professionals who are trained in trauma-informed interviewing skills to conduct TVPRA screenings (without divesting DHS of final decision-making authority regarding whether the child meets any of the three criteria established by the TVPRA).
- Develop policies to allow parents of children apprehended internally to pursue release directly from DHS prior to their child’s designation as an unaccompanied minor.
- Develop policies to evaluate whether a child is *prima facie* eligible for asylum, SIJS, T or U non-immigrant status, or any other form of relief or prosecutorial discretion before issuing an NTA.

- Develop policies to determine whether children referred from delinquency or state child welfare authorities are a priority for enforcement, and for the appropriate consideration of delinquency adjudications (particularly for alleged gang activity for children under the age of 16).
- Consider a child’s best interests (in conjunction with existing decision making priorities) before placing a detainer on a child in state custody.
- Contract/partner with local Child Advocacy Centers equipped with child-appropriate rooms and staff for screening.

RECOMMENDATIONS FOR PROCEDURES IN IMMIGRATION COURT

- Streamline or automate the Change of Venue process for unaccompanied children while in custody and upon their release.
- Develop and provide all children and sponsors with materials that explain common forms of relief and the children’s rights (these forms could be drafted by USCIS in collaboration with NGOs).
- Develop policies to ensure that agency officials understand and abide by state confidentiality laws for juvenile court proceedings when seeking information or records from juvenile courts.
- Develop policies to prohibit any court-related enforcement (*e.g.*, issuing NTA’s) against an unaccompanied child’s parent, family member or sponsors unless such person presents a serious threat to national security or community safety.

RECOMMENDATIONS FOR PROCEDURES FOR USCIS INTERVIEWS

- Establish procedures or guidance for USCIS officials that reduce the need to ask questions of children that may invite or induce the re-visiting of traumatic events (*e.g.*, accepting declarations of a trauma history in advance of the interview, and limiting further questions unless there is a need to clarify or there is a concern about credibility; or accepting transcripts of interviews conducted at Child Advocacy Centers to establish facts whose re-telling may be traumatizing for the child).
- Provide space for legal services providers and child advocates to meet with children during designated interview days to facilitate representation and child advocate services.
- Establish additional mechanisms to refer children to *pro bono* or low cost counsel if they appear for an interview unrepresented.
- Develop forms and instructions that are tailored to children’s general stages of development to ensure that children—particularly those who are unrepresented—are able to seek protection for which they are eligible.
- Develop scripts for asylum officers and other officers that are tailored to children’s general stages of development, to ensure that children—particularly those who are unrepresented—understand and have access to fundamentally fair proceedings.
- Develop advisories for state courts, child welfare, and law enforcement agencies on USCIS-adjudicated forms of relief for children.
- Create a mechanism for USCIS officials to recommend the appointment of a child advocate if they are concerned about the child’s safety (*e.g.*, that the child is in the custody of a trafficker) or believe the child is particularly vulnerable.

RECOMMENDATIONS REGARDING DECISIONS TO GRANT OR DENY RELIEF FROM REMOVAL IN IMMIGRATION COURT

- Incorporate “the best interests of the child” as an explicit criterion in policies regarding the exercise of prosecutorial discretion.
- Develop policies that require the agency to consider the child’s safety in home country and other best interests factors before the agency takes a position on a child’s request for voluntary departure or removal.
- Develop policies to ensure the department does not inhibit the child’s ability to be represented by counsel, and which recognize that representation is necessary to ensure the child’s express wishes are heard and that the child is not pressured into revealing information that could negatively impact the child’s case.

- Develop specialized training for ICE trial attorneys on the following subjects:
 - the forms of relief available to children and children’s unique experiences and needs relevant to these forms of relief;
 - child- and culturally-appropriate questioning techniques;
 - children’s development and the impact of trauma on children; and
 - the differences between delinquency and criminal proceedings.
- Designate and train Points of Contact for children’s cases in each ICE Office of Chief Counsel.
- Develop procedures to refer vulnerable children for the appointment of a child advocate.

RECOMMENDATIONS REGARDING DECISIONS TO GRANT OR DENY RELIEF IN USCIS PROCEEDINGS

- Develop specialized training for asylum officers on the following subjects:
 - children’s asylum claims;
 - child- and culturally-appropriate questioning techniques;
 - children’s development and the impact of trauma on children; and
 - the differences between delinquency and criminal proceedings.
- Develop specialized training for USCIS officials involved in the adjudication of children’s petitions for SIJS and adjustment of status on the following subjects:
 - the forms of relief available to children and children’s unique experiences and needs relevant to these forms of relief;
 - child- and culturally-appropriate questioning techniques;
 - children’s development and the impact of trauma on children; and
 - the differences between delinquency and criminal proceedings.
- Develop corps of specially-trained asylum officers for children’s cases.
- Designate and train Points of Contact for children’s cases in each USCIS office.

SAFE REPATRIATION RECOMMENDATIONS

- Establish a designated unit within DHS to accept referrals of cases—from attorneys, from immigration judges, or from children—where there is no relief or relief was denied, but there are clear safety concerns or a fear of return, so that the agency can consider exercising its discretion (deferred action/administrative closure).
- Establish policies encouraging trial attorneys to actively participate in, and not object to, inquiries into the child’s safety when a child requests voluntary departure, as outlined below.
- Pursuant to the TVPRA, identify and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied immigrant children.
- Collaborate with other government agencies, including the Department of Health and Human Services, the Department of State and United States Agency for International Development (USAID) to develop relationships with public or private agencies in the receiving countries so that children can be referred for appropriate services prior to the child’s return.
- Continue to participate and engage in regional, bilateral dialogue on children’s migration.

2. DEPARTMENT OF JUSTICE—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

The role of immigration judges is to ensure fundamentally fair proceedings. To do so, immigration judges should not consider a child’s claims on the merits without first resolving barriers that impede a child’s ability to understand the proceedings and to express his or her interests, including access to counsel. It is in children’s best interests for all stakeholders, including immigration judges, to ask questions about and consider the child’s safety, well-being and family integrity before making any decisions. Immigration judges should consider whether the child will be safe upon return to his or her country of origin before ruling on DHS’s request for a removal order and consider a child advocate’s best interests recommendation before ordering a child’s removal.

It is in children’s best interests for the government to ensure fundamentally fair proceedings for children.

GENERAL RECOMMENDATIONS

- Establish separate dockets for released children in all jurisdictions, with frequency aligned to case volume, where children are recognized as children and where the immigration judge can implement child-protective measures in a more efficient manner.
- Develop a corps of specially-trained immigration judges who oversee children’s dockets (multiple judges in each jurisdiction).
- Develop procedures whereby immigration judges who have concerns about a child’s capacity can refer the child for appointment of a child advocate where such programs exist, and/or can refer the child to an expert for a competency evaluation.

- Develop training for all immigration judges overseeing children’s dockets on the following subjects:
 - the forms of relief available to children and children’s unique experiences and needs relevant to these forms of relief;
 - the differences between delinquency and criminal proceedings;
 - child- and culturally-appropriate questioning techniques; and
 - children’s development and the impact of trauma on children.
- Develop training for all interpreters working with children.
- Collaborate with state juvenile courts and NGOs to develop training and tools for immigration judges on children’s development, capacity and vulnerability.
- Issue the regulations required by the TVPRA of 2008.

