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## Special Immigrant Juvenile Status: Refining State and Federal Practice

Justin Potesta

*Loyola Law School, Los Angeles*

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## Special Immigrant Juvenile Status: Refining State and Federal Practice

### Cover Page Footnote

J.D., May 2016, Loyola Law School, Los Angeles. Thanks to the editors and staff of the Loyola of Los Angeles Law Review for their help in editing this Article. Thanks, also, to Professor Kathleen Kim for her guidance and support. Lastly, thanks to my grandparents, Alfredo and Nancy Potesta, for the sacrifices you made to bring our family to this great country.

## **SPECIAL IMMIGRANT JUVENILE STATUS: REFINING STATE AND FEDERAL PRACTICE**

*Justin Potesta\**

*Each year, thousands of unaccompanied minors enter the United States. Upon arrival, these children face a complicated legal process defined by several exchanges between state and federal entities. This Article focuses on one avenue of relief available to these unaccompanied minors: Special Immigrant Juvenile Status. While SIJS provides a path to citizenship for abused, neglected, or abandoned minors, the protection is often misapplied or misunderstood. Focusing on practical improvements, this Article highlights key areas where state and federal entities can more appropriately and efficiently address the unique concerns presented by SIJS-eligible unaccompanied minors.*

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\* J.D., May 2016, Loyola Law School, Los Angeles. Thanks to the editors and staff of the *Loyola of Los Angeles Law Review* for their help in editing this Article. Thanks, also, to Professor Kathleen Kim for her guidance and support. Lastly, thanks to my grandparents, Alfredo and Nancy Potesta, for the sacrifices you made to bring our family to this great country.

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## I. INTRODUCTION

During the 2016 fiscal year, United States Customs and Border Patrol (CBP) apprehended 59,692 unaccompanied children at the Southwest border, around 20,000 more than in the previous fiscal year.<sup>1</sup> This number will likely increase in 2017. In the first two months of the 2017 fiscal year (October and November 2016), CBP apprehended 14,128 unaccompanied children, almost 4,000 more than were apprehended in the same period in 2016.<sup>2</sup>

Once in the United States, unaccompanied children face a complex legal system spanning several state and federal agencies.<sup>3</sup> Federal immigration law provides multiple avenues of relief for these children. This Article focuses on one of those avenues: Special Immigrant Juvenile Status (SIJS).

A pathway to permanent U.S. citizenship, SIJS grants relief only to unaccompanied children who have suffered abuse, neglect, or abandonment.<sup>4</sup> SIJS commits the determination of whether a child has been abused, neglected, or abandoned to state family and juvenile courts. As discussed more thoroughly below, this creates a tricky dynamic among state entities—which typically have little or no role in immigration determinations—and federal immigration agencies—which frequently do not have appropriate resources to care for children. Because SIJS requires immigration expertise *and* child-sensitive policies, an unaccompanied child must rely on the strengths of both the federal and state systems.

The goal of this Article is to highlight practical areas where state and federal agencies can appropriately address the legal and pragmatic concerns facing unaccompanied minors. Part II of this Article gives a brief overview of SIJS's history and current form. Part III discusses the procedural and substantive confusion state courts encounter in SIJS-related cases, and details practical proposals aimed to resolve those issues. Part IV turns to the federal system, analyzing potential

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1. William A. Kandel, *Unaccompanied Alien Children: An Overview*, CONG. RESEARCH SERV. (2017), <https://digital.library.unt.edu/ark:/67531/metadc855771>.

2. *Id.*

3. OLGA BYRNE & ELISA MILLER, VERA INSTITUTE OF JUSTICE, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS 4 (Mar. 2012) [hereinafter THE FLOW OF UNACCOMPANIED CHILDREN], <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>.

4. *See* 8 U.S.C. § 1101(a)(27)(J).

areas where federal agencies can more appropriately identify and assist SIJS-eligible children.

## II. SIJS'S DEVELOPMENT & REQUIREMENTS

When SIJS was enacted as part of the Immigration Act of 1990, it was intended as a narrow means for unaccompanied minors dependent on state courts to obtain permanent residence in the United States.<sup>5</sup> Before this, many unaccompanied minors under threat of abuse, neglect, or abandonment in their country of origin had no legal recourse to avoid deportation when they were apprehended in the United States.<sup>6</sup> Congress ultimately amended SIJS under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).<sup>7</sup> This bill expanded SIJS's provisions and, in some ways, clarified many of its requirements.<sup>8</sup> To qualify for SIJS under the TVPRA, an unaccompanied minor must be: (1) under the age of 21; (2) unmarried; (3) physically present in the United States; and (4) declared dependent upon a court or legally committed to, or placed under the custody of a state agency, individual, or entity appointed by state court.<sup>9</sup> A court must also find that it would not be in the minor's best interest to be returned to their country of origin.<sup>10</sup>

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5. Immigration Act of 1990, Pub. L. No. 101-659, 104 Stat. 4978; Randi Mandelbaum & Elissa Steglich, *Disparate Outcomes: The Quest for Uniform Treatment of Immigrant Children*, 50 FAM. CT. REV. 606, 607 (2012).

