

## THE INTERSECTION BETWEEN STATE AND FEDERAL AGENCIES

The line between federal and state jurisdictions regarding the custody of undocumented youth is muddled. While federal immigration authorities enforce immigration law and state child welfare personnel are responsible for protecting the best interest of abused and neglected children, these jurisdictions can overlap in certain situations. Without clear and standardized guidelines, the resolution of these situations depends on the working relationships of the regional authorities and individuals involved.

### **CPS' Pursuit of Unaccompanied Child's Legal Immigration Status**

Special Immigrant Juvenile Status (SIJS) is a form of immigration relief available to child victims of abuse or abandonment. SIJS is a temporary protective immigration status that allows non-U.S. citizen children to remain in the U.S. While children may apply for SIJS based on abuse or abandonment suffered in their country of origin, they may also be eligible for mistreatment experienced while in the U.S. Unaccompanied children in the custody of a state protective service often qualify apply for SIJS protection, yet it is not standard practice for states to pursue SIJS for their undocumented clients.

The extent to which states pursue SIJS for eligible children is determined by that state's internal child welfare policy and the state's child protective services policies and procedures. Depending on the given state, a state agency attorney may assist an unaccompanied undocumented child in the U.S. with an application for SIJS. A ward of the state who has a permanency plan that does not include family reunification, is not a legal U.S. resident, and whose best interest does not include repatriation may petition for SIJS.

Complicated or unclear age requirements for state jurisdiction and agency policy can affect a child's access to relief through SIJS. Further restricting the child's access, overburdened child welfare caseworkers may fail to recommend their eligible clients in a timely manner because: 1) they do not understand SIJS requirements in relation to their state's policy; 2) they are unaware that SIJS even exists; or 3) they prioritize the immediate safety and security of the child over the resolution of his immigration status. ( e. g., Some workers may be resistant to ascertaining the child's immigration status for fear that the child might be removed, and thereby not effectively protected from his or her abusers.)

Failure by state child welfare services to recognize and acknowledge a child's immigration status could place SIJS eligible children at risk of aging out of the application requirements. If a child ages out of the SIJS criteria and then ages out of state care, their vulnerability would be twofold. Not only would they receive reduced, if any, support services (as are many children in child welfare), but they would be subject to the enforcement of immigration law as it regards adults, with no special consideration for their situation as a victim of abuse or their original entry into the state system as a child. Viewed as an undocumented adult, youth are subject to adult detention and deportation.

As neither state agencies nor the Department of Homeland Security (DHS) maintain statistics on the number of children in state care who qualify for or receive SIJS status, an accurate assessment of SIJS underutilization is not possible. However, Citizenship and Immigration Services (CIS) does report on the number of Child Protective Services (CPS) wards granted permanent status by some means in its annual data report, the *Yearbook of Immigration*

*Statistics*.<sup>1</sup> In 2006, 19,122 immigrant children received immigration protection while under the dependency of state child welfare services. When these numbers, of which unaccompanied SIJS recipients in direct CPS custody would be a subset, are considered in the context of how many children are in state care nationally, the potential disparity constitutes a strong case for under-utilization.

At the federal level, it is unclear why department agencies do not keep statistics on this population, particularly since the need for improvements in the collection and availability of information related to unaccompanied children in the immigration system was identified prior to the HSA and Congress has repeatedly instructed the DHS to provide related data.<sup>2</sup> At the state level, there seems to be competing motivations for not collecting data on the number of unaccompanied or abandoned undocumented children in state care. The suppositions offered by child protection staff in states across the nation, include:

- Lack of infrastructure/resources within an already overburdened system;
- Fear that recognition of the fact that these SIJS eligible children in state care would politicize the situation at the state level, resulting in an interruption or suspension of services to abused and abandoned children based on nationality;
- General resistance to releasing any information to the public<sup>3</sup> that might complicate relations with federal immigration agencies (either by increasing immigration enforcement's interest in children in state care, or by jeopardizing state and federal relations in areas where immigration enforcement and state agencies enjoy a level of cooperation); and
- Concern that the collection of these statistics might negatively affect overall federal funding for state services.

