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## Child trauma: Research, law, and policy for considerations in immigration proceedings

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ISSUE BRIEF

**CHILD TRAUMA: RESEARCH, LAW,  
AND POLICY FOR CONSIDERATION IN  
IMMIGRATION PROCEEDINGS**

BY SARAH J. DIAZ AND CAROLYN E. FRAZIER



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**TABLE OF CONTENTS**

**INTRODUCTION..... 4**

**CHILD TRAUMA DEFINED ..... 5**

**INTERDISCIPLINARY RESEARCH ON CHILD TRAUMA ..... 7**

**LEGAL SYSTEMS’ ADAPTATIONS TO INTERDISCIPLINARY RESEARCH ON  
CHILD TRAUMA ..... 13**

**CRITICAL IMPLICATIONS FOR IMMIGRATION PRACTICE ..... 16**

# CHILD TRAUMA: RESEARCH, LAW, AND POLICY FOR CONSIDERATION IN IMMIGRATION PROCEEDINGS<sup>1</sup>

## INTRODUCTION

Children are not adults in miniature. This proposition has long been confirmed by science and supported by decisions of the United States Supreme Court.<sup>2</sup> As a result, some child-serving legal systems have increasingly adapted to recognize the unique characteristics and needs of young people, as well as to ensure that laws and processes are designed to safeguard the rights and well-being of these youth. Yet immigration law and policies do not yet adequately address the basic differences inherent between children and adults. As a result, judges and other adjudicators are left to apply a legal system designed exclusively for adults to the youth who appear before them, resulting in a fundamental mismatch that prevents fair and judicious proceedings, and which increases the likelihood that children are harmed by the process.

“Our history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults.”

U.S. Supreme Court

Child trauma is a particularly important topic for study by the immigration bar. The past decades have seen increasing rates of migration by children and families across international borders.<sup>3</sup> Many of these children endure significant trauma even prior to migration due to civil unrest, natural disasters, domestic violence, or poverty – events that themselves are often key factors behind why children migrate.<sup>4</sup> Children are further vulnerable during the migration journey as they are likely to experience physical or sexual abuse, unsafe travel conditions, separation from family members, and trafficking.<sup>5</sup> The impact of these traumatic events will often play out in immigration proceedings, affecting the ways in which young people interact with system decision-makers and

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<sup>1</sup> This document was developed with the generous support of the Schreiber Family Foundation in connection with a Loyola University Chicago, School of Law’s Center for the Human Rights of Children (CHRC) project providing training to immigration judges on childhood and adolescents. The primary contributors to this brief are faculty and students of Loyola including Sarah Diaz (author), Katherine Kaufka Walts (editor), and Alex Fox (researcher), as well as faculty and students of the Center for International Human Rights at the Northwestern Pritzker School of Law including Carolyn Frazier (author) and Portia Xiong (author.) Additional CHRC partners and collaborators on this brief include Xiaorong Jajah Wu (editor), Maria Woltjen (editor), and Lisa Jacobs (editor). Finally, this brief was reviewed by an incredible, interdisciplinary advisory board on child trauma and immigration intersections including Marisa Chumil, MSW; (retired) Immigration Judge Jennie Giambastiani; Dr. Greg Lewis; Dr. Brad Stolbach; Dr. Amanda Zelechowski; and Aryah Somers, JD.

<sup>2</sup> J.D.B. v. North Carolina, 564 US 261 (2011). (“[T]he legal disqualifications placed on children as a class . . . exhibit the settled understanding that the differentiating characteristics of youth are universal.”)

<sup>3</sup> UNITED NATIONS HIGH COMM’R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2019 (Statistics and Demographics Section, UNHCR Global Data Service ed., 2020), <https://www.unhcr.org/media/unhcr-global-trends-2019>.

<sup>4</sup> UNITED NATIONS DEP’T OF ECON. & SOC. AFFS., YOUTH ISSUE BRIEFS 2016: YOUTH AND MIGRATION (2016), <https://www.un.org/esa/socdev/documents/youth/fact-sheets/youth-migration.pdf>.

<sup>5</sup> *Id.*

sometimes wrongfully raising questions about a child’s competence and credibility.<sup>6</sup> Further, while youth generally possess great capacity for resilience, policies that lead to removal, maltreatment of unaccompanied minors, detention, and family separation can compound these prior traumatic experiences.<sup>7</sup> As the National Council of Juvenile and Family Court Judges stresses in its technical assistance bulletin *Ten Things Every Juvenile Court Judge Should Know About Trauma and Delinquency*, understanding trauma and recognizing the many ways it can impact children will help child-serving systems make better decisions regarding the youth with whom they interact, thus better meeting the needs of both child and community.<sup>8</sup>

This brief is intended to assist adjudicators as they consider the cases of children who come before them, to help shed light on how to recognize and engage with traumatized children and reduce unintended harm to these young people as they navigate the system. The brief is comprised of two main sections: (1) a primer on child trauma, examining the research and social science around the issue; and (2) documenting how other child-serving legal systems have evolved to become more trauma-informed, and identifying critical implications for immigration proceedings. Throughout the brief, the terms “child,” “children,” “youth,” and “young people” will be used interchangeably to refer to individuals under 18 years of age.<sup>9</sup>

## **CHILD TRAUMA DEFINED**

To understand the impact of trauma on children and the legal systems with which they interact, it is important to first define the term “trauma.” The American Psychiatric Association defines trauma as “the exposure to, or the imminent threat of, unexpected death or bodily violation, directly or as a witness.”<sup>10</sup> Traumatic experiences can include, among others: interpersonal violence such as physical or sexual abuse; community violence, such as war, civil unrest, or terrorism; and events such as severe or life-threatening accidents, illnesses, natural disasters, and the loss of important relationships.<sup>11</sup> One of the foremost trauma researchers in the field, psychiatrist Bessel Van Der

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<sup>6</sup> Altaf Saadi et al., *Associations Between Memory Loss and Trauma in U.S. Asylum Seekers: A Retrospective Review of Medico-Legal Affidavits*, 16 PLOS ONE (2021).

<sup>7</sup> Kalina Brabeck et al., *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32 HISP. J. BEHAV. SCIS. 341-361 (2010).

<sup>8</sup> KRISTINE BUFFINGTON ET AL., *TEN THINGS EVERY JUVENILE COURT JUDGE SHOULD KNOW ABOUT TRAUMA AND DELINQUENCY* 6 (National Council of Juvenile and Family Court Judges ed., 2010), <https://www.ncjfcj.org/publications/ten-things-every-juvenile-court-judge-should-know-about-trauma-and-delinquency/>.

<sup>9</sup> Use of the terms “child” and “children” to refer to individuals under the age of 18 comports with immigration law’s definition of child as found in INA 101(b) and 6 U.S.C. 279(g)(2), as well as the child trauma field’s use of these terms to refer to anyone under the age of 18.

<sup>10</sup> AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5* 271 (5th ed. 2013).

