

Rights of Children in ORR Custody Placed in Restrictive Settings

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Overview

Before an unaccompanied child in the custody of the Office of Refugee Resettlement (ORR) is placed in a secure juvenile detention facility, a residential treatment center, or a heightened supervision facility, ORR must have **clear and convincing evidence** to justify the placement. The child, as well as their child advocate and attorney, are entitled to detailed **notice** of the reasons for their restrictive placement and the child must be afforded a prompt **opportunity to challenge** the placement.

If your client is placed in a restrictive setting while in ORR custody, they have legal rights under the following:

U.S. Constitution

- Due Process Clause of the Fifth Amendment
 - See *Lucas R. v. Becerra*, No. 18-CV-5741, 2022 WL 2177454, at *13-23 (C.D. Cal. March 11, 2022).

Statutes

- Trafficking Victims Protection Reauthorization Act, 8 U.S.C. § 1232(c)

Regulations

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

Court Orders

- Order Granting Declaratory Judgment, *Lucas R. v. Becerra*, No. 18-CV-5741, ECF 447 (C.D. Cal. Sept. 16, 2024)
- Flores Settlement Agreement (“*Flores Settlement*”) (partially terminated as to HHS but still in effect as to children in restrictive and out-of-network placements)

This Guide is designed to explain what rights your clients have and what sources of law undergird these rights.

Overview

What You Can Do

If you have concerns regarding your client's restrictive placement, 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.
- **Contact the program director and Federal Field Supervisor responsible for your client's facility** – Identify what concerning practices are occurring, citing relevant laws, regulations, and policy provisions, and make specific requests for your client. If you believe the transfer to a more restrictive facility is inappropriate, it may be helpful to reach out to the program director and Federal Field Supervisor for both the less restrictive facility where the child was placed and the child's new more restrictive facility.
- **Report concerns to ORR** – Email uchearings@acf.hhs.gov to report concerns regarding possible discrimination in the restrictive placement process or to request administrative review of your client's placement. See [ORR Nondiscrimination Notice](#); [ORR Policy Guide § 1.4.7](#).
- **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. See [45 C.F.R. § 410.2002](#). Complaints can be submitted through the UC Office of the Ombuds [website](#) or by email at UC.Ombuds@acf.hhs.gov.
- **Consider pursuing an administrative appeal or federal litigation to enforce your client's rights** – Reach out to NCYL at immigration@youthlaw.org if you would like assistance evaluating this option and/or finding counsel for your client.

Types of ORR Placements

What facilities are categorized as restrictive placements?

- A restrictive placement means a secure facility, including a residential treatment center (RTC), or a heightened supervision facility. See [45 C.F.R. § 410.1001](#).
- A secure facility is “a physically secure structure” and is “the most restrictive placement option for an unaccompanied child who poses a danger to self or others or has been charged with having committed a criminal offense.” [45 C.F.R. § 410.1001](#).
- An RTC is a type of secure facility that is supposed to provide “a sub-acute, time limited, interdisciplinary, psycho-educational, and therapeutic 24-hour-a-day structured program with community linkages, provided through non-coercive, coordinated, individualized care, specialized services, and interventions.” [45 C.F.R. § 410.1001](#).
- A heightened supervision facility “maintains stricter security measures than a shelter, such as intensive staff supervision, in order to provide supports, manage problem behavior, and prevent children from running away. A heightened supervision facility may have a secure perimeter but shall not be equipped internally with major

restraining construction or procedures typically associated with juvenile detention centers or correctional facilities.” [45 C.F.R. § 410.1001](#).

What facilities are categorized as non-restrictive?

- A “standard program” such as a shelter or foster care home is not a restrictive placement. [45 C.F.R. § 410.1001](#).
- A “standard program” must be state licensed “to provide residential, group, or transitional or long-term home care services for dependent children,” or meet the requirements of state licensing that would otherwise be applicable in states that do not license ORR facilities. [45 C.F.R. § 410.1001](#).
- “All homes and facilities operated by a standard program, including facilities for unaccompanied children with specific individualized needs, shall be non-secure as required under State law. However, a facility for unaccompanied children with specific individualized needs may maintain that level of security permitted under State law which is necessary for the protection of an unaccompanied child or others in appropriate circumstances.” [45 C.F.R. § 410.1001](#).