RECOMMENDATIONS FOR PROCEDURES IN IMMIGRATION COURT

- Develop procedures to ensure children are represented by counsel in immigration proceedings.
- Develop and provide all children and sponsors with materials that explain common forms of relief and the children’s rights (these could be drafted by EOIR in collaboration with NGOs).
- Provide space for legal services providers, child advocates, and other service providers to meet with children during children’s (detained & released) dockets.
- Develop scripts for immigration judges that are tailored to children’s stages of development, to ensure that children—particularly those who are unrepresented—understand and have access to fundamentally fair proceedings.
- Provide full, simultaneous interpretation for children appearing at master calendar and merits hearings.
- Develop procedures to ensure consideration of best interests recommendations submitted by child advocates.
- Expand pilot program postponing initial master calendar hearing for detained children.
- Collaborate with DHS to develop an automatic change of venue procedure for detained children who are released.

SAFE REPATRIATION RECOMMENDATIONS

- Develop procedures requiring immigration judges to make specific inquiries of all parties about a child’s safety when a child requests voluntary departure or removal, including:
 - to whom the child will return;
 - whether there is a parent, guardian, traditional caregiver or agency willing and able to take custody of and care for the child;
 - whether the child has previously expressed any fear of return to home country; and
 - what the child believes will happen upon his or her return (e.g., whether or what kind of harm the child could experience upon return).

- Develop procedures (through a new Operating Policies and Procedures Memorandum, or OPPM) allowing the immigration judge to take the following steps when a child requests voluntary departure or removal and there are concerns about the child’s safety upon return, including:
 - ensuring the child has representation before proceeding, so that the child understands all of his or her rights and to ensure the child’s express wishes are zealously represented;
 - referring the child for appointment of a child advocate to provide a recommendation regarding the child’s best interests;
 - considering the child advocate’s best interests recommendation prior to making a decision on the child’s request, and affording the opportunity for inquiries from all parties, and particularly the child, of information contained in the recommendation;
 - referring the child for an independent mental health examination if there are concerns about the child’s competency; and
 - in the face of evidence that the child will be unsafe if returned to his or her country or origin, continuing the case or denying the child’s request for voluntary departure and instead referring the case to DHS for consideration of whether the case merits the exercise of prosecutorial discretion.
- Modify current EOIR guidance to recognize that children frequently change their mind, particularly in situations of great stress, and encourage immigration judges to take these concerns into account when adjudicating an unaccompanied child’s motion to reopen after a grant of voluntary departure. An immigration judge may grant a motion to reopen on the basis of a child deciding to pursue relief after having requested voluntary departure.

3. DEPARTMENT OF HEALTH AND HUMAN SERVICES—OFFICE OF REFUGEE RESETTLEMENT (ORR)

The Department of Health and Human Services is required by statute to place unaccompanied children in the least restrictive placement that is in their best interests; to provide children with access to attorneys to “the greatest extent practicable;”⁶³ and may appoint child advocates for child trafficking victims and other vulnerable children.

It is in children’s best interests to receive age- and developmentally-appropriate care at all times and to be released expeditiously to a parent or to another sponsor determined to be able to provide a safe home.

Children should receive the educational, health and mental health services necessary to ensure their safety and well-being while in custody, be referred to such services in their communities where they are released, and have access to mechanisms to seek help if these necessary services break down after their release.

RECOMMENDATIONS FOR CUSTODY AND RELEASE

- Establish short-term foster care or small group home care as primary model for care of children; eliminate large (50+ beds) facilities.
- Collaborate with outside experts to demonstrate cost-effectiveness of short-term foster care.
- Focus on developing or expanding facilities in resource-rich, metropolitan areas where there are more pro bono services providers (legal, health and therapeutic service providers).
- Develop policies for children's placement and transfer that require consideration of children's proximity to U.S.-based family; their access to counsel; and their access to state, federal and immigration court.
- Prioritize the transfer of children likely to turn 18 while in custody to a location close to family or other support services.
- Create a mechanism to evaluate whether post-release services should continue past the initially-recommended period for services.
- Provide post-release, follow-up services to expanded categories of children.
- Establish a mechanism where released children, or attorneys, child advocates or other stakeholders serving released children, can seek help from ORR if the placement is or becomes unsafe.

SAFE REPATRIATION RECOMMENDATIONS

- Pursuant to the TVPRA, identify and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied immigrant children.
- Continue to ensure that all children requesting voluntary departure or removal while in custody are represented by counsel.
- When a child or others have disclosed reliable information indicating the child will be unsafe in home country and the child indicates intention to request voluntary departure or removal, request appointment of a child advocate.
- Provide information regarding the child's safety in home country to the child's attorney and the appointed child advocate (e.g., if family in home country have disclosed threats to the child or family to ORR officials, this information should be provided to the child's attorney and child advocate).
- Pursuant to the TVPRA, identify and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied immigrant children.
- Collaborate with other government agencies, including the Department of Homeland Security, Department of State and USAID, to develop relationships with public or private agencies in the receiving countries, so that children can be referred for appropriate services prior to their return.

4. DEPARTMENT OF STATE AND USAID

SAFE REPATRIATION RECOMMENDATIONS

- Pursuant to the TVPRA, identify and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied immigrant children.
- Collaborate with other agencies, including the Department of Health and Human Services, the Department of Homeland Security and United States Agency for International Development (USAID) to develop relationships with public or private agencies in receiving countries so that children can be referred for and connected to appropriate services prior to their return.
- Engage in dialogue and foster collaboration with the governments and civil society of the primary countries of origin and countries of transit for unaccompanied children, to develop designated safe spaces in which children repatriated from the United States can meet with family members or child welfare authorities upon their return.
- Engage in dialogue and foster collaboration with the governments and civil society of the primary receiving countries for unaccompanied children to build support for agencies and nongovernmental organizations that serve the immediate needs of repatriated children, with attention to shelter, nutrition, abuse prevention, access to medication, mental health, educational and legal services.
- Engage in dialogue and foster collaboration with the governments and civil society of the primary receiving countries for unaccompanied children to build support for agencies and nongovernmental organizations that provide long-term reintegration support for at-risk children, or children who have returned from the United States with English-language and other skills, such as counseling and child-appropriate job training, vocational training and skill-building.
- Engage in dialogue and foster collaboration with the governments and civil society of the primary receiving countries for unaccompanied children to ensure that children's families receive transportation assistance to meet returning children and ensure their safe passage home.
- Incorporate children's rights and child-specific harms that relate to children's asylum claims and other forms of relief in State Department Reports on country conditions and human trafficking.
- Continue to participate and engage in regional, bilateral dialogue on children's migration.

5. ATTORNEYS OF RECORD, BIA-ACCREDITED REPRESENTATIVES

GENERAL

- Zealously advocate for and ensure that children’s express wishes are communicated to the court and decision makers.
- Develop strategies to address representation of the full range of a child’s express legal interests including conditions of custody, placement, and release.
- Ensure that the child understands all of his or her rights and has an opportunity to discuss decisions with the adults of his or her choosing before making a decision.
- Ensure the child is free from coercion or external factors that a child may view as coercive, to the greatest extent possible.
- Ensure that counsel has experience and/or receives training representing children in immigration proceedings and addressing legal issues relating to the detention of unaccompanied children.
- Provide training to counsel on:
 - the forms of relief available to children and the unique experiences of children, and the needs relevant to these forms of relief;
 - child- and culturally-appropriate questioning techniques;
 - children’s development and the impact of trauma on children; and
 - the differences between delinquency and criminal proceedings.
- Develop resources so that individual counsel can seek out experts to help children address untreated trauma or other physical or mental health needs.
- Seek appointment of a child advocate if the child is particularly vulnerable or there are safety concerns.