<sup>11</sup> See Nicole Caporino et. al., *The impact of different traumatic experiences in childhood and adolescence*. 2003 EMOTIONAL BEHAV. DISORD. YOUTH, Summer 2003, at 63-64, 73-76; JULIAN D. FORD ET. AL, *TRAUMA AMONG YOUTH IN THE JUVENILE JUSTICE SYSTEM: CRITICAL ISSUES AND NEW DIRECTIONS* 2 (National Center for Mental Health and Juvenile Justice ed., 2007); ERICA J. ADAMS, *HEALING INVISIBLE WOUNDS: WHY INVESTING IN*

Kolk, explains that through the advent of brain-imaging tools in the early 1990's and the resulting explosion of scientific research that has followed, "we have learned that trauma is not just an event that took place sometime in the past; it is also the imprint left by that experience on the mind, brain and body. This imprint has ongoing consequences for how the human organism manages to survive in the present."<sup>12</sup> Trauma that is untreated can lead to the loss of a child's ability to regulate emotions and behaviors, to have healthy relationships, to feel safe, to trust others, and to use words to describe their experience.<sup>13</sup> They are essentially doing their best to survive in the moment in response to a threat or perceived threat that is overwhelming and for which they have limited abilities to soothe and regulate themselves.

Trauma experienced by individuals under the age of 18 is referred to as "child trauma" or "childhood trauma."<sup>14</sup> According to the National Child Traumatic Stress Network (NCTSN), the premier organization dedicated to raising the standard of care for child trauma in the U.S., "Children who suffer from child traumatic stress are those who have been exposed to one or more traumas over the course of their lives and develop reactions that persist and affect their daily lives after the events have ended."<sup>15</sup> Child trauma is defined not only by the kind of stressful events a child has experienced, but also their subjective experience of the events – in other words, what meaning a child has assigned to such events and how they react to them.<sup>16</sup> There is a great deal of uncertainty about the frequency and severity of child trauma worldwide because such trauma largely remains hidden and unreported.<sup>17</sup> However, it is now widely understood that child trauma is more common than previously thought.<sup>18</sup>

There are many features unique to child trauma because of children's distinct stage of development and their dependence on others. For example, as they lack a full understanding of the causal relationship between events, children may believe that they are responsible for what happened to

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TRAUMA-INFORMED CARE FOR CHILDREN MAKES SENSE 1 (Justice Policy Institute ed., 2010), <https://justicepolicy.org/research/healing-invisible-wounds-why-investing-in-trauma-informed-care-for-children-makes-sense/>.

<sup>12</sup> BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* 21 (Penguin Books ed., 2014).

<sup>13</sup> See, e.g., *What Is Child Trauma? About Child Trauma*, NATIONAL CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/what-is-child-trauma/about-child-trauma> (last visited Oct. 10, 2023); *What is Child Trauma? Effects*, NATIONAL CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/what-is-child-trauma/trauma-types/complex-trauma/effects/> (last visited Oct. 10, 2023.)

<sup>14</sup> *What is Child Trauma?*, CENTER FOR CHILD TRAUMA ASSESSMENT, SERVICES AND INTERVENTIONS, <https://cctasi.northwestern.edu/child-trauma/> (2023). For purposes of this issue brief, the term "child trauma" will be used. This term is synonymous with the term "childhood trauma."

<sup>15</sup> *What Is Child Trauma? About Child Trauma*, *supra* note 13.

<sup>16</sup> Jacqueline G. F. M. Hovens, *Emotional Scars: Impact of Childhood Trauma on the Development of Depressive and Anxiety Disorders* 12 (Oct. 29, 2015) (Ph.D. dissertation, Leiden University) (on file with authors).

<sup>17</sup> Andrea Danese & Jesse Baldwin, *Hidden Wounds? Inflammatory Links between Childhood Trauma and Psychopathology*, 68 ANN. REV. PSYCH. 517 (2017).

<sup>18</sup> In the United States, for instance, 38.5% of the adult population had traumatic experiences before age 13 and 25.1% of the adolescent population experienced severe trauma before age 16. E. Jane Costello et al., *The Prevalence of Potentially Traumatic Events in Childhood and Adolescence*, 15(2) J. TRAUMATIC STRESS 99 (2002).

them and blame themselves for a traumatic event.<sup>19</sup> Young children may even believe that their thoughts made the traumatic event happen.<sup>20</sup> While traumatic stress manifests differently in different children depending on factors such as their personal trauma history, their age, and their level of development, the NCTSN reminds us that “at no age are children immune to the effects of traumatic experiences.”<sup>21</sup>

## **INTERDISCIPLINARY RESEARCH ON CHILD TRAUMA**

As noted above, individual responses to trauma vary from child to child. However, biological and social science research over the past few decades has shown that trauma exhibits certain hallmark features. Trauma can have important biological, cognitive, emotional, psychological, and behavioral consequences that can continue to exist long after the traumatic event itself has ended. Simply put, trauma impacts the whole child: how they think, behave, remember, feel, and experience the world around them. For professionals working in child-serving legal systems to do their jobs effectively, they need to understand these consequences and take them into account when interacting with and making decisions impacting young people.

### **A. Trauma causes measurable physiological changes due to the body’s stress response**

The human organism is biologically designed to ensure its own survival.<sup>22</sup> When a child’s brain confronts a situation it perceives as dangerous, it quickly and automatically mounts a whole-body response in reaction to the threat.<sup>23</sup> This reaction, known as the fight-or-flight stress response, is a normal survival response designed to help humans survive stressful and life-threatening situations.<sup>24</sup> During the fight or flight response, “[t]he amygdala’s danger signals trigger the release of powerful stress hormones, including cortisol and adrenaline, which increase heart rate, blood pressure, and rate of breathing, preparing us to fight back or run away.”<sup>25</sup>

Under non-traumatic circumstances, the brain and body reestablish their baseline states fairly quickly after the perceived danger is gone.<sup>26</sup> However, after one or more traumatic exposures, these systems can become dysregulated; they “may be reactivated at the slightest hint of danger and mobilize disturbed brain circuits and secrete massive amounts of stress hormones.”<sup>27</sup> Such

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<sup>19</sup> *What is Child Trauma? Effects*, *supra* note 13.

<sup>20</sup> *Id.*

<sup>21</sup> *See, e.g., What Is Child Trauma? About Child Trauma*, *supra* note 13.

<sup>22</sup> Van Der Kolk, *supra* note 12, at 55.

<sup>23</sup> *Id.* at 60.

<sup>24</sup> *What Happens to Your Body During the Fight-or-Flight Response? Your survival response explained*, CLEVELAND CLINIC (Dec. 9, 2019), <https://health.clevelandclinic.org/what-happens-to-your-body-during-the-fight-or-flight-response/>.

<sup>25</sup> Van Der Kolk, *supra* note 12, at 61.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 2.



dysregulation can lead to symptoms such as flashbacks, agitation, irritability, and problems with memory and attention.<sup>28</sup> Another common symptom is hypervigilance, or the physiological hyperarousal that causes a child to be overly responsive to stimuli and constantly scan the environment for threats.<sup>29</sup> As one child trauma expert explains, traumatized youth who are experiencing hypervigilance “can have some big, out-of-control seeming behaviors, because their fight or flight response has gone off.”<sup>30</sup>

If a child can’t fight or flee from danger, another survival response may emerge: freezing.<sup>31</sup> Freezing is another physiological stress reaction that renders the child numb, shut down, and disengaged from their surroundings.<sup>32</sup> Children may stare blankly or appear not to be paying attention, both of which are common outward expressions of the freeze response.<sup>33</sup> Some youth exhibit a depersonalization response, in which they feel a sense of unreality and detachment from their own body, occasionally reporting their trauma as if they were an outside observer.<sup>34</sup> Depersonalization is one symptom of what psychologists call “dissociation,” or the brain’s attempt to prevent itself from becoming psychologically and emotionally overwhelmed at the time of the trauma.<sup>35</sup> Dissociation is “an unconscious process by which a group of mental processes is separated from the rest of the thinking processes, resulting in an independent functioning of these processes and a loss of the usual relationships, for example, a separation of affect from cognition.”<sup>36</sup> This separation of affect from cognition can be seen in the traumatized child who recounts a devastating trauma story with a flat or robotic affect.<sup>37</sup> Dissociation is central to the trauma response, both during and subsequent to the experience of threat.<sup>38</sup>

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<sup>28</sup> Jonathan E. Sherin & Charles B. Nemeroff, *Post-Traumatic Stress Disorder: The Neurobiological Impact of Psychological Trauma*, 13(3) *DIALOGUES IN CLINICAL NEUROSCIENCE* 263 (Sep. 2011). See also Van Der Kolk, *supra* note 12, at 46.