Types of ORR Placements

Is a therapeutic placement a restrictive placement?

- The proper classification depends on the specific facility's level of security and restrictiveness. See, e.g., *Flores v. Sessions*, No. 85-CV-4544, 2018 WL 10162328, at *9-11 & n.18 (C.D. Cal. July 30, 2018).
- RTCs and therapeutic staff-secure placements are restrictive placements. Therapeutic long-term foster care is generally not a restrictive placement.
- Therapeutic group homes are not specifically addressed in the [ORR Foundational Rule](#) or [ORR Policy Guide](#), although ORR in practice categorizes these placements as non-restrictive.
- Regardless of a facility's official designation, a child with a mental health or other disability has the right to be placed in the most integrated setting appropriate to their needs. [45 C.F.R. § 410.1311\(c\)](#). The "[m]ost integrated setting means a setting that provides individuals with disabilities the opportunity to interact with nondisabled persons to the fullest extent possible" and provides opportunities for community engagement and "choice in their daily life activities." [45 C.F.R. § 84.10](#); see also [89 Fed. Reg. at 34,536](#) (Preamble to Foundational Rule).

- For more information, see [Guide to Rights of Children with Disabilities](#).

What is an out-of-network placement?

- Out-of-network (OON) facilities are state-licensed facilities that accept unaccompanied children "under a single case agreement for care of a specific child between ORR and the OON provider." [45 C.F.R. § 410.1001](#). OON facilities are not regular ORR care providers. *Id.*
- OON facilities can be restrictive or non-restrictive. See [45 C.F.R. § 410.1001](#). The general definitions of a secure facility, residential treatment center, and heightened supervision facility can be applied to determine the restrictiveness of an OON placement. Because OON facilities must be state licensed, their state license may provide information on their level of restrictiveness.
- Although the ORR Foundational Rule does not require OON facilities to meet the same minimum standards as ORR programs, [45 C.F.R. § 410.1302](#), children placed OON remain fully protected by the minimum standards in the *Flores* Settlement. See *Flores v. Garland*, No. 85-CV-4544, 2024 WL 3467715, at *6 (C.D. Cal. June 28, 2024).

Types of ORR Placements

What can I do if I believe ORR has incorrectly designated a facility?

- Reach out to NCYL at immigration@youthlaw.org to discuss your concerns. The *Flores Settlement* remains in force as to children in ORR custody placed in restrictive or OON placements and there may be options to challenge the facility's designation under both the *Flores Settlement* and the *ORR Foundational Rule*.

Criteria for Restrictive Placements

When can a child be placed in a secure facility such as a juvenile detention center?

- A child cannot be placed in a secure facility unless they are a danger to themselves or others or have been charged with a criminal offense. See [8 U.S.C. § 1232\(c\)\(2\)\(A\)](#).
- In addition to this general requirement, under [45 C.F.R. § 410.1105\(a\)\(3\)](#) a child must meet at least one of the three following criteria before they are placed in a secure facility (that is not an RTC):
 - Has been charged with or convicted of a crime (or a delinquency charge) and the circumstances of that charge or conviction demonstrate the child poses a danger to others.
 - This does not include petty offenses or isolated offenses that do not involve either violence against others or a weapon;
 - “[H]as committed, or has made credible threats to commit, a violent or malicious act directed at others,” while in immigration custody or in the presence of an immigration officer, ORR official, or ORR contractor staff.
 - “Has engaged, while in a restrictive placement, in conduct that has proven to be unacceptably disruptive of the normal functioning of the care provider facility, and removal is necessary to ensure the welfare of others, as determined by the staff of the care provider facility (e.g., stealing, fighting, intimidation of others, or sexually predatory behavior), and ORR determines the unaccompanied child poses a danger to others based on such conduct.”
- Even if a child meets secure criteria, “ORR shall not place an unaccompanied child in a secure facility . . . if less restrictive alternatives in the best interests of the unaccompanied child are available and appropriate under the circumstances” and the child does not currently pose a danger to others or require RTC placement. [45 C.F.R. § 410.1105\(a\)\(2\)](#).

Criteria for Restrictive Placements

When can a child be placed in a residential treatment center?

