

117TH CONGRESS
1ST SESSION

S. 3108

To provide counsel for unaccompanied children, and for other purposes.

IN THE SENATE OF THE UNITED STATES

OCTOBER 28, 2021

Ms. HIRONO (for herself, Mr. BENNET, Mr. BLUMENTHAL, Mr. BOOKER, Mr. COONS, Ms. CORTEZ MASTO, Mr. DURBIN, Mrs. FEINSTEIN, Mrs. GILLIBRAND, Mr. HEINRICH, Mr. HICKENLOOPER, Ms. KLOBUCHAR, Mr. LEAHY, Mr. MARKEY, Mr. MENENDEZ, Mr. MERKLEY, Mr. MURPHY, Mr. PADILLA, Mr. REED, Ms. ROSEN, Mr. SANDERS, Mr. SCHATZ, Ms. SMITH, Ms. WARREN, Mr. WHITEHOUSE, and Mr. WYDEN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide counsel for unaccompanied children, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Fair Day in Court
5 for Kids Act of 2021”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act:

1 (1) NONCITIZEN.—The term “noncitizen”
2 means an individual who is not a citizen or national
3 of the United States.

4 (2) UNACCOMPANIED CHILD.—The term “unac-
5 panied child” has the meaning given the term
6 “unaccompanied alien child” in section 462(g) of the
7 Homeland Security Act of 2002 (6 U.S.C. 279(g)).

8 **SEC. 3. REFERENCES TO ALIENS.**

9 With respect to an individual who is not a citizen or
10 national of the United States, any reference in this Act
11 to a “noncitizen” shall be deemed to refer to an individual
12 otherwise described as an “alien” in any Federal law, Fed-
13 eral regulation, or any written instrument issued by the
14 executive branch of the Government.

15 **SEC. 4. IMPROVING IMMIGRATION COURT EFFICIENCY AND**
16 **REDUCING COSTS BY INCREASING ACCESS**
17 **TO LEGAL INFORMATION.**

18 (a) DEFINITIONS.—Section 101(a) of the Immigra-
19 tion and Nationality Act (8 U.S.C. 1101(a)) is amended
20 by adding at the end the following:

21 “(53) The term ‘noncitizen’ means an individual who
22 is not a citizen or national of the United States.

23 “(54) The term ‘unaccompanied child’ has the mean-
24 ing given the term ‘unaccompanied alien child’ in section

1 462(g) of the Homeland Security Act of 2002 (6 U.S.C.
2 279(g)).”.

3 (b) APPOINTMENT OF COUNSEL IN REMOVAL PRO-
4 CEEDINGS; RIGHT TO REVIEW CERTAIN DOCUMENTS IN
5 REMOVAL PROCEEDINGS.—Section 240(b) of the Immi-
6 gration and Nationality Act (8 U.S.C. 1229a(b)) is
7 amended—

8 (1) in paragraph (4), in the matter preceding
9 subparagraph (A), by striking “under regulations of
10 the Attorney General” and inserting “under regula-
11 tions of the Attorney General, or in the case of an
12 unaccompanied child, under regulations of the Sec-
13 retary of Health and Human Services”—

14 (A) in subparagraph (A)—

15 (i) by striking “, at no expense to the
16 Government,”; and

17 (ii) by striking the comma at the end
18 and inserting a semicolon;

19 (B) by redesignating subparagraphs (B)
20 and (C) as subparagraphs (D) and (E), respec-
21 tively;

22 (C) by inserting after subparagraph (A)
23 the following:

24 “(B) the Attorney General, or in the case
25 of an unaccompanied child, the Secretary of

1 Health and Human Services, may appoint or
 2 provide counsel, at Government expense, to
 3 noncitizens in immigration proceedings;

4 “(C) the noncitizen, or the noncitizen’s
 5 counsel, not later than 7 days after receiving a
 6 notice to appear under section 239(a), shall re-
 7 ceive a complete copy of the noncitizen’s immi-
 8 gration file (commonly known as an ‘A-file’) in
 9 the possession of the Department of Homeland
 10 Security (other than documents protected from
 11 disclosure under section 552(b) of title 5,
 12 United States Code);” and