<sup>29</sup> Buffington et al., *supra* note 8, at 3 (quoting *DORLAND’S MEDICAL DICTIONARY FOR HEALTH CONSUMERS*, 2007).

<sup>30</sup> Caroline Miller, *How Trauma Affects Kids in School*, CHILD MIND INSTITUTE, <https://childmind.org/article/how-trauma-affects-kids-school/> (last updated Oct. 13, 2023).

<sup>31</sup> Leonard F. Seltzer, *Trauma and the Freeze Response: Good, Bad or Both?* *PSYCHOLOGY TODAY* (Jul. 18, 2015), <https://www.psychologytoday.com/us/blog/evolution-the-self/201507/trauma-and-the-freeze-response-good-bad-or-both>.

<sup>32</sup> Van Der Kolk, *supra* note 12, at 84-85.

<sup>33</sup> *Id.* at 72.

<sup>34</sup> Julie P. Gentile et. al, *Stress and Trauma: Psychotherapy and Pharmacotherapy for Depersonalization/Derealization Disorder*, 11(7-8) *INNOVATIONS IN CLINICAL NEUROSCIENCE* 37, 37 (Jul.-Aug. 2014).

<sup>35</sup> *Id.*

<sup>36</sup> ROBERT SCAER, *THE BODY BEARS THE BURDEN: TRAUMA, DISSOCIATION, AND DISEASE* 17 (Routledge 3<sup>rd</sup> ed. 2014).

<sup>37</sup> See, e.g., Van Der Kolk, *supra* note 12, at 72.

<sup>38</sup> *Id.* at 66.

## IMMEDIATE EFFECTS WHEN TRIGGERED

HYPER	HYPO
<ul style="list-style-type: none"><li>• Fight</li><li>• Flight/Avoidance</li><li>• Re-experiencing<ul style="list-style-type: none"><li>• Nightmares</li><li>• Flashbacks</li></ul></li><li>• Negative Alterations in Cognition and Mood<ul style="list-style-type: none"><li>• Misinterpret cues</li><li>• Easily offended</li><li>• Overreactive</li></ul></li></ul>	<ul style="list-style-type: none"><li>• Freeze</li><li>• Faint</li><li>• Dissociation</li><li>• Cutting</li><li>• Self-medication</li><li>• Nonresponsive</li><li>• Memory Gaps</li></ul>

*Graphic adapted from work by Gene Griffin, J.D., Ph. D.*

If children are exposed to traumatic stress repeatedly, their bodies may become so sensitive that even a minor perceived threat can trigger this cascade of physiological responses. While this increased sensitivity to potential danger is initially adaptive because it helps the child to survive, it can become maladaptive (e.g., chronic hypervigilance) after the environment has shifted and the sensitization is no longer functional.<sup>39</sup> For many traumatized children, no place feels safe and no one can be trusted. For all children with trauma, “the world is experienced with a different nervous system that has an altered perception of risk and safety.”<sup>40</sup>

### **B. Trauma has a profound impact on memory**

Trauma dramatically changes a child’s way of remembering things, processing new memories, and accessing old ones. A growing body of scientific evidence indicates that there are two different memory systems in the brain: verbal and nonverbal.<sup>41</sup> Normally, these systems work together in an integrated manner. The verbal memory system, however, is vulnerable to high levels of stress. When people are overwhelmed with fear, they may lose the capacity to put their experiences into

<sup>39</sup> Gregory A. Fonzo, *Childhood Maltreatment and Amygdala Threat Reactivity in Young Adults – Timing is Everything*, 76 (8) JAMA PSYCHIATRY 781 (Aug. 1, 2019).

<sup>40</sup> Van Der Kolk, *supra* note 12, at 82.

<sup>41</sup> Bessel Van Der Kolk, *The Body Keeps Score: Approaches to the Psychobiology of Posttraumatic Stress Disorder*, in *TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY* 214 (Bessel van der Kolk et al eds., 1996).

words; in fact, their brains may not encode the traumatic memory in a verbal, linear narrative at all.<sup>42</sup> “Without words, the mind shifts to a mode of thinking characterized by visual, auditory, olfactory, and kinesthetic images, physical sensations, and strong feelings.”<sup>43</sup> This kind of nonverbal memory, which researchers have termed “emotional memory,”<sup>44</sup> can be deeply imprinted in the mind.<sup>45</sup> Such memories of traumatic events are not remembered in words but rather in the form of images, strong emotions, and bodily sensations like smells, touch, tastes, and even pain.<sup>46</sup>

Because of the way trauma impacts memory, traumatized children often struggle to talk about their experiences. When asked to recount a traumatic event, they may communicate in a “highly emotional, contradictory and fragmented manner.”<sup>47</sup> They may struggle to recall the precise details of events or may recall events in a way that is non-linear.<sup>48</sup> Multiple, similar events may become blurred in their memory. Sometimes, the attempt to recount a traumatic event will trigger a flashback, during which a child may be overwhelmed with the same terror and emotional intensity they felt at the time of the original event.<sup>49</sup> While their minds and bodies will be full of strong images, emotions, and sensations, these memories may remain locked in the nonverbal memory system, leaving the child without “the linguistic narrative structure that gives a person’s ordinary memories a sense of logical and chronological coherence.”<sup>50</sup> Simply put, traumatized children may be unable to put their trauma experience into words. While adult trauma survivors also struggle with the issues described above, the fact that children’s verbal capacities are still developing throughout adolescence can make articulating their traumatic experiences even more challenging for them.

### **C. Trauma has a distinct impact on children’s behavior**

The physiological, cognitive, psychological and emotional impacts of trauma can all lead directly to changes in a child’s behavior. As mentioned above, these behavioral changes can continue long after the immediate threat from a traumatic experience has passed. Youth who are experiencing the hyperarousal and hypervigilance associated with the “fight” stress response might appear angry, irritable, or overreactive. Youth experiencing the “flight” response might present as restless, edgy,

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<sup>42</sup> Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 487 (2016).

<sup>43</sup> SANDRA L. BLOOM, TRAUMA THEORY ABBREVIATED 5 (Attorney General of Pennsylvania’s Family Violence Task Force ed., Oct. 1999), (on file with authors).

<sup>44</sup> Joseph E. LeDoux, *Emotional Memory Systems in the Brain*, 58(1-2) BEHAV. BRAIN RSCH. 69 (1993).

<sup>45</sup> The “engraving” of trauma has been noted by many studies involving various survivor groups.

<sup>46</sup> Paskey, *supra* note 42, at 487.

<sup>47</sup> Judith L. Herman, *Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma*, 5(3) J. TRAUMATIC STRESS 377 (1992).

<sup>48</sup> Philip Spinhoven et. al, *Inconsistencies in the Self-Report of Traumatic Experiences by Unaccompanied Refugee Minors*, 19 J. TRAUMATIC STRESS 663 (2006).

