

Children's Right to Counsel and Child Advocates in ORR Custody

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Overview

Children in the custody of the Office of Refugee Resettlement (ORR) have legal rights related to access to counsel and child advocates. This guide is designed to explain your clients' rights to meaningfully access counsel and child advocate support and what source of law undergird these rights.

Your client has legal rights related to counsel and child advocate support under the following:

Statutes

- Homeland Security Act, 6 U.S.C. § 279
- Trafficking Victims Protection Reauthorization Act (TVPRA), 8 U.S.C. § 1232(c)
- Immigration and Nationality Act, 8 U.S.C. § 1362

Regulations

- 45 C.F.R. § 410.1000, *et seq.* (ORR Foundational Rule)

Court Orders

- *Lucas R. Access to Counsel Settlement* ("Access to Counsel Settlement")
- *Lucas R. Disability Claim Settlement* ("Disability Settlement") (to be implemented by 05/03/25)
- *Lucas R. Psychotropic Medications Settlement* ("Psych Meds Settlement") (rolling implementation)

This guide is designed to inform you of what rights your clients have and connect you to relevant resources. It does not, and is not intended to, constitute legal advice in a particular case. Examples used throughout the guide are intended to illustrate possible fact scenarios for unaccompanied children.

Overview

What You Can Do

If you are prevented from meeting with or effectively representing or advocating for your client, you can:

- **Reach out to the National Center for Youth Law** – We can help identify potential legal violations and suggest options for relief. Please contact NCYL at immigration@youthlaw.org.
- **Report concerns to ORR** – Email UCLegalServicesSupport@acf.hhs.gov to elevate concerns related to provision of legal services to ORR. See [ORR Policy Guide § 3.7.4](#); see also [Access to Counsel Settlement § II.11](#).
- **File a complaint with the UC Office of the Ombuds** – The ORR Foundational Rule creates a UC Office of the Ombuds with the authority to receive and investigate complaints regarding ORR's adherence to federal law and ORR regulations and standards. [45 C.F.R. § 410.1309\(b\)\(2\)](#); UC Office of the Ombuds [website](#). The Ombuds can be reached at UC.Ombuds@acf.hhs.gov.

Right to Legal Counsel

Are all unaccompanied children entitled to legal counsel provided at the government's expense?

- **No.** As explained below, children do have the right to retain counsel to represent them in immigration and non-immigration matters and ORR is obligated to ensure access to counsel to the greatest extent practicable. [8 U.S.C. § 1232\(c\)\(3\)\(5\)](#).

Do children in ORR custody have a general right to retain counsel in immigration proceedings?

- **Yes.** Immigrants—including children—in removal proceedings have a statutory right to retain and be represented by counsel in their removal proceedings. See [8 U.S.C. § 1362](#). Care providers must advise children of this right. See [45 C.F.R. § 410.1302\(c\)\(12\)](#).
- Attorneys of record, including legal service providers funded by ORR, for a child in ORR custody can notify ORR that they represent a child by submitting a [Notice of Attorney Representation](#) form.

Do children in ORR custody have a right to retain counsel in non-immigration legal matters?

- **Yes.** Children have a right to be represented by counsel in “legal proceedings or matters” beyond immigration proceedings, including ORR placement, release, and medication decisions. See [Lucas R. v. Becerra](#), No. 18-CV-5741, 2022 WL 2177454, at *30-33 (C.D. Cal. March 11, 2022); [Access to Counsel Settlement § II.8](#).
- **Restrictive placement:** Unaccompanied children have the right to seek the assistance of counsel related to challenging their restrictive placement. [45 C.F.R. §§ 410.1901\(c\), 410.1902\(a\)](#). ORR must encourage the care provider facility to seek legal representation from a contracted legal service provider or child advocate if a child is not represented in a Placement Review Panel. [45 C.F.R. § 410.1902\(a\)](#).