13 (D) in subparagraph (D), as redesignated,
 14 by striking “, and” and inserting “; and”; and
 15 (2) by adding at the end the following:

16 “(8) FAILURE TO PROVIDE NONCITIZEN RE-
 17 QUIRED DOCUMENTS.—A removal proceeding may
 18 not proceed until the noncitizen, or the noncitizen’s
 19 counsel if the noncitizen is represented—

20 “(A) has received the documents required
 21 under paragraph (4)(C); and

22 “(B) has been provided at least 10 days to
 23 review and assess such documents, unless the
 24 noncitizen or the noncitizen’s counsel expressly
 25 waives such review period.”.

1 (c) CLARIFICATION REGARDING THE AUTHORITY OF
2 THE FEDERAL GOVERNMENT TO APPOINT COUNSEL TO
3 NONCITIZENS IN IMMIGRATION PROCEEDINGS.—

4 (1) IN GENERAL.—Section 292 of the Immigra-
5 tion and Nationality Act (8 U.S.C. 1362) is amend-
6 ed to read as follows:

7 **“SEC. 292. RIGHT TO COUNSEL.**

8 “(a) IN GENERAL.—In any removal proceeding and
9 in any appeal proceeding before the Attorney General from
10 any such removal proceeding, the subject of the proceeding
11 shall have the privilege of being represented by such coun-
12 sel as may be authorized to practice in such proceeding
13 as he or she may choose. This subsection shall not apply
14 to screening proceedings described in section
15 235(b)(1)(A).

16 “(b) ACCESS TO COUNSEL FOR UNACCOMPANIED
17 CHILDREN.—

18 “(1) IN GENERAL.—In any removal proceeding
19 and in any appeal proceeding before the Attorney
20 General from any such removal proceeding, an unac-
21 companied child shall be represented by counsel ap-
22 pointed or provided by the Secretary of Health and
23 Human Services, at Government expense, unless the
24 child has obtained at his or her own expense counsel
25 authorized to practice in such proceeding.

1 “(2) TIMING.—The Secretary of Health and
2 Human Services shall appoint or provide counsel to
3 an unaccompanied child under paragraph (1)—

4 “(A) as expeditiously as possible; and

5 “(B) not later than the date on which the
6 child is first scheduled to appear before an im-
7 migration judge.

8 “(3) LENGTH OF REPRESENTATION.—An unac-
9 companied child shall be represented by counsel
10 under paragraph (1) at every stage of the pro-
11 ceedings from the unaccompanied child’s initial ap-
12 pearance through the termination of immigration
13 proceedings, and any ancillary matters appropriate
14 to such proceedings even if the child attains 18
15 years of age or is reunified with a parent or legal
16 guardian while the proceedings are pending.

17 “(4) CONTINUITY IN REPRESENTATION.—If
18 counsel retained by an unaccompanied child at his or
19 her own expense ceases representing the child for
20 any reason, the Secretary of Health and Human
21 Services shall ensure continued representation of the
22 child by appointing or providing new counsel as ex-
23 peditiously as possible.

24 “(5) NOTICE.—Not later than 72 hours after
25 an unaccompanied child is taken into Federal cus-

1 today, the child shall be notified that he or she will
2 be provided with legal counsel in accordance with
3 this subsection.

4 “(6) WITHIN DETENTION FACILITIES.—The
5 Secretary of Homeland Security shall ensure that
6 unaccompanied children have access to counsel in-
7 side all detention, holding, and border facilities.

8 “(c) PRO BONO REPRESENTATION.—

9 “(1) IN GENERAL.—To the maximum extent
10 practicable, the Secretary of Health and Human
11 Services shall make every effort to use the services
12 of competent counsel who agree to provide represen-
13 tation to such children under subsection (b) without
14 charge.

