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July 15, 2020

Lauren Alder Reid,
Assistant Director, Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

Re: Comments Opposing Proposed Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, Federal Register Vol. 85, No. 115 (June 15, 2020), OMB Control Number 1615–0067

Dear Assistant Director Reid,

We are writing to submit comments for consideration in the agency's development of final revisions to Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, Federal Register Vol. 85, No. 115 (June 15, 2020).

Statement of Interest

The Center for the Human Rights of Children (CHRC) is an interdisciplinary Center representing educators and scholars in the fields of law, child development, child welfare, social work, education, psychology, public health, and mental health. Recognizing that children require special protections due to their vulnerabilities, the Center for the Human Rights of Children (CHRC), a University Center of Excellence, was established in 2007 to pursue an agenda of research, outreach, education, and advocacy to address critical and complex issues affecting children and youth, both locally and globally. The CHRC strives to honor and advance the principles derived from the UN Convention on the Rights of the Child and believes that a child's survival and healthy future is dependent on family, community, civil society, and government working toward a shared vision that protects their fundamental rights. Together, CHRC Directors have over 30 years of experience working with vulnerable migrant children across an array of disciplines, including immigration law, including in the context of child trafficking and exploitation, child refugee and asylum seekers, and other humanitarian considerations of migrant children. CHRC students who contributed to this comment represent the disciplines of law, psychology, and education.

As a general observation, the regulations, as written, present a gross overreach of executive authority that ignores the purpose and spirit of the Refugee Act of 1980, abdicates U.S. obligations under the Refugee Protocol, flouts Constitutional due process protections and ignores the inviolable *jus cogens* law of non-refoulement. Nonetheless, our comment focuses on the fact

that the proposed regulations violate the rights and special protections American jurisprudence and international law affords the most vulnerable among us: children.

The proposed regulations stand in opposition to domestic and international law related to the protection of refugees, in particular, children.

The proposed regulations completely disregard the special position of children appearing at our borders and seeking protection. The regulations, as set forth, are designed to dictate how all asylum seekers will be treated. UNHRC and UNICEF estimate that over half of the world's refugees are children. Yet, the term "unaccompanied child" does not appear once in the text of regulations.[1] In 43 pages of guidance, the word "child" appears only 13 times. At all times, the child is treated as an extension of the parent with one exception: a child is permitted to request a separate "fear evaluation" from the parents. However, there is no guidance for how to elicit that request from a child, nor any special procedural provisions for pursuing a "fear evaluation" of a child alone.

In fact, the entire procedural and substantive asylum framework, as constructed through this regulation, treats children either as an extension of the parent or as an adult in miniature which is in direct violation of the tenants of the United Nations Convention on the Rights of the Child, US case law, as well as best practices supported by scientific research addressing the developmental differences between children and adults. The omission of any special considerations for children alone represents an abject failure of these regulations to properly administer the rule of law, as well as common sense, as it relates to refugee children. The comments that follow deal, specifically, with the procedural and substantive deficiencies in the regulations as they relate to children and the resulting harm to children if these regulations are finalized.

Comments on Section A "Expedited Removal and Screenings in the Credible Fear Process": The proposed regulatory scheme for adjudicating asylum cases is ultra vires and flouts Constitutional due process protections, especially for children.

Section A of the regulations sets out an *ultra vires* regulatory framework which permits border officials to adjudicate the merits of an asylum claim vis-a-vis a completely new asylum adjudication process pursuant to the phrase, "for further consideration of the application for asylum." The process proposes to permit CBP officers to determine the merits of the asylum claim rather than place an individual who passes a credible fear interview into removal proceedings. For the last 25 years, since the implementation of IRIIRA, the government has placed individuals who pass a credible fear interview and warrant "further consideration of the application for asylum" into removal proceedings under INA section 240. Indeed, there are no other types of adjudicatory removal proceedings described in the INA. However, these new regulations seek to create an entire extrajudicial adjudicatory system through which to determine asylum eligibility.

