

115TH CONGRESS
2^D SESSION

S. 3263

To limit the separation of families at or near ports of entry, to provide access to counsel for unaccompanied alien children, and to improve immigration detention, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 25, 2018

Mr. DURBIN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To limit the separation of families at or near ports of entry, to provide access to counsel for unaccompanied alien children, and to improve immigration detention, 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 “Humane Treatment
5 of Migrant Children Act”.

1 **TITLE I—KEEPING FAMILIES**
2 **TOGETHER**

3 **SEC. 101. DEFINITIONS.**

4 In this title:

5 (1) **AGENT; OFFICER.**—The terms “agent” and
6 “officer” include contractors of the Federal Govern-
7 ment.

8 (2) **CHILD.**—The term “child” means an indi-
9 vidual who—

10 (A) has not reached the age of 18; and

11 (B) has no permanent immigration status.

12 (3) **COMMITTEES OF JURISDICTION.**—The term
13 “committees of jurisdiction” means—

14 (A) the Committee on the Judiciary and
15 the Committee on Health, Education, Labor,
16 and Pensions of the Senate; and

17 (B) the Committee on the Judiciary of the
18 House of Representatives.

19 (4) **DANGER OF ABUSE OR NEGLECT AT THE**
20 **HANDS OF THE PARENT OR LEGAL GUARDIAN.**—The
21 term “danger of abuse or neglect at the hands of the
22 parent or legal guardian” shall not mean migrating
23 to or crossing the United States border.

24 (5) **DESIGNATED AGENCY.**—The term “des-
25 ignated agency” means—

- 1 (A) the Department of Homeland Security;
2 (B) the Department of Justice; and
3 (C) the Department of Health and Human
4 Services.

5 (6) FINDING.—The term “finding” means an
6 individualized written assessment or screening by the
7 trained agent or officer that includes a consultation
8 with a child welfare specialist, formalized as required
9 under section 102(c) and consistent with sections
10 103, 104, and 108.

11 (7) SECRETARY.—Unless otherwise specified,
12 the term “Secretary” means the Secretary of Home-
13 land Security.

14 **SEC. 102. LIMITATION ON THE SEPARATION OF FAMILIES.**

15 (a) IN GENERAL.—An agent or officer of a des-
16 ignated agency shall be prohibited from removing a child
17 from his or her parent or legal guardian, at or near the
18 port of entry or within 100 miles of the border of the
19 United States, unless one of the following has occurred:

20 (1) A State court, authorized under State law,
21 terminates the rights of a parent or legal guardian,
22 determines that it is in the best interests of the child
23 to be removed from his or her parent or legal guard-
24 ian, in accordance with the Adoption and Safe Fam-
25 ilies Act of 1997 (Public Law 105–89), or makes

1 any similar determination that is legally authorized
2 under State law.

3 (2) An official from the State or county child
4 welfare agency with expertise in child trauma and
5 development makes a best interests determination
6 that it is in the best interests of the child to be re-
7 moved from his or her parent or legal guardian be-
8 cause the child is in danger of abuse or neglect at
9 the hands of the parent or legal guardian, or is a
10 danger to herself or others.

11 (3) The Chief Patrol Agent or the Area Port
12 Director in their official and undelegated capacity,
13 authorizes separation upon the recommendation by
14 an agent or officer, based on a finding that—

15 (A) the child is a victim of trafficking or
16 is at significant risk of becoming a victim of
17 trafficking;

18 (B) there is a strong likelihood that the
19 adult is not the parent or legal guardian of the
20 child; or

21 (C) the child is in danger of abuse or ne-
22 glect at the hands of the parent or legal guard-
23 ian, or is a danger to themselves or others.

24 (b) PROHIBITION ON SEPARATION.—An agency may
25 not remove a child from a parent or legal guardian solely

1 for the policy goal of deterring individuals from migrating
2 to the United States or for the policy goal of promoting
3 compliance with civil immigration laws.

4 (c) DOCUMENTATION REQUIRED.—The Secretary
5 shall ensure that a separation under subsection (a)(3) is
6 documented in writing and includes, at a minimum, the
7 reason for such separation, together with the stated evi-
8 dence for such separation.

9 **SEC. 103. RECOMMENDATIONS FOR SEPARATION BY**
10 **AGENTS OR OFFICERS.**

11 (a) IN GENERAL.—Not later than 180 days after the
12 date of the enactment of this Act, the Secretary, in con-
13 sultation with the Secretary of Health and Human Serv-
14 ices, shall develop training and guidance, with an empha-
15 sis on the best interests of the child, childhood trauma,
16 attachment, and child development, for use by the agents
17 and officers, in order to standardize the implementation
18 of section 102(a)(3).