- An RTC is a type of secure placement. A child cannot be placed in an RTC unless they are a danger to themselves or others or have been charged with a criminal offense. See [8 U.S.C. § 1232\(c\)\(2\)\(A\)](#); [45 C.F.R. § 410.1001](#).
- In addition, to be placed in an RTC, the child must be “evaluated and determined to be a danger to self or others by a licensed psychologist or psychiatrist.” [45 C.F.R. § 410.1105\(c\)\(1\)](#).

When can a child be placed in a heightened supervision facility?

- Under [45 C.F.R. § 410.1105\(b\)\(2\)](#), a child may be placed in a heightened supervision facility if the child:
 - “(i) Has been unacceptably disruptive to the normal functioning of a shelter such that transfer is necessary to ensure the welfare of the unaccompanied child or others;
 - (ii) Is a runaway risk; [or]

- (iii) Has displayed a pattern of severity of behavior, either prior to entering ORR custody or while in ORR care, that requires an increase in supervision by trained staff.”
- The ORR Foundational Rule also permits placement in a heightened supervision facility if a child has committed isolated or petty offenses or “is assessed as ready for step-down from a secure facility.” [45 C.F.R. § 410.1105\(b\)\(2\)](#). But a federal district court has held that these criteria are inconsistent with the *Flores* Settlement and cannot be the basis for heightened supervision placement. See *Flores v. Garland*, No. 85-CV-4544, 2024 WL 3467715, at *6 (C.D. Cal. June 28, 2024). If your client is placed in heightened supervision based on an isolated or petty offense or because they are assessed as ready for step-down from a secure facility with no other justification, their placement can be challenged.

Criteria for Restrictive Placements

Maurice

Maurice is in an ORR long-term foster care program and was charged with shoplifting. This is a petty offense under the *Flores* Settlement. Although the ORR Foundational Rule permits a step-up to a heightened supervision facility under these circumstances, the *Flores* Settlement does not. Maurice should not be placed in a heightened supervision facility.

How is runaway risk defined?

- “Runaway risk means it is highly probable or reasonably certain that an unaccompanied child will attempt to abscond from ORR care. Such determinations must be made in view of a totality of the circumstances and should not be based solely on a past attempt to run away.” [45 C.F.R. § 410.1001](#).
- ORR considers the child’s past or present runaway behaviors as well as whether the status of the child’s immigration case or relationship with a trafficker creates a runaway risk. [45 C.F.R. § 410.1107](#).

When can a child be placed in an out-of-network facility?

- The same requirements for placement in a restrictive facility apply to out-of-network (OON) restrictive facilities. See [45 C.F.R. §§ 410.1001, 410.1105\(c\)\(3\)](#).
- In addition, a child can be placed OON only if “a child has a specific need that cannot be met within the ORR network of facilities, if no in-network care provider facility equipped to meet the child’s needs has the capacity to accept a new placement, or if transfer to a less restrictive facility is warranted and ORR is unable to place the child in a less restrictive in-network facility.” [45 C.F.R. § 410.1102](#).

Criteria for Restrictive Placements

Is ORR required to consider my client's mental health diagnosis or other disability in making restrictive placement decisions?

- If a child has a disability, ORR must consider whether the child could be placed in a less restrictive setting with additional aids and services or reasonable modifications to policies, practices, or procedures. [45 C.F.R. § 410.1105\(d\)](#).
- ORR is required to consider "reasonable modifications and auxiliary aids and services to facilitate less restrictive placement" as part of the initial restrictive placement decision and at each 30-day restrictive placement review. [45 C.F.R. § 410.1105\(d\)](#).
- For more information, see [Guide to Rights of Children with Disabilities](#).

Can a child be placed in a restrictive setting as their initial placement?

- A child can be placed in a non-RTC secure facility or a heightened supervision facility as an initial placement if they meet the criteria for that type of placement. See [45 C.F.R. §§ 410.1105\(a\)\(1\), \(b\)\(1\)](#).
- The ORR Foundational Rule is silent on initial RTC placement. Because RTC placement requires a recommendation "by a licensed psychologist or psychiatrist consulted by ORR or a care provider facility," initial RTC placement is likely impermissible except in unusual circumstances. [45 C.F.R. § 410.1105\(c\)](#).

Documentation, Notice, and Automatic Review Requirements

What evidence is required to place a child in a restrictive placement?