Right to Legal Counsel

- **Children who have experienced significant incidents:** ORR must refer children with certain Significant Incident Reports (SIRs) to the contracted legal service provider. This includes when children have experienced severe abuse or neglect, are involved in incidents involving law enforcement or weapons, or are reported to be involved in alleged sexual abuse or harassment. [ORR Policy Guide § 4.10.4](#); [ORR Policy Guide § 5.8.11](#).
- **Children with disabilities:** ORR should consult the child's attorney and child advocate when developing a Section 504 Service Plan. [ORR Policy Guide § 3.8.3](#); see also [Disability Settlement § II.B.3 \(to be implemented by 05/03/25\)](#). For more information about advocating for UCs with disabilities, see [Guide to Rights of Children with Disabilities In ORR Custody](#).
- **Children prescribed psychotropic medications:** A child in ORR custody has the right to assistance of counsel with respect to the administration of psychotropic medications. [45 C.F.R. § 410.1310\(c\)](#).
- **Release decisions:** Children may have the assistance of counsel in challenging the denial of release to a sponsor. [45 C.F.R. § 410.1206\(c\), \(e\), \(j\)\(2\)](#). A child's attorney and child advocate also likely qualify as relevant stakeholders for addressing unresolved items in a sponsor application identified through a 90-day review. See [45 C.F.R. § 410.1207\(b\)](#).

Is ORR required to fund legal counsel for unaccompanied children?

- In the Homeland Security Act, Congress tasked ORR with "developing a plan . . . on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each [unaccompanied] child." [6 U.S.C. § 279\(b\)\(1\)\(A\)](#).
- The Trafficking Victims Protection Rehabilitation Act (TVPRA) requires the federal government to "ensure, **to the greatest extent practicable**" that **unaccompanied children "have counsel to represent them** in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking." [8 U.S.C. § 1232\(c\)\(3\)\(5\)](#).

Right to Legal Counsel

- To the extent appropriations are available and it is not practicable to secure pro bono counsel, the Foundational Rule requires ORR to fund legal service providers to provide direct immigration legal representation for certain unaccompanied children currently or formerly in ORR custody. [45 C.F.R. § 410.1309\(a\)\(4\)](#).
- The Foundational Rule also authorizes ORR to use appropriated funds for legal representation for certain non-immigration matters such as ORR hearings and certain state proceedings. [45 C.F.R. § 410.1309\(b\)\(2\)](#).

Standards for the Provision of Legal Services

What legal services are all unaccompanied children entitled to receive at ORR care provider facilities?

- Within 10 business days of arriving at an ORR facility, a **child must receive a presentation by an independent legal service provider** regarding the immigration system and their legal rights. [45 C.F.R. § 410.1309\(a\)\(2\)](#).
- Care providers must provide children information about “the availability of free legal assistance,” their right to representation by counsel, their right to an immigration court hearing, their ability to apply for asylum, and their ability to request voluntary departure in lieu of removal. [45 C.F.R. § 410.1302\(c\)\(12\)](#).
- Unaccompanied children are also entitled to a **confidential legal consultation** to determine possible forms of immigration relief within 10 business days of arrival at an ORR facility. [45 C.F.R. § 410.1309\(a\)\(2\)\(v\)](#).
- ORR must request an additional legal consultation for certain children, including children identified as potential victims of crime, trafficking, abuse, or neglect, and children fleeing persecution. [45 C.F.R. § 410.1309\(a\)\(2\)\(v\)](#).
- Care providers must make interpretation and translation services available to a child’s legal service provider upon request. [45 C.F.R. § 410.1306\(h\)](#).

Do children in ORR custody have a right to meet with their legal representatives in person in ORR facilities?

- There is a preference for in-person legal meetings with children, but telephone and video communication are also permissible “as appropriate.” See [45 C.F.R. § 410.1309\(c\)\(1\)](#).

Standards for the Provision of Legal Services

Adrian

Adrian is five years old and gets easily distracted. It is hard for him to sit still. He often needs to use a fidget toy and/or use drawing or playing to communicate effectively with his lawyer. Adrian's lawyer works well with him when she meets with him in person. In the past, Adrian has not been able to meet with her for more than 10-15 minutes if they meet by video call. Where in-person meetings are possible, telephone and video communications would not be appropriate for Adrian.

Adrian's older sister, Camila, is 14 years old. She is very shy, and she has a hard time trusting people because of what she has experienced in the past. She suffers from post-traumatic stress disorder. When she meets with her lawyer in person, it takes about 10 minutes before she feels comfortable enough to share important information. One time they tried to meet by video, and Camila would not speak loudly enough to be heard and provided short, one-word answers to her lawyer, unlike when they had met in person in the past. This continued throughout the hour-long call. Where in-person meetings are possible, telephone and video communications would not be appropriate for Camila.