19 (b) ANNUAL REVIEW.—Not less frequently than an-
20 nually, the Secretary of Health and Human Services shall
21 review the guidance developed under subsection (a) and
22 make recommendations to the Secretary to ensure such
23 guidance is in accordance with current evidence and best
24 practices in child welfare, child development, and child-
25 hood trauma.

1 (c) REQUIREMENT.—The guidance under subsection
 2 (a) shall incorporate the presumptions described in section
 3 104.

4 (d) ADDITIONAL REQUIREMENTS.—

5 (1) EVIDENCE-BASED.—The guidance and
 6 training developed under this section shall incor-
 7 porate evidence-based practices.

8 (2) TRAINING REQUIRED.—

9 (A) All agents and officers of designated
 10 agencies, upon hire, and annually thereafter,
 11 shall complete training on adherence to the
 12 guidance under this section.

13 (B) All Chief Patrol Agents and Area Port
 14 Directors, upon hire, and annually thereafter,
 15 shall complete—

16 (i) training on adherence to the guid-
 17 ance under this section; and

18 (ii) 90 minutes of child welfare prac-
 19 tice training that is evidence-based and
 20 trauma-informed.

21 **SEC. 104. PRESUMPTIONS.**

22 The presumptions described in this section are the
 23 following:

24 (1) FAMILY UNITY.—There shall be a strong
 25 presumption in favor of family unity.

1 parent or legal guardian, in the language or manner that
2 is understandable by the parent or legal guardian.

3 **SEC. 106. REQUIRED INFORMATION FOR SEPARATED FAMI-**
4 **LIES.**

5 Not less frequently than once every month, the Sec-
6 retary shall provide the parent or legal guardian of a child
7 who was separated, the following information, at a min-
8 imum:

9 (1) A status report on the monthly activities of
10 the child.

11 (2) Information about the education and health
12 of the child, including any medical treatment pro-
13 vided to the child or medical treatment recommend-
14 ed for the child.

15 (3) Information about changes to the child's
16 immigration status.

17 (4) Other information about the child, designed
18 to promote and maintain family reunification, as the
19 Secretary determines in his or her discretion.

20 **SEC. 107. ANNUAL REPORT ON FAMILY SEPARATION.**

21 Not later than 1 year after the date of the enactment
22 of this Act, and annually thereafter, the Secretary shall
23 submit to the committees of jurisdiction a report that de-
24 scribes each instance in which a child was separated from

1 a parent or legal guardian and includes, for each such in-
2 stance, the following:

3 (1) The relationship of the adult and the child.

4 (2) The age and gender of the adult and child.

5 (3) The length of separation.

6 (4) Whether the adult was charged with a
7 crime, and if the adult was charged with a crime,
8 the type of crime.

9 (5) Whether the adult made a claim for asylum,
10 expressed a fear to return, or applied for other im-
11 migration relief.

12 (6) Whether the adult was prosecuted if
13 charged with a crime and the associated outcome of
14 such charges.

15 (7) The stated reason for, and evidence in sup-
16 port of, the separation.

17 (8) If the child was part of a sibling group at
18 the time of separation, whether the sibling group has
19 had physical contact and visitation.

20 (9) Whether the child was rendered an unac-
21 companied alien child.

22 (10) Other information in the Secretary's dis-
23 cretion.

1 **SEC. 108. CLARIFICATION OF PARENTAL RIGHTS.**

2 If a child is separated from a parent or legal guard-
3 ian, and a State court has not made a determination that
4 the parental rights have been terminated, there is a pre-
5 sumption that—

6 (1) the parental rights remain intact; and

7 (2) the separation does not constitute an af-
8 firmative determination of abuse or neglect under
9 Federal or State law.

10 **SEC. 109. CLARIFICATION OF EXISTING LAW.**

11 (a) FEDERAL LAW.—Nothing in this title shall be in-
12 terpreted to supersede or modify Federal child welfare law,
13 where applicable, including the Adoption and Safe Fami-
14 lies Act of 1997 (Public Law 105–89).

15 (b) STATE LAW.—Nothing in this title shall be inter-
16 preted to supersede or modify State child welfare laws
17 where applicable.