- ORR must determine by “clear and convincing evidence” that a child meets the criteria for restrictive placement. See [45 C.F.R. §§ 410.1105, 410.1901\(a\)](#). “Clear and convincing evidence means a standard of evidence requiring that a factfinder be convinced that a contention is highly probable—i.e., substantially more likely to be true than untrue.” [45 C.F.R. § 410.1001](#).
- The evidence supporting a restrictive placement decision must be recorded in the child’s case file. [45 C.F.R. § 410.1901\(a\)](#). If a child is placed in an RTC, the child’s case file must include “documentation by a licensed psychologist or psychiatrist that placement in an RTC is appropriate.” [45 C.F.R. § 410.1105\(c\)\(1\)](#).

When must a child receive notice of the reasons for their restrictive placement?

- ORR must provide a child with a Notice of Placement (NOP) in the child’s native or preferred language no later than 48 hours after placement in a restrictive setting. [45 C.F.R. § 410.1901\(b\)](#).

- ORR must also provide a NOP every 30 days the unaccompanied child remains in a restrictive placement. See [45 C.F.R. § 410.1901\(b\)](#).

Who else receives notice of a child’s restrictive placement?

- The care provider facility must provide a copy of the NOP to the child’s attorney of record, legal service provider, child advocate, and to a parent or legal guardian, within 48 hours of step-up and every 30 days the child remains in a restrictive placement. See [45 C.F.R. § 410.1901\(c\)](#).
- Service of the NOP on a parent or legal guardian is not required when there are child welfare reasons not to share this information, when the parent or legal guardian cannot be reached, or when a child 14 years of age or older states that the child does not wish for the parent or legal guardian to receive the NOP. See [45 C.F.R. § 410.1901\(c\)\(1\)](#).
- When a NOP is not automatically provided to a parent or legal guardian, ORR must document in the child’s case file the child welfare reason for not providing the NOP to the parent or legal guardian. [45 C.F.R. § 410.1901\(c\)\(3\)](#).

Documentation, Notice, and Automatic Review Requirements

What information must be included in the Notice of Placement?

- The NOP must “clearly and thoroughly set forth the reason(s) for placement and a summary of supporting evidence.” [45 C.F.R. § 410.1901\(b\)\(1\)](#).
- The NOP must “inform the child of their right to contest the restrictive placement before a Placement Review Panel (PRP) upon receipt of the NOP and the procedures by which the unaccompanied child may do so. The NOP must further inform the child of all other available administrative review processes.” [45 C.F.R. § 410.1901\(b\)\(2\)](#).
- The NOP must also include an explanation of the child’s right to be represented by counsel at no cost to the government in challenging their restrictive placement. See [45 C.F.R. § 410.1901\(b\)\(3\)](#).
- A case manager must explain the NOP to the child, in a language the child understands. [45 C.F.R. § 410.1901\(b\)\(4\)](#).

Beatriz

Beatriz was hospitalized for suicidal ideation while at an ORR shelter and later transferred to a residential treatment center (RTC) at the recommendation of her psychiatrist. Before transferring her to the RTC, ORR must include documentation in Beatriz’s case file establishing that her psychiatrist evaluated her, determined that she was a danger to herself, and determined that RTC placement was appropriate. Every 30 days that Beatriz remains at the RTC, a licensed psychiatrist or psychologist must review her case and evaluate whether she continues to meet the criteria for RTC placement. If Beatriz has an identified mental health disability, ORR must consider whether any reasonable modifications or additional aids or services could facilitate her placement in a less restrictive setting.

Documentation, Notice, and Automatic Review Requirements

What automatic reviews must occur for children in restrictive placements?

- Every 30 days
 - All children placed in restrictive placements must receive an administrative review. [45 C.F.R. § 410.1901\(d\)\(1\)](#); see also [8 U.S.C. § 1232\(c\)\(2\)\(A\)](#).
 - For children in RTCs, this review must involve “a psychiatrist or psychologist to determine whether the unaccompanied child should remain in restrictive residential care.” [45 C.F.R. § 410.1901\(d\)\(3\)](#).
 - For children with disabilities, this review must consider “whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow the unaccompanied child to be placed in that less restrictive facility.” [45 C.F.R. § 410.1105\(d\)](#).
- Every 90 days
 - Children in secure facilities (including RTCs) must receive a more intensive review by ORR supervisory staff. [45 C.F.R. § 410.1901\(d\)\(2\)](#).
- Children and their attorneys generally do not participate in these administrative reviews.