15 “(2) DEVELOPMENT OF NECESSARY INFRA-
16 STRUCTURES AND SYSTEMS.—Through appropriate
17 nonprofit organizations described in subsection (d),
18 the Secretary of Health and Human Services shall
19 ensure the availability of the necessary mechanisms
20 to identify, recruit, train, and oversee counsel avail-
21 able to provide pro bono legal assistance and rep-
22 resentation to unaccompanied children under sub-
23 section (b).

24 “(d) CONTRACTS; GRANTS.—

1 “(1) IN GENERAL.—The Secretary of Health
 2 and Human Services may enter into contracts with,
 3 or award grants to, nonprofit organizations with rel-
 4 evant expertise in the delivery of immigration-related
 5 legal services to children to carry out the responsibil-
 6 ities under this section, including providing legal ori-
 7 entation, screening cases for referral, identifying, re-
 8 cruiting, training, and overseeing pro bono attor-
 9 neys.

10 “(2) SUBCONTRACTS AND SUBGRANTS PER-
 11 MITTED.—Nonprofit organizations may enter into
 12 subcontracts with, or award grants to, other non-
 13 profit organizations with relevant expertise in the
 14 delivery of immigration-related legal services to chil-
 15 dren in order to carry out this section.

16 “(e) MODEL GUIDELINES ON LEGAL REPRESENTA-
 17 TION OF CHILDREN.—

18 “(1) DEVELOPMENT OF GUIDELINES.—The Di-
 19 rector of the Office of Refugee Resettlement, in con-
 20 sultation with the Director of the Executive Office
 21 for Immigration Review and nonprofit organizations
 22 with relevant expertise in providing immigration-re-
 23 lated legal services to children, shall develop model
 24 guidelines for the legal representation of unaccom-

1 panied children in immigration proceedings, which
2 shall be based on—

3 “(A) the 2018 report of the American Bar
4 Association entitled ‘Standards for the Custody,
5 Placement and Care; Legal Representation; and
6 Adjudication of Unaccompanied Alien Children
7 in the United States’;

8 “(B) the American Bar Association Model
9 Rules of Professional Conduct; and

10 “(C) any other source the Director of the
11 Office of Refugee Resettlement considers appro-
12 priate.

13 “(2) PURPOSE OF GUIDELINES.—The guide-
14 lines developed under paragraph (1) shall be de-
15 signed to help protect each child from any individual
16 suspected of involvement in any criminal, harmful,
17 or exploitative activity associated with the smuggling
18 or trafficking of children, while ensuring the fairness
19 of the removal proceeding in which the child is in-
20 volved.

21 “(f) DUTIES OF COUNSEL.—The duties of counsel
22 appointed or provided under this section shall include—

23 “(1) representing the unaccompanied alien child
24 concerned—

1 “(A) in all proceedings and matters relat-
2 ing to the immigration status of the child and;

3 “(B) with respect to any other action in-
4 volving the Department of Homeland Security;

5 “(2) appearing in person for each of the
6 child’s—

7 “(A) individual merits hearings and master
8 calendar hearings before the Executive Office
9 for Immigration Review; and

10 “(B) interviews involving the Department
11 of Homeland Security;

12 “(3) owing the same duties of undivided loyalty,
13 confidentiality, and competent representation to the
14 child as is due to an adult client;

15 “(4) advocating for the child’s legal interests,
16 as directed by the child’s express wishes;

17 “(5) in the case of a child who does not express
18 the objectives of representation, or is found incom-
19 petent, referring the child for the appointment of an
20 independent child advocate, as described in section
21 235(c)(6) of the William Wilberforce Trafficking
22 Victims Protection Reauthorization Act of 2008 (8
23 U.S.C. 1232(c)(6)); and

24 “(6) carrying out other such duties as may be
25 prescribed by the Secretary of Health and Human

1 Services or the Director of the Executive Office for
2 Immigration Review.

3 “(g) SAVINGS PROVISION.—Nothing in this section
4 may be construed to supersede—

5 “(1) any duties, responsibilities, disciplinary, or
6 ethical responsibilities an attorney may have to his
7 or her client under State law;

8 “(2) the admission requirements under State
9 law; or

10 “(3) any other State law pertaining to the ad-
11 mission to the practice of law in a particular juris-
12 diction.”.