18 **SEC. 110. GAO REPORT ON PROSECUTION OF ASYLUM**
19 **SEEKERS.**

20 (a) STUDY.—The Comptroller General of the United
21 States shall conduct a study of the prosecution of asylum
22 seekers during the period beginning on January 1, 2008,
23 and ending on December 31, 2018, including—

24 (1) the total number of persons who claimed a
25 fear of persecution, received a favorable credible fear
26 determination, and were referred for prosecution;

1 (2) an overview and analysis of the metrics
2 used by the Department of Homeland Security and
3 the Department of Justice to track the number of
4 asylum seekers referred for prosecution;

5 (3) the total number of asylum seekers referred
6 for prosecution, a breakdown and description of the
7 criminal charges filed against asylum seekers during
8 such period, and a breakdown and description of the
9 convictions secured;

10 (4) the total number of asylum seekers who
11 were separated from their children as a result of
12 being referred for prosecution;

13 (5) a breakdown of the resources spent on pros-
14 ecuting asylum seekers during such period, as well
15 as any diversion of resources required to prosecute
16 asylum seekers, and any costs imposed on States
17 and localities;

18 (6) the total number of asylum seekers who
19 were referred for prosecution and also went through
20 immigration proceedings; and

21 (7) the total number of asylum seekers referred
22 for prosecution who were deported before going
23 through immigration proceedings.

24 (b) REPORT.—Not later than 1 year after the date
25 of the enactment of this Act, the Comptroller General shall

1 submit to Congress a report that describes the results of
2 the study conducted pursuant to subsection (a).

3 **TITLE II—FAIR DAY IN COURT**
4 **FOR KIDS**

5 **SEC. 201. IMPROVING IMMIGRATION COURT EFFICIENCY**
6 **AND REDUCING COSTS BY INCREASING AC-**
7 **CESS TO LEGAL INFORMATION.**

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

13 (1) in paragraph (4)—

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:

1 “(B) the Attorney General may appoint or
2 provide counsel, at Government expense, to
3 aliens in immigration proceedings;

4 “(C) the alien, or the alien’s counsel, not
5 later than 7 days after receiving a notice to ap-
6 pear under section 239(a), shall receive a com-
7 plete copy of the alien’s immigration file (com-
8 monly known as an ‘A-file’) in the possession of
9 the Department of Homeland Security (other
10 than documents protected from disclosure under
11 section 552(b) of title 5, United States Code);”;
12 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 ALIEN REQUIRED
17 DOCUMENTS.—A removal proceeding may not pro-
18 ceed until the alien, or the alien’s counsel, if the
19 alien 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.”.

1 (b) CLARIFICATION REGARDING THE AUTHORITY OF
2 THE ATTORNEY GENERAL TO APPOINT COUNSEL TO
3 ALIENS 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.—Except as provided in sub-
9 sections (b) and (c), in any removal proceeding and in any
10 appeal proceeding before the Attorney General from any
11 such removal proceeding, the subject of the proceeding
12 shall have the privilege of being represented by such coun-
13 sel as may be authorized to practice in such proceeding
14 as he or she may choose. This subsection shall not apply
15 to screening proceedings described in section
16 235(b)(1)(A).

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

19 “(1) IN GENERAL.—In any removal proceeding
20 and in any appeal proceeding before the Attorney
21 General from any such removal proceeding, an unac-
22 companied alien child (as defined in section 462(g)
23 of the Homeland Security Act on 2002 (6 U.S.C.
24 279(g))) shall be represented by Government-ap-
25 pointed counsel, at Government expense.

1 “(2) LENGTH OF REPRESENTATION.—Once a
2 child is designated as an unaccompanied alien child
3 under paragraph (1), the child shall be represented
4 by counsel at every stage of the proceedings from
5 the child’s initial appearance through the termi-
6 nation of immigration proceedings, and any ancillary
7 matters appropriate to such proceedings even if the
8 child attains 18 years of age or is reunified with a
9 parent or legal guardian while the proceedings are
10 pending.

11 “(3) NOTICE.—Not later than 72 hours after
12 an unaccompanied alien child is taken into Federal
13 custody, the alien shall be notified that he or she will
14 be provided with legal counsel in accordance with
15 this subsection.

16 “(4) WITHIN DETENTION FACILITIES.—The
17 Secretary of Homeland Security shall ensure that
18 unaccompanied alien children have access to counsel
19 inside all detention, holding, and border facilities.

