

Migrant children: Out of sight, still in mind

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Weeks before November's elections, the child migrant crisis has dropped out of sight even as the children themselves have moved into that less visible but perilous maze — the nation's immigration courts.

The summer headlines have faded. Congress is out of town. And the one great constant, critics say, is the mixed message still coming from the White House as to what outcome it really wants.

Just last week, Health and Human Services broke new ground when it committed millions of dollars to provide legal counsel for the children who have left HHS' custody and now face deportation proceedings.

But this same administration slow-walks requests for data on the full scope of the attorney shortage. And after shaking up the courts by demanding that the children go to the head of the line, the White House is unwilling to set some minimal standard for the time allowed to find an attorney.

Tensions surfaced at a Sept. 24 White House meeting between administration officials and representatives of the Central American nonprofit community and migrant-rights lawyers from around the country.

"The system they are advocating is almost bipolar," said Abel Núñez, executive director of the Central American Resource Center or CARECEN, based in the Washington area. "You have to ask yourself what are they thinking. Do they think these children are refugees or do they just want to shut the door?"

"They say they want to expedite the process. We say they are short-circuiting it," Núñez said. "Who pays in the end except the children?"

During one six-week period this summer, government records show that over half the 3,824 continuances granted by the immigration courts for the children were because the defendants — often poor and unable to speak English — lacked representation.

Another 299 children, also without counsel, received orders of removal in the same period of late July and August.

Moreover the length of the continuances granted by the courts can vary wildly with some judges allowing only 30 days while others permit four to six months.

“We’re in court almost every day with kids and we are certainly seeing judges that are giving much shorter continuances than they ever did before,” said Caitlin Sanderson, the program director for the Esperanza Immigrant Rights Project, an arm of Catholic Charities in Los Angeles. “These are judges we have appeared in front of for years. We certainly know what their typical practice used to be and it has changed 180 degrees.”

Indeed, it can seem a sea of contradictions at the White House not unlike July and August, when President Barack Obama talked up changes in the law to expedite deportations but then never submitted legislation to Congress.

The administration would argue that it is back in a “damned if you do, damned if you don’t” situation, when the president is only trying to balance two priorities.

“We are trying to balance two things,” said a White House official. “The first is to adequately deal with humanitarian claims. Nobody is interested in returning folks who should not be returned. The second set of interests we have to address is a deterrent function.”

Here the White House has embraced the argument that smugglers drove the surge in border crossings more than the poverty and violence in countries like Honduras and El Salvador. And there lies a fundamental disagreement between Cecilia Muñoz, the director of the White House Policy Council, and her old allies in the migrant rights community.

In fact, Muñoz went a big step further at the White House meeting when she warned that if there is another surge of children across the border next year, it could jeopardize the ability of immigrant rights groups to protect existing asylum provisions in current law.

“We see this as a forced migration and children are coming as refugees, not because of something they have been told about U.S. policy,” said Lindsay Toczylowski, a top litigation attorney for Esperanza in Los Angeles. “And I never thought I’d hear them used as sacrificial lambs in the immigration debate.”

Both sides came away from the September meeting grateful for the dialogue. But the White House still bristles at any suggestion that it is creating “rocket docket” for unaccompanied children or UC cases. And it has belatedly put more muscle behind efforts to find attorneys for the children.

In fact, it was Senate Appropriations Committee Chairwoman Barbara Mikulski (D-Md.), a former Baltimore social worker, who most insisted on this funding for attorneys in the debate this summer. The HHS breakthrough last week appeared to be helped along by the working alliance between herself and HHS Secretary Sylvia Mathews Burwell — and their respective staffs.

Republicans in Congress have made it harder to respond. Twice this year already, the House GOP has blocked requests from the Justice Department for funding.

Immigration judges argue that having attorneys for the children actually helps to expedite the process and avoid continuances — a goal shared by the GOP. But there is such pressure from the right — which fears the children will “lawyer up” at taxpayer expense — that even more moderate Republicans have shied away from the fight.

A case in point is Rep. Frank Wolf (R-Va.), a senior member of the House Appropriations Committee who oversees the budget for Justice. Wolf has a long record on human rights and has stood up in the past for the Legal Services Corp. But he has refused repeated requests to discuss his views and appears determined not to be drawn into the migrant counsel fray.

Indeed, HHS’ announcement last week was something of an end run around Republicans in Congress as the department waited literally until the last day of fiscal year 2014 to make its decision public.

The fact that any appropriations were left over shows the volatility of the whole crisis.

Just two months ago, Burwell was telling Congress that she feared she was running out of money given the pace of the border crossings. But as the numbers dropped, HHS was able to close down some of its most costly shelter operations and Burwell, a former White House budget director, was able to find with her staff an extra \$4.2 million.