6. TVPRA-APPOINTED CHILD ADVOCATES

GENERAL

- Develop procedures to ensure full and fair consideration of a child’s best interests, with particular emphasis on the child’s safety and the child’s express wishes, consistent with domestic child welfare law and the Convention on the Rights of the Child.
- Develop polices to conduct Best Interests Determination (BID) panels of independent experts from different backgrounds, consistent with UNHCR protocols, in cases involving the risk of permanent separation of a parent and child against the parent’s or child’s will; cases where children lack capacity to express their own wishes, e.g., due to extreme tender age or mental disability or developmental delays; or cases where the best interests recommendation is likely to conflict with the child’s express wishes, e.g., cases where a child seeking asylum suddenly requests voluntary departure despite known risks to the child’s life.
- Develop policies to protect the confidentiality of information pursuant to the TVPRA.
- Ensure that each best interests recommendation is reviewed with the child before it is provided to government decision makers (if the child lacks capacity to understand the specific recommendation, ensure the child is aware of the underlying facts included in the recommendation, consistent with the child’s age and developmental stage).
- Ensure that all best interests recommendations are reviewed by an attorney with expertise in immigration law before they are provided to government decision makers.
- Ensure all procedures account for the adversarial nature of immigration proceedings.
- Develop a grievance mechanism for children or stakeholders to submit complaints about a child advocate.

SAFE REPATRIATION

- Establish procedures to determine whether the child will be safe upon return to his or her country of origin, including:
 - whether there is an adult who can, and will, care for the child;
 - whether the child will have adequate food and shelter;
 - whether the child will be free from immediate violence or coercion (for example, gang threats, trafficking or forced labor); and
 - whether the child will be able to access services critical to maintain the child’s physical and mental health.

B. Agency Checklists for Considering the Best Interests of the Child in All Actions

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CHECKLIST #1

Action: Apprehending and Taking Custody of Child / Agency: DHS - CBP

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Safety	Will the child's urgent physical and mental health needs be addressed?	
Safety	Will the child be separated from unrelated adults?	
Safety	Will the child be provided with food and water?	
Safety	Will the child be provided with warm/dry clothing, menstrual supplies and personal hygiene necessities?	
Safety	Will the child be provided with a blanket and a quiet, safe place to sleep?	
Safety	If the child requires a medical examination, will the examination be limited to the child, the physician/medical professional, and if necessary a non-law-enforcement interpreter?	
Family Integrity	Will the child be kept with siblings?	
Family Integrity	Will the child be allowed to remain with adult family members, such as grandparents?	
Expressed Interests	Will the child be interviewed in a child-appropriate environment?	
Expressed Interests	Will the child be interviewed by a trained child welfare expert?	
Expressed Interests	Will the child be interviewed in the language of his or her choice?	
Expressed Interests	Will the child be permitted as many phone calls as necessary to reach a parent, legal services provider, and consular official?	



CHECKLIST #2

Action: Apprehending and Taking Custody of Child within the United States /

Agency: DHS - ICE

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Safety	Will the child's urgent physical and mental health needs be addressed?	
Safety	Will the child be separated from unrelated adults?	
Safety	Will the child be provided with food and water, warm/dry clothing, a blanket and a quiet, safe place to sleep, and personal hygiene necessities?	
Safety	Will the child be designated an unaccompanied alien child if s/he meets the statutory definition, despite any allegations or confirmation of delinquency or criminal history?	
Safety	If the child requires a medical examination, will the examination be limited to the child, the physician/medical professional, and if necessary a non-law-enforcement interpreter?	
Family Integrity	Is the child's parent or guardian given sufficient time to secure the child's release prior to the child's designation as an unaccompanied alien child?	
Family Integrity/ Development	Would a detainer against a child in state custody risk the child's separation from family, school or community?	
Liberty	If a detainer is placed on a child in state custody will ICE take custody within the required timeframe?	
Liberty	Is it necessary for ICE to take custody of the child? If the child is determined to be an enforcement priority, can the child be charged without entering DHS custody?	



CHECKLIST #3

Action: Screening Mexican Child Pursuant to the TVPRA / Agency: DHS - CBP

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Safety	Will the child be screened in a safe and private environment, separated from other adults and from other children whose interests might be adverse to the child?	
Safety	Will a child welfare expert screen the child?	
Safety	Are the child's urgent health needs addressed prior to the screening?	
Safety	Are the child's physical needs—food, water, sleep, warm/dry clothing and personal hygiene—met prior to the screening?	
Expressed Interests	Has the screening official received training on issues of age, language, maturity, gender, culture, trauma and non-discrimination with respect to children?	
Expressed Interests	Is the screening officer using child-sensitive materials designed to elicit relevant information?	
Expressed Interests	Is the child able to request a female screening officer?	
Expressed Interests	Is the child screened in his or her best language?	
Expressed Interests	Does the child have sufficient time to understand and respond to the questions?	
Expressed Interests	If a child thinks of information after the screening, will s/he have the opportunity to meet with the official again and convey that information?	



CHECKLIST #4

Action: Issuing the Notice of Rights / Agency: DHS - CBP/ICE

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Safety/ Expressed Interests	Have DHS officials ensured that each child understands the I-770 and waiver of his or her rights?	
Safety/ Expressed Interests	Have DHS officials provided the I-770 to children in a setting in which they can make independent decisions?	
Safety/ Expressed Interests	If the child is apprehended internally, did the child receive the I-770 before they are interviewed by ICE officials and before the ICE interview is used to issue an NTA?	
Expressed Interests	Was the form read to the child in the child's best language?	
Expressed Interests	Have DHS officials made efforts to determine the child's literacy level and ability to read the I-770 if it is not read to the child?	



CHECKLIST #5

Action: Placing or Transferring Child within ORR Custody / Agency: HHS - ORR

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Safety	Does the placement have appropriate food, shelter, medical and dental care?	
Safety	Will the child receive mental health services, counseling, and therapy?	
Safety	Will the child have uninhibited access to an attorney, unless there are concerns the attorney presents a safety risk (e.g., was hired by a trafficker)?	
Safety	If the child is particularly vulnerable, has a child advocate been appointed?	
Expressed Interests	Has the agency considered the child's expressed wishes regarding placement with family, release from custody, or transfer to another facility?	
Expressed Interests	Can the agency accommodate the child's wishes for a particular placement, or type of placement, or location of placement, without risking the child's safety or well-being or the safety of another?	
Expressed Interests	Has the child's attorney been informed of the transfer or placement decision in advance and been given an opportunity to consult with and advise the child?	
Expressed Interests	Will the child be placed or transferred to a setting where at least one staff member speaks the child's language; or in the case of rare dialects or languages, to a program with other children who speak the language or dialect or a program that can provide regular access to an interpreter through a language line?	

continued:



CHECKLIST #5 (CONTINUED)		
ACTION: PLACING OR TRANSFERRING CHILD WITHIN ORR CUSTODY / AGENCY: HHS - ORR		
<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Liberty	Is the child placed in the least restrictive setting?	
Liberty	Will transfer adversely impact the child's access to an attorney, or ability to attend an immigration or other court proceeding?	
Liberty	Will the child have daily outdoor access opportunities for play and exercise?	
Liberty	Will the child have access to religious services of the child's choice?	
Liberty	Have all efforts been made to transfer the child to the least restrictive setting long before the child turns 18?	
Liberty and Family Integrity	Will the child be afforded a right to privacy, including the right to wear his or her own clothes when available, private visits with approved family or sponsors?	
Family Integrity	Will the child be placed or transferred as close to family as possible, unless proximity poses a threat to the child's safety or proximity to family is contrary to the child's wishes?	
Family Integrity	Will the placement or transfer inhibit the child's access to siblings, extended family members or others the child considers similar to family?	
Development	Will the child have access to public school, or if prior schooling in US or 90+ days in custody, coursework that will count toward public school requirements?	



