February 9, 2015

Juan Osuna
Director of the Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1902
Falls Church, VA 20530

Sarah Saldaña
Assistant Secretary
Department of Homeland Security (DHS)
U.S Immigration and Customs Enforcement
500 12th St., SW
Washington, D.C. 20536

Ken Tota
Acting Director
Administration for Children and Families
901 D Street, SW
ORR/8th Floor
Washington, DC 20447

Dear Sir or Madam:

The undersigned organizations write to express our concern that Immigration Judges nationwide have issued, and are continuing to issue, large numbers of *in absentia* removal orders against recently-arrived children who did not receive notice of their removal proceedings. Legal service providers, social service providers, and immigration advocates that work with children in removal proceedings have received numerous reports throughout the country of significant numbers of children who have either received defective notice of their removal proceedings and upcoming hearing dates, or who have not received notice at all. Yet immigration courts have issued and continue to issue numerous *in absentia* removal orders against such children, including those without legal representation. *In absentia* orders should not be issued on children's cases when they have not received adequate notice of their immigration proceedings.

We suggest that you take following steps to remedy this problem. First, we appreciate the endeavors this Administration, Office of Refugee Resettlement (ORR) and the Executive Office for Immigration Review (EOIR) have taken to provide counsel for children; we ask that this program be expanded to ensure no unaccompanied child will go before an immigration judge alone. Second, we ask that you immediately put procedures in place to ensure that children are given proper legal notice of their removal proceedings and hearing dates. Third, in light of the significant numbers of children who recently have received *in absentia* removal orders without notice, we request that for every child who has received an *in absentia* removal order on or after May 24, 2014, Department of Homeland Security (DHS) should move to reopen. EOIR should grant that request, or alternatively, EOIR should reopen a child's removal proceedings *sua*

sponte. EOIR should administratively close those children's case they are unable to provide adequate legal notice of the new hearing. Going forward, EOIR should also grant continuances in children's cases until such time as they can be sure proper legal notice is provided. Finally, EOIR should allocate sufficient resources in order to update the EOIR hotline in a timely manner.

As you know, immigration courts have been directed to ensure that recently-arrived children have their first master calendar hearing date within 21 days of the date that their notice to appear ("NTA") is filed with the immigration court.[1] Many immigration courts, including those with the highest volumes of cases, have responded to this directive by establishing specialized dockets for handling children's cases. In the midst of the increase in children's cases, ORR, EOIR and DHS instituted a new procedure on May 1, 2014 meant to increase court efficiency and reduce the burden on sponsors to file change of address ("COA") or change of venue ("COV") forms. Under the new procedure, DHS issues the NTA with the immigration court location and hearing date marked "TBD" and delays filing the NTA until after the child is released to a sponsor or after 60 days, whichever is earlier, or unless the child requests an earlier hearing. In such cases, ORR, service providers and sponsors do not need to complete either the ORR Release Notification or the COV and COA forms. Instead, ORR emails a Discharge Notification form to various stakeholders. DHS procedure is to file the NTA with an immigration court based off the address from the Discharge Notification. Since the procedure has gone into effect, service providers have noticed a sharp increase in the breakdown in adequate notice to sponsors and children and on-going problems with NTAs being filed at the appropriate venue.

In addition to this, the online version of the packet that ORR distributes to sponsors contains the wrong form for updating one's address.[2] Instead of the form titled *Alien's Change of Address/Immigration Court*, the packet includes a form used for address changes once an appeal is pending with the BIA. Unlike the correct form, this form does not contain any warnings about the consequences of failing to update one's address and it is pre-addressed to the BIA in Falls Church, Virginia—not to the local immigration court. Another issue resulting from the delay in filing are cases in which a child and their sponsor move before their NTA is filed. Without knowing which court they will be required to appear in, a child cannot file their EOIR-33. This can result in additional no-notice *in absentia* orders.

Compounding this problem is the recent mandate to expedite the cases of recently-arrived children. Because EOIR is now required to have a child's first master calendar hearing within 21 days of the NTA's filing, there is not enough time to identify these errors before the court issues the invalid hearing notice.

Regardless of the exact point where the flow of information is breaking down, these communication failures, combined with the mandate to expedite children's cases, are clearly resulting in ubiquitous notice problems. We have received many reports of hearing notices arriving with only a few days' advance warning, and some reports of them arriving *after* a scheduled hearing date has passed. In some cases, the hearings were set to take place over a

[1] *See* David Rogers, *Migrants' right to counsel argued*, Politico (Sept. 3, 2014) (quoting counsel for the government at oral argument in *J.E.F.M. v. Holder* as stating existence of 21-day policy).