6. Jennifer Baum et al., *Most in Need but Least Served: Legal and Practical Barriers to Special Immigrant Juvenile Status for Federally Detained Minors*, 50 FAM. CT. REV. 621, 621 (2012); see also Jessica G. Taverna, *Did the Government Finally Get It Right? An Analysis of the Former INS, the Office of Refugee Resettlement, and Unaccompanied Minor Aliens' Due Process Rights*, 12 WM. & MARY BILL RTS. J. 939 (2004) (discussing due process violations during SIJS's earliest years).

7. IMMIGRANT LEGAL RESOURCE CENTER, PART II: SPECIAL IMMIGRANT JUVENILE STATUS FOR CHILDREN AND YOUTH UNDER JUVENILE COURT JURISDICTION (Jan. 2010), [http://www.ilrc.org/files/2010\\_sijs-chapter\\_03-sijs\\_overview.pdf](http://www.ilrc.org/files/2010_sijs-chapter_03-sijs_overview.pdf) (last visited Jan. 16, 2014). Though the name of the TVPRA seems singularly concerned with trafficking victims, Congress used the TVPRA as a vehicle to enact broader immigration improvements, including SIJS updates. See 8 U.S.C. § 1101(a)(27)(J).

8. See Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 252-53 (2010) ("The 2008 passage of the William Wilberforce Trafficking Victims Protection Reauthorization Act . . . took the first major steps toward developing a more effective system to address the needs of unaccompanied children.").

9. See Karen Moulding, *Eligibility for Special Immigrant Juvenile Status Under 8 U.S.C.A. § 1101(a)(27)(J) and 8 C.F.R. § 204.11*, 67 A.L.R. FED. 299 (2012) (detailing SIJS's full requirements).

10. *Id.*; see also *In re Hei Ting C.*, 969 N.Y.S.2d 150, 154 (App. Div. 2013) ("The provision employs a unique hybrid procedure that directs the collaboration of state and federal systems,

### III. CLARIFYING THE ROLE OF STATE COURTS: PROCEDURAL AND SUBSTANTIVE GUIDANCE

State courts, in Congress's judgment, were best suited to make the requisite SIJS findings listed above.<sup>11</sup> However, as discussed below, state courts have not always understood their procedural and substantive roles in the SIJS process. This Part focuses on simple improvements states can adopt to ensure their courts handle SIJS cases efficiently and appropriately.

#### A. *Jurisdiction*

From SIJS's earliest days, state courts were reluctant to make the necessary findings, wary of infringing on the jurisdiction of federal agencies and immigration courts.<sup>12</sup> For example, in *In re Welfare of C.M.K.*, the Minnesota Court of Appeals held that it lacked jurisdiction to make required SIJS findings because federal immigration law preempted any state court determination.<sup>13</sup> Some federal courts eventually tried to clarify the picture, and the Sixth Circuit once explicitly held that SIJS considerations fell within state courts' jurisdiction.<sup>14</sup>

#### B. *SIJS Definitions*

Beyond this jurisdictional uncertainty, courts have struggled to interpret SIJS's substantive provisions consistently from state to state. State courts play a critical role in determining whether an unaccompanied child is eligible for SIJS.<sup>15</sup> But Congress did not specifically define the terms "abuse," "neglect," and "abandonment," punting the interpretative task to state courts.<sup>16</sup> Congress also failed to define other terms of art, such as "reunification with one or both parents" and "dependency," leading to disparate definitions among

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'recognizing that juvenile courts have particularized training and expertise in the area of child welfare and abuse.'" (quoting David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 1005 (2002)); Moulding, *supra* note 9, at 306.

11. *Chapter 4: Special Immigrant Juvenile Status (SIJS)*, KIDS IN NEED OF DEF., <https://www.supportkind.org/en/about-us/resources/manual/chapter-4?pdf=1> (last visited Nov. 10, 2014).

12. Mandelbaum & Elissa, *supra* note 5, at 606–07.

13. *In re Welfare of C.M.K.*, 522 N.W.2d 768, 771 (Minn. Ct. App. 1996).

14. *Gao v. Jenifer*, 185 F.3d 548, 556 (6th Cir. 1999).