CHECKLIST #6

Action: Releasing Child from ORR Custody / Agency: HHS - ORR

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Safety	Has the release been determined to be safe and in the best interests of the child?	
Safety	If there are any concerns for the child's safety upon release, will post-release services be provided to the child to monitor and address safety concerns?	
Safety	Can a released child seek help from the agency if a sponsor subsequently poses a threat to the child's safety?	
Safety	Will the child's physical and mental health needs be adversely affected if the child is not released prior to his or her 18th birthday but is instead transferred to ICE custody?	
Safety	If the child is particularly vulnerable, has a child advocate been appointed?	
Expressed Interests	Has the agency considered the child's expressed wishes regarding release from custody?	
Expressed Interests	Has the child's attorney been informed of release, transfer or placement decisions in advance and been given an opportunity to consult with and advise the child?	
Liberty	If a sponsor or community agency can care for the youth, is there a compelling public safety or flight justification for not releasing the child prior to his or her 18th birthday?	
Family Integrity	If the agency is denying or delaying release to a parent, has the agency considered the parent's or legal guardian's constitutional rights in making those decisions?	
Family Integrity	Was the parent's socio-economic status improperly factored into release decisions?	
Development	Is the child's need for additional post-release services evaluated at the end of initially-recommended time period?	



CHECKLIST #7

Action: Convening Immigration Court Proceedings / Agency: DOJ - EOIR

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Safety / Expressed Interests	Is the child represented by an attorney or accredited representative?	
Safety / Expressed Interests	Is a pre-hearing conference used to discuss case, limit scope of hearing, and discuss capacity and evidentiary concerns?	
Safety	Has ICE shared the child's A-file with the child's legal representative in order to facilitate adjudication of case?	
Safety	If the child is particularly vulnerable, is there a child advocate or has the immigration judge referred the child for the appointment of a child advocate?	
Safety	If there is a child advocate, has the best interests recommendation been received and considered?	
Safety / Expressed Interests	Is the proceeding private?	
Safety / Expressed Interests	Does the child have access to full and simultaneous interpretation of the proceedings in the child's best language?	
Safety / Expressed Interests	If there are indications that the child lacks capacity, is there an evaluation of the child's capacity?	
Safety / Development	Can the child's appearance be excused?	
Safety / Family Integrity	Are continuances granted so that the child can reunify with family and to find an attorney or for other protection purposes?	
Safety / Family Integrity	Are Changes of Venue easily sought and liberally granted when children are transferring or leaving ORR custody?	

continued:



CHECKLIST #7 (CONTINUED)		
ACTION: CONVENING IMMIGRATION COURT PROCEEDINGS / AGENCY: DOJ - EOIR		
BEST INTERESTS FACTORS	CONSIDERATIONS	COMMENTS
Safety / Expressed Interests	<p>Did the immigration judge implement child-protective evidentiary considerations, including:</p> <ul style="list-style-type: none"> • Limiting questioning or sustaining objections to harmful questions? • Considering the child’s age, developmental stage, cognitive concerns and history of trauma when evaluating the child’s credibility? • Considering the developmental, physical, emotional or psychological factors that may affect a child’s testimony? • Removing barriers to a child presenting evidence? • Accepting testimony/report from Child Advocacy Centers to avoid re-traumatizing child? • Drawing inferences in child’s favor? • Carefully considering the circumstances under which an unrepresented child made statements to a law enforcement or custodial agency? • Allowing parents or other witnesses to testify without fear that their testimony will be used against them, except in cases involving national security or other extreme threats to community safety? 	
Expressed Interests	Has the immigration judge implemented child-friendly procedures?	
Expressed Interests	Does the immigration judge use instructions that take into account the child’s age?	
Expressed Interests	Is case continued for child to locate and submit evidence?	
Safety / Family Integrity	Has ICE limited court-related apprehension of child’s family to cases involving national security or other threats to community safety?	



CHECKLIST #8

Action: Adjudicating Child's Case withing USCIS / Agency: DHS - USCIS

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Safety / Expressed Interests	Is the child represented by an attorney or accredited representative?	
Safety	If the child is particularly vulnerable, is there a child advocate or has USCIS referred the child for the appointment of a child advocate?	
Safety / Expressed Interests	Has the USCIS official limited the scope of questions posed to the child so that the child is not unnecessarily required to re-visit traumatic events?	
Expressed Interests	Is the child permitted to bring a trusted adult to the interview?	
Expressed Interests	Is the child scheduled for an interview on a day or at a time designated for children?	
Expressed Interests / Safety	Has USCIS accommodated a child's request to be interviewed by a person of a particular gender?	
Expressed Interests	Does USCIS select adjudicators for children's cases who have particular expertise in interviewing children with trauma histories?	
Expressed Interests	Is the proceeding explained in developmentally-appropriate language?	
Expressed Interests	Does the interview begin promptly?	
Expressed Interests	Is the child given breaks—whether to eat, drink or use the restroom, or because the child is scared, nervous or upset, or simply because of the child's age or stage of development?	
Expressed Interests	Has USCIS granted child's request to extend/reschedule to submit evidence or to address a child's emotional or developmental needs (e.g., counseling for trauma)?	
Expressed Interests	Upon a child's request, will officials reschedule an interview for a child with other pending applications for relief?	
Expressed Interests	Has USCIS developed forms, instructions and explanations for children that take into account a child's age and stage of development?	
Expressed Interests	Has USCIS waived the in-person SIJS or adjustment interview for any child under 14 or where there are other extenuating circumstances, e.g., if the child has a disability or lives far from a field office?	



CHECKLIST #9

Action: Responding to Child’s Request for Voluntary Departure or Removal, or the Immigration Judge’s Order of Removal / Agency: DHS - ICE

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Safety / Expressed Interests	Is the child represented by an attorney or accredited representative?	
Safety	If the agency has information that the child may be unsafe upon return, has the agency considered this information in deciding whether to file or withdraw a Notice to Appear?	
Safety	If the agency has information that the child may be unsafe upon return, has the agency considered whether any other form of agency discretion in the case is appropriate?	
Safety	If the agency has information that the child may be unsafe upon return, has the agency disclosed this information to the immigration judge and the child’s legal representative?	
Safety	Has the agency consulted the Department of State Country Condition Reports and Trafficking in Persons reports before deciding how to proceed in the case?	
Safety	Could DHS join a Motion to Reopen filed on behalf of a child who previously requested and was granted voluntary departure, but has changed his or her mind, or who was ordered removed while unrepresented?	
Expressed Interests	If child is unrepresented when requesting voluntary departure or facing removal, has DHS notified child of right to an attorney?	
Expressed Interests	If child is unrepresented when requesting voluntary departure or facing removal, has DHS confirmed that the child had an opportunity to consult with an attorney?	
Expressed Interests	If child is unrepresented when requesting voluntary departure or facing removal, has DHS confirmed that the child had an opportunity to consult with a trusted adult?	

continued:



CHECKLIST #9 (CONTINUED) ACTION: RESPONDING TO CHILD'S REQUEST FOR VOLUNTARY DEPARTURE OR REMOVAL, OR THE IMMIGRATION JUDGE'S ORDER OF REMOVAL / AGENCY: DHS – ICE		
<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Expressed Interests	If child is unrepresented when requesting departure or facing removal, has DHS afforded the child every opportunity to identify an attorney or request the appointment of attorney (e.g., by not objecting to the child's request for a continuance)?	
Expressed Interests	When communicating with the child, has DHS identified the child's best language (particularly languages other than Spanish, including indigenous languages and dialects) and provided the child with access to a qualified interpretation service?	
Expressed Interests	Are there any concerns that the child is not competent to make a reasoned and informed decision about returning to his or her home country? If so, has DHS referred the child for a mental health assessment and referred the child to the Department of Health and Human Services for the appointment of a child advocate?	
Family Integrity/ Development	Is the child's separation from family members—in the United States or in the home country—contributing to the child's decision to seek voluntary departure? Has DHS carefully considered this issue before presenting arguments to the immigration judge?	