<sup>49</sup> Paskey, *supra* note 42, at 486.

<sup>50</sup> *Id.* at 487.

fidgety, or anxious. If the “freeze” response is present, a child might seem withdrawn, unresponsive, and lacking in affect. In any of these scenarios, traumatized youth will likely struggle to pay attention, focus, or concentrate.

Many studies have documented changes in self-perceptions among traumatized children such as low self-esteem and negative body image.<sup>51</sup> Two additional inward-focused behaviors stemming from trauma that are worth noting are self-blame and learned helplessness. If children believe a traumatic event is their fault, they may carry a deep sense of guilt or shame that contributes to negative self-regard.<sup>52</sup> The term “learned helplessness”, meanwhile, refers in the trauma context to an adaptive behavior where children appear to stop trying to escape from danger.<sup>53</sup> When children are exposed to chronic and repeated trauma, they may normalize and internalize this ill treatment and appear to show no interest in escaping.<sup>54</sup>

Risk-taking behaviors are also commonly seen among children dealing with traumatic stress. Such behaviors can include substance abuse, unprotected sexual activity, and breaking rules.<sup>55</sup> The reasons traumatized youth engage in risky behaviors are manifold. For example, some youth who are exposed to repeated experiences of prolonged stress may become “addicted” to their own internal endorphins, and “only feel calm when they are under stress, while feeling fearful, irritable and hyperaroused when the stress is relieved, much like someone who is withdrawing from heroin.”<sup>56</sup> Others might adopt these behaviors as a coping strategy to help them overcome negative feelings (such as passivity or helplessness) arising from their victimization.<sup>57</sup> These are both ways in which children’s minds and bodies adapt to the ongoing impact of their trauma.

When child-serving systems are unaware of the myriad behavioral impacts of trauma, the behaviors associated with trauma are often misunderstood, creating a disconnect between the way the child is viewed and the actual reasons for their behavior. This issue, which has important ramifications for decision-makers in legal systems that interact with children, is discussed further below.

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<sup>51</sup> See, e.g., Lars O. White et al., *Analyzing Pathways from Childhood Maltreatment to Internalizing Symptoms and Disorders in Children and Adolescents (AMIS): a Study Protocol*, 15 BMC PSYCHIATRY 126 (2015).

<sup>52</sup> Naomi B. Fine et. al, *Neuroscientific Account of Guilt- and Shame-Driven PTSD Phenotypes*, 14 EUR. J. PSYCHOTRAUMATOLOGY, Article 2202060 (May 11, 2023).

<sup>53</sup> See, e.g., Jayne Leonard, *What is Learned Helplessness?*, MEDICAL NEWS TODAY, <https://www.medicalnewstoday.com/articles/325355> (last updated May 23, 2023).

<sup>54</sup> *Id.*

<sup>55</sup> Mareike Augsburger & Thomas Elbert, *When Do Traumatic Experiences Alter Risk-Taking Behavior? A Machine Learning Analysis of Reports from Refugees*, 12 PLOS ONE (ISSUE 5) 1 (May 12, 2017), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0177617>.

<sup>56</sup> Bloom, *supra* note 43, at 9.

<sup>57</sup> Augsburger & Elbert, *supra* note 55.

#### **D. Further exposure to additional traumatic events can compound the negative effects of child trauma**

Contemporary research shows that children exposed to multiple traumas over a period of time can have cumulative long-term impacts. In particular, research has shown that youth with histories of trauma are prone to being retraumatized by the institutional practices of various child-serving legal systems such as physical restraint, detention, punitive seclusion, and invasive searches.<sup>58</sup> Retraumatization of youth in such systems also results from ill treatment by system actors, in the form of verbal, physical, and sexual abuse.<sup>59</sup> Trauma experts now also recognize that inherently stressful experiences such as court hearings can exacerbate existing trauma symptoms, whether or not they are experienced by a youth as traumatic in and of themselves.<sup>60</sup>

#### **E. Child trauma can be largely overcome through therapeutic interventions that help support resilience and recovery**

While their young age may make them uniquely vulnerable to certain of trauma's effects, children also have the capacity for great resilience. Resilience is "the ability of a child to recover and show early and effective adaptation following a potentially traumatic event."<sup>61</sup> Contrary to common belief, resilience is not an innate character trait that children either do or don't possess; rather, resilience is better thought of as a skill that youth can develop over the course of their lives.<sup>62</sup> As neuroscientist and preeminent child trauma researcher Bruce Perry has often said, resilient children are made, not born.<sup>63</sup> When traumatic events overwhelm a child's ability to adapt, that child might require the help of family and/or a child-serving system to support their resilience and recovery.<sup>64</sup> Many factors can contribute to a youth's resilience, including a positive attachment to caregivers, independence, and the use of humor.<sup>65</sup>

Proper treatment and support in healing can help children avoid long-term negative psychological, social, developmental and health consequences of trauma. Studies have shown that therapeutic interventions can be effective in minimizing trauma's detrimental impact; for example, research in the medical field has shown that pediatricians and other health professionals can help

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<sup>58</sup> See, e.g., Carly Dierkhising et. al, *Victims behind Bars: A Preliminary Study of Abuse during Juvenile Incarceration and Post-release Social and Emotional Functioning*, 20 PSYCH., PUB. POL'Y, & LAW 181 (2014).

<sup>59</sup> *Id.*; see also, e.g., A. Geller et. al, *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH, 2321 (2014).

<sup>60</sup> Ford et. al, *supra* note 11, at 3.

<sup>61</sup> *Resilience and Child Traumatic Stress*, NATIONAL CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/resources/resilience-and-child-traumatic-stress> (last visited Oct. 3, 2023).

<sup>62</sup> Katie Hurley, *Resilience in Children: Strategies to Strengthen Your Kids*, PSYCOM, <https://www.psycom.net/build-resilience-children> (last updated Nov. 4, 2020).

<sup>63</sup> See, e.g., BRUCE D. PERRY AND MAIA SZALAVITZ, *THE BOY WHO WAS RAISED AS A DOG: AND OTHER STORIES FROM A CHILD PSYCHIATRIST'S NOTEBOOK* (Basic Books, 2006).

<sup>64</sup> *Resilience and Child Traumatic Stress*, *supra* note 61.

<sup>65</sup> See, e.g., Leonard, *supra* note 53.

traumatized foster youth heal from toxic stress and trauma through trauma-informed practices.<sup>66</sup> However, it is important to highlight that in order for child-serving systems to implement appropriate interventions, they must first be able to identify and recognize child trauma as such. Child trauma is too often missed – or mischaracterized as mental illness or just bad behavior – due to a lack of understanding on the part of these systems. The next section of this brief will explore reforms designed to help child-serving systems better recognize and respond to trauma.

## **LEGAL SYSTEMS’ ADAPTATIONS TO INTERDISCIPLINARY RESEARCH ON CHILD TRAUMA**

As the body of research on child trauma has grown over the past few decades, experts in public service systems including medicine, social work, and psychology have called for systems reforms in how traumatized youth are identified, understood, and treated.<sup>67</sup> These calls for reform have increasingly been echoed by experts in the juvenile justice and child welfare systems. The term for the resulting paradigm shift—the “trauma-informed” service system—was first introduced at the beginning of the 21<sup>st</sup> century.<sup>68</sup> There is now general agreement in the literature from these fields that a trauma-informed approach requires “the integration of trauma awareness and understanding throughout an organization or service system.”<sup>69</sup> While much work remains to be done for the juvenile justice and child welfare systems to be fully trauma-informed, these systems have made strides in incorporating trauma-informed practices into existing frameworks and policy, as outlined below.