15. Mandelbaum & Steglich, *supra* note 5, at 607.

16. *Id.*

state courts.<sup>17</sup> This disparity has led to varying outcomes in the success of SIJS petitions across the United States, meaning the success of an unaccompanied children's *federal* immigration petition may often depend on which *state* makes the prerequisite findings.<sup>18</sup> Although the TVPRA made SIJS more accessible in many ways,<sup>19</sup> state courts remain confused as to what SIJS determinations they are required—or even permitted—to make.<sup>20</sup>

### C. Court Templates

To help clarify state courts' role in SIJS determination, some state courts have adopted form orders for judges to use in cases where an undocumented, unaccompanied child appears before a state juvenile court. As some scholars have pointed out, these forms are an excellent way to alert judges to potential SIJS implications.<sup>21</sup> But they must be drafted to comply with federal immigration guidance.

In a memorandum providing SIJS guidance to child welfare workers, United States Citizenship and Immigration Services (USCIS) explicitly stated that template orders from state courts concerning SIJS factors “are usually not sufficient to establish” the prerequisite findings.<sup>22</sup> The memorandum noted that a state court “should include

17. Compare *In re Erick M.*, 820 N.W.2d 639 (Neb. 2012) (holding that a child who could be reunified with her mother did not need federal immigration protection), with *H.S.P. v. J.K.*, 87 A.3d 255 (N.J. Super. Ct. App. Div. 2014) (finding that a juvenile's mother did not abandon him, as defined by the statute, while his father did).

18. See Lalla L. Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266 (2014) (highlighting the contrast between SIJS outcomes depending on different states).

19. See DEBORAH LEE ET AL., UPDATE ON LEGAL RELIEF OPTIONS FOR UNACCOMPANIED ALIEN CHILDREN FOLLOWING THE ENACTMENT OF THE WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008 6 (2009), [http://www.ilrc.org/files/235\\_tvptra\\_practice\\_advisory.infonet.pdf](http://www.ilrc.org/files/235_tvptra_practice_advisory.infonet.pdf).

20. See *B.F. v. Superior Court*, 143 Cal. Rptr. 3d 730, 733 (Ct. App. 2012) (reversing the trial court's reading of SIJS requirements); *Eddie E. v. Superior Court*, 167 Cal. Rptr. 3d 435, 439 (Ct. App. 2013) (same); see also Meghan Johnson & Kele Stewart, *Unequal Access to Special Immigrant Juvenile Status: State Court Adjudication of One-Parent Cases*, A.B.A. (July 14, 2014), <http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2014-0714-unequal-access-special-immigrant-juvenile-status-state-court-adjudication-one-parent-case-s.html> (explaining that some language of the TVPRA is still being misapplied throughout state courts).

21. See, e.g., Mandelbaum & Steglich, *supra* note 5, at 612–14.

22. *Special Immigrant Juvenile Status: Information for Child Welfare Workers*, USCIS, [http://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Information\\_for\\_Child\\_Welfare\\_Workers\\_-FINAL.pdf](http://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Information_for_Child_Welfare_Workers_-FINAL.pdf) (last visited Mar. 24, 2015) [hereinafter *Information for Child Welfare Workers*]; see also *Immigration Relief for Abused Children: Information for Juvenile Court Judges and Child Welfare Professionals*, USCIS (Apr. 2016), <https://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Thro>



the factual basis for findings on parental reunification, dependency or custody, and best interests,” important SIJS determinations.<sup>23</sup>

Unfortunately, some state court SIJS templates are not designed to comply with this guidance. New York’s form SIJS order, Form GF-42, lists the SIJS elements yet only leaves three short lines for judges to include the factual determinations concerning reunification.<sup>24</sup> The form does not require any factual information concerning the “best interests” determination, a fundamental SIJS requirement.<sup>25</sup>

In contrast, California courts have adopted SIJS form orders more appropriately tailored to USCIS’s guidance. California Courts Form FL-357/GC-224/JV-357 provides space for a judge to include specific factual findings on each of the necessary SIJS determinations.<sup>26</sup> While USCIS’s memo seemed to disfavor judicial forms, California’s SIJS form appears to encourage judges to include enough factual information to appropriately support a SIJS application.

Another benefit of appropriately drafted template orders is that they solve some of the jurisdictional hesitancy discussed above. In filling out the form order, a judge acts within pre-approved jurisdictional boundaries, avoiding the perceived threat of stepping into federal immigration jurisdiction.<sup>27</sup> California courts have taken an additional measure to signal to judges that they are authorized to make SIJS determinations. California Form FL-356 is a form that unaccompanied children and their counsel can use to petition a California family court to issue a SIJS findings order.<sup>28</sup> The form petition includes the basis of the court’s jurisdiction to make SIJS findings.<sup>29</sup>

Judicial order templates allowing state courts to make the

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ugh%20a%20Job/PED.SIJ.1015\_Brochure\_M-1114B\_Revised\_05.19.16.pdf (providing similar guidance).