In regions where state and local authorities have a history of tension related to the jurisdiction over undocumented children and in areas where communities have adopted "anti-immigrant" legislation, these fears are not always unfounded. Still the advocacy and service for unaccompanied children will remain a challenge as long as the population remains invisible.

### **SIJS Access Often Limited Due to Delays**

Children may also miss the opportunity to apply for SIJS due to administrative and legal delays within the system. A child's immigration case may be delayed at any stage by a multitude of judicial and administrative factors, including:

- Delays in transfer between (Department of Homeland Security) DHS agency custody and ORR;
- Transfer from one ORR facility to another (sometimes on the other side of the country);
- Transfer from the court where the child's proceedings were initiated;

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<sup>1</sup> [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/OIS\\_2006\\_Yearbook.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/OIS_2006_Yearbook.pdf)

<sup>2</sup> *Unaccompanied Juveniles in INS Detention*(2001). The Department of Justice Office of the Inspector General; Haddal, Chad. (March 1, 2007). *CRS Report for Congress: Unaccompanied Alien Children: Policies and Issues*. Congressional Research Services; P.L. 109.295; H. Rept. 109-699; House Report 110-181; See also *Recent Reviews of U.S. Policy on Unaccompanied Children* backgrounder

<sup>3</sup> Any data that a state agency collects is available to the public upon request, unless explicitly tied to security interests.

- Granting of extensions to obtain counsel and review options for relief<sup>4</sup>; and
- Any number of delays associated with a federal agency processing a petition.

The potential for substantial delays places older children who are eligible for relief at risk of aging out of both ORR care and, for those seeking SIJS, a chance to apply for legal status.

### **Aging Out: How Federal and State Definitions of Maturity Can Affect a Child's Chance to Stay or Decision to be Removed**

#### **Children in ORR Care**

Under the Immigration and Naturalization Act Sec. 204.11 (c) (1) children and youth in the immigration system may seek and receive SIJS until their 21<sup>st</sup> birthday. However, children “age out” of ORR custody at age 18 and are remanded to the custody of ICE.

“Aging out” of ORR care means that on the morning of a child’s 18<sup>th</sup> birthday, DHS agents take him into custody and place him in an adult detention facility. These facilities are typically prison-like environments. When faced with the possibility of indefinite detention in an adult prison, some children choose not to pursue their claims for relief, opting for removal instead.

One of my teenage clients ultimately granted SIJS could not withstand protracted detention when he aged out and was placed in an adult detention facility and instead of pursuing adjustment of status to permanent residence before the Immigration Court decided to opt for removal to his Central American home country- where he immediately encountered subsequent threats by the same gang he had fled. Had he been placed in a transitional living program in the United States for youth 18-21 for example, he would have had the fortitude to remain and pursue his permanent residence. My pro bono client ultimately and tragically forfeited his relief options because of the dire conditions of adult detention.

Christopher Nugent, Unaccompanied Children’s attorney and advisor to this study. Via e-mail, October 16, 2008.

If a client chooses to remain in the U.S., state family law and child welfare policy can determine the child’s ability to proceed with a SIJS petition. (i.e. In states that allow dependency to continue past the age of 18, the applicant may continue to pursue SIJS.)

#### **Children in CPS Care**

A number of factors can determine the point at which a child ages out of a given state’s custody. A child might age out at age 18 (as is the case in Florida and California); at age 19 (as in Nebraska); or at age 21 or 23, the age in which many states will extend care and services in instances of special or transitional needs. From a list maintained by the National Child Welfare

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<sup>4</sup> While the child’s receipt of an extension from an immigration judge may seem favorable, it is indicative of the difficulties in obtaining counsel for unaccompanied children. In effect, an extension may just prolong detention as a child may receive an extension and ultimately a removal order without obtaining counsel.