If Adrian or Camila's care provider tells the lawyer it is too burdensome to arrange in-person meetings, the lawyer can inform the care provider that virtual meetings are not appropriate for her clients and can insist on in-person meetings.

Do children in ORR custody have a right to confidential meetings with legal representatives?

- **Yes.** ORR must allow children in their care to "conduct private communications with their attorney of record, DOJ Accredited Representative, or legal service provider in a private enclosed area that allows for confidentiality for in-person, virtual, or telephonic meetings." [45 C.F.R. § 410.1309\(a\)\(2\)\(vi\)](#).

Standards for the Provision of Legal Services

When is ORR obligated to provide notice to a child's counsel?

- ORR must inform a child's attorney of significant updates in their case. See [Access to Counsel Settlement § II.10](#). For example:
- **Sponsorship Denial:** ORR must inform the child and the child's counsel or assigned legal service provider of a sponsorship denial, including the child's right to inspect the evidence underlying ORR's decision. [45 C.F.R. § 410.1205\(e\)](#).
 - ORR must provide a complete Notification of Denial letter to a child and their counsel if a child is denied release based solely on a determination that the child is a danger to themselves or others. [45 C.F.R. § 410.1205\(f\)](#).
 - If **an appeal of a release denial** affirms the denial of release, ORR must provide notice of this decision to the child and the child's attorney. [45 C.F.R. § 410.1206\(g\)](#).
 - For additional details, see [Guide to Rights of Children in ORR Custody to Prompt Release](#).
- **Step-up:** ORR must provide a copy of the Notice of Placement to a child's attorney or legal service provider within 48 hours of a child's transfer to a more restrictive facility. [45 C.F.R. § 410.1901\(c\)](#). For additional details, see [Guide to Rights of Children in ORR Custody Placed in Restrictive Settings](#).
- **Significant Incident Report:** ORR must notify the child's attorney of record or refer a child to the contracted legal service provider for certain significant incidents, including a child's arrest while in ORR custody. [ORR Policy Guide § 5.8.11](#).

How can a child's counsel obtain a child's ORR records?

- The child's attorney of record is entitled to receive a child's complete casefile within a reasonable timeframe of a request. See [45 C.F.R. § 410.1309\(c\)\(2\), \(3\)](#); see also [Access to Counsel Settlement § II.14](#) (ORR must provide casefile in no more than 40 days); [Authorization for Release of Records](#) form.

Standards for the Provision of Legal Services

- If properly requested on an **expedited basis** for specified reasons such as an upcoming hearing or imminent age-out, ORR must provide an attorney or DOJ Accredited Representative of record with “key documents from the unaccompanied child’s case file” within seven calendar days of the request. [45 C.F.R. § 410.1309\(c\)\(3\)-\(4\)](#); see also [Access to Counsel Settlement § II.15](#) (listing key documents).
- If a child requests a **Placement Review Panel**, ORR must permit the child’s attorney to review evidence within a reasonable time prior to a PRP review. See [45 C.F.R. § 410.1902\(b\)](#).
- If the sponsor(s) consent, ORR must provide a child’s legal representative with **contact information for all potential sponsors** who submitted a family reunification application. [45 C.F.R. § 410.1309\(c\)\(2\)](#); [Access to Counsel Settlement § II.12](#).
- If a **sponsorship denial is appealed**, ORR must provide a child’s complete case file to a child and the child’s attorney within a reasonable time. [45 C.F.R. § 410.1206\(e\)](#). For additional details related to records and information related to sponsorship, see [Guide to Rights of Children in ORR Custody to Prompt Release](#).
- If a child has a disability or is prescribed psychotropic medications, their attorney of record is entitled to receive relevant records. See [Disability Settlement §§ II.A.2.f, II.C.2](#); [Psych Meds Settlement III.D.5](#).

Can a child and their legal counsel review documents the child possessed prior to entering ORR custody?

- Children are entitled to review papers, notes, and other documents they possessed at the time they were apprehended by the federal government if those documents are in the possession of ORR or an ORR care provider facility, absent a reasonable belief based on articulable facts that this access would endanger the child. [45 C.F.R. § 410.1309\(c\)\(2\)](#).
- The child can review these documents in the company of their attorney of record or DOJ Accredited Representative. [45 C.F.R. § 410.1309\(c\)\(2\)](#).