23. *Information for Child Welfare Workers*, *supra* note 22. The report also states, “Alternatively, the child may submit separate findings of fact, records from the judicial proceedings, or affidavits summarizing the evidence presented to the court.” *Id.*

24. *GF-42 Special Immigrant Juvenile Status Order 8 U.S.C. § 1101*, N.Y. STATE UNIFIED CT. SYS., <https://www.nycourts.gov/forms/familycourt/pdfs/gf-42.pdf> (last visited Feb. 24, 2017).

25. *Id.*; see *Information for Child Welfare Workers*, *supra* note 22 (explaining that a court order must include a ruling regarding a child’s “best interests”).

26. *California Court Form FL-357/GC-224/JV-357: Special Immigrant Juvenile Findings*, CAL. CTS., <http://www.courts.ca.gov/documents/gc224.pdf> (last visited Feb. 25, 2017).

27. See Mandelbaum & Steglich, *supra* note 5, at 612.

28. *California Court Form FL-356: Confidential Request for Special Immigrant Juvenile Findings—Family Law*, CAL. CTS., <http://www.courts.ca.gov/documents/fl356.pdf> (last visited Feb. 25, 2017).

29. *Id.*

requisite SIJS findings are an important advancement in SIJS state court procedure.<sup>30</sup> These forms provide cover for state courts historically reluctant to make SIJS findings for fear of intruding on federal jurisdiction.<sup>31</sup> All states, especially those states with frequent contact with unaccompanied children, would benefit from developing template SIJS orders assuring judges of their power to make SIJS findings.<sup>32</sup>

But state courts must be conscious of USCIS's detailed fact-finding requirements when they craft these forms.<sup>33</sup> Like California's form order, other states should develop forms requiring a specific factual basis for each element of the requisite SIJS findings.<sup>34</sup> Courts might also consider developing form petitions similar to California Form FL-356 to assist unaccompanied minors in obtaining SIJS findings. It's unlikely that crafting these forms would be burdensome, and if drafted appropriately, they may even conserve judicial resources while ensuring that eligible SIJS applicants receive the findings necessary for their petition.

#### *D. State Legislation*

Another way to clarify state courts' roles in the SIJS process is through carefully crafted state legislation. Some state legislatures have passed laws specifically designed to assist state courts in handling SIJS-related cases. For example, California enacted Senate Bill 873, which amended the California Code of Civil Procedure.<sup>35</sup> The bill, signed into law in September 2014, provided \$3 million in legal aid for unaccompanied minors navigating the removal process.<sup>36</sup> It also

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30. Mandelbaum & Steglich, *supra* note 5, at 612–14 (highlighting the use of forms in New York, California, and Massachusetts).

31. *See id.* (discussing court templates as one of several “uniform practices” that could dispel the misunderstanding that state courts have regarding their authority to make SIJS determinations).

32. *Id.*

33. *See Information for Child Welfare Workers, supra* note 22.

34. As mentioned above, the required SIJS elements are that the unaccompanied minor is: (1) under the age of 21; (2) unmarried; (3) physically present in the United States; (4) declared a dependent upon a court or legally committed to, or placed under the custody of a state agency, individual, or entity appointed by state court; and (5) it would not be in the minor's best interest to be returned to their country of origin. *See Moulding, supra* note 9, at 306.

35. S.B. 873, 2014 Leg. (Cal. 2014). California has also previously enacted Senate Bill 1064, which required state agencies to provide SIJS screening and resources to qualifying unaccompanied minors. *See* S.B. 1064, 2012 Leg. (Cal. 2012) (instructing the state Department of Social Services to develop “guidelines” and “best practices” for “assisting eligible children in applying for special immigrant juvenile status”).

36. IMMIGRANT LEGAL RES. CTR., HOW CALIFORNIA'S NEW LAW SB 873 BENEFITS

specified the role state courts play in the SIJS process,<sup>37</sup> mandating that the Judicial Council “adopt any rules and forms necessary to” allow state courts to make appropriate SIJS findings.<sup>38</sup>

Beyond developing appropriate forms, the California legislature went a step further: it codified state courts’ jurisdiction to make SIJS findings. Senate Bill 873 explicitly stated that California superior courts have “jurisdiction under California law to make judicial determinations regarding” SIJS.<sup>39</sup> The bill requires that California Superior Court judges make SIJS findings where evidence is available to support them.<sup>40</sup> The bill also solidifies the admissibility of children’s testimony concerning their experience, including testimony about SIJS requirements like abuse, neglect, and abandonment.<sup>41</sup>