CHECKLIST #10
Action: Adjudicating Child’s Petition for Voluntary Departure or Request for Removal /
Agency: DOJ - EOIR

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Safety / Expressed Interests	Is the child represented by an attorney or accredited representative?	
Safety	Has the Immigration Judge inquired where and with whom the child will reside upon returning to his or her country of origin? This inquiry would include: <ul style="list-style-type: none"> • Whether there is there an adult—specifically, a parent, close relative, or previous caregiver whom the child has not accused of abuse, abandonment or neglect, or a functioning child welfare agency—who is willing and able to take custody of the child? • Whether any federal agency has spoken with this adult to confirm that this person will, in fact, receive and take custody of the child upon the child’s return? 	
Safety	Has the immigration judge conducted further inquiry to determine whether repatriation would place the child at risk of trafficking, persecution, return to a previously abusive or neglectful parent or no parent at all, or other safety concerns that threaten the child’s safety and well-being? Has the immigration judge consulted the State Department’s Trafficking in Persons and Country Conditions reports?	
Safety / Liberty	When an immigration judge undertakes a “best interests inquiry” pursuant to these recommendations, is the information gathered limited to use during that inquiry, so that it cannot be used in later or subsequent proceedings to establish the truth of allegations or charges against the alien, or to establish ineligibility for relief?	
Safety	Has the immigration judge allowed the child, if unrepresented, liberal continuances in order to secure counsel or for other purposes related to the child’s protection?	

continued:



CHECKLIST #10 (CONTINUED)		
ACTION: ADJUDICATING CHILD'S PETITION FOR VOLUNTARY DEPARTURE OR REQUEST FOR REMOVAL / AGENCY: DOJ - EOIR		
<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Safety	If the child is particularly vulnerable, or there are any concerns about the child's safety, has the immigration judge referred the child for the appointment of a child advocate, and continued the proceedings in order for the child advocate to provide a best interests recommendation to the court?	
Expressed Interests	Has the child had an opportunity to consult with a trusted adult?	
Expressed Interests	If the child wishes to speak with an adult or family member about a decision to request voluntary departure, has the immigration judge briefly continued the proceeding in order to allow the child to have this conversation?	
Expressed Interests	Is the child being pressured by a trafficker, smuggler, or other person (including a family member)? Has the immigration judge considered whether that person poses a threat to the child's safety and well-being?	
Expressed Interests	Has the immigration judge identified the child's best language (particularly languages other than Spanish, including indigenous languages and dialects) and provided the child with access to a qualified interpretation service?	
Safety / Expressed Interests	Are there concerns about the child's competency to participate in the court proceeding?	
Safety / Expressed Interests	<p>If there are concerns about the child's competency:</p> <ul style="list-style-type: none"> • Has the court had the opportunity to examine mental health or other records regarding the child's competency? • Has the court referred the child to an independent expert to examine the child and provide a recommendation on the child's competency? • Has the immigration judge referred the child for the appointment of a child advocate? 	



CHECKLIST #11
Action: Responding to Child’s Intention to Request Voluntary Departure or Removal /
Agency: HHS - ORR

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Safety	Are there any conditions of custody or of a foster care placement—for example, the child’s desire for more contact with family, the child’s desire to attend school outside of detention, separation from a prior attorney, lengthy custody, isolation from children who speak the child’s language, or conflict with staff or another child—that may be contributing to the child’s decision?	
Safety	If so, can these conditions be remedied, giving the child an opportunity to reconsider his or her decision in a less restrictive environment?	
Safety	Does the agency have reason to believe the child will not be safe upon returning to his or her country of origin?	
Safety	Is there an adult— specifically, a parent, close relative, or previous or trusted caregiver, or a functioning child welfare agency—who is willing and able to take custody of the child? Has ORR designated someone to speak with this adult to confirm that this person will receive and take custody of the child upon the child’s return?	
Safety	Are there known or suspected factors such as prior trauma history, pregnancy, parenthood, tender age, mental or physical disability, prior coercion by gangs or traffickers, which render the child particularly vulnerable? If so, has the agency referred the child for appointment of a child advocate (if a request has not already been received) or approved the appointment of a child advocate?	
Expressed Interests	If the child is not yet represented by counsel, has ORR/its care provider contacted the local legal services provider to request that an attorney or accredited representative meet with the child prior to the child’s next court date?	

continued:



CHECKLIST #11 (CONTINUED) ACTION: RESPONDING TO CHILD'S INTENTION TO REQUEST VOLUNTARY DEPARTURE OR REMOVAL / AGENCY: ORR		
<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Expressed Interests	Has ORR and its contracted staff identified the child's best language (particularly languages other than Spanish, including indigenous languages and dialects) and provided the child with access to a qualified interpretation service for communications with ORR/contracted staff?	
Expressed Interests	Has ORR required staff at contracted facilities to meet with children within 48 hours of any court appearances to update them on the status of their family reunification efforts, and allow children to speak with approved family members and their attorneys?	
Family Integrity	Is it likely that a delay in release to a parent or other sponsor, or a particular placement (in a location far from family, community or other services) is contributing to the child's request to return to home country?	
Family Integrity	If so, can the process for reunification with family be expedited, or the child transferred to a facility closer to family or prior community?	



CHECKLIST #12

Action: Safely Repatriating Child to Country of Origin / Agency: DHS

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Safety / Family Integrity	Has DHS confirmed that the child will have a safe place to return and an adult—specifically, a parent, close relative, or previous caregiver or a functioning child welfare agency—to provide appropriate care for him or her upon repatriation?	
Safety / Family Integrity	Has DHS or another federal agency spoken with this adult or agency to confirm that they will, in fact, receive and take custody of the child upon the child’s return and have made all necessary arrangements to promptly reunify the child with a family member?	
Safety	If there is no adult willing and able to take custody of the child, and there is no child welfare agency available and equipped to address the child’s basic needs, and the child does not wish to return to his or her country of origin, has DHS carefully evaluated whether the child’s removal is consistent with agency enforcement priorities, and whether it would be more appropriate to terminate proceedings or grant the child deferred action?	
Safety	If the answer to the previous question is negative, has the child’s removal been suspended until such time as those conditions are met?	
Safety	If the child’s removal must be suspended, has DHS informed the child’s attorney and the immigration court to ensure the child’s grant of voluntary departure does not convert to an order of removal?	
Safety	If the decision is to remove the child, has DHS confirmed that the child’s consulate has notified child welfare authorities in the receiving country of the child’s return no less than 72 hours prior to the child’s return?	
Safety	Has DHS confirmed, through the consulate, that child welfare authorities in the receiving country have designated an appropriate location for the child’s return and agreed to be present at the specified time and location?	