Challenging a Restrictive Placement

Can my client request reconsideration of their restrictive placement?

- Yes, a child placed in a restrictive setting can request that a Placement Review Panel (PRP) review their placement. [45 C.F.R. § 410.1902\(a\)](#).
- A child can “request a PRP review as soon as the unaccompanied child receives a Notice of Placement (NOP).” [45 C.F.R. § 410.1902\(b\)](#).

What is the Placement Review Panel?

- The PRP is “a three-member panel consisting of ORR’s senior-level career staff with requisite experience in child welfare that is convened for the purposes of reviewing requests for reconsideration of restrictive placements.” [45 C.F.R. § 410.1001](#).
- The PRP cannot include any ORR staff members who were involved in the decision to step up the child to a restrictive setting. [45 C.F.R. § 410.1001](#); see also [45 C.F.R. § 410.1902\(e\)](#).

Will my client receive a hearing if they request PRP review?

- A child can choose to request PRP review with or without a hearing. A child who does not wish to have a hearing may instead submit a written request for reconsideration along with any supporting evidence. [45 C.F.R. § 410.1902\(a\)](#).

Can my client be represented by counsel in their PRP review?

- Yes, but ORR is not required to pay for this representation. See [45 C.F.R. § 410.1902\(a\)](#).
- If the child does not have an attorney, ORR must encourage the care provider facility to seek assistance for the child from a contracted legal service provider or child advocate. See [45 C.F.R. § 410.1902\(a\)](#).

Challenging a Restrictive Placement

How quickly will the PRP review my client's case?

- If a hearing is requested:
 - ORR must convene the PRP within 7 days of a child's request for a hearing. [45 C.F.R. § 410.1902\(c\)](#).
 - The PRP must issue a written decision within 7 days of a hearing and submission of evidence. [45 C.F.R. § 410.1902\(d\)](#).
- If no hearing is requested:
 - The PRP must issue a written decision within 7 days following receipt of the child's written statement. See [45 C.F.R. § 410.1902\(d\)](#).
- ORR may institute procedures to request clarification or additional evidence if warranted, or to extend the 7-day deadlines as necessary under specified circumstances. See [45 C.F.R. § 410.1902\(c\), \(d\)](#).

What evidence must ORR provide prior to PRP review?

- ORR must permit the child or the child's attorney to "review the evidence in support of step-up or continued restrictive placement, and any countervailing or otherwise unfavorable evidence, within a reasonable time before the PRP review is conducted." [45 C.F.R. § 410.1902\(b\)](#).
- ORR must also share the child's complete case file apart from any legally required redactions with their attorney within a reasonable timeframe to be established by ORR. [45 C.F.R. § 410.1902\(b\)](#).

What evidence can my client present at a PRP hearing?

- A child may present witnesses and cross-examine ORR's witnesses, if these witnesses are willing to voluntarily testify. See [45 C.F.R. § 410.1902\(a\)](#). Neither ORR nor a child can compel witness testimony at a PRP hearing. See [id.](#); [ORR Policy Guide § 1.4.7](#).

Challenging a Restrictive Placement

Vladimir

Vladimir was stepped up from a heightened supervision facility to a secure facility after a fight broke out among several youth. He maintains that he did not initiate the fight and was being bullied by other youth at the facility. Vladimir does not speak English or Spanish and believes miscommunication with staff contributed to his step up. He thinks at least one staff member at his prior facility—Linda—would support his version of events. Vladimir can request PRP review as soon as he receives his NOP, although he may wish to take more time to consult with counsel and prepare his case. If he requests a hearing, he can ask Linda to testify on his behalf but he cannot compel her testimony if Linda does not wish to participate. Vladimir is entitled to interpretation in his preferred language at the PRP hearing.

Who bears the burden of proof at the hearing?

- ORR has the burden to show, “based on clear and convincing evidence, that sufficient grounds exist for stepping up or continuing to hold an unaccompanied child in a restrictive placement.” [45 C.F.R. § 410.1901\(a\)](#).

What language services will be provided in the PRP process?

- At the PRP hearing, a child must be provided “interpretation services in their native or preferred language, depending on the unaccompanied child’s preference, and in a way they effectively understand.” [45 C.F.R. § 410.1902\(a\)](#).
- The PRP’s written decision must be issued in the child’s native or preferred language. [45 C.F.R. § 410.1902\(d\)](#).