Maryland has also passed legislation concerning state courts’ authority to address SIJS concerns. Maryland House Bill 315 explicitly granted some Maryland courts jurisdiction to rule on SIJS-related claims.<sup>42</sup> The stated purpose of the bill was to alter “the jurisdiction of an equity court to include a certain petition to award custody or guardianship of an immigrant child.”<sup>43</sup> Because unaccompanied children are eligible to apply for SIJS relief until their twenty-first birthday, Maryland juvenile courts could no longer address required SIJS findings for applicants over eighteen because those courts may only hear cases involving children under eighteen.<sup>44</sup> To remedy this situation, the bill provided “equity courts with jurisdiction over SIJS applicants who would otherwise have aged out of the juvenile court system” but who may still be eligible to apply for SIJS relief.<sup>45</sup>

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UNACCOMPANIED MINORS, [http://www.ilrc.org/files/documents/sb\\_873\\_ilrc\\_final\\_pdf.pdf](http://www.ilrc.org/files/documents/sb_873_ilrc_final_pdf.pdf) [hereinafter CALIFORNIA’S NEW LAW].

37. Cal. S.B. 873; *see also* CALIFORNIA’S NEW LAW, *supra* note 36 (detailing S.B. 873 and its amendments).

38. Cal. S.B. 873.

39. *Id.*

40. CALIFORNIA’S NEW LAW, *supra* note 36.

41. *Id.*

42. H.B. 315, 2014 Leg. (Md. 2014), <http://mgaleg.maryland.gov/2014RS/bills/hb/hb0315f.pdf>.

43. *Id.*

44. *See* Jennifer K. Botts, MD, GEN ASSEMB. DEP’T OF LEGISLATIVE SERVICES, FISCAL AND POLICY NOTE, H.B. 315, 2014 Sess. (2014), [http://mgaleg.maryland.gov/2014RS/fnotes/bil\\_0005/hb0315.pdf](http://mgaleg.maryland.gov/2014RS/fnotes/bil_0005/hb0315.pdf).

45. *Id.*

Other states should look to the California and Maryland models in enacting SIJS-minded legislation. Potential bills might include funding for training and support for non-profit organizations that assist unaccompanied children in seeking the required SIJS determinations in state court. At the very least, states should ensure that their courts have clear jurisdictional grounds to make SIJS determinations. That jurisdictional guidance must include authorizing the appropriate state courts to address SIJS findings for SIJS applicants who age out of the juvenile system but who remain eligible to apply for SIJS. By enacting laws authorizing state courts to address SIJS-related findings, state legislatures would minimize the burden on their courts of SIJS applicants returning to state court to amend previously inadequate SIJS findings.

#### IV. FEDERAL AGENCIES: ENSURING ACCESS TO SIJS DETERMINATIONS THROUGH APPROPRIATE TRAINING

Federal authorities at ports of entry and the border apprehend most unaccompanied children, while up to fifteen percent are apprehended internally within the United States.<sup>46</sup> Surprisingly, this initial contact often determines the outcome of the unaccompanied minor's SIJS petition, rather than the qualifications for the protection.<sup>47</sup> Children detained in federal custody have a harder time accessing state court proceedings necessary to obtain the requisite SIJS findings.<sup>48</sup> Fewer than one percent of children detained in federal immigration custody obtain immigration relief.<sup>49</sup> As a result, a child's ability to apply for and obtain SIJS may depend upon which level of government, state or federal, she reaches first. This Part addresses some areas where federal agencies can ensure children potentially eligible for SIJS receive the screening and state court access they need.

##### A. *Overview of the Federal System*

The main federal entities a child will meet throughout the immigration process are the Department of Homeland Security (DHS) and its component agencies—Immigrations and Customs

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46. THE FLOW OF UNACCOMPANIED CHILDREN, *supra* note 3, at 4.

47. Baum et al., *supra* note 6, at 622.

48. *Id.*

49. *Id.*

Enforcement (ICE), United States Citizenship and Immigration Services (USCIS), and U.S. Customs and Border Protection (CPB)<sup>50</sup>—as well as the Department of Health and Human Services’ (HHS) Office of Refugee Resettlement (ORR),<sup>51</sup> the Department of Justice (DOJ), the Executive Office for Immigration Review (EOIR), and federal immigration courts.<sup>52</sup> Unaccompanied minors apprehended at the border or other ports of entry by federal authorities, usually ICE or CBP, are held in DHS custody.<sup>53</sup> State child welfare agencies and courts also often refer undocumented unaccompanied children to ICE—so-called “internal apprehensions.”<sup>54</sup> Strangely, the child may be referred to ICE and placed in federal custody *before* any state court can make findings or orders concerning dependency, abuse, and neglect—key SIJS determinations.<sup>55</sup>