### **A. Recognizing Child Trauma: The Importance of Training and Screening**

Quality training about trauma is now recognized as a core feature of any child-serving legal system committed to becoming trauma-informed.<sup>70</sup> Courts must make complex decisions regarding the youth who appear before them; thus, to do their jobs effectively, court actors—and judges in particular—must be trained to understand the myriad effects trauma has had on these youth.<sup>71</sup> In recent years, prominent national organizations such as the National Council of Juvenile and Family Court Judges (NCJFCJ) and the American Bar Association, as well as the U.S. Justice Department, have made a significant effort to educate judges and lawyers about child trauma.

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<sup>66</sup> Heather Forkey & Moira Szilagy, *Foster Care and Healing from Complex Childhood Trauma*, 61 PEDIATRIC CLINICS 1059 (Jul. 24, 2014).

<sup>67</sup> Adams, *supra* note 11, at 8.

<sup>68</sup> Maxine Harris & Roger D. Falloot, *Envisioning a Trauma-informed Service System: A Vital Paradigm Shift*, 89 NEW DIRECTIONS FOR MENTAL HEALTH SERVS. 3 (Spring 2001).

<sup>69</sup> Elizabeth K. Hopper, Ellen L. Bassuk, & Jeffrey Olivet, *Shelter from the Storm: Trauma-informed Care in Homelessness Services Settings*, 3 OPEN HEALTH SERVS. & POL’Y J. 80 (Apr. 2010).

<sup>70</sup> See, e.g., Buffington et al., *supra* note 8, at 12.

<sup>71</sup> *Id.* at 2.

Another key facet of a trauma-informed legal system includes trauma screening and assessment. As knowledge about trauma has developed, so have tools for detecting it in various populations, including children. Over the past two decades, mental health professionals have created several trauma-focused screening and assessment instruments that assist systems in identifying youth suffering from traumatic stress.<sup>72</sup> The NCJFCJ has underscored the importance of trauma screening and assessment for court-involved youth: "...it makes good sense and is also ethically imperative to use evidence-based assessment tools to make accurate diagnoses that can inform appropriate responses and treatment for trauma-exposed youth."<sup>73</sup>

Given the prevalence of child trauma, some experts now recommend universal trauma screening for all child-serving agencies.<sup>74</sup> And given that as many as 93% of youth in juvenile detention report having experienced a traumatic event,<sup>75</sup> some juvenile justice stakeholders now argue that in the absence of screening, there should be a default presumption that trauma is present.

### **B. Reframing Child Trauma: Assessing Behavior and Credibility Through a Trauma Lens**

Experience from juvenile justice and child welfare systems shows that using a trauma-informed approach can change a court's understanding of a young person's behavior. As judges receive trauma training and education, they may realize that behavior patterns they have previously attributed to other causes may in fact be rooted in trauma.<sup>76</sup> For example, they may conclude that a youth who fidgets, avoids eye contact, and seems not to be paying attention to the court is being disrespectful (or even has attention-deficit/hyperactivity disorder), when in reality they are displaying the "flight" traumatic stress response. Likewise, a youth who presents as angry and has outbursts may not be antisocial or oppositional-defiant, but rather experiencing the "fight" traumatic stress response. A youth who exhibits a flat affect when discussing the violence they have encountered may not be unemotional or callous, but rather experiencing dissociation because the memory of the trauma is too great a psychological burden for them to recall.

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<sup>72</sup> Ford et. al, *supra* note 11, at 2.

<sup>73</sup> Buffington et al., *supra* note 8, at 8.

<sup>74</sup> The Justice Policy Institute is one of these orgs. See Adams, *supra* note 11, at 9.

<sup>75</sup> Ford et. al, *supra* note 11, at 2 (citing Karen M. Abram et. al, *Posttraumatic Stress Disorder and Trauma in Youth in Juvenile Detention*, 61 ARCHIVES GEN. PSYCHIATRY 403 (2004)).

<sup>76</sup> *Id.* at 3.

## SYMPTOMS THAT OVERLAP WITH CHILD TRAUMA AND MENTAL ILLNESS

DSM Diagnosis	Overlapping Symptoms	Trauma
<b>Anxiety Disorders</b>	Avoidance of feared stimuli, physiologic and psychological hyperarousal upon exposure to feared stimuli, sleep problems, hypervigilance, and increased startle reaction	Child Trauma
<b>ADHD</b>	Restless, hyperactive, disorganized, and/or agitated activity; difficulty sleeping, poor concentration, and hypervigilant motor activity	Child Trauma
<b>Bipolar</b>	Hyperarousal and other anxiety symptoms mimicking hypomania; traumatic reenactment mimicking aggressive or hypersexual behavior; and maladaptive attempts at cognitive coping mimicking pseudo-manic statements	Child Trauma
<b>Major Depressive Disorder</b>	Self-injurious behaviors as avoidant coping with trauma reminders, social withdrawal, affective numbing, and/or sleep difficulties	Child Trauma

AACAP, 2010

Employing a trauma-informed approach in the assessment of a child’s credibility is critical to ensuring a fair and accurate determination by the decision-maker. Studies have shown that all children, traumatized or not, suffer from “testimonial injustice”<sup>77</sup> and a “credibility deficit”<sup>78</sup> because of their age. When a youth is suffering traumatic stress, this credibility deficit may be exacerbated, as several hallmark features of trauma might be misinterpreted as an indication that they are lying. As discussed above, a child may provide accounts of a traumatic event that contain gaps or inconsistencies due to the nature of how their brain has processed and stored the traumatic memory. What they do recall, they may not fully share due to shame, avoidance, or fear of triggering a flashback.<sup>79</sup> Added to all this, children’s vulnerability to suggestive (vs. open-ended) interview questions can lead to further inconsistencies in their reports.<sup>80</sup> To the eye untrained in trauma, these behaviors may all appear to be evidence that a youth is lying. With appropriate screening and training, however, court actors can view these behaviors through a trauma lens, when applicable, and understand them differently. This knowledge, especially when applied in the courtroom, leads to more just, and sometimes vastly different, legal outcomes for children.

<sup>77</sup> “Testimonial injustice” is unfairness related to giving a low level of trust to someone’s word. This term is coined by British philosopher Miranda Fricker to conceptualize epistemic injustice.

<sup>78</sup> Credibility deficit happens when someone’s words are not given due credibility. *See, e.g.,* DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS (Harper Wave 2021).

<sup>79</sup> Paskey, *supra* note 42, at 487-89.

<sup>80</sup> Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86(1) CORNELL L. REV. 33 (2000).



### C. Responding to Child Trauma: Decision-Making with Trauma in Mind

Courts must make numerous decisions every day regarding the youth who appear before them. All these decisions directly impact the legal and personal trajectories of these children’s lives. Child-serving legal systems adopting a trauma-informed approach do so knowing that this perspective will help them make the best decisions they can for both youth and community. Beyond credibility determinations, decisions benefiting from a trauma-informed approach include those regarding detention, testimony, and culpability.