Can my client request PRP review multiple times related to the same placement?

- The Foundational Rule does not limit the number of times an individual child can request PRP review. [45 C.F.R. § 410.1902\(b\)](#).
- A child must receive a new Notice of Placement every 30 days the child remains in a restrictive placement. [45 C.F.R. § 410.1901\(b\)](#). Every time a child receives a NOP, they can request PRP review. [45 C.F.R. § 410.1902\(b\)](#). Even if an initial PRP review is unfavorable to the child, ORR still bears the burden to show that continued restrictive placement is justified. [45 C.F.R. § 410.1901\(a\)](#).

Challenging a Restrictive Placement

What is the difference between PRP review and a risk determination hearing?

- If your client is placed in a restrictive setting, they have the option of pursuing PRP review and/or a risk determination hearing. See [45 C.F.R. §§ 410.1902, 410.1903\(a\), \(b\)](#). The below chart compares these options.
- Note that a child in a restrictive placement will automatically receive a risk determination hearing unless they opt-out. [45 C.F.R. § 410.1903\(a\)](#).

	Placement Review Panel 45 C.F.R. § 410.1902	Risk determination hearing 45 C.F.R. § 410.1903
Timing of request	Any time after receipt of a Notice of Placement (NOP). § 410.1902(b) .	Automatic if child is in a restrictive placement (can opt-out). § 410.1903(a) . Any child in ORR custody can request at any time. § 410.1903(b) .
Timeline	If a hearing is requested, decision within 14 days of request. If no hearing is requested, decision within 7 days of child's written statement. Extensions are possible. § 410.1902(c), (d) .	Not specified.
Decision-maker	Three senior-level career ORR staff not involved in initial placement decision. §§ 410.1001, 410.1902(e) .	Independent HHS hearing officer. § 410.1903(a) .

Challenging a Restrictive Placement

	Placement Review Panel 45 C.F.R. § 410.1902	Risk determination hearing 45 C.F.R. § 410.1903
Burden of proof	<p>ORR has burden to justify placement by clear and convincing evidence. § 410.1901.</p>	<p>ORR has burden to show danger to self or community by clear and convincing evidence. § 410.1903(c).</p>
Right to counsel	<p>Child may have assistance of counsel, at no cost to the government. § 410.1902(a).</p>	<p>Child may be represented by a person of their choosing. § 410.1903(d).</p>
Hearing?	<p>Child can request a hearing or choose to submit a written request only. § 410.1902(a).</p>	<p>Yes, hearing will be held by videoconference. § 410.1903(d); ORR Policy Guide § 2.9.</p>
Effect of a positive decision	<p>Panel reverses restrictive placement decision and directs that the child be transferred to a less restrictive facility. ORR Policy Guide § 1.4.7.</p> <p>Panel could also remand the case to the FFS for further consideration based on the panel's recommendations. ORR Policy Guide § 1.4.7.</p>	<p>The hearing officer cannot directly order a child's placement change. § 410.1903(j). But a decision that a child is not a danger is binding on ORR and may lead to a change in placement. § 410.1903(f).</p>
Effect of a negative decision	<p>Panel affirms NOP and child remains in restrictive setting. ORR Policy Guide § 1.4.7.</p> <p>Child can request another PRP review after next 30-day review and NOP. § 410.1902(b).</p>	<p>A decision that a child is a danger to self or the community is final and binding on ORR and is likely to prevent step-down. § 410.1903(h).</p> <p>A child must demonstrate a material change in circumstances to receive a new hearing to revisit this decision. § 410.1903(h).</p>

Challenging a Restrictive Placement

Opportunities for further appeal

Placement Review Panel 45 C.F.R. § 410.1902

May be able to seek further review in U.S. District Court. See, e.g., 5 U.S.C. § 702.

Risk determination hearing 45 C.F.R. § 410.1903

Child or ORR can appeal to the Assistant Secretary for Children and Families, or their designee, within 30 days of the decision. § 410.1903(g).

If ORR appeals a finding that a child is *n* a danger, a child's release should not be delayed absent specific findings set out in the regulations. § 410.1903(g)(3).

Child may also be able to file a writ of habeas corpus in federal court if the child or their attorney believes they are being held unlawfully.