After a child is placed in CBP or ICE custody, the detaining agency confirms whether he or she is an unaccompanied minor.<sup>56</sup> Once the enforcement agency makes that determination, DHS refers the child to the ORR for transfer to an ORR facility.<sup>57</sup> In ORR custody, the unaccompanied child undergoes a clinical analysis within three to twenty-one days.<sup>58</sup> This analysis reveals details about the child’s biographical history and mental, physical, and psychosocial health.<sup>59</sup>

Concurrently with the child’s detention in the ORR facility, DHS initiates removal proceedings against the child.<sup>60</sup> Through these proceedings, the child typically will either return to his or her country of origin involuntarily, will return voluntarily, or will obtain some form of immigration relief like SIJS.<sup>61</sup> If the child turns eighteen while

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50. See BETSY CAVENDISH & MARU CORTAZAR, APPLESEED, CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS (2011) [hereinafter CHILDREN AT THE BORDER], <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf> (defining various federal immigration authorities in the Glossary section).

51. See OFFICE OF REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/programs/orr> (last visited Apr. 6, 2015).

52. See CHILDREN AT THE BORDER, *supra* note 50.

53. THE FLOW OF UNACCOMPANIED CHILDREN, *supra* note 3, at 10.

54. *Id.*

55. *Id.*

56. *Id.* There has been some criticism of the methods DHS officials use to make this determination. See *id.* at 10 n.23.

57. *Id.*

58. *Id.* at 17.

59. *Id.* These determinations are made through a series of interviews with social workers. At least one of the social workers at each facility must have a master’s degree in social work. See *id.*

60. *Id.* at 9.

61. *Id.*

in ORR custody, they might also be transferred to an adult DHS facility.<sup>62</sup>

### B. Child Welfare Training & Screening

A threshold issue unaccompanied children face while in federal custody is whether they will be identified as potentially eligible for SIJS and, in turn, receive access to state courts to receive the necessary prerequisite findings. Without these findings, an unaccompanied child cannot receive SIJS relief.<sup>63</sup> As discussed below, there is some confusion about just which federal entity is (or should be) equipped to handle child-related concerns.

One study, conducted by the Appleseed Network, suggested that CBP lacked “child welfare expertise” and that CBP officers are “ill-equipped to conduct the kind of child-centric interviewing required by the TVPRA.”<sup>64</sup> The TVPRA requires that all federal authorities “who have substantive contact with unaccompanied children . . . receive specialized training to work with unaccompanied alien children, including identifying children . . . for whom . . . special immigrant relief may be appropriate.”<sup>65</sup> The Appleseed report suggested that screening responsibilities should be transferred to USCIS, the agency responsible for ultimately processing SIJS applications.<sup>66</sup>

However, USCIS might not be suitably equipped to screen children for SIJS eligibility either. In 2011, an ombudsman from USCIS, January Contreras, prepared a report detailing specific suggestions to improve USCIS’s processing of SIJS cases.<sup>67</sup> The report recommended that USCIS provide “specialized training for those officers adjudicating SIJ[S].”<sup>68</sup> It based this recommendation on the observation that USCIS officers were “unfamiliar with techniques

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62. *Id.*

63. See Kristen Jackson, *Through Underused SIJS Process, Immigrant Juveniles May Obtain Legal Status*, 34 L.A. LAW. 20, 22 (Feb. 2012) (“[A] juvenile court must establish the child’s eligibility for immigration relief. Without the court’s findings, the child cannot apply for SIJS.” (footnotes omitted)).

64. CHILDREN AT THE BORDER, *supra* note 50, at 6, 33.

65. *Id.* at 35 (internal quotation marks omitted).

66. *Id.* at 6.

67. JANUARY CONTRERAS, U.S. DEP’T OF HOMELAND SEC., CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN RECOMMENDATION: SPECIAL IMMIGRANT JUVENILE ADJUDICATIONS: AN OPPORTUNITY FOR ADOPTION OF BEST PRACTICES 1–2 (2011), <http://www.dhs.gov/xlibrary/assets/Citizenship-and-Immigration-Services-Ombudsman-Recommendation-Special-Immigrant-Juvenile-Adjudications.pdf>.