The regulations fail to state clearly that under no circumstances is an unaccompanied child to be subject to the new asylum process. Pursuant to the TVPRA 2008, all children found to fit the

[1] The term "unaccompanied alien child" does appear briefly in a footnote detailing that "Unaccompanied alien children, as defined in 6 U.S.C. 279(g)(2), are exempt from expedited removal. See 8 U.S.C. 1232(a)(5)(D)(i)."

definition of an "unaccompanied alien child"[2] shall be placed in the removal proceedings pursuant to INA Section 240. Unaccompanied children cannot be subject to the procedures of INA Sec. 235 "expedited removal." This appears in a footnote to the regulations, but given the Administrations proclivity for abandoning the reasonable interpretation of statutes (such as creating a new adjudicatory process for asylum seekers), we recommend that the protections afforded to unaccompanied children under the TVPRA should be stated more clearly in the regulations.

The regulations should also clearly articulate how this process applies to children who have sought severed "fear evaluations" from their parents. Severing the evaluations implies separate tracks for hearings, separate fear determinations, and possibly separate outcomes. Officers conducting "fear evaluations" with a child outside of the company of a parent or legal guardian should be provided with significant procedural guidance and training in order to ensure the process properly and accurately reflects both a legally and developmentally appropriate procedure for a child seeking asylum alone.

Comments on Section B "Relating to Asylum Procedures": The novel frivolousness and pretermission procedures hold children to an impossible standard.

1. ***The novel standard and procedures for frivolous asylum findings ignores the American jurisprudence relating to a child's ability to exercise mature judgment.***

The proposed Rule purports to "clarify" the definition of a frivolous claim in 8 C.F.R. §§ 208.1 and 1208.1. Under the current regulations, an asylum seeker who files a frivolous asylum application may be barred from receiving any immigration benefit.[3] This harsh penalty is generally reserved for an asylum applicant who knowingly fabricates any material element of the application and has received notice prior to filing of the potential consequences of filing a frivolous claim.[4] The proposed rule, however, would broaden the interpretation to include individuals who are "willfully blind" to any materially false elements of their asylum application, as well as any asylum claims which are "knowingly filed without regard for the merits of the claim."[5] Notwithstanding the vague and overly broad language of "willfully blind" to all applicants, the proposed Rule does not make exceptions for children

By not providing exceptions for children, the Department ignores the distinction between the culpability of adults and children in the legal context and flouts the Supreme Court's admonishment that children are not to be treated as "adults in miniature."[6] The Court has long recognized that "children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them."[7] Indeed, social science

[2] *Id*.

[3] 8 USC § 1158(d)(6) detailing penalties for frivolous asylum applications.
[4] *Id.*

[5] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264, 36273 (June 15, 2020).

[6] JDB v North Carolina 546 Sup Ct 261, 273-274 (2011)

[7] Both cited in the ABA article above - JDB v North Carolina 546 Sup Ct 261, 273-274 (2011)

clearly demonstrates that children inherit a special space in the law due to their developing social and cognitive functioning.[8] Moreover, it has been shown that children are far more likely to make false or inconsistent statements to law enforcement or judicial authorities, and they are far less likely to understand their individual rights and privileges within the legal context.[9] This inherent predilection is exacerbated at the border where child migrants are subjected to terse, and often adversarial, processing on the heels experiencing untold hardship, exploitation, and trauma prior to and during their journey to the U.S. border.[10] Migrant children fleeing persecution will have compound trauma and preexisting concerns about the reliability of authority figures. The applicability of the frivolousness findings in this context seems an unnecessary added cruelty to the most vulnerable of migrants

In addition to complications with the procedures of applying frivolousness findings to children, the substantive determination itself undermines due process for any child seeking protection. Specifically, the proposed Rule's frivolousness standard indicates that the finding can be applied where an asylum seeker "knowingly filed without regard for the merits of the claim."[11] The standard holds the asylum seeker to the burden of knowing the complex legal basis of their prayer for relief, as well as American jurisprudence as it relates to their claim. The failure of the asylum seeker to determine whether their claim is "meritorious" will be grounds for a frivolousness finding and the permanent consequences that flow from the finding. Since the INA doesn't provide the right to appointed counsel for immigrants in removal proceedings, including children,[12] it is absurd that the proposed regulations could permit the government to create sanctions against an individual for their failure to learn the law as it relates to their case. Children should not be subject to the absurdity of this new rule. A child, who is physically and developmentally unique from an adult, cannot be tasked with understanding the merits of their claim. That is the very responsibility of the adjudicating party with respect to children's asylum

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Double check cite. Miller v Alabama 132 Sup Ct 2455 2458 (2012) – no sentencing scheme for life w/out parole

[8] See generally Sarah B. Johnson, et. al., Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy, NAT'L INST. OF HEALTH (Sept. 2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2892678/; (stating that "a child's prefrontal cortex is far less developed than that of an adult and can lead to a diminished capacity to think critically, process information, and regulate emotions.")