13 (2) RULEMAKING.—The Secretary of Health
14 and Human Services shall promulgate regulations to
15 implement section 292 of the Immigration and Na-
16 tionality Act, as added by paragraph (1), in accord-
17 ance with the requirements set forth in section
18 3006A of title 18, United States Code.

19 **SEC. 5. ACCESS BY COUNSEL TO DEPARTMENT OF HOME-**
20 **LAND SECURITY FACILITIES.**

21 The Secretary of Homeland Security shall provide ac-
22 cess to counsel for all noncitizens detained in—

23 (1) a facility under the supervision of U.S. Im-
24 migration and Customs Enforcement or U.S. Cus-
25 toms and Border Protection; or

1 (2) a private facility that contracts with the De-
2 partment of Homeland Security to house, detain, or
3 hold noncitizens.

4 **SEC. 6. REPORT ON ACCESS TO COUNSEL.**

5 (a) REPORT.—Not later than December 31 of each
6 year, the Secretary of Health and Human Services, in con-
7 sultation with the Attorney General, shall prepare and
8 submit a report to the Committee on the Judiciary of the
9 Senate and the Committee on the Judiciary of the House
10 of Representatives regarding the extent to which the Sec-
11 retary has provided counsel for unaccompanied children
12 as described in subsection (b) of section 292 of the Immi-
13 gration and Nationality Act, as amended by section 4(c).

14 (b) CONTENTS.—Each report submitted under para-
15 graph (a) shall include, for the immediately preceding 1-
16 year period—

17 (1) the number and percentage of unaccom-
18 panied children described in subsection (b) of section
19 292 of the Immigration and Nationality Act, as
20 amended by section 4(c), who were represented by
21 counsel, including information specifying—

22 (A) the stage of the legal process at which
23 representation of each such child commenced;

1 (B) whether each such child was in govern-
 2 ment custody on the date on which such rep-
 3 resentation commenced; and

4 (C) the nationality and ages of such chil-
 5 dren;

6 (2) the number and percentage of children who
 7 received Know Your Rights presentations, including
 8 the nationality and ages of such children; and

9 (3) a description of the mechanisms used under
 10 subsection (b) of section 292 of the Immigration and
 11 Nationality Act, as added by section 4(c), for identi-
 12 fying, recruiting, and training pro bono counsel to
 13 represent unaccompanied children.

14 **SEC. 7. MOTIONS TO REOPEN.**

15 Section 240(c)(7)(C) of the Immigration and Nation-
 16 ality Act (8 U.S.C. 1229a(c)(7)(C)) is amended by adding
 17 at the end the following:

18 “(v) SPECIAL RULE FOR UNACCOM-
 19 PANIED CHILDREN ENTITLED TO APPOINT-
 20 MENT OF COUNSEL.—If the Secretary of
 21 Health and Human Services fails to ap-
 22 point or provide counsel for an unaccom-
 23 panied child under section 292(b)—

24 “(I) the limitations under this
 25 paragraph with respect to the filing of

1 a motion to reopen by such child
2 shall not apply; and
3 “(II) the filing of such a motion
4 shall stay the removal of the child.”.

5 **SEC. 8. AUTHORIZATION OF APPROPRIATIONS.**

6 (a) IN GENERAL.—There is authorized to be appro-
7 priated to the Office of Refugee Resettlement such sums
8 as may be necessary to carry out this Act.

9 (b) BUDGETARY EFFECTS.—The budgetary effects of
10 this Act, for the purpose of complying with the Statutory
11 Pay-As-You-Go Act of 2010, shall be determined by ref-
12 erence to the latest statement titled “Budgetary Effects
13 of PAYGO Legislation” for this Act, submitted for print-
14 ing in the Congressional Record by the Chairman of the
15 Senate Budget Committee, provided that such statement
16 has been submitted prior to the vote on passage.

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