[2] *See* ORR Div. of Children's Services, *Sponsor Handbook*, PDF at 12-13. https://www.acf.hhs.gov/sites/default/files/orr/sponsor_handbookrev_09_15_2014.pdf.

thousand miles away from the address to which the notice was sent just days beforehand. For example:

- Two sisters were initially detained in Los Angeles, where their NTAs were filed, but were subsequently released to a sponsor in Alexandria, Virginia. The sisters did not receive notice of their hearing date, so their lawyer called EOIR in mid-July 2014 and found out that they had a hearing scheduled for early/mid-September 2014. This lawyer submitted a notice of appearance and a venue change request via U.S. mail to the Los Angeles Immigration Court, requesting a transfer to the Arlington Immigration Court. Much to the sisters' surprise, on July 28, 2014, they received a notice stating that their hearing dates had been set for *that very afternoon in Los Angeles*. The notices were dated July 23, 2014, and had been sent via regular mail to the sisters' address in Virginia. The sisters' lawyer managed to avert the entry of an *in absentia* order only by calling in a personal favor with a local Los Angeles attorney, who covered the girls' hearing and requested a venue transfer.[3]
- In the last quarter of Fiscal Year 2014, one regional post-release social service provider reported that out of her caseload of 13 cases, only in one case was the hearing notice provided before the hearing.[4]
- One child who was in ORR custody in Virginia was awaiting a home study on the sponsor in New Orleans prior to the child's release. The legal service provider checked the EOIR hotline and discovered that the child's hearing was scheduled miles away in the New Orleans immigration court for a hearing several days later, despite the child having not been released from ORR custody.[5]

In other cases, children are not receiving notice of their hearings at all. The reasons for these notice failures appear to be complex, but much of this phenomenon also is likely explained by the large numbers of children who have been required to appear in immigration court on an expedited basis. For example, legal and social service providers have observed an increase in database and human errors on the part of government actors, such as incorrect entry of addresses, and addresses on file with EOIR that do not match the addresses provided by the ORR sponsors. These malfunctions not only result in initial notice failures, but also stymie those children and custodians who make diligent efforts to obtain crucial information regarding their cases. The EOIR hotline, which sponsors rely on in order to obtain case status updates, often contains incorrect information or is not updated in a timely fashion. We have also heard reports of sponsors calling courts for assistance with filling out change-of-address forms, only to be turned away without instructions or told that they must wait to receive a notice of hearing before they are allowed to move. For example:

- In Los Angeles, an ORR sponsor received a hearing notice for the child living with her, as well as a notice for *a child completely unknown to her*. The ORR sponsor drove to the unknown child's address and delivered the notice of hearing personally. The notice stated that this child was required to appear in immigration court three days later. But for this

[3] Decl. of Simon Sandoval-Moshenberg, *J.E.F.M. v. Holder,* 14-cv-01026-TSZ (July 31, 2014), Dkt. 34, ¶¶9-12.

[4] Lutheran Immigration and Refugee Service (LIRS), report from partner (November 2014).

[5] CAIR Coalition (January 2015).

particular sponsor's generosity, the child would never have received notice of her fast-approaching hearing date.

- In *J.E.F.M. v. Holder,* the Plaintiffs filed an amended complaint which added a new plaintiff named J.E.V.G. to the case.[6] J.E.V.G. had never received notice of his first removal hearing date. When he did not appear at the hearing, the immigration judge issued an *in absentia* removal order against him. After he was added as a plaintiff to the federal lawsuit, the government conducted a review of J.E.V.G.'s file, which revealed that EOIR had sent notice to an incorrect mailing address, likely resulting from an error transcribing his address in the EOIR database.
- One teenage girl never received her notice in the mail. She was instructed by her post-release social service provider to call the hotline every day. The girl, however, was using the Alien number of her son—not realizing that her number corresponded to a separate case. Each time she called there was no hearing scheduled. The post-release service provider then called on her behalf two weeks later and discovered that the girl and her son both had received removal orders *in absentia*.[7]

These widespread notice problems are no doubt responsible, at least in part, for the large numbers of children who have been ordered removed *in absentia* during the latter half of 2014. According to EOIR's own data, from July 18, 2014 to October 1, 2014, immigration courts issued 1,449 *in absentia* orders against children who did not appear for their hearing dates.[8] No doubt that number has risen since October 1, 2014. Moreover, legal services providers have submitted sworn affidavits in *J.E.F.M. v. Holder,* 14-cv-01026-TSZ (W.D. Wash.), attesting to the entry of at least dozens of *in absentia* removal orders against children, including in some cases where notice was plainly deficient.[9]

While the government has initiated new programs expand legal counsel for vulnerable groups, the vast majority of unaccompanied children still do not have access to counsel. The representation rate of children in immigration court has dropped precipitously, from 71% in 2012 to as low as 14-15% in some months of 2014.[10] As data on case outcomes indicates, legal representation vastly increases the chances that a child will appear in immigration court: Over the last decade, only 6.1% of children with counsel received *in absentia* removal orders, compared with 64.2% of unrepresented children.[11] The intervention of counsel would no doubt

---

[6] Second Amended Compl., *J.E.F.M. v. Holder*, 14-cv-01026-TSZ (Dec. 1, 2014), Dkt. 95, ¶¶109-12.

