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THE REFUGEE AND IMMIGRANT CENTER
FOR EDUCATION AND LEGAL SERVICES

Competency Hearings

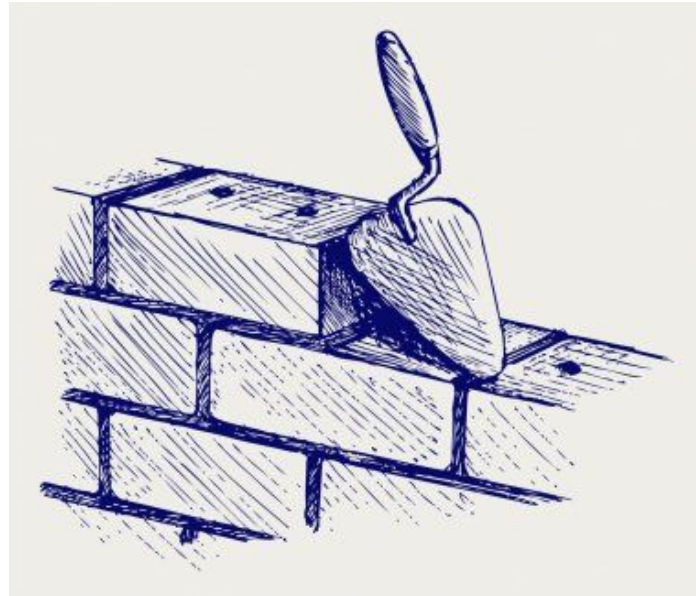
Best Practices for Representing Children



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Foundations





Competency:

- Competency as a legal construct tied to due process (as opposed to capacity, referring to a client’s ability to make a decision or perform a task in a given context)
- Presumption of competency in immigration court
- Competence in immigration proceedings: “whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses” *Matter of M-A-M-*, 25 I&N Dec. 474, 484 (BIA 2011)
 - Ability to assist counsel is necessary
 - Ability to understand what evidence is relevant
 - Ability to produce evidence
 - Ability to understand evidence against them
- Not limited to “rational and actual understanding of the proceedings”



Competency:

- Competency issues emerge in the context of:
 - Intellectual disability and cognitive disabilities
 - Mental health disorders
 - PTSD
 - ADHD
 - Depressive Disorder
 - Anxiety disorder
 - Bipolar disorder, schizophrenia, and other mental disorders
 - Child development
 - Autism



Requesting a Competency Hearing

1. Show “bona fide doubt” as to competency
2. IJ will question to assess “reasonable cause” to believe incompetent
3. Competency hearing
 - Can be requested through motion practice or at a Master Calendar Hearing
 - Evidence
 - Mental health evaluations
 - Medical records from past/current medical treatment
 - Medical reports from criminal proceedings
 - School records: special education classes or individualized education plans
 - Reports or letters from teachers, counselors, social workers, child advocate
 - Affidavits or letters from friends or family
 - ORR Special Incident Reports
 - Prescription medication



Competency Hearing

- Burden of proof: Preponderance of the evidence
- OPLA has duty to disclose relevant evidence
- Witnesses:
 - Mental health professional
 - Social worker
 - Child advocate
 - Family/community
- Role of IJ



Requesting Safeguards INA 240 (b)(3)

- Assign child advocate
- Allowing others to appear on child's behalf
- No negative inference if child does not testify
- Allowing others to provide information to the court
- Consider appropriate lens in credibility assessment
- Managing case to allow child to obtain treatment
- Managing case to allow child to obtain evidence/time to work with counsel
- Allowing court accommodations
- Waiving appearance
- Service protections (*Matter of E-S-I-*, 26 I & N Dec. 136 (BIA 2013))
- Admission protections
- Preserve appeal rights on behalf of respondent



Ethics

RIGHT TO FULL PARTICIPATION IN DECISION-MAKING

Rule: A Child has the right to understand all proceedings and to express his own views freely in all matters affecting him.

Comments: Children have the right to participate in all decision-making processes that affect their lives. Specifically, allowing a Child meaningfully to participate in decision-making means ensuring that this process must (i) provide the Child with sufficient and Developmentally Appropriate information to allow the Child to make an informed decision; (ii) account for the Child's evolving ability to understand situations and respond to advice and guidance; and (iii) be free from pressure and manipulation either to reach a certain decision or to make a decision at all. In some circumstances, due to characteristics such as age and capacity, a Child may not be able to comprehend the information presented. In such cases, the Child shall be appointed a Child Advocate.



Panel Discussion





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Additional Resources

Matter of M-A-M-

Matter of M-J-K-

Matter of E-S-I-

Matter of J-R-R-A-

Matter of J-S-S-

Franco-Gonzalez v. Holder

Section 504 of the Rehabilitation Act of 1973



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