[9] Lorelei Laird, *Police Routinely Read Juveniles Their Miranda Rights, But Do Kids Really Understand Them?*, AM. B. ASS'N: CHILD L. PRAC. TODAY, Aug. 1, 2016, available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/august-2016/police-routinely-read-juveniles-their-miranda-rights--but-do-kid/.; *see also* Hana M. Sahdev, *Juvenile Miranda Waivers and Wrongful Convictions (Winner of American Constitution Society's National Student Writing Competition)*, 20 U. Pa. J. Const. L. 1211, 1217-18 (2018), available at https://scholarship.law.upenn.edu/jcl/vol20/iss5/5.

[10] Manuel Paris, Jr., Psy.D. *et al.*, IMMIGR. PSYCHOL. WORKING GROUP, Vulnerable But Not Broken: Psychological Challenges and Resilience Pathways Among Unaccompanied Children from Central America, 36, (2018) available at https://www.nwirp.org/wp-content/uploads/2018/08/Vulnerable-But-Not-Broken.pdf.

[11] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264, 36273 (June 15, 2020).

[12] INA Sect 240 provides the right to counsel but not at government expense which, as a practical matter, means that the vast majority of respondents appear pro se.

claims – to hear the story of a child and parse out the legal elements so as to protect the child where their story gives rise to refugee status. Placing that burden on a child, appearing without counsel, violates procedural due process.

2. ***The novel procedure for pretermission of "legally insufficient" asylum claims placed the child asylum seeker in the position of knowing and understanding how to state a claim for relief.***

The proposed Rule's addition of a mechanism to pretermit "legally insufficient" applications creates yet another unreasonable and harmful hurdle for child migrants in the asylum process. The added language would allow DHS to move to pretermit an application which fails to state a *prima facie* case for asylum, and allows immigration judges to pretermit claims *sua sponte* on the same grounds.[13] For many of the same concerns stated above in response to the proposed Rule's new frivolousness standard and procedures, allowing DHS and/or IJs to terminate a claim before allowing a child to present their story due to "legal insufficiency" creates an unreasonable barrier to asylum for child migrants. Many children will appear *pro se* and are not capable of understanding the technical nuance of stating a legal claim. This burden falls on the adjudicator – it is their responsibility alone to hear a child's story and determine whether the child can be offered protection under U.S. law. To require a child to present their case, legally developed for DHS and the IJ to review, ignores not just due process rights of a child in proceedings, but the developmental differences between adults and children that are confirmed not just by science, but by law, policy and practice in other legal systems in the United States. We strongly recommend that children should be exempted from pretermission.

Comments on Section C "Relating to Standards for Consideration During Review of an Application for Asylum or for Statutory Withholding of Removal":

1. ***The novel construction of "membership in a particular social group" will categorically exclude the majority of children who seek asylum on account of "private-sphere" persecution.***

As stated earlier, children comprise more than half of the world's refugee population based on universally applied international definitions of "refugee." However, the proposed rule would introduce *new* standards for membership in a particular social group (PSG) membership that would categorically eliminate asylum eligibility for children. These definitions ignore the reality that the vast majority of child migrants flee "private sphere" persecution. The effects of private persecution on children are detailed below, as well as the special considerations that must be made to adequately address protection for children within the asylum context.

The regulations seeks to categorically omit from consideration for particular social group " (7) interpersonal disputes of which governmental authorities were unaware or uninvolved, Matter of Pierre, 15 I&N Dec. 461, 462–63 (BIA 1975); see also Gonzalez-Posadas v. Att'y Gen. of U.S., 781 F.3d 677, 685 (3d Cir. 2015); (8) private criminal acts of which governmental authorities were unaware or uninvolved, Matter of A–B–, 27 I&N Dec. at 343–44; see also Gonzales-Veliz v. Barr, 938 F.3d 219, 230–31 (5th Cir. 2019)." This misinterpreted case law would allow the

[13] 85 Fed. Reg. at 36277.

government to bar from eligibility children who have been subject to extraordinary domestic cruelty including acts of abuse, torture and trafficking – to name only a few – on the basis that their persecutor was a non-state actor or where the government was "uninvolved" (whatever that means – the INA, by statute, defines a refugee as one who is "unable or unwilling" to avail themselves of the protection of their government.")[14] The definition ignores the reality that many children seek protection based on private-sphere human rights violations and seek protection in the United States because of the notorious impunity of their home countries in offering protection from serious and significant harm. It also presumes that children have the developmental capacity, knowledge, and wherewithal to attempt to seek protection from their respective governments as individuals.