Child Advocates

Are all children in ORR custody entitled to child advocates?

- **No.** ORR is authorized but not required to appoint a child advocate for an unaccompanied child. See [8 U.S.C. § 1232\(c\)\(6\)](#); [45 C.F.R. § 410.1308\(d\)](#).

Under what circumstances is a child advocate appointed for an unaccompanied child?

- The TVPRA and the Foundational Rule provide for the **appointment of child advocates** to identify and advocate for the best interests of child trafficking victims and other particularly vulnerable unaccompanied children. See [8 U.S.C. § 1232\(c\)\(6\)](#); [45 C.F.R. § 410.1308](#).
- Any “interested party” can refer a child who is or was previously in ORR custody for appointment of a child advocate. This includes a child’s legal service provider, attorney of record, federal staff and contractors, and child advocate organization, among other interested parties. [45 C.F.R. § 410.1308\(d\)\(1\)](#).
- ORR is required to make an appointment decision within 5 business days of a referral, except in exceptional circumstances. [45 C.F.R. § 410.1308\(d\)\(2\)](#).

Do children in ORR custody have the right to meet with a child advocate who has been appointed?

- **Yes.** The child advocate’s responsibilities include “visiting with their unaccompanied child client” and a child advocate’s best interest recommendations are based on information from a variety of sources, including “the unaccompanied child.” [45 C.F.R. §§ 410.1308\(b\), 410.1308\(c\)\(1\)](#).
- Visiting in person may be required to allow a child advocate to perform their duties, including explaining the impact of decisions, advocating for the child’s best interests, providing best interest determinations, and regularly communicating case updates with the child. [45 C.F.R. § 410.1308\(c\)\(2\)-\(5\)](#).

Child Advocates

Do children in ORR custody have a right to confidentiality with their child advocate?

- **Yes.** Child advocates are required to keep information about a child's case confidential and may disclose information only with the child's consent and in the child's best interests. [45 C.F.R. § 410.1308\(f\)](#). The child advocate cannot be required to testify or provide evidence about information received from the child. [8 U.S.C. § 1232\(c\)\(6\)\(A\)](#).
- ORR is required to "allow the child advocate of [an] unaccompanied child [in ORR care] to **conduct private communications** with the unaccompanied child, in a private area that allows for confidentiality for in-person and virtual or telephonic meetings." [45 C.F.R. § 410.1308\(f\)](#).

Ximena

Ximena's child advocate arrives to meet with her as scheduled. When the child advocate arrives, the care provider apologizes and says there are no offices or private spaces available to meet, but they can use a corner of the library to talk. The child advocate can inform the care provider of the child's right to meet with the child advocate confidentially and insist upon a private setting for the meeting.

One week, Ximena is unable to meet in-person with her child advocate because she is sick, but she still wants to meet with her child advocate virtually. When they begin the call, the child advocate asks where Ximena is sitting and who is around her. Ximena tells her child advocate that she is in an office, wearing headphones, with a care provider staff person. This setting does not allow for confidential communication. The child advocate can request to speak with the care provider staff, and the child advocate can insist that the staff person leave the room to allow for confidential communication with the child advocate.

Child Advocates

Does a child advocate have the right to obtain a child's records?

- **Yes.** The child advocate is entitled to their client's case file and can request the case file directly from the care provider without going through ORR's standard case file request process. See [45 C.F.R. § 410.1308\(e\)](#).
- Child advocates recommendations are based on information from a variety of sources, including "government agencies" and "representatives of the unaccompanied child's care provider." Therefore, child advocates should have access to any and all information in a child's record necessary to make independent best interest determination recommendations. [45 C.F.R. § 410.1308\(b\)](#).
- For a child with a disability, the child advocate is entitled to a copy of the child's disability evaluation report and documentation relating to their Section 504 Service Plan and placement in a restrictive setting, if applicable. [Disability Settlement §§ II.A.2.f, II.C.2, IV.D.](#)
- A child advocate can also request to see information about a child's psychotropic medication and documentation of verbal and written consent. Psych Meds Settlement § III.D.5. For more details, see [Guide to Rights of Children Prescribed Psychotropic Medications in ORR Custody](#).

Is a child advocate protected from retaliation by ORR?

- **Yes.** ORR "shall not retaliate against a child advocate for actions taken within the scope of their responsibilities." [45 C.F.R. § 410.1308\(g\)](#).