Arrests and ICE Secure Detention

Who will be notified if my client is arrested while in ORR custody?

- Within four hours of a child's arrest during regular business hours (or the following morning if an arrest occurs outside regular business hours), the care provider is required by ORR policy to notify:
 - the child's parent or legal guardian, if possible and if there are no specified child welfare reasons not to provide notice;
 - the legal service provider or attorney of record (if applicable);
 - the appointed Child Advocate (if applicable); and
 - any potential sponsor, if possible and if there are no specified child welfare reasons not to provide notice. [ORR Policy Guide § 5.8.11](#).
- Care providers must provide the child's present location, if known; a law enforcement point of contact; and a public defender contact, if known. The care provider will disclose details of the arrest if the child is 13 years or younger or has a diagnosed developmental disability. In other cases, the care provider will not share details without the child's consent. [ORR Policy Guide § 5.8.11](#).

- Within 48 hours of any incident involving the child and law enforcement on-site, the care provider must also make referrals to the on-site legal service provider and for the appointment of a child advocate. [ORR Policy Guide § 5.8.11](#).

If my client was discharged from ORR custody after an arrest, what are ORR's responsibilities?

- Under federal law, ORR is responsible for the care and custody of all unaccompanied children. See [8 U.S.C. § 1232\(b\)\(1\)](#). Nothing in federal law requires ORR to discharge children from their custody upon arrest.
- If a child is discharged from ORR custody, ORR must begin planning for the child's return to ORR custody within one day of the child's arrest to ensure there is an appropriate placement available for the child upon their release from law enforcement custody. [ORR Policy Guide § 5.8.11](#).

Arrests and ICE Secure Detention

If my client was discharged from ORR custody after an arrest, what are ORR's responsibilities? (continued)

- ORR policy requires care providers to make reasonable and timely efforts to notify law enforcement of information necessary to ensure the child's immediate safety while in law enforcement custody, such as current medications or allergies, any disability-related accommodations needed, or whether the child is at documented enhanced risk for suicide. See [ORR Policy Guide § 5.8.11](#).
- ORR is also required to "ensure, to the greatest extent practicable," that all unaccompanied children "who are or have been" in ORR or DHS custody "have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking." [8 U.S.C. § 1232\(c\)\(5\)](#).

Felicia

Felicia was arrested for vandalism after damaging furniture at her shelter. The circumstances did not indicate any danger to herself or anyone else. She does not have a child advocate or an attorney of record. Per ORR policy, the care provider promptly notified Felicia's mother, her potential sponsor, and the assigned legal service provider of Felicia's arrest. The care provider also submitted referrals for a follow-up legal screening and for the appointment of a child advocate. Felicia was discharged from ORR custody after her arrest. Prosecutors declined to file charges and Felicia was transferred to ICE custody. ORR should already be planning an appropriate placement for Felicia (not in a secure facility) and must accept custody from ICE within 72 hours.

Arrests and ICE Secure Detention

My minor client was in ORR custody but is now detained by Immigration and Customs Enforcement, what are their rights?

- Under federal law, ICE must transfer an unaccompanied child to ORR within 72 hours, unless there are exceptional circumstances. [8 U.S.C. § 1232\(b\)\(3\)](#).
 - The ORR Foundational Rule defines exceptional circumstances to include, in relevant part, “[t]he apprehension of an unaccompanied child whom the referring Federal agency indicates: (i) Poses a danger to self or others; or (ii) Has been charged with or has been convicted of a crime, or is the subject of delinquency proceedings, delinquency charge, or has been adjudicated delinquent, and additional information is essential in order to determine an appropriate ORR placement.” [45 C.F.R. § 410.1101\(d\)\(6\)](#).
- While an unaccompanied child is in ICE custody, federal law requires ORR to “ensure, to the greatest extent practicable,” that the child has access to counsel. [8 U.S.C. § 1232\(c\)\(5\)](#).
- All children in ICE custody are protected by the *Flores* Settlement. For example, children have the right to a notice of the reasons for their placement in a secure facility and the right to a bond hearing before an immigration judge. *Flores Settlement* ¶¶ 24.A, 24.C.
- Regardless of whether a child is in ORR or ICE custody, the government must “make and record the prompt and continuous efforts on its part toward family reunification” and release of the child. *Flores Settlement* ¶ 18.

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