Resource Center, the combination of instances in which a state extends child protective services or custody past a child's 18<sup>th</sup> birthday is unique to each of the 50 states<sup>5</sup>

These variations affect the ability of social workers and CPS attorneys to pursue SIJS (if it is in their clients' best interest), as well as the children in ORR care whose ability to obtain SIJS is tied to policies of the states in which they are detained. As required by the SIJS process, all applicants for SIJS (including those in federal custody) must obtain a ruling from a state court that substantiates their status as an abused or abandoned child. Thus the fact that some states will terminate a dependency ruling on a child's 18<sup>th</sup> birthday, while other states do not, results in a patchwork of SIJS eligibility requirements across regions.

### **State Juvenile Correctional Systems**

States have considerable discretion in the development of their corrections systems and codes. The manner and extent to which state correctional authorities and facilities structure policy related to undocumented children have a direct impact on the child's ability to access consular or legal assistance.

The Texas Youth Commission (TYC), the state agency responsible for juvenile correction, has a written policy mandating the notification of ICE in cases involving undocumented children.<sup>6</sup> The agency's legal department, however, has advised against the release of children's information to outside agencies as it is deemed a violation of the child's right to privacy. Likewise, TYC advises that confirming a child's immigration status through collaboration with outside agencies would also violate the child's right to privacy. Currently, the agency's policies are under review. TYC representatives confirm that it is common practice not to refer a child to ICE unless ICE has issued a detainer and maintains that it does not notify foreign consulates unless the child requests such contact. Some TYC agents will reportedly transport undocumented Mexican children to the border with Mexico, without notification of U.S. immigration authorities, if they express an interest in returning home following their release from custody. There is no indication, however, that this informal practice involves consular or parental notification either.<sup>7</sup>

### **Adult Correctional Systems**

Unaccompanied children may also enter the adult state corrections systems in states where children may be tried as adults. The application of state procedures designed for adult inmates may conflict with international norms protecting children in detention. In Texas, the Texas Department of Criminal Justice (TDCJ) works closely with ICE and refers all foreign-born inmates to the agency for immigration status verification. ICE actually maintains offices within the state correctional facilities at Huntsville, one of the larger facilities, in order to facilitate the processing of immigration cases concurrent with the serving of sentences.<sup>8</sup> In this manner, inmates may be deported immediately upon the completion of their sentence. The Texas state agency maintains a policy of not notifying consulates of the detention of any national, unless

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<sup>5</sup> [http://www.nrcys.ou.edu/yd/state\\_pages/search.php?search\\_option=remain\\_after\\_18](http://www.nrcys.ou.edu/yd/state_pages/search.php?search_option=remain_after_18)

<sup>6</sup> All TYC related information is based on our conversations with TYC staff and open records act requests.

<sup>7</sup> Staff mentioned that TYC is considering the development of reporting procedures that would mirror those in adult corrections. If this occurs, all non-citizen children would be referred to ICE, significantly increasing the likelihood of the child entering removal proceedings without consular notification.

<sup>8</sup> Bozarth, Melinda. General Counsel for the Texas Department of Criminal Justice. Interview by Amy Thompson. Via telephone (April 11, 2008).

that national is sentenced to capital punishment. Under this policy, consulates would not be notified of any undocumented youth in TDCJ custody (unless sentenced to death row), and thus would be denied access to any assistance or services the consulate could offer. This policy is in clear violation of both Article 36 and 37 of the Vienna Convention on Consular Relations (VCCR) (see *Related Federal Code and Legal Precedent* backgrounder for more information).

State policies and procedures that do not ensure consular notification in accordance with the VCCR are in clear violation of both international convention and the best interest of the child. Delinquency on the part of children can be born of desperation brought on by abuse or abandonment. As such, an unaccompanied undocumented child may still be eligible for special protections, including SIJS, despite the child's assignment to the correctional system. State agency policies and procedures should not impede a child's access to relief through the legal system.