As written, the proposed Rule would also deny asylum where the PSG is based on the individual's targeted recruitment by a criminal, gang, or terrorist organization or where the individual was a member of a criminal enterprise.[15] This strict definition overlooks the legal obligations under the TVPRA to provide protection for child trafficking victims.[16] In the event that a UAC seeks refuge from targeted coercion and trafficking by a criminal enterprise, this provision of the proposed Rule would categorically disfavor that claim without accounting for the potential harm and persecution that the child has suffered. It furthermore ignores the coercive nature of "forced criminality" associated with children involved in gangs. Rather than appropriately view the child as a victim of a severe form of human trafficking – which in fact they are (forced criminality such as child soldiers and compelled or coerced drug trafficking fits the definition of human trafficking pursuant to the TVPRA and the Optional Protocol on the Sale of Children, of which the United States has ratified) – the rule categorically denies asylum to these children for failure to craft an appropriate PSG.

The proposed Rule also creates a bar to children claiming membership in a PSG on the basis of gender and LGBTQ status.[17] The Supreme Court in *Bostock* established that discrimination on the basis of homosexual or transgender status necessarily discriminates on the basis of gender. Since "gender" is the same language in the proposed Rule as at issue in *Bostock* in Title VII, the effects of the proposed Rule would necessarily bar asylum claims based on LGBTQ status for the purposes of establishing PSG grounds. Furthermore, many LGBTQ children from other countries experience the compound of effects of persecution in both the public and private sphere. For many LGBTQ children, their parents or families are often the initial perpetrators of violence and harm against them, compounded by a subsequent lack of governmental protections from harm and persecution. This definition will categorically bar claims for asylum made by desperate children who flee severe persecution in the home on the basis of their gender or LGBTQ status.

Finally, in addition to the substantive legal changes proposed in the regulations, the proposed process for seeking asylum based on PSG also discriminates against children. The proposed regulations state that while in proceedings before an immigration judge, the asylum-seeker must

[14] Refugee definition INA 1010(a)(42).

[15] 85 Fed. Reg. at 36279.

[16] 8 U.S.C. §1232.

[17] *Bostock v. Clayton Co., Georgia,* 140 S.Ct. 1731, 1741 (2020).

first define the proposed particular social group as part of the asylum application in the record. If the applicant for asylum fails to do so, the opportunity will be deemed to have been waived. For the reasons articulated earlier about children's ability to process and share information in an adversarial proceeding, we believe this will be an impossible hurdle for most children. This is especially salient because children do not have a right to court-appointed counsel in these proceedings.

2. ***The narrow interpretation of political opinion will categorically exclude children targeted by private actors on account of their socio-political beliefs and expressions.***

The new regulations similarly ignore any special considerations for children when they articulate that persecution based on political opinion can only qualify for protection when it takes place in the public sphere. The regulations erroneously state that "BIA case law makes clear that apolitical opinion involves a cause against a state or a political entity, rather than against a culture. Matter of S–P–, 21 I&N Dec. 486, 494 (BIA 1996)." The regulations reach this sweeping conclusion by citing a 1996 case, but also fails to account for the significant intervening case law to the contrary.[18] The regulations fail to explain where culture and causes against political entities can be disentangled. Under this guidance, children pushing back against gender norms in countries that practice Sharia law can be viewed as engaging private acts of cultural defiance. Young women protesting cultural practices that have not been outlawed – such as female genital mutilation – might also be deemed to lack a political opinion on the matter.

The proposed Rule further states that persecution on account of one's political opinion related to opposition to crime, gang, terrorist, or guerilla organizations will "not be favorably adjudicated. This provision ignores positive precedent which has recognized opposition to gangs as sufficient to establish persecuted political opinion.[19] In *Alvarez-Lagos v. Barr*, the Fourth Circuit held that the petitioner's allegations that a gang had imputed an anti-gang political opinion to her could have been a central reason for fear of persecution if returned.[20] Similarly, in *Hernandez-Chacon*, the Second Circuit held that the immigration judge had erred in not considering the imputed anti-gang political opinion of the petitioner.[21] This provision could have devastating consequences on children who are believed by gangs to hold an anti-gang political opinion. These children are often vulnerable to being targeted by those organizations for retribution. We have seen this in our own practice and research.