68. *Id.* at 6.

for interviewing children, specifically for the sensitive nature of cases involving trauma.”<sup>69</sup>

USCIS issued a memorandum responding to the ombudsman’s recommendations.<sup>70</sup> In its memorandum, USCIS noted that it had already conducted a training session for USCIS officials who are responsible for the SIJS program.<sup>71</sup> This training, however, was primarily concerned with giving USCIS officials guidance on the general procedures and substantive provisions of SIJS law.<sup>72</sup> While this is certainly important training, it does not fix the fundamental problem: immigration officials are not often trained in identifying and addressing child welfare concerns including signs of abuse, neglect, or abandonment. Without identifying these key considerations of SIJS relief, an unaccompanied child in federal custody might not be given access to a juvenile court to receive the necessary requisite findings.<sup>73</sup>

On the other hand, HHS has taken important steps to address child-centric needs within its subagency, ORR. As mentioned, after apprehending an unaccompanied minor, DHS refers the child to ORR.<sup>74</sup> In January 2015, the ORR published the “ORR Guide: Children Entering the United States Unaccompanied.”<sup>75</sup> The Guide details several policies and procedures governing how ORR screens and places unaccompanied children.<sup>76</sup> After referral from DHS, ORR either places an unaccompanied child in one of its shelters or in foster care, or reunites the child with a family member.<sup>77</sup>

In the past, ORR has had a difficult time appropriately screening and placing children in its custody. Because so many children are

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69. *Id.* (quotation included on cover page).

70. Lori Scialabba, *Response to Recommendation 47, Special Immigrant Juvenile (SIJ) Applications: An Opportunity for Adoption of Best Practices*, USCIS (2011), <http://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20For%20mal%20Recommendations/cisomb-2011-response47.pdf>.

71. *Id.*

72. *Id.*

73. See LISA FRYDMAN ET AL., CTR. FOR GENDER & REFUGEE STUDIES, KIDS IN NEED OF DEFENSE, A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM, 3 (2014), [http://www.uchastings.edu/centers/cgrs-docs/treacherous\\_journey\\_cgrs\\_kind\\_report.pdf](http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf) (noting federal agents lack the “training and expertise to be able to screen . . . children effectively and ensure that unaccompanied children who need U.S. protection are identified”).

74. THE FLOW OF UNACCOMPANIED CHILDREN, *supra* note 3, at 10.

75. *ORR Guide: Children Entering the United States Unaccompanied*, OFFICE OF REFUGEE RESETTLEMENT (2015), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied>.

76. *Id.*

77. Kandel, *supra* note 1, at 8.

referred to ORR custody, ORR struggles “to meet demand for its services while maintaining child welfare protocols and administrative standards.”<sup>78</sup> A recent investigation by the United States Senate revealed that some children released from ORR custody to distant relatives in 2014 “ended up being forced to work in oppressive conditions on an Ohio farm.”<sup>79</sup> In response to the investigation, officials from HHS, ORR’s parent department, “acknowledged limitations of their screening and post-placement follow-up procedures” for finding and reviewing appropriate placements for unaccompanied children with relatives or unrelated adults.<sup>80</sup>

So CBP (the agency responsible for apprehending unaccompanied children), USCIS (the agency responsible for processing SIJS applications), and ORR (the agency responsible for placing and housing unaccompanied children) all have significant training or resource deficits concerning the screening and care of children. While this presents a problem for all children in the federal immigration system, it creates an even more substantial burden for SIJS applicants, who must access courts *outside* the federal system to receive the necessary state SIJS findings. Without the assistance of well-trained immigration officials, children potentially eligible for SIJS relief might never be referred to the state court system or placed in an appropriate long-term setting. To ensure that children are appropriately cared for and screened for SIJS, the following Sections discuss practical proposals to remedy this issue.

### C. Funding

The most obvious way to remedy the lack of appropriate training and resources in federal immigration agencies is to increase funding. Congress has already begun this task. In 2015, Congress dedicated \$1.6 billion to ORR, money largely directed toward assisting unaccompanied minors.<sup>81</sup> Congress also appropriated \$3.4 billion to DHS and its sub-agencies, money to be used for detecting unauthorized immigrants, enforcing immigration laws, and removing unauthorized immigrants from the United States.<sup>82</sup>

However, large sums of money dedicated to DHS for immigration

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78. *Id.* at 10.

79. *Id.*

80. *Id.*

81. Kandel, *supra* note 1 (information included in Summary).

82. *Id.* (information included in Summary).



enforcement might not change conditions and screening procedures concerning unaccompanied minors. Many unaccompanied children who enter the United States willfully present themselves to immigration authorities and do not attempt to avoid apprehension.<sup>83</sup> To appropriately deal with issues facing unaccompanied children, funds should be dedicated to internal procedures and training of DHS authorities rather than apprehension and enforcement. Consequently, to appropriately address the child-centric concerns in federal immigration agencies, Congress should favor appropriating funds to specific, child-centric training programs, even if in small amounts, rather than assuming general enforcement budgeting accounts for that kind of training.