20 “(c) PRO BONO REPRESENTATION.—

21 “(1) IN GENERAL.—To the maximum extent
22 practicable, the Attorney General should make every
23 effort to utilize the services of competent counsel
24 who agree to provide representation to such children
25 under subsection (b) without charge.

1 “(2) DEVELOPMENT OF NECESSARY INFRA-
2 STRUCTURES AND SYSTEMS.—The Attorney General
3 shall develop the necessary mechanisms to identify
4 counsel available to provide pro bono legal assistance
5 and representation to children under subsection (b)
6 and to recruit such counsel.

7 “(d) CONTRACTS; GRANTS.—The Attorney General
8 may enter into contracts with, or award grants to, non-
9 profit agencies with relevant expertise in the delivery of
10 immigration-related legal services to children to carry out
11 the responsibilities under this section, including providing
12 legal orientation, screening cases for referral, recruiting,
13 training, and overseeing pro bono attorneys. Nonprofit
14 agencies may enter into subcontracts with, or award
15 grants to, private voluntary agencies with relevant exper-
16 tise in the delivery of immigration related legal services
17 to children in order to carry out this section.

18 “(e) MODEL GUIDELINES ON LEGAL REPRESENTA-
19 TION OF CHILDREN.—

20 “(1) DEVELOPMENT OF GUIDELINES.—The Ex-
21 ecutive Office for Immigration Review, in consulta-
22 tion with voluntary agencies and national experts,
23 shall develop model guidelines for the legal represen-
24 tation of alien children in immigration proceedings,
25 which shall be based on the children’s asylum guide-

1 lines, the American Bar Association Model Rules of
2 Professional Conduct, and other relevant domestic or
3 international sources.

4 “(2) PURPOSE OF GUIDELINES.—The guide-
5 lines developed under paragraph (1) shall be de-
6 signed to help protect each child from any individual
7 suspected of involvement in any criminal, harmful,
8 or exploitative activity associated with the smuggling
9 or trafficking of children, while ensuring the fairness
10 of the removal proceeding in which the child is in-
11 volved.

12 “(f) DUTIES OF COUNSEL.—Counsel provided under
13 this section shall—

14 “(1) represent the unaccompanied alien child in
15 all proceedings and matters relating to the immigra-
16 tion status of the child or other actions involving the
17 Department of Homeland Security;

18 “(2) appear in person for all individual merits
19 hearings before the Executive Office for Immigration
20 Review and interviews involving the Department of
21 Homeland Security;

22 “(3) owe the same duties of undivided loyalty,
23 confidentiality, and competent representation to the
24 child as is due to an adult client; and

1 “(4) carry out other such duties, as determined
2 by the Attorney General or the Executive Office for
3 Immigration Review.

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

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

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

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

14 (2) RULEMAKING.—The Attorney General shall
15 promulgate regulations to implement section 292 of
16 the Immigration and Nationality Act, as added by
17 paragraph (1), in accordance with the requirements
18 set forth in section 3006A of title 18, United States
19 Code.

20 **SEC. 202. ACCESS BY COUNSEL AND LEGAL ORIENTATION**
21 **AT DETENTION FACILITIES.**

22 The Secretary of Homeland Security shall provide ac-
23 cess to counsel for all aliens detained in a facility under
24 the supervision of U.S. Immigration and Customs En-
25 forcement, U.S. Customs and Border Protection, or the

1 Department of Health and Human Services, or in any pri-
2 vate facility that contracts with the Federal Government
3 to house, detain, or hold aliens.

4 **SEC. 203. REPORT ON ACCESS TO COUNSEL.**

5 (a) REPORT.—Not later than December 31 of each
6 year, the Secretary of Homeland Security, in consultation
7 with the Attorney General, shall prepare and submit to
8 the Committee on the Judiciary of the Senate and the
9 Committee on the Judiciary of the House of Representa-
10 tives a report regarding the extent to which aliens de-
11 scribed in section 292(b) of the Immigration and Nation-
12 ality Act, as added by section 201(b)(1), have been pro-
13 vided access to counsel.

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 aliens de-
18 scribed in section 292(b) of the Immigration and
19 Nationality Act, as added by section 201(b)(1), who
20 were represented by counsel, including information
21 specifying—

22 (A) the stage of the legal process at which
23 each such alien was represented;

24 (B) whether the alien was in government
25 custody; and

1 (C) the nationality and ages of such aliens;
2 and
3 (2) the number and percentage of aliens who
4 received legal orientation presentations, including
5 the nationality and ages of such aliens.