[7] Story from Lutheran Immigration and Refugee Service (2014).

[8] David Rogers, *Thousands of child migrants still lack lawyers*, Politico (Nov. 6, 2014), http://www.politico.com/story/2014/11/child-migrants-lawyers-112654.html.

[9] Decl. of Tin Thanh Nguyen, *J.E.F.M. v. Holder,* 14-cv-01026-TSZ (Aug. 25, 2014), Dkt. 63, ¶¶12-13 (to the best of declarant's recollection, immigration judge in Charlotte ordered removed in absentia all children who did not appear to hearings on July 31, 2014 and August 12, 2014; one child who appeared in court had received fewer than four days' notice); Decl. of Simon Sandoval-Moshenberg, *J.E.F.M. v. Holder*, 14-cv-01026-TSZ (July 31, 2014), Dkt. 34, ¶¶9-12 (describing children living in Virginia who received notice only two days prior to hearing in Los Angeles Immigration Court); Decl. of Stacy Tolchin, *J.E.F.M. v. Holder,* 14-cv-01026-TSZ (July 31, 2014), Dkt. 31, ¶¶3-5; (same).

[10] Transactional Records Access Clearinghouse, *Representation for Unaccompanied Children in Immigration Court*, http://trac.syr.edu/immigration/reports/371/ (Nov. 25, 2014).

[11] Transactional Records Access Clearinghouse, *Juveniles — Immigration Court Deportation Proceedings Court Data through December 2014*, http://trac.syr.edu/phptools/immigration/juvenile/ (last visited Jan. 21, 2015).

have prevented numerous children from receiving *in absentia* orders in recent months. For example, on a single day in August, legal service organizations filed change of venue motions for 200 children scheduled for hearings at the Chicago immigration court, but who no longer lived in the area.[12] Without the work of those organizations, many if not all of those children would now have removal orders.

Despite mounting evidence of these pervasive and systemic notice deficiencies, Immigration Judges have ordered and continue to order the removal of children who fail to appear for their hearings. ORR sponsors frequently find out about the resulting *in absentia* order only when a legal service provider or a post-release social service provider takes it upon herself to obtain the sponsor's phone number and contact them. And, we presume, many such sponsors likely never find out that the children in their care have been ordered removed *in absentia*.

In absentia removal orders issued against children who have failed to receive proper notice violate both the INA and the U.S. Constitution. *See, e.g., Reno v. Flores,* 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in [removal] proceedings[.]"); *see also Matter of G-Y-R*, 23 I&N Dec. 181 (BIA 2001) (due process requires that non-citizens receive notice of their removal hearings that is reasonably calculated to reach them). In keeping with these requirements, the INA and agency regulations require that all respondents in removal proceedings receive proper notice of their hearings, and also create additional protections specific to children. *See* 8 U.S.C. § 1229(a)(1)-(2); 8 C.F.R. § 103.8(c)(2)(ii); 8 C.F.R. § 236.2(a); *see also G-Y-R*, 23 I&N Dec. at 189-90 (recognizing that that respondents may not be ordered removed *in absentia* until they are warned – by proper service of the NTA – that consequence of failing to inform government of change in address is entry of removal order). If the child does not attend a removal hearing because she was not provided proper notice of the hearing, she may have the resulting *in absentia* removal order rescinded. *See* 8 U.S.C. § 1229a(b)(5)(C)(ii).

Given that a significant proportion of recently-arrived children who have been ordered removed *in absentia* have received defective or no notice of their hearing dates, thereby violating their statutory and constitutional due process rights, the government must take steps to prevent these notice problems in the future and undo the harm that has already been done. The circumstances of one of the named plaintiffs in *J.E.F.M. v. Holder* illustrates the effectiveness of the remedial measures that we propose. As noted above, one of the new Plaintiffs in that case, J.E.V.G., never received notice of his first removal hearing date and received an *in absentia* removal order. [13] After the government ascertained that EOIR had sent his hearing notice to the wrong address, it then filed a motion to reopen J.E.V.G.'s *in absentia* order, acknowledging its error.[14] Based on our experience serving these children and the reports of service providers throughout the country, we suspect there are at least dozens, if not hundreds, of children who did not receive notice, just as J.E.V.G. did not. A review of their files would likely reveal that DHS should move to reopen, or alternatively, EOIR should reopen *sua sponte* the child's case.