#### *D. NGO Participation*

In addition (or in the alternative) to increasing federal funding to train federal immigration agents, the federal government could continue to allow nongovernment organizations to participate in screening children for SIJS eligibility. ORR has partnered with non-profit organizations to provide unaccompanied minors in ORR custody access to pro bono attorneys.<sup>84</sup> The VERA Institute, for example, manages “a national network of legal services providers for unaccompanied children” under contract with ORR.<sup>85</sup> The network provides free legal services, individual screenings, and seminars to unaccompanied children.<sup>86</sup>

Partnerships like the one between ORR and VERA are essential to providing adequate representation and screening for minors where federal resources run thin. However, to ensure that SIJS-eligible children are adequately protected, DHS should also consider partnering with NGOs to give volunteer attorneys and social workers access to unaccompanied minors earlier in the process, such as during CBP processing.

After apprehending an unaccompanied child, CBP agents

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83. AMERICAN IMMIGRATION COUNCIL, *CHILDREN IN DANGER: A GUIDE TO THE HUMANITARIAN CHALLENGE AT THE BORDER* (July 2014), [http://www.immigrationpolicy.org/sites/default/files/docs/children\\_in\\_danger\\_a\\_guide\\_to\\_the\\_humanitarian\\_challenge\\_at\\_the\\_border\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/children_in_danger_a_guide_to_the_humanitarian_challenge_at_the_border_final.pdf) [hereinafter *CHILDREN IN DANGER*].

84. *THE FLOW OF UNACCOMPANIED CHILDREN*, *supra* note 3, at 22.

85. *Unaccompanied Children Program*, VERA INST. OF JUSTICE, <https://www.vera.org/projects/legal-services-for-unaccompanied-children/learn-more> (last visited Feb. 25, 2017).

86. *Id.*

“process” the child.<sup>87</sup> Processing includes “gathering biographic information such as [the child’s] name and age as well as their citizenship and whether they are unaccompanied.”<sup>88</sup> DHS must transfer the child to ORR custody within seventy-two hours of identifying the individual as an unaccompanied child.<sup>89</sup> However, as noted above, CBP officials are not often trained in appropriate techniques for interviewing children or identifying signs of abuse, neglect, or abandonment.<sup>90</sup>

Allowing NGOs to provide trained social workers to assist CBP in interviewing and identifying children could afford unaccompanied children quicker access to ORR resources and placement. This would prevent children from remaining in DHS custody and would allow them to be housed in ORR placements. Furthermore, by delegating the role of interviewing unaccompanied children to third-party, trained professionals, CBP agents could focus their efforts on other enforcement activities.

#### *E. Relationship Between State and Federal Systems*

The final area where SIJS procedure might improve is by coordinating federal and state entity timelines. Children outside federal custody who are first contacted by state actors have more immediate access to state courts to receive the requisite SIJS findings. But, at times, unaccompanied minors in state court proceedings will be transferred to DHS custody before their cases are processed.<sup>91</sup> In fact, the state court proceedings are sometimes “dismissed . . . to expedite transfer of the child to DHS custody.”<sup>92</sup>

However, dismissing a child’s state court proceedings prevents her from obtaining the necessary state court SIJS findings.<sup>93</sup> Instead, DHS should determine whether a child is already involved with state court welfare proceedings and delay taking custody of the child until

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87. Kandel, *supra* note 1, at 5.

88. *Id.*

89. THE FLOW OF UNACCOMPANIED CHILDREN, *supra* note 3, at 10 n.27. For children from Canada and Mexico, DHS must screen these children within 48 hours “to determine whether they should be returned to their country or transferred to HHS and placed in removal proceedings. Kandel, *supra* note 1, at 4.

90. CHILDREN AT THE BORDER, *supra* note 50, at 6, 33.

91. THE FLOW OF UNACCOMPANIED CHILDREN, *supra* note 3, at 10.

92. *Id.*

93. See Jackson, *supra* note 63, at 22 (“[A] juvenile court must establish the child’s eligibility for immigration relief. Without the court’s findings, the child cannot apply for SIJS.” (footnotes omitted)).

completion of those proceedings. In doing so, DHS would increase potentially SIJS-eligible minors' chances of obtaining relief. It would also likely decrease the number of minors in the federal system, specifically in overburdened ORR shelters and placements,<sup>94</sup> by allowing the children to stay in state placements during the pendency of their state court proceedings.

#### V. CONCLUSION

SIJS requires a uniquely cooperative relationship between federal and state governments. However, state actors remain uncertain of their role in the SIJS process, and federal agencies are often ill equipped to handle child-centric needs. To combat these issues, states must clarify their courts' role in SIJS cases, and the federal government must ensure that its agencies are better suited to address the physical, emotional, and legal needs of SIJS-eligible minors. These practical changes, among others, will promote lawful access to SIJS for abused, neglected, and abandoned unaccompanied minors.

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94. Kandel, *supra* note 1, at 5.