## **Inter-jurisdictional Relations:**

### **Children in ORR Custody Often Must Go Before State and County Courts**

State child welfare authorities and courts can affect the cases of children in the custody of immigration agencies. For a child to petition for Special Immigrant Juvenile Status (SIJS), a form of immigration relief commonly sought by ORR detainees, it must be determined that:

- The child is dependent on the state or in state custody due to abuse, neglect, or abandonment;
- There is no possibility for family reunification, and
- Return to the child's country of origin is not in the child's best interest.

A state judge must make these findings as an immigration judge lacks the necessary child welfare expertise and can not rule on the child's best interest. The extent to which state child welfare courts and judges are willing to entertain dependency hearings for children in the immigration system can have a direct impact on the ability of a child's attorney to successfully pursue a SIJS application.

In states without set or clear guidelines for child welfare courts on whether to allow dependency cases for children in ORR custody, the decision is left to the discretion of the judge. In turn, differences in the temperament and opinions of individual judges lead to variations in the access allowed to and overall experience of children in federal custody seeking a local court dependency determination. Thus the child's access to the child welfare court is determined by the judge to whom the children are assigned. In some cases a child's only hope of relief lies in the SIJS process—the barring of a child's access to court (i.e. a dependency hearing) is, in effect, an order of removal.

Although child welfare and family law judges routinely hear SIJS cases for children in state custody, they may be unwilling to hear the cases of children petitioning from ORR custody without clear guidance to do so. Some judges may view the required ruling as taking a position on immigration policy and feel unqualified to do so. However, if a child welfare judge finds the

child to be dependent<sup>9</sup>, an immigration authority will ultimately make the determination in regards to the child's immigration status. If a judge chooses not to make the necessary determination, however, the child is removed by default. By refusing to hear a case so as not to take a position on immigration, the judge may, in effect, be exercising immigration policy.

As many children in ORR care are in their late teens, the threat of aging out of state dependency eligibility requirements can also be a barrier. Advocates for abused and abandoned immigrant children in ORR custody struggle with navigating the variations in state limits for dependency hearings to determine if a child is a victim of abuse or neglect requiring state assistance. Without a reliable reference for which jurisdiction will allow youth over age 18 a dependency hearing and under what circumstances, attorneys are challenged to represent child clients who maybe transferred across state lines (i.e. from one ORR facility to another, a common occurrence). In some local districts gaining access to local child welfare courts is so cumbersome that children must seek a dependency determination from other courts, such as local probate courts. As a result of these regional variations and obstacles, the geographic placement of the child within the U.S. (determined largely by bed availability in ORR facilities) can , in effect, determine, a child's access to protection via the SIJS process.

## **DHS Recognition of State Child Protection Agency Authority:**

### **Inconsistent and Contradictory**

#### **A History of Cooperation in the Southwest**

In some regions of the U.S./Mexico border, Border Patrol (BP) has historically and actively sought the assistance of state child welfare specialists in caring for apprehended unaccompanied children and reunifying them with their families in the U.S. or Mexico.

Informal arrangements between BP and state agencies are implemented to varying degrees along the U.S./Mexico border.<sup>10</sup> In some areas, BP releases unaccompanied children to local state child welfare services pending the child's release or removal. To varying degrees the state agency may assist consular efforts to identify family members for placement in either the U.S. or Mexico. The extent to which these agreements are utilized depends on the individual supervisor on staff and implementation can vary by shift. Reported benefits of the system include: children are not detained in overcrowded BP facilities; children receive greater attention to their immediate needs; and children are more likely to be reunified with families through the resources and expertise of CPS staff.

However, foreign consulates reported several concerns to us, including:

- Inconsistent application of BP/CPS cooperation can frustrate consular efforts to identify and assist children in a timely manner;
- Depending on whether they are in the care of state agencies, children may be at greater risk for reunification with smugglers; and

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<sup>9</sup> A dependency hearing is the process by which a judge determines whether a child is the victim of abuse or abandonment and in need of guardianship. This finding is requisite for the SIJS application process.