A central tenet of the trauma-informed child-serving legal system is to avoid the harm of further traumatization wherever possible – in other words, “to develop practices that make [traumatized youth’s] situation better, not worse.”<sup>81</sup> A prime illustration of this approach is the way trauma-informed systems highly favor community-based placements over detention, as research has shown that detention is harmful to children.<sup>82</sup> Another example, from the juvenile justice arena, can be found in caselaw favoring diversion over formal system involvement. In a review of relevant caselaw addressing trauma, the Juvenile Law Center found that many cases recommending diversion (i.e., the referral of youth for help in the community rather than prosecution and punishment) “explicitly acknowledge that the juvenile justice system itself can impose trauma, and articulate the importance of keeping some youth, particularly those most vulnerable to harm or retraumatization, out of the juvenile justice system entirely.”<sup>83</sup>

On occasion, youth appear before courts with a history of both trauma and offending behavior. In such instances, several cases can be found where courts using a trauma-informed approach have acknowledged trauma as a mitigating factor when assessing the youth’s culpability for such behavior. For example, in *Miller v. Alabama*,<sup>84</sup> the U.S. Supreme Court “not only recognize[d] the importance of a defendant’s trauma history, but also that such experiences are particularly relevant to assessing culpability for youthful offenders, who have little or no control over their environments.”<sup>85</sup>

### **CRITICAL IMPLICATIONS FOR IMMIGRATION PRACTICE**

The cumulative effect of trauma is well established in research. This concept is particularly important as it applies to migrant children who have been exposed to more traumatic experiences

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<sup>81</sup> SUE BURRELL, TRAUMA AND THE ENVIRONMENT OF CARE IN JUVENILE INSTITUTIONS 2 (National Child Traumatic Stress Network ed., Aug. 2013).

<sup>82</sup> See, e.g., *Id.*; Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641, 685 (2016).

<sup>83</sup> JESSICA FEIERMAN & LAUREN FINE, TRAUMA AND RESILIENCE: A NEW LOOK AT LEGAL ADVOCACY FOR YOUTH IN THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS 19 (Juvenile Law Center ed., Apr. 2014), <https://jlc.org/resources/trauma-and-resilience>.

<sup>84</sup> *Miller v. Alabama*, 567 U.S. 460 (2012). *Miller* mandates, *inter alia*, an individualized determination of a youth’s circumstances – including their trauma history – before imposition of a life without parole sentence.

<sup>85</sup> Feierman & Fine, *supra* note 83, at 23.

and more violent situations than the average child. The trauma-informed lens can impact both adjudications and the well-being of child and adolescent migrants in the following contexts: Avoiding Re-traumatization; Reducing Stress to Facilitate Meaningful Participation; Rendering Decisions with Trauma in Mind (credibility and discretion); and Ensuring Competency.

### A. Avoiding Re-Traumatization in the Immigration Court Process

Avoiding re-traumatization is a central tenet of a trauma-informed legal system. In domestic systems, in recognition of the extraordinary stress court practices can have upon child victims, some children are often not required to testify in a public hearing.<sup>86</sup> Where testimony is required, the ABA has recommended video testimony for children in removal proceedings.<sup>87</sup> The Immigration and Nationality Act (INA), the regulations, the Immigration Court Practice Manual (ICPM), and various Operating Policies and Procedures Memoranda (OPPM) give immigration judges broad discretion to conduct hearings in a way that mitigates the impact on children by employing trauma-informed court practices.

*The following practice tips may be useful in limiting a child or adolescent’s exposure to re-traumatization in a removal hearing:*

- **Regulatory tools to avoid re-traumatization through pre-hearing conferences and statements.** Immigration Judges have the discretion under the INA and applicable regulations to request pre-hearing conferences to narrow issues, to obtain stipulations from the parties, to exchange information voluntarily, and to otherwise simplify and organize the proceedings. Indeed, immigration judges “should actively and routinely encourage parties to engage in pre-hearing communications, both for the efficiency of the court and the efficacy of pro bono representation.”<sup>88</sup>
  - **Narrow the Issues:** Per federal regulations,<sup>89</sup> immigration judges can simplify proceedings by calling upon parties to narrow the issues to be adjudicated in a hearing involving a child or adolescent. This will limit the scope of testimony for children and adolescents and minimize the amount of time children and adolescents are exposed to harmful or retraumatizing circumstances.
  - **Obtain stipulations.** Per federal regulations,<sup>90</sup> immigration judges are permitted to simplify proceedings by calling upon parties to submit a statement of facts to which both parties have stipulated and a statement of unresolved issues involved in the proceedings. The respondent’s presence at a pre-hearing conference is optional.<sup>91</sup> Attorneys for children must have the authority to stipulate about all matters, including the possible resolution of proceedings. This format will allow for the child or adolescent to avoid being present when traumatic events are discussed.

<sup>86</sup> Robert H. Pantell and AAP Committee on Psychosocial Aspects of Child and Family Health, *The Child Witness in the Courtroom*, PEDIATRICS, Mar. 2017, at 1, 2.

<sup>87</sup> See ABA Standards for Children, *supra* at 34 section VIII.B.6.b.

[https://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant\\_Standards.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf)

<sup>88</sup> Memorandum from the Executive Office for Immigration Review, U.S. Dep’t of J., Pre-Hearing Conferences in Immigration Proceedings Program (Jun. 3, 2022), <https://www.aila.org/infonet/eoir-issues-guidance-on-pre-hearing-conferences> [hereinafter Memo on Pre-Hearing Conferences].

<sup>89</sup> 8 CFR §1003.21 (2022).

<sup>90</sup> *Id.*

<sup>91</sup> See Memo on Pre-Hearing Conferences, *supra* note 88.

Pre-hearing conferences have the power to mitigate the harmful effects of re-traumatizing children and adolescents by limiting testimony from children and adolescents and/or by waiving their appearance at hearings that discuss their traumatic events. Moreover, pre-trial conferencing has the potential to promote representation amongst child and adolescent respondents. EOIR OPPM Pre-hearing Conferences in Immigration Proceedings Program<sup>92</sup> is instructive indicating that immigration judges “should actively and routinely encourage parties to engage in pre-hearing communications, both for the efficiency of the court and the efficacy of pro bono representation.”<sup>93</sup>

## **B. Reducing Stress to Facilitate Meaningful Participation**

Recognizing the extreme levels of stress and trauma these children and adolescents may experience in retelling traumatic experiences, many courts have enacted accommodations for children who must testify in court.<sup>94</sup> These protections<sup>95</sup> range from allowing children to bring a comforting toy or object, to being accompanied by a trusted adult while testifying,<sup>96</sup> to providing access to specially trained dogs to offer calm and solace.<sup>97</sup> All states have laws to minimize the impact on children and adolescents of appearing in court by allowing for support people or comfort objects or for excluding the press.<sup>98</sup>

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Myers, *supra* note 118. (Describing a Massachusetts Supreme Judicial Court case from 1989 and a Florida Supreme Court case from 1993 where the courts ruled that protections permitted by the trial judges that altered the courtroom setting and procedures to accommodate child witnesses were permissible).

<sup>95</sup> A mitigation strategy employed in other courtrooms to prevent a child from having to face their abuser is closed-circuit televised testimony. The Supreme Court has ruled that closed-circuit televised testimony is an acceptable form of evidence in federal cases. *Maryland v. Craig*, 497 U.S. 836 (1990). Over time, many states have adopted procedures that allow children to testify through closed-circuit television or other alternative means. The National Center for Prosecution of Child Abuse has documented a list of states with such protective procedures. NAT’L CENTER FOR PROSECUTION OF CHILD ABUSE, NAT’L DISTRICT ATTORNEYS ASS’N, *Closed Circuit Television Statutes* (2012), <https://ndaa.org/wp-content/uploads/CCTV-2012.pdf>. The Department of Justice, the very same administrative body that adjudicates immigration court cases, funded the development of closed-circuit televising and videotaping of testimony for child victims of abuse in order to “reduce the trauma related to testifying at a hearing or trial by these children.” BUREAU OF JUST. ASSISTANCE, OFFICE OF JUST. PROGRAMS, US. DEP’T OF JUST., *Closed-Circuit Televising of Testimony of Children Who Are Victims of Abuse Grant Program 1* (1998), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/sl000287.pdf>. To learn more about some considerations relevant to remote hearings, consult CILA’s resource “Tips for Working with Children and Youth Remotely in a Hearing or USCIS Asylum Office Interview,” which is available on CILA’s *Additional Resources* webpage. Contact CILA at [cila@abacila.org](mailto:cila@abacila.org) if you need access to this resource.