3. ***The unlawful construction of "persecution" defies the purpose of the refugee statute and will require the child to first suffer extreme harm before seeking protection in the United States.***

[18] Cite cases such as Matter of Ali

[19] *Alvarez-Lagos v. Barr*, 927 F.3d 236, 251 (4th Cir. 2019); *Hernandez-Chacon v. Barr*, 948 F.3d 94, 102-03 (2d Cir. 2020).

[20] *Alvarez-Lagos*, 927 F.3d at 251.

[21] *Hernandez-Chacon*, 948 F.3d at 105.

The Departments proposes "adding a new paragraph to 8 CFR 208.1 and 1208.1 to define persecution and to better clarify what does and does not constitute persecution. It would provide that persecution is an extreme concept of a severe level of harm… involving a severe level of harm that includes actions so severe that they constitute an exigent threat." The new standard limits the definition in ways that violate *jus cogen* principle of non-refoulement,[22] a legal standard which cannot be set aside. Notwithstanding the generally unlawful nature of this interpretation, this new standard creates an unacceptable burden for children

The proposed regulations flatly ignore agency guidance distinguishing the experience of the child as it relates to persecution. Since 1998, the U.S. government (then-INS) has maintained that

> In assessing a child's claim of persecution, asylum adjudicators should follow the procedural considerations outlined above. As in all asylum cases, the Asylum Officer must assess whether the harm that the child fears or has suffered is serious enough to constitute "persecution" as that term is understood under the relevant international and domestic law. The Board of Immigration Appeals (BIA) has interpreted persecution to include threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom. Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985), overruled on other grounds, by Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). Physical or mental harm, including rape, has been considered persecution. Matter of D-V-, Int. Dec. #3252 (BIA 1993). In addition, though discriminatory practices and experiences are not generally regarded by themselves as persecution, they "can accumulate over time or increase in intensity so that they may rise to the level of persecution." …
>
> The harm a child fears or has suffered, however, may be relatively less than that of an adult and still qualify as persecution. Given the "variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary. " UNHCR Handbook, supra note 18, at 152. The types of harm that may befall children are varied. In addition to the many forms of persecution an adult may suffer, children may be particularly vulnerable to sexual assault, forced labor, forced prostitution, infanticide, and other forms of human rights violations such as the deprivation of food and medical treatment. Cultural practices, such as FGM, may under certain circumstances constitute persecution. Matter of Kasinga, Int. Dec. 3278 (BIA 1996).[23]

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[22] UNHCR definition to be included here.

[23] File: 120/11.26

December 10, 1998

Human Rights Day

MEMORANDUM FOR:

Asylum Officers

Immigration Officers

Headquarters Coordinators (Asylum and Refugees)

FROM:

Jeff Weiss

Acting Director

Office of International Affairs

SUBJECT: Guidelines For Children's Asylum Claims

Indeed, the US government has long recognized that "the types of harm that may befall children are varied… In addition to the many forms of persecution an adult may suffer, children may be particularly vulnerable to sexual assault, forced labor, forced prostitution, infanticide, and other forms of human rights violations such as the deprivation of food and medical treatment."[24] Indirect harm, such as harm committed against a child's parents, caregivers, or other family members, may also constitute persecution to a child.[25] A number of cases in the Courts of Appeals have recognized that children suffer significant harm when their caregivers experience physical or psychological trauma that impedes their ability to care for children.[26]

The UNHCR Handbook indicates that minors may lack the maturation required to form a well-founded fear of persecution, suggesting that the fear experienced by children may not have the same significance as in the case of an adult.[27] In *Abay v. Ashcroft*, the Sixth Circuit court's decision reflected the UNHCR's distinction regarding children's subjective fear. In this case, the court overturned an Immigration Judge's finding that a nine-year-old child expressed only a "general ambiguous fear," indicating that young children may be unable to articulate fear to the same degree as adults.[28] More so, it is not unreasonable for a child to be unable to provide an objective basis for a subjective fear.[29] For instance, in *Cruz-Diaz v. INS*, the Fourth Circuit found that a seventeen-year-old child who had entered the United States two years prior had a subjective fear of persecution but had not established an objectively reasonable fear with a nexus to one of the protected grounds.[30] To that end, relying upon a child to establish a nexus to a protected ground is also unreasonable and developmentally inappropriate. According to the U.S. Citizenship and Immigration Service, a child may express fear or have experienced harm without understanding the persecutor's intent, and "an incomplete understanding of the situation does not mean that a nexus between the harm and a protected ground does not exist."[31]