Those funds are now allocated to two prior HHS grantees — the U.S. Conference of Catholic Bishops and the U.S. Committee for Refugees and Immigrants or USCRI — which will contract out the work at the local level.

The plan is for additional funds to be made available in the new 2015 fiscal year, which began Oct. 1. And HHS envisions a \$9 million commitment altogether: one able to support 64 attorneys and then provide “post-release legal services” for 2,600 UC cases.

HHS says it is only expanding its authority under a 2008 statute to assist children “who are or have been” in the custody of the secretary. But it represents an important departure from what’s been past practice.

HHS has long provided “know your rights” information to the child migrants and in recent years began using public money to help represent those children in its shelters. But the new initiative takes that a step further in recognition that so many of the children need legal help after being released from HHS’ custody but still face deportation hearings.

Nine urban areas, including Houston, Los Angeles and Miami are targeted, and together with new attorneys, child advocates will be added to assist during the proceedings.

But when measured against the number of children relocated around the nation already this year, the proposal still falls short.

For example, in the three counties encompassing Houston, Los Angeles and Miami, HHS

estimates that almost 6,800 children had been relocated from January through Aug. 31. But even when fully engaged, the new legal service funds will cover under a third or 1,920 of these children, according to the goals assigned to the Bishops and USCRI.

“It’s a welcome change, a good start, but we are still far way from being able to meet the demand for quality counsel,” said Eric Tijernia, a Texas veteran of the child migrant battles and now associate director of the Immigrant Children’s Legal Program at USCRI’s headquarters in Virginia. “It is a small portion of the universe of need.”

Getting a good handle on the scope of the problem is made more difficult by the slow pace with which the administration has been willing to release court data collected by the Executive Office of Immigration Review within Justice.

EOIR modified its reporting system in July so as to better focus on the number of UC cases in the system. At one level, this is a step forward but also complicates any historic comparisons since EOIR had previously lumped the UC cases in with all juvenile defendants.

EOIR argues that it is a small office overwhelmed by the demands now for information. But for anyone seeking answers, it can seem like Alice’s Red Queen running to stay in place.

The most basic requests for data to measure the availability of counsel for the children can take 10 to 15 business days to process. If a reporter should ask then for an update to reflect that elapsed time, EOIR’s answer is that another 10 to 15 business days will be needed.

Just last week, for example, EOIR told POLITICO that the latest available data ended Sept. 2 — or more than a month ago. Early this week, an expanded set of numbers running through Sept. 30 was used to show the percentage of removal orders issued in absentia. But when POLITICO asked for an update too on the number of continuances to seek counsel, it was told that would require a new data run and 10 to 15 more business days.

Time is important here since the pace of court activity is so striking.

As part of its campaign to discourage future border crossings, the administration has greatly stepped up the pace for holding at least master calendar hearings — the equivalent of an arraignment — for the children.

From July 18, when the new reporting system began, to Sept. 2, EOIR estimates there were 4,444 such UC hearings. By Sept. 30, that number grew by 2,687 more. The combined total was 7,131 or almost 130 daily assuming a five-day work week for the courts.

This is where the term “rocket docket” arose. But at a federal court hearing in Seattle last

month, Deputy Assistant Attorney General Leon Fresco insisted judges were free to grant whatever continuances they wanted to try to allow the children to obtain counsel.

“There are no ‘rocket dockets,’ your honor, from the standpoint of any policy of any kind that says you have to speed up the cases for these kids,” Fresco said.

“What there is,” he continued, “is one policy that says the first hearing for the kids has to happen in 21 days after the notice to appear is served, which is the indictment. But after that, if the kid cannot find a lawyer, the immigration judge can continue the case as many times as the immigration judge wants without penalty to the immigration judge. ... There are no case completion goals for minors in that situation.”

Fresco’s comments were so strong that the American Civil Liberties Union sent out an advisory to defense attorneys, accompanied by a link to a court video of the proceedings. It got to the point where lawyers began going into court, quoting Fresco in asking judges for continuances. And on Sept. 10, EOIR issued guidance re-enforcing the message.

Signed by the chief immigration judge, Brian O’Leary, the advisory read: “Nothing in the priority scheduling of UC cases for the first master calendar hearing should in any way inhibit a judge’s discretion to reset the case to obtain representation.”

Two weeks later came the meeting on Sept. 24.

“They are definitely sending mixed messages” said one attorney familiar with those discussions. “You are having the attorney in court arguing there is no rocket docket, the head of EOIR telling us there is no rocket docket. But then Cecilia Muñoz, telling us we want to conclude these cases quickly we want to send a message to these children that they just can’t come here and get status.”

<http://www.politico.com/story/2014/10/child-migrants-111795.html>