<sup>96</sup> *See, e.g.,* *People v. Adams*, 19 Cal. App. 4th 412 (1993); *State v. Menzies*, 603 A.2d 419 (Conn. App. Ct. 1992).

<sup>97</sup> Myers, *supra* note 118.

<sup>98</sup> Pantell *supra* note 86, at 1.

*Immigration judges can apply the following practice tips to ensure that a child or adolescent is comfortable, to reduce anxiety, and to facilitate more consistent testimony:*<sup>99</sup>

- **Remove the robe.** Per EOIR guidance, “the robe is a symbol of... authority... [and] may be disconcerting for younger respondents.”<sup>100</sup> Consider removing the robe to reduce anxiety of youthful respondents.
- **Use age-appropriate language.** To facilitate understanding, use age or developmentally appropriate language with respondents recognizing that cognitive levels may not reflect or match the child’s chronological age.
- **Smile and be kind with your words.** Children are more responsive to rewards versus punishment. Even kind words are perceived as rewards. Ensure that language used in the courtroom reflects a plain understanding of the law and engages positive reinforcement. Use kind words, ensure a neutral or gentle tone, and be wary of using nonverbal expressions from which negative inferences can be drawn.
- **Consider child and adolescent modifications to the courtroom.** To further reduce stress or anxiety for adolescent respondents, consider coordinating a courtroom that postures the hearing as investigative. For example, the immigration judge seated up on a dais conveys that the respondent is literally and figuratively “sitting in judgment.” Consider modifications to the courtroom that facilitate more meaningful participation (e.g., permit the child to testify while seated next to a guardian or friend instead of from the witness stand.
- **Take breaks.** EOIR has already provided similar guidance indicating that judges” should recognize that, for emotional and physical reasons, children may require more frequent breaks than adults.”<sup>101</sup> Check on the child or adolescent’s physical comfort: ensure the child is not hungry, thirsty, cold, etc.
- **To the extent possible, permit the child have some agency over various steps in the process.** Invite the child or adolescent’s feedback in procedural modifications (e.g., “do you want to stay in your seat or come up here to answer the attorney’s questions?”, or “there are 3 things we have to do, in which order do you want to do them?”, etc.)

These practice tips are drawn from EOIR Policy Memorandum 17-03 establishing “Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children.”<sup>102</sup> Following the spirit of this Memorandum can result in trauma-informed outcomes for a child or adolescent appearing in removal proceedings.

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<sup>99</sup> RAO DIRECTORATE, USCIS, *RAIO Combined Training Program Children’s Claims Training Module*, (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/Childrens\\_Claims\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Childrens_Claims_LP_RAIO.pdf).

<sup>100</sup> OFFICE OF THE CHIEF IMMIGRATION JUDGE, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, OPERATING POLICIES AND PROCEDURES MEMORANDUM 17-01: GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING UNACCOMPANIED ALIEN CHILDREN (2007).

<sup>101</sup> OFFICE OF THE CHIEF IMMIGRATION JUDGE, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, OPERATING POLICIES AND PROCEDURES MEMORANDUM 17-03: GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING JUVENILES, INCLUDING UNACCOMPANIED ALIEN CHILDREN (2017) [hereinafter OPPM GUIDELINES].

<sup>102</sup> *Id.*

### C. Decision-making with Trauma in Mind (Credibility and Discretion)

A trauma-informed child justice system can lead to profoundly different assessments of a youth's credibility by a decision-maker. As noted above, studies have shown that minors in general—whether traumatized or not—already suffer from “testimonial injustice”<sup>103</sup> and a “credibility deficit”<sup>104</sup> because of their age. When a youth is suffering traumatic stress, this credibility deficit may be exacerbated, as several hallmark features of trauma (e.g., lack of eye contact, flat affect, fidgeting) might be misinterpreted as an indication that he or she is lying. How might the science behind trauma shed light on children's decision-making related to testimony and general presentation?

*Immigration judges can apply the following practice tips for a child or adolescent with layered traumatic experiences who is asked to testify or otherwise present information to the court:*

- **Avoid drawing inferences.** As a general rule, Immigration Judges can expect some degree of inconsistency and/or lack of clarity when a child testifies. Rather than draw a negative inference, the Immigration Judge should seek clarification, re-word the question, inquire whether the child understood the question and otherwise try to ensure that the child's response is accurate and truthful.<sup>105</sup>
- **Work with respondent's counsel to secure outside experts.** Where clarification in a hearing cannot be accomplished, the immigration should consider giving time to respondent's counsel to retain experts in adolescent development and mental health to help explain the inconsistencies or discrepancies in presentation.
- **Seek the appointment of a Child Advocate.** The Administration for Children and Families within HHS' Office of Refugee Resettlement (ORR) appoints independent child advocates—functionally serving as guardians ad litem—to advocate for the best interests of unaccompanied children in immigration proceedings. Child Advocates serve a critical role in offering holistic assistance to promote a child's best interests. However, not all children or adolescent respondents receive a Child Advocate. For further guidance on the utility of a Child Advocate in the context of trauma, see OPPM The Role of Child Advocates in Immigration Court.<sup>106</sup>
- **Keep in mind that hallmark signs of trauma can be counterintuitive.** Avoid drawing conclusions based on the manner in which a child or youth appears before the court. A child who fails to make eye contact, is fidgety, or relays information with a flattened affect to an adjudicator without trauma informed training may be perceived as shifty or irreverent. The decision-maker should recognize that these are the hallmark characteristics of a child experiencing trauma.

<sup>103</sup> “Testimonial injustice” is unfairness related to trusting someone's word. This term is coined by British philosopher Miranda Fricker to conceptualize epistemic injustice.

<sup>104</sup> Credibility deficit happens when someone's words are not given due credibility. See DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS (2021).

<sup>105</sup> This is consistent with EOIR guidance which sets out that “[v]ague, speculative, or generalized answers by a child, especially a particularly young child, are not necessarily indicators of dishonesty.” See OPPM GUIDANCE *supra* note 102, at 7.

<sup>106</sup> Memorandum from the U.S. Dep't of Justice, Policy Memorandum 20-03: Provide guidance to adjudicators on Child Advocates, (Jul. 5, 2023), <https://www.justice.gov/eoir/book/file/1589691/download>.

These critical trauma-informed practices can lead to significant improvement in outcomes for children with respect to the assessment of *credibility*.

“Just because you know the offense, doesn’t mean you know the offender.”

– Elizabeth Cauffman, Ph. D.

Similarly, trauma-informed practices can improve equity outcomes in the context of *discretion*. Children and youth with adverse discretionary facts should be viewed through the trauma-informed lens. A child or adolescent presenting with adverse discretionary factors or other “offending” behavior may not be evidence that they have delinquent tendencies, but rather that they have a significant trauma history such that

adverse factors should be considered/situated in the context of both adolescent development and the layering of trauma.