Additionally, the impact of trauma exposure and post-traumatic stress are of particular importance in children's asylum procedures, not only because it indicates the high level of need these children possess, but also because trauma exposure may compromise a child's ability to sufficiently engage with immigration legal proceedings.[32] Children exposed to trauma have been found to experience significant post-traumatic stress symptoms (e.g., painful recall, avoidance, and hyperarousal), high rates of psychopathology such as anxiety and depression, and additional impairments compared to adults.[33] These impairments during childhood include the loss of recently acquired developmental skills (i.e., regression), the onset of new fears or the re-activation prior fears, separation anxiety, and psychosomatic complaints such as stomach aches and headaches.[34] More so, children may be at risk for detrimental consequences to their biological stress systems, cognitive development, and information processing.[35]

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[24] USCIS, Guidelines for Children's Asylum Claims, Asylum Office Basic Training Course, March 21, 2009, p.19.
[25] (CGRS, 2015).
[26] (CGRS, 2015).
[27] UNHCR Handbook.
[28] *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004).
[29] (USCICS, 2019).
[30] Cruz-Diaz v. INS, 86 F.3d 330, 331 (4th Cir. 1996) (per curiam).
[31] (USCIS, 2019 p. 53).
[32] (Given-Wilson, Hodes, & Herlihy, 2017).
[33] (Copeland, Keeler, & Angold, 2007).
[34] (Kaminer, Seedat & Stein, 2005).
[35] (De Bellis & Zisk, 2015).

Asylum procedures for children require a developmentally appropriate, trauma-informed, and culturally sensitive lens in which the child's evolving capacities and needs are thoroughly considered.[36] The proposed regulations, as they relate to persecution, flatly ignore the rights of children and fail to protect children in any meaningful way.

4. ***The novel interpretation of the "nexus" requirement conflates nexus with other legal elements and creates an insurmountable barrier to asylum for the majority of children who suffer private-sphere persecution.***

The nexus requirement in asylum law is another area in which children experience significant difficulty due to age and development. Children are often unable to understand, identify, or articulate the reasons for which they are being persecuted. As a result, adjudicators often must take an active role in reviewing the context for the persecution to learn the basis or motive for such acts. The proposed regulations seek to categorically eliminate certain types of animus (including animus based on gender) – a clear conflation of the nexus element with social group and other elements. For purposes of these comments, however, we focus on the inappropriate categorical exclusion of interpersonal – private -sphere persecution – from protection.

The proposed rule will also categorically deny cases based on "personal animus or retribution" and/or "interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue."[37] This rule creates an effective bar to asylum for private-sphere persecution. This new definition categorically fails to protect the refugee child.

5. ***Internal Relocation & Firm Resettlement***

The proposed regulations seek to "presume that for applications in which the persecutor is not a government or government-sponsored actor, internal relocation would be reasonable unless the applicant demonstrates by a preponderance of the evidence that it would not be."[38] The Center for Gender and Refugee Studies (2015) states that "there is a strong argument that it is never reasonable for a child to relocate on his or her own."[39] The U.S. Citizenship and Immigration Services (2019) largely concurs, suggesting that "it is generally not reasonable to expect a child to internally relocate by himself or herself."[40] Where internal relocation may be relevant and reasonable for an adult, it may not be in the case of a child, particularly if the child is unaccompanied. The proposed regulations fail to account for these differences by holding all applicants to the same burden regardless of age or developmental period.

The UNHCR argues: "Internal flight or relocation alternatives, for instance, would not be appropriate in cases where unaccompanied children have no known relatives living in the

[36] (Given-Wilson, Hodes, & Herlihy, 2017; Pobjoy, 2017).

[37] FR at page 36281

[38] FR at page 36282

[39] Center for Gender and Refugee Studies (2015) at 31.