continued:



CHECKLIST #12 (CONTINUED)		
ACTION: SAFELY REPATRIATING CHILD TO COUNTRY OF ORIGIN / AGENCY: DHS		
<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Safety	Will the child be returned to his or her country of origin during daylight hours, separate from unrelated adults and anyone affiliated with a gang or trafficking cartel, and accompanied by an agency official trained in principles of child welfare?	
Safety	If multiple children are returning to the same location, are there sufficient agency personnel, appropriately trained in child welfare, accompanying the group?	
Safety	Has DHS notified the child, the child's attorney, the child advocate and any U.S.-based organizations providing safe return & repatriation services of the date, time and location of the child's return, at least 72 hours in advance of the child's return?	
Safety	Will the child be returned to the port-of-entry closest to his or her ultimate destination?	
Safety	Has DHS ensured that the child has identity documents showing that he or she is a citizen or national of that country before transporting the child?	
Safety	Will the child be provided food, beverages, warm clothing, necessary medications, and access to personal items during the journey?	
Liberty	Will the child be unrestrained (no handcuffs, shackles) during transportation, unless necessary to ensure the child's safety or the safety of others?	
Liberty / Family Integrity	If the child will be in custody for an extended period after a grant of voluntary departure or order of removal, the child has a viable sponsor, does not present a threat to the community and is not a particular flight risk, has DHS agreed to not oppose the child's release to the sponsor until arrangements can be made for the child's return?	



CHECKLIST #13

Action: Facilitating the Safe Repatriation of Child to Country of Origin / Agency: HHS - ORR

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Safety	If the child is in ORR custody, has ORR/its contracted agencies worked closely with other agencies to confirm that a parent, an adult family member, prior caregiver or functioning child welfare agency will receive, take custody of the child and provide appropriate care of the child upon his or her return, and that the adult can be present at the date and time of the child's arrival or that an agency in the country of origin has made all necessary arrangements to promptly reunify the child with a family member?	
Safety	If the child is in ORR custody, has the child received an adequate supply of prescription medication, instructions on use/consumption of the medication, and information regarding the continued use or discontinuation of the medicine in the child's best language, and is that information also provided to the child's parent or guardian in the child's country of origin?	
Safety	If the child has special needs, including but not limited to a diagnosis of a physical or mental illness, medication, behavioral concerns, abuse, neglect or trauma, a delinquency or criminal history, has the family received information about the child's condition in advance of the child's return? Has ORR identified service providers in the home country?	
Safety	Has the child received documentation of all medical care (including vaccinations, medications) and education (school records) the child has received while in ORR custody?	
Safety / Family Integrity	Has ORR allowed the child to maintain regular contact with approved family members in the United States and in the country of origin prior to the child's departure, unless such contact threatens the child's safety?	
Safety / Development	Has ORR referred the child to an existing "safe return and reintegration" program through which children are connected to in-country resources (for example, public and private agencies providing education, nutrition, and other services)?	

continued:



CHECKLIST #13 (CONTINUED)
ACTION: FACILITATING THE SAFE REPATRIATION OF CHILD TO COUNTRY OF ORIGIN / AGENCY: HHS - ORR

<i>BEST INTERESTS FACTORS</i>	<i>CONSIDERATIONS</i>	<i>COMMENTS</i>
Liberty / Family Integrity	If the child will be in custody for an extended period after a grant of voluntary departure or order of removal, and the child has a viable sponsor, does not present a threat to the community and is not a particular flight risk, has the child been released to the sponsor pursuant to the family reunification process until arrangements can be made for the child's return?	

ENDNOTES

- 1 Fact Sheet: Protection of Unaccompanied Children Alien Children in the United States (est. 2013), available through the Executive Office for Immigration Review Office of Legal Access Programs. The Fact Sheet further explains:

The Working Group is not an advisory committee, and in hosting regular meetings, the U.S. Government does not request comments specific to any policy or regulation. There is no formal membership process to join the Working Group, which is open to interested individuals who want to contribute their ideas and share their experiences. Any recommendations produced as a result of these discussions do not have any official status.

- 2 *Id.*

- 3 Implementing some aspects of the Framework would require additional resources or changes in existing policies or procedures; such changes should not contravene existing law. For additional ideas on implementing a “best interests of the child” standard, *see* JENNIFER NAGDA & MARIA WOLTJEN, BEST INTERESTS OF THE CHILD STANDARD: BRINGING COMMON SENSE TO IMMIGRATION DECISIONS (2015).
- 4 Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, Supp. No. 49, U.N. Doc A/44/49 (Nov. 20, 1989) *available at* <http://www2.ohchr.org/english/law/pdf/crc.pdf> [hereinafter CRC].
- 5 *See, e.g.*, U.N. Comm. on the Rights of the Child, Gen. Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, 39th Sess., May 17-June 3, 2005, ¶19, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005) [hereinafter, Comm. on the Rights of the Child, Gen. Comment No. 6] (“In the case of a displaced child, the principle [of best interests] must be respected during all stages of the displacement cycle. At any of these stages, a best interests determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child’s life.”)
- 6 “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” CRC, *supra* note 4, art. 3.
- 7 8 U.S.C. § 1232(c)(2)(A) (2008).
- 8 8 U.S.C. § 1232(c)(6). The Young Center developed the first program in the United States to provide child advocates (best interests guardians *ad litem*) for unaccompanied alien children in removal proceedings, served as the model for Section 235(c)(6) of the TVPRA, and has developed procedures to identify and advocate for the best interests of children with federal agencies, attorneys, and other service providers making decisions on behalf of unaccompanied children. *See* THE YOUNG CENTER FOR IMMIGRANT CHILDREN’S RIGHTS, <http://www.theyoungcenter.org>.
- 9 8 U.S.C. § 1101(a)(27)(J) (eligibility for Special Immigrant Juvenile Status depends in part on a finding that returning the child to his/her home country is not in the “best interest” of the child).

- 10 The Subcommittee’s work focused on unaccompanied children as defined by 6 U.S.C. § 279(g). However, committee members recognized that many of the recommendations are applicable to any child who is a respondent in removal proceedings, or who is a principal applicant for relief or an immigration benefit.
- 11 Pursuant to the Model Rules of Professional Conduct, attorneys—including those representing unaccompanied children—are obligated to represent their clients’ expressed interests. MODEL RULES OF PROF’L CONDUCT R. 1.2 (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation...”). *See also*, ABA Comm. on Immigr., *Standards For the Custody, Placement and Care; Legal Representation; And Adjudication of Unaccompanied Alien Children In the United States*, § V.A.1.b (2004), available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf. [hereinafter, “ABA Comm”] (“The Attorney shall provide the Child with legal advice and zealously advocate the Child’s legal interests, as directed by the Child’s expressed wishes.”) To the extent that an attorney representing a child believes that the child’s expressed interests conflict with the child’s best interests, the attorney may seek the appointment of a child advocate to represent the child’s best interests, or in some cases may seek to withdraw his or her representation of the child. MODEL RULES OF PROF’L CONDUCT R. 1.14(b) (“When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.”).
- 12 Although the United States has not yet ratified the Convention, the U.S. Supreme Court has recognized its “nearly universal” acceptance. *See Roper v. Simmons*, 543 U.S. 551, 576–78 (2005) (noting that the universal ratification of the CRC demonstrates international agreement with the laws contained therein). The Court has also recognized its persuasive authority. *See id.* at 578 (“The opinion of the world community, while not controlling... does provide respected and significant confirmation...”).
- 13 In 2012, the Department of Health and Human Services compiled a summary of domestic child welfare law from all 50 states. *See CHILD WELFARE INFORMATION GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD* (2012), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm (last viewed Feb. 8, 2015). According to the HHS summary of domestic child welfare laws:

Although there is no standard definition of ‘best interests of the child,’ the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child. ‘Best Interests’ determinations are generally made by considering a number of factors related to the child’s circumstances and the parent or caregiver’s circumstances and capacity to parent, *with the child’s ultimate safety and well-being the paramount concern.*

Id. at 2 (emphasis added). *See also* CRC, *supra* note 4, at art. 3 (declaring that “in all actions concerning children...the best interests of the child shall be a primary consideration” and that “State parties undertake to ensure the child such protection and care as is necessary for his or her well-being”); U.N. Comm. on the Rights of the Children, Gen. Comment No. 14: On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, 62nd Sess., Jan. 14-Feb. 1 (2013), ¶ 71, U.N. Doc.

CRC/C/GC/14 (May 29, 2013) [hereinafter Comm. on the Rights of the Children, Gen. Comment No. 14] (“When...determining the best interests of a child ...the obligation of the State to ensure the child such protection and care is necessary for his or her well-being should be taken into consideration. The terms ‘protection and care’ must also be read in a broad sense...in relation to the comprehensive ideal of ensuring the child’s ‘well-being’ and development.”)(citations omitted); *id.* at ¶ 73 (“Assessment of the child’s best interests must also include consideration of the child’s safety, that is, the right of the child to protection against all forms of physical or mental violence, injury or abuse, sexual harassment, peer pressure, bullying, degrading treatment, etc., as well as protection against sexual, economic and other exploitation, drugs, labour, armed conflict, etc.”)(citations omitted).

- 14 See CHILD WELFARE INFORMATION GATEWAY, *supra* note 13, at 4-5; see also ABA Comm., *supra* note 11, at III.D.2 (“A determination of the best interests of the Child shall take into account...the Child’s expressed interests.”); CRC, *supra* note 4, art. 12 (“State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”); U.N. High Commissioner for Refugees, *A Framework for the Protection of Children*, (in order for children to achieve durable solutions in their best interests, their views must be given “due weight in accordance with their age and level of maturity); Comm. on the Rights of the Children, Gen. Comment No. 14, *supra* note 13, at ¶53 (“Any decision that does not take into account the child’s views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.”); *id.* at ¶54 (“The fact that the child is very young or in a vulnerable situation...does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child’s views in determining his or her best interests.”).
- 15 See CRC, *supra* note 4, at art. 24; Comm. on the Rights of Children, Gen. Comment No. 14, *supra* note 13, at ¶ 77 (“The child’s right to health and his or her health condition are central in assessing the child’s best interest.”)(citations omitted).
- 16 See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“The integrity of the family unity has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.”) (internal citations omitted); CHILD WELFARE INFORMATION GATEWAY, *supra* note 13, at 2 (identifying “the importance of family integrity and preference for avoiding removal of the child from his/her home” as “one of the most frequently stated guiding principles” of best interests determinations in state statutes); *id.* at 5 (citing “the importance of maintaining sibling and other close family bonds” as factors that courts commonly take into consideration in making best interests determinations); CRC, *supra*, note 4 at art. 8 (“State parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”); *id.* at art. 9 (“State parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine...that such separation is necessary for the best interests of the child.”); *id.* at art. 10 (“A child whose parents reside in different States shall have the right to maintain on a regular basis...personal relations and direct contacts with both parents.”); Comm. on the Rights of Children, Gen. Comment No. 14, *supra* note 13, at ¶ 58 (“[I]t is indispensable to carry out the assessment and determination of the child’s best interests in the context of potential separation of a child from his or her parents.”); *id.* at ¶ 61 (“[S]eparation [of a child from his or her parents] should only occur as a last resort measure, as when the child is in

danger of experiencing imminent harm or when otherwise necessary.”); *id.* at ¶66 (“When the child’s relations with his or her parents are interrupted by migration...preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.”); Comm. on the Rights of the Child, Gen. Comment No. 6, *supra* note 5, at ¶ 20 (“A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.”).

- 17 ABA Comm., *supra* note 11, at VI.A.1 (“There is a presumption that release from a Detention Facility and family reunification are in the best interests of the Child and that a Child should be so reunified and/or so released.”); *id.* at III.D.2 (“A determination of the best interests of the child shall take into account...the impact on the Child of continued detention versus immediate release to a parent, other Adult Family Member, or legal guardian.”) 42 U.S.C.A. § 671 (requiring that “reasonable efforts” are “made to preserve and reunify families (i) prior to the placement of the child in foster care, to prevent or eliminate the need for removing the child from the child’s home; and (ii) to make it possible for a child to return safely to the child’s home.”). The Subcommittee recognizes that the right to liberty may sometimes be in tension with immigration control efforts, but stresses that children must nevertheless be recognized as children, rather than adults-in-miniature. This may afford them greater rights to liberty, with appropriate safeguards for public safety, than adults enjoy.
- 18 *See, e.g.*, CHILD WELFARE INFORMATION GATEWAY, *supra* note 13 at 2 (listing “the assurance that a child removed from his/her home will be given care, treatment, and guidance that will assist the child in developing into a self-sufficient adult” as “among the most frequently stated guiding principles” in state laws governing best interests determinations.); CRC, *supra* note 4, at art. 6 (“State parties shall ensure to the maximum extent possible the survival and development of the child.”); *id.* at art. 27 (“State parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”); European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU, available at: <http://www.refworld.org/docid/51d29db54.html> (accessed 18 March 2015) (noting that member states must provide unaccompanied minors with schooling, the protection of mental and physical health, and an adequate standard of living). Regarding education, see 42 U.S.C.A. § 675(1)(G) (requiring “assurances that each placement of the child in foster care takes into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement” and “if remaining in such school is not in the best interests of the child, assurances by the State agency and the local educational agencies to provide immediate and appropriate enrollment in a new school”); and Comm. on the Rights of the Children, Gen. Comment No. 14, *supra* note 13, (“It is in the best interests of the child to have access to quality education, including early childhood education, non-formal or informal education and related activities, free of charge.”); *id.* (requiring that in the best interests assessment, decision-makers “should not only assess the physical, emotional, educational and other needs at the specific moment of the decision, but should also consider the possible scenarios of the child’s development, and analyse [sic] them in the short and long term.”)