<sup>10</sup> This information is based on our experience interviewing U.S. state and Mexican Consular representatives in communities throughout all four border states. While local opinions regarding the efficacy of BP/ state cps cooperation vary, no officials wished to report openly on the specifics of these agreements for fear that they might lose a valuable tool in protecting abandoned or abused children.

- The CPS system is overburdened, leading to an increased chance of children being lost in the system and consulates not being notified.

## Occupied Texas

Despite evidence of historic BP and state child welfare cooperation at the local level, some regions report an increasing friction between federal immigration enforcement and state child welfare authorities. This trend is perhaps best illustrated by the current situation in South Texas, where all residents are subject to BP inspection during transit. Within border states, BP regulates travel not just internationally, but along state and federal highways, as well. BP establishes checkpoints on all byways leading from the border region into the interior of the state, in some instances hundreds of miles from the border. They also closely monitor domestic flights and bus lines. As a result, South Texans cannot leave their home communities without having to prove their authorized presence in the United States. One CPS judge refers to this situation as “occupied Texas”.<sup>11</sup>

This situation creates an obstacle for state child welfare agencies to the extent that some BP divisions and supervisors refuse to acknowledge state custody of an undocumented child. Federal law prohibits the transport of undocumented individuals.<sup>12</sup> Generally, this is interpreted as a device to prosecute smuggling and harboring of fugitives. Some U.S. Customs and Border Patrol authorities interpret this law to apply equally to any agencies or authorities outside the U.S. immigration system.

State child protection authorities are challenged by this situation when their clients—abused and abandoned children—need mental health, medical, or placement services that are not available in the greater border area. In some areas, United States Border Patrol will not recognize state court orders authorizing a child’s transport and placement outside the border area.

For example, in the Rio Grande Valley area, state CPS agents have been detained by U.S. immigration authorities and threatened with prosecution for attempting to transport their clients to needed services. BP agents have taken custody of state wards, assuming the custody and care of abused children who they are not prepared to receive. In one instance, a girl who was a victim of sexual and physical abuse and had significant mental health needs was taken by BP without any heed to her condition. CPS learned of her fate weeks later, when contacted by an ORR contractor outside of Chicago. BP had transferred the girl to ORR care without notifying ORR of their involvement in the CPS system, her status as a ward of the state of Texas, the presence of her family in South Texas, or the girls’ immediate medical and mental health care needs. As our report goes to press, the girl has been in ORR care for more than a year, is still located in Chicago, and no plan for family reunification has been identified.<sup>13</sup>

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<sup>11</sup> Flores, Roberto. Judge for the 139<sup>th</sup> Judicial District of Texas. Interview by Amy Thompson. Via telephone. (August 1, 2007).

<sup>12</sup> 8 U.S.C.A. § 1324

<sup>13</sup> Rodriguez, Sandra. Border Liaison for Texas Department of Family Protective Services. Interviews by Amy Thompson. In Edinburg, Texas (July 25, 2007). Via telephone (October 17, 2008).

## **Summary**

The disconnects that currently exist between state and federal agencies, as well as between law enforcement and child welfare agencies place vulnerable unaccompanied children at greater risk of disenfranchisement of their rights to representation and contact with their consulates. This, in turn, places unaccompanied children at greater risk of an unsafe return, by bypassing the few protections in place.

The U.S. must resolve the internal conflict between its commitment to the protection of all children and its perspectives on law enforcement. While the development of a comprehensive policy to ensure the safe repatriation of children should be the ultimate goal, federal law enforcement agencies must be ordered to respect the orders of state courts regarding children in state custody. State child welfare agencies, in turn, must ensure that their staff is sufficiently trained on their obligations to their clients under federal law regarding the service of undocumented children. State agencies should endeavor to secure regional agreements with immigration enforcement to address ongoing issues and inform policy development.