[40] USCIS (2019) at 52.

country of origin and willing to support or care for them and it is proposed that they relocate to live on their own without adequate State care and assistance. What is merely inconvenient for an adult might well constitute undue hardship for a child, particularly in the absence of any friend or relation. Such relocation may violate the human right to life, survival and development, the principle of the best interests of the child, and the right not to be subjected to inhuman treatment."[41] Similarly, regulatory language concerning "firm resettlement" will be broadened in ways that harm children by requiring children to make efforts to normalize their status and or seek protection in transit countries. Relocation and the acquisition of status as it relates to children should be viewed through a child appropriate lens.

6. ***Discretionary Factors***

The proposed rules fail to note how the new discretionary and adverse factors should apply to children. Some of the factors that must be considered under the proposed rule involve criminal conduct that could bar asylum; however, the rule does not consider this type of conduct from a child's perspective. Discretion should be applied to children differently, especially when considering criminal history and intent. The proposed rule fails to mention the long recognized differences between the culpability of adults and children. As noted, the U.S. Supreme Court has taken note that juveniles lack the reasoning and judgment of adults, have less impulse control, and are more susceptible to the influence of others.[42] Therefore, children are treated differently than adults and crimes they may have commit as children do not necessarily demonstrate bad intent.[43] Additionally, children have a different perception of the law and the legal system which affects their decision making regarding criminal conduct and the law, but the proposed rule ignores this and never mentions how a child's criminal history should be viewed by an adjudicator.[44]

Comments on Section D Information Disclosure: The diminished confidentiality protections will have a chilling effect on the child refugee.

The proposed rule unnecessarily eviscerates confidentiality by opening the availability of disclosures pursuant to third-party authorization under § 208.6(c).[45] The failure to continue robust confidentiality of information provided by asylum seekers diminishes the ability of the applicant to report their honest experiences without fear of retaliation.[46] These regulations clearly fail to recognize the special harms this amendment would cause to children.

Children require robust confidentiality because disclosure can result in risk to the asylum applicant, his family, and others.[47] In a variety of settings, social science experts recognize the

[41] UNHCR at 164.

[42] *Graham v. Florida*, 130 S.Ct. 2011, 2026 (2010)
[43] *Id.*
[44] *J.D.B. v. North Caroline*, 131 S.Ct. 2394, 2403 (2011).
[45] 8 C.F.R. §§ 208.6(a), 1208.6(a); Lin v. U.S. Dep't of Justice, 459 F.3d 255, 39 (2d Cir. 2006) (stating that all information pertaining to an asylum application shall not be disclosed to third parties where disclosure would allow the third party to infer a person had applied for asylum).
[46] Corovic v. Mukasey, 519 F.3d 90 (2d Cir. 2008) (showing a scenario where the U.S. government attempted to validate two unredacted documents provided by an asylum seeker with his home country's government, thereby exposing the applicant and his family to risk of further persecution).
[47] Maria Baldini-Potermin, Immigration Trial Handbook §7:8 (April 2019).

importance of confidentiality for children. "Adolescents, particularly as they grow older, have significant worries about the confidentiality of their health information, which could lead to reluctance to trust their health providers with confidential information (Carlisle, Shickle, Cork, & McDonaugh, 2006)." "Children would benefit from respect for their wishes for confidentiality, either partially or completely. The aim in doing so would be to develop trusting relationships with the youths in the hopes that they return for care when needed … Drawing on the considerations discussed above, respecting confidentiality with children can engender trust, respect and better collaboration toward optimal health outcomes" Noiseux et al. (2019).

In order for children to develop trust, and share their experience, confidentiality is a prerequisite. By taking away confidentiality protections for children seeking asylum, the proposed regulations will have a chilling effect on a child's opportunity to honestly share their experiences for fear that their stories could be shared to their home country--possibly resulting in retaliation.[48] The result is easy to foresee: children will not disclose the traumatic experiences needed to state a claim for asylum, and they will be needlessly returned to unsafe situations.

Conclusion

For reasons set forth above, the Center for the Human Rights of Children opposes the proposed rule. The rule violates important tenants of international and US asylum law, and it does not account for the unique needs and vulnerabilities of children, who represent half of global refugees. We urge DHS to abandon this rule or to revise the proposed rule to account for our concerns and recommendations.

Sincerely,

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[48] National Immigrant Justice Center, *Trump Eviscerates U.S. Asylum System in Proposed Rule*, National Immigrant Justice Center, (June 11, 2020), https://immigrantjustice.org/press-releases/trump-eviscerates-us-asylum-system-proposed-rule