6 **SEC. 204. AUTHORIZATION OF APPROPRIATIONS.**

7 (a) IN GENERAL.—There is authorized to be appro-
8 priated to the Executive Office of Immigration Review of
9 the Department of Justice such sums as may be necessary
10 to carry out this title.

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

19 **TITLE III—IMPROVING**
20 **IMMIGRATION DETENTION**

21 **SEC. 301. IMMIGRATION DETENTION PRIORITIES.**

22 (a) PRIORITIZATION.—The Director of U.S. Immi-
23 gration and Customs Enforcement shall use the limited
24 resources of U.S. Immigration and Customs Enforcement

1 to detain aliens who pose a threat to national security or
2 public safety.

3 (b) PRESUMPTION.—Absent extraordinary cir-
4 cumstances, aliens shall not be detained if—

5 (1) they are known to be suffering from serious
6 physical or mental illness;

7 (2) they have a disability;

8 (3) they are elderly, pregnant, or nursing;

9 (4) they are minors;

10 (5) they demonstrate that they are primary
11 caretakers of a minor or an infirm person; or

12 (6) their detention is otherwise not in the public
13 interest.

14 **SEC. 302. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT**
15 **DETENTION FACILITY STANDARDS.**

16 Beginning not later than 1 year after the date of the
17 enactment of this Act, all U.S. Immigration and Customs
18 Enforcement detention system facilities, including con-
19 tract facilities and local and county jails operating under
20 intergovernmental service agreements, shall meet the Per-
21 formance-Based National Detention Standards developed
22 by U.S. Immigration and Customs Enforcement in 2011,
23 including the revisions issued in December 2016.

1 **SEC. 303. INCREASED FUNDING FOR ALTERNATIVES TO DE-**
2 **TENTION.**

3 (a) IN GENERAL.—The Secretary of Homeland Secu-
4 rity shall provide sufficient funding to the Alternatives to
5 Detention Division to cover alternatives to detention pro-
6 gram costs for all aliens awaiting immigration proceedings
7 who are not subject to detention.

8 (b) CONTRACTS AUTHORIZED.—The Director of U.S.
9 Immigration and Customs Enforcement shall contract
10 with nonprofit service providers with the ability to provide
11 the services required in operating an alternatives to deten-
12 tion program whenever feasible.

13 (c) AUTHORIZATION OF APPROPRIATIONS.—There
14 are authorized to be appropriated such sums as may be
15 necessary to carry out this section.

16 **SEC. 304. INCREASING THE NUMBER OF IMMIGRATION**
17 **JUDGES AND STRENGTHENING MERIT-BASED**
18 **HIRING AND DUE PROCESS.**

19 (a) IMMIGRATION JUDGES.—The Attorney General
20 shall increase the total number of immigration judges by
21 225, compared to the number of immigration judges au-
22 thorized on the date of the enactment of this Act.

23 (b) SUPPORT STAFF; OTHER RESOURCES.—The At-
24 torney General shall ensure that the Executive Office for
25 Immigration Review has sufficient support staff, adequate
26 technological and security resources, and appropriate fa-

1 cilities to conduct the immigration proceedings required
2 under Federal law.

3 (c) LIMITATION.—Amounts appropriated for the Ex-
4 ecutive Office for Immigration Review or for any other De-
5 partment of Justice agency or function may not be used
6 to implement numeric judicial performance standards or
7 other standards that could negatively impact the fair ad-
8 ministration of justice by the immigration courts.

9 (d) QUALIFICATION; SELECTION.—The Attorney
10 General shall—

11 (1) ensure that all newly hired immigration
12 judges and Board of Immigration Appeals members
13 are highly qualified and trained to conduct fair, im-
14 partial adjudications in accordance with applicable
15 due process requirements; and

16 (2) in selecting immigration judges, may not
17 give any preference to candidates with prior govern-
18 ment experience compared to equivalent subject-mat-
19 ter expertise resulting from nonprofit, private bar, or
20 academic experience.

21 (e) AUTHORIZATION OF APPROPRIATIONS.—There
22 are authorized to be appropriated such sums as may be
23 necessary to carry out this section.

1 **SEC. 305. U.S. CITIZENSHIP AND IMMIGRATION SERVICES**

2 **REFUGEE CORPS OFFICERS.**

3 The Secretary of Homeland Security shall increase
4 the total number of Department of Homeland Security
5 personnel who are responsible for processing refugee appli-
6 cations by not fewer than the maximum number of such
7 personnel reassigned to the Asylum Division during fiscal
8 year 2018.

○