Complex trauma is associated with the risk of delinquency. Youth who experience complex trauma, often by those meant to protect them, can experience derailment in their development that leads to greater risk for delinquency and other inappropriate behaviors.<sup>107</sup> Trauma survivors often develop coping mechanisms/behaviors that may be adaptive in one environment (*e.g.*, homeless youth who must protect themselves and survive on the street) and perceived as maladaptive in a different environment (*e.g.*, detained immigrant child in congregate care setting). Such behaviors are not predictive of bad moral character.

#### D. Ensuring Competency

Despite the presumption of competency in all cases,<sup>108</sup> trauma will impact a child’s understanding of basic legal concepts, particularly abstract concepts. Research indicates that children under the age of 16 have a limited ability to understand everything at play in a trial.<sup>109</sup>

In other child-serving systems, children and adolescents must first be screened for competency before they can take an oath.<sup>110</sup> In fact, prior to 1997, Immigration Judges were not permitted to “accept an admission of deportability from an unrepresented respondent who is incompetent or

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<sup>107</sup> Complex trauma is associated with risk of delinquency. See KRISTINE BUFFINGTON ET AL., NAT’L CHILD TRAUMATIC STRESS NETWORK, TEN THINGS EVERY JUVENILE COURT JUDGE SHOULD KNOW ABOUT TRAUMA AND DELINQUENCY 6 (2010).

<sup>108</sup> Matter of M-A-M-, 25 I&N Dec. 474 (BIA 2011).

<sup>109</sup> COURTNYE LLOYD & LISA J. BERLIN, DUKE UNIVERSITY, RESEARCH ON ADOLESCENT DEVELOPMENT, COMPETENCE, AND CHARACTER, 14 (2015), [https://www.purdue.edu/hhs/hdfs/fii/wp-content/uploads/2015/07/s\\_ncfis03c02.pdf](https://www.purdue.edu/hhs/hdfs/fii/wp-content/uploads/2015/07/s_ncfis03c02.pdf).

<sup>110</sup> Under New Jersey law, for example, under the age of 14, child witnesses are admitted only if they are adjudged by a trial court to possess the requisite mental capacity and moral responsibility. See C. M. Henderson, *Juvenile Witness in Criminal Trials: Standards for Determining Competency and the Applicability of the Traditional Oath*, CRIMINAL JUSTICE QUARTERLY, (1979). “Other State laws provide that children are incompetent unless they understand the nature of an oath. Still other States hold that children below certain ages, usually 10, 12, or 14, are presumptively incompetent unless determined otherwise.” See J.E.B. Myers, *Testimonial Competence of Children*, J. OF FAMILY LAW, (1986).

*under age 16* and is not accompanied by a guardian, relative, or friend.”<sup>111</sup> State laws provide that “children are incompetent unless they understand the nature of an oath.”<sup>112</sup> EOIR has noted that “immigration judges should be confident that the child is competent to testify... including whether the child is of sufficient mental capacity to understand the oath and to give sworn testimony.”<sup>113</sup>

*The following practice tips and safeguards should be employed by Immigration Judges to ensure that a child understands the nature of the proceedings and can meaningfully participate in the hearing.*<sup>114</sup>

- **Explain the proceedings in plain language and repeat the purpose and nature of proceedings often.** Take time to explain roles, ensure children and adolescents understand that they are not “in trouble” in these civil proceedings.<sup>115</sup>
- **Ask the child to explain their understanding of the proceeding.** Age impacts a child’s understanding of basic legal concepts, like “rights”, such that while the child may superficially know he has a “right,” he may not fully understand what is meant by the concept. For emphasis, when a 12-year-old was asked what the “right to remain silent” meant, and the boy answered, ““It means that you don’t have to say anything until the police ask you a question.””<sup>116</sup> The District Court Order in *Franco*,<sup>117</sup> included the following examples of questions that may be useful in assessing a child’s true ability to understand the nature of the proceedings:
  - What are your rights in immigration proceedings?
  - What is a legal representative?
  - What does a legal representative do in court?
  - How do you find an attorney or legal representative? Is there anyone who can help with your case?
  - What is “evidence”?
  - Can you give me an example of “evidence” that may be offered in your proceeding?
  - What is an “appeal”? Why and how would you file an appeal?

<sup>111</sup> For proceedings commenced prior to April 1, 1997, the following regulation applies to pleadings: 8 CFR §1240.48(b): “The immigration judge shall require the respondent to plead to the order to show cause by stating whether he or she admits or denies the factual allegations and his or her deportability under the charges contained therein. . . .The immigration judge shall not accept an admission of deportability from an unrepresented respondent who is incompetent or under age 16 and is not accompanied by a guardian, relative, or friend; nor from an officer of an institution in which a respondent is an inmate or patient.”

<sup>112</sup> J.E.B. Myers, *Testimonial Competence of Children*, J. OF FAMILY LAW, (1986).

<sup>113</sup> See OPPM GUIDANCE *supra* note 102.

<sup>114</sup> RAI0 Directorate *supra* note 99.

<sup>115</sup> See OPPM GUIDANCE *supra* note 102.

<sup>116</sup> Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANNUAL REVIEW OF CLINICAL PSYCHOLOGY 474 (2009).

<sup>117</sup> *Franco v. Holder*, Case No. CV 10-02211 DMG, at 15 -16. See M. ARYAH SOMERS, CHILDREN IN IMMIGRATION PROCEEDINGS, CHILD CAPACITIES AND MENTAL COMPETENCY IN IMMIGRATION LAW AND POLICY 7 (May 2015), stating “In the 2013 Franco order, the court indicated that Matter of M-A-M- failed to provide sufficient safeguards because these safeguards are left to the immigration judge’s discretion and none guarantee that the incompetent alien may participate in his or her proceedings as fully as an individual who is disabled. The evaluation system is required for individuals who either (a) have a mental disorder causing serious limitation in communication, memory or general mental and/or intellectual functioning or severe medical condition, or (b) exhibit one or more of the following psychiatric symptoms: severe disorganization, active hallucinations or delusions, mania, catatonia, severe depressive symptoms, suicidal ideation, marked anxiety or impulsivity.”

**If necessary, consider MAM safeguards to ensure the adolescent can meaningfully participate.**

Consider the MAM procedural safeguards<sup>118</sup> when an adolescent's competency comes into question:

- Appoint legal representation;
- Identify parent, guardian or next friend to assist legal representation;
- Referral for appointment of a child advocate;
- Grant continuances;<sup>119</sup>
- Closed hearing;
- Waive adolescent's appearance;
- Assistance with development of the record (including child/adolescent-appropriate questioning for direct exam and cross exam);
- Request prosecutorial discretion;
- Terminate the proceedings where appropriate.

These procedural safeguards are designed to ensure that traumatized children are able to fully and fairly participate in the removal proceedings against them.

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<sup>118</sup> See generally, Matter of M-A-M-, 25 I & N Dec. 474 (BIA 2011); See also AIC Practice Advisory, *Representing Clients with Mental Competency Issues Under Matter Of M-A-M*, (Nov. 30, 2011), available at [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/Mental-Competency-Issues.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/Mental-Competency-Issues.pdf)

<sup>119</sup> EOIR guidance already suggests that “stress and fatigue can adversely impact the ability of a younger child to participate in his or her removal proceedings. Therefore, where appropriate, Immigration Judges should seek not only to limit the number of times that children must be brought to court but also to resolve issues of removability and relief without undue delay.” See OPPM GUIDANCE, *supra* note 102, at 6.