- 19 Comm. on the Rights of the Child, Gen. Comment No. 14, *supra* note 13, at ¶ 55 (“[t]he identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality.”); ¶56 (“when considering a...placement for the child, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background, and the decision-maker must take into consideration this specific context when assessing and determining the child’s best interests.”) (citation omitted).
- 20 Comm. on the Rights of the Child, Gen. Comment No. 14, *supra* note 13, at ¶¶53-54.
- 21 ABA Comm., *supra* note 11, at III.B. (citing *Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997), other Immigration & Naturalization Services documents and the CRC.); *see also* CRC, *supra* note 4, at Preamble (noting that, “in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance”); *id.* at art. 37 (“Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.”).
- 22 ABA Comm., *supra* note 11, at III.E. (“Right to Non-Discrimination”); CRC, *supra* note 4, at art. 2 (“State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind...”).
- 23 *See Roper v. Simmons*, 543 U.S. 551, 569 (2005) (explaining that youth lack maturity, have “an underdeveloped sense of responsibility” and “are more vulnerable or susceptible to negative influences”); *J.D.B. v. N. Carolina*, 131 S. Ct. 2394, 2398-99 (2011) (“It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.”); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (finding a 14-year-old boy cannot be compared to an adult with knowledge of the consequences of his admissions); Kristin Henning, *Juvenile Justice After Graham v. Florida: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 Wash. U. J.L. & Pol’y 17, 47 (2012) (stating that youth are “particularly vulnerable to poor decision-making in coercive, on-the-scene encounters with the police”).
- 24 The U.N. High Commissioner for Refugees calls for a formal process, with “stricter procedural safeguards” to determine the child’s best interests whenever there is a “particularly important decision[] affecting the child...” U.N. High Comm’r for Refugees, *UNHCR Guidelines on Determining the Best Interests of the Child*, 23 (May 2008).
- 25 *See* U.S. Customs and Border Protection, *Southwest Border Unaccompanied Alien Children*, available at <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children> (last viewed March 21, 2016).
- 26 8 C.F.R. § 236.3(h) (West 2010). The regulation in full reads:

When a juvenile alien is apprehended, he or she must be given a Form I-770, Notice of Rights and Disposition. If the juvenile is less than 14 years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language he or she understands. In the event a juvenile who has requested a hearing pursuant to the notice subsequently decides to accept voluntary departure or is allowed to withdraw his or her application for admission, a new Form I-770 shall be given to, and signed by the juvenile.

- 27 *Id.*
- 28 Form I-770 (08/01/07).
- 29 8 C.F. R. § 236.3(h).
- 30 8 U.S.C. §§ 1232(a)(2)-(4). In 2011, Appleseed authored a report that made several key recommendations on the apprehension, screening and repatriation of children from Mexico, including strategies for considering the best interests of those children. APPLESEED, CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS, 6-8, 46-48, 58 (2011).
- 31 6 U.S.C. § 279(g)(2).
- 32 8 U.S.C. § 1232(b)(3).
- 33 Trafficking Victims Protection Reauthorization Act § 235(c)(2), 8 U.S.C. § 1232(c)(2)(A) (2008).
- 34 *See Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997).
- 35 Trafficking Victims Protection Reauthorization Act § 235(c)(5), 8 U.S.C. § 1232(c)(5) (2008).
- 36 Trafficking Victims Protection Reauthorization Act § 235(c)(6), 8 U.S.C. § 1232(c)(6) (2008).
- 37 *Id.* at §VI, ¶14.
- 38 Office of Refugee Resettlement: An Office of the Administration for Children & Families, *About Unaccompanied Children's Services*, available at <http://www.acf.hhs.gov/programs/orr/programs/ucs/about> (last viewed Feb. 9, 2015).
- 39 8 USC § 1232(c)(3).
- 40 8 U.S.C. § 1158(b)(3)(C).
- 41 8 U.S.C. § 1232(c)(6) (“a child advocate shall be provided access to materials necessary to effectively advocate for the best interest of the child”). *See also* ABA Comm., *supra* note 11, § III (I) (“[t]he Advocate for Child Protection is distinct from the Attorney, and his role is to ensure that the Child’s best interests are identified, expressed, and advocated, and that the Child’s views are expressed.”).
- 42 8 U.S.C. § 1232(a)(5).
- 43 *Id.* at § 1232(a)(5)(A) (emphasis added).
- 44 *Id.* at § 1232(a)(5)(B) (emphasis added).

- 45 *Id.* at § 1232(a)(5)(C) (requiring the report to include “statistical information and other data on unaccompanied alien children as provided for in section 279(b)(1)(J) of Title 6.”). Congress’s concern for children’s safe repatriation extended beyond U.S. borders, requiring the government to provide support for “best interests determinations for unaccompanied and separated children who come to the attention of United Nations High Commissioner for Refugees, its partner organizations, or any organization that contracts with the Department of State in order to identify child trafficking victims and to assist their safe integration, reintegration, and resettlement.” 22 U.S.C. § 7105(a)(1)(F)(ii).
- 46 *See also* CENTER FOR GENDER & REFUGEE STUDIES & KIDS IN NEED OF DEFENSE, A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM 79-83 (Feb. 2014), *available at* http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf.
- 47 Memorandum from Jeff Weiss, Acting Dir., Office of Int’l Affairs, to Asylum Officers, Immigration Officers, & Headquarters Coordinators (Asylum and Refugees), *Guidelines for Children’s Asylum Claims*, 2 (Dec. 10, 1998), *available at* <http://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf>.
- 48 *Id.* at 5-6.
- 49 *Id.* at 6.
- 50 *Id.* at 7-10.
- 51 *Id.* at 10.
- 52 *See Guidance to ICE Attorneys Reviewing CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review* (AILA Infonet Doc. No. 11111762, posted 11/17/2011); Memorandum from John Morton, Dir., ICE, to All Field Off. Dirs., All Special Agents in Charge, and All Chief Counsel, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, 5 (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.
- 53 *Id.* at 5.
- 54 Trafficking Victims Protection Reauthorization Act § 235(c)(2), 8 U.S.C. § 1232(c)(2)(A) (2008).
- 55 8 U.S.C. § 1232(c)(6)(A) (emphasis added).
- 56 *See* U.S. Dep’t of Health and Human Services Office of Refugee Resettlement, “Age Determinations Of Aliens in Custody of HHS and DHS,” (Sept. 15, 2010) at 1-2 (acknowledging that the TVPRA of 2008 requires that age determination procedures must take into account multiple forms of evidence and stating that “[a]mbiguous, debatable or borderline results” from medical age determination procedures “will be resolved in favor of determining the alien as a minor”). *See also* ABA Comm., *supra* note 11, at VI.C.4. (“The Custodial Agency should resolve all doubts about age in favor of a finding that the individual is under 18.”); Comm. on the Rights of the Child, Gen. Comment No. 6, *supra* note 5, at ¶ 31 (stating that an age “assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of the violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.”).

- 57 U.S. Immigration and Customs Enforcement, 111064.1: *Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities* (Aug. 23, 2013), available at http://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf.
- 58 *See id.* at §§ 5.4(1), 5.5(1), 5.6(1).
- 59 Memorandum from David L. Neal, Chief Immigration Judge, U.S. Dep't of Justice, to All Immigration Judges, Court Admins, Judicial Law Clerks, & Immigration Court Staff, *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children* (May 22, 2007), available at <http://www.usdoj.gov/eoir/efoia/ocij/oppm07/07-01.pdf>.
- 60 *Id.* at 4.
- 61 *Id.* at 6.
- 62 Subcommittee members proposed specific questions, which could include:
- *Why do you want to go back?*
 - *Are you afraid of going back?*
 - *Where will you live? Who lives there? How old are they? How do you know them?*
 - *Will you go to school?*
 - *Is there anyone who wants to hurt you, or who has hurt you in the past?*
 - *Would you try to return to the United States, and if so why?*
- 63 TVPRA § 235(c)(5); 8 U.S.C. § 1232(c)(5).
- 64 *Cf. Perez-Funez v. INS*, 619 F. Supp. 656, 665-70 (C.D. Cal. 1985) (ordering the INS to inform contact with legal counselor, close relative *or* friend) (emphasis added).
- 65 TVPRA §235(c)(6); 8 U.S.C. § 1232(c)(6).

NOTES



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