---

[12] Odette Yousef, *Lawyers Fear Speedy Deportations Harm Minors*, WBEZ 91.5 (Aug. 27, 2014), http://www.wbez.org/news/lawyers-fear-speedy-deportations-harm-minors-110715.

[13] Second Amended Compl., *J.E.F.M. v. Holder*, 14-cv-01026-TSZ (Dec. 1, 2014), Dkt. 95, ¶¶109-12.

[14] Defs' Br. Supplementing Their Mot. to Dismiss, *J.E.F.M. v. Holder*, 14-cv-01026-TSZ (Dec. 1, 2014), Dkt. 97, at 10 n.6.

In conclusion, the increased volume of children's cases in immigration courts, combined with the government's mandate to expedite the those cases, has resulted in numerous *in absentia* removal orders that were issued in violation of the constitutional, statutory, and regulatory due process rights of children in removal proceedings. To remedy the violations that these children have suffered, we recommend that the Government take the following steps:

1. Unaccompanied children in removal proceedings should be appointed counsel, no child should be forced to navigate the complex immigration system alone.

2. For every child who has received an *in absentia* removal order on or after May 24, 2014, Department of Homeland Security (DHS) should move to reopen. EOIR should grant that request, or alternatively, EOIR should reopen a child's removal proceedings *sua sponte*, and EOIR should administratively close those children's case they are unable to provide adequate legal notice of the new hearing. Going forward, EOIR should also grant continuances in children's cases until such time as they can be sure proper legal notice is provided.

3. Implement reliable procedures to ensure that children are provided fair and accurate notice of their hearings, while not unduly burdening the sponsor or child by having to file COVs or COAs.

4. Ensure children are adequately advised of their right to request a hearing prior to the 60 day filing delay; in particular this consequence needs to be explained to children who do not have family reunification resources and children in secure facilities.

5. Pending the implementation of reliable procedures and practices for providing notice, EOIR should direct the immigration courts to grant continuances to non-appearing pro se children and continue to permit legal service providers to attempt to contact them, rather than entering *in absentia* removal orders against them. EOIR should also accept EOIR-33 forms at a central location as children and their sponsors do not have a court address prior to the filing.

6. Allocate sufficient resources to the EOIR hotline procedures to ensure it is updated in a timely fashion and serves its purpose of facilitating notice.

We look forward to working with you in improving and implementing the above recommendations. Thank you for your attention.

Sincerely,

American Friends Service Committee
Americans for Immigrant Justice

American Immigration Lawyers Association
Ascentria Care Alliance
Asian Pacific Institute on Gender Based Violence
ASISTA Immigration Assistance
Atlas: DIY
Bethany Christian Services
Boston University Immigrants' Rights Clinic
Brooks Immigration, LLC
Capital Area Immigrants' Rights (CAIR) Coalition
Catholic Legal Immigration Network Inc. (CLINIC)
CCDA - Hogar Immigrant Services
Center for Gender & Refugee Studies
Center for the Human Rights of Children, Loyola University Chicago
Children's Choice, Inc.
Children's Law Center of Massachusetts
Church World Service
Community Legal Services in East Palo Alto
Durham/Orange Woman Attorneys (D.O.W.A.)
First Focus
Florence Immigrant and Refugee Rights Project (FIRRP)
Grossman Law, LLC
HIAS Pennsylvania
Hofstra Youth Advocacy Clinic
Immigration Center for Women and Children
Immigration Counseling Service (ICS)
Kids in Need of Defense (KIND)
Las Americas Immigrant Advocacy Center
Law Office of Jennifer M. Smith, P.C.
Legal Services for Children
LifeBridge Community Alliance (Phoenix, AZ)
Lutheran Children and Family Service of Eastern Pennsylvania
Lutheran Immigration and Refugee Service (LIRS)
Lutheran Services Carolinas
Morrison Child & Family Services
National Immigrant Justice Center
National Immigration Law Center
National Justice for Our Neighbors
National Latin@ Network; Casa de Esperanza
Neighborhood Ministries (Phoenix, AZ)
North Carolina Justice Center
Northwest Immigrant Rights Project

Pangea Legal Services
Public Counsel
RAICES
Refugio del Rio Grande
Rocky Mountain Immigrant Advocacy Network
Sin Fronteras
Tahirih Justice Center
The Door's Legal Services Center
Tulsa Immigration Resource Network, University of Tulsa College of Law
U.S. Committee for Refugees and Immigrants
UC Davis School of Law Immigration Law Clinic
Urban Justice Center's Peter Cicchino Youth Project
Women's Refugee Commission
Young Center for Immigrant Children's Rights