National Center for Youth Law

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Rights of Children Potentially Subject to the Laken Riley Act

Frequently Asked Questions

The Laken Riley Act (LRA) expands mandatory immigration detention to include individuals who are arrested for, charged with, convicted of, or admit to committing specified crimes. These crimes include theft offenses, assault on a law enforcement officer, or offenses that result in death or serious bodily injury to another person. 8 U.S.C. § 1226(c)(1)(E).

This guide addresses questions that are likely to arise if the LRA is enforced against children under the age of 18.

Do admissions or alleged acts by children trigger mandatory detention under the Laken Riley Act?

Although the Laken Riley Act does not explicitly exempt children from its mandatory detention provisions, **acts of juvenile delinquency (including admissions to acts of delinquency) should not be considered qualifying offenses under the Laken Riley Act**. Under settled interpretations of the Immigration and Nationality Act (INA), an act of juvenile delinquency is not a crime. For a detailed discussion of this issue, see Immigrant Legal Resource Center, *The Laken Riley Act & Juvenile Delinquency* (February 2025).

In addition, **an admission has a specific meaning within immigration law and should be narrowly interpreted**. The Laken Riley Act's language on admissions mirrors the language in the INA provision related to crimes of moral turpitude and controlled substance offenses. *Compare* 8 U.S.C. § 1226(c)(1)(E)(ii) with 8 U.S.C. § 1182(a)(2)(A)(i). Under longstanding Board of Immigration Appeals (BIA) precedent, an admission under that section is valid only if the individual is first given an explanation of the crime and its essential elements and the admission is given voluntarily. *See Matter of K-*, 7 I&N Dec. 594 (BIA 1957); *see also* National Immigration Project, *Practice Advisory: The Laken Riley Act's Mandatory Detention Provisions*, 8-9 (February 2025) ("NIPNLG Practice Advisory").

Congress imported the same wording related to admissions into the LRA with knowledge of this settled BIA precedent. It should therefore be "presumed to carry forward that interpretation." *Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project*, 576 U.S. 519, 536-37 (2015) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012)). For example, if the Office of Refugee Resettlement (ORR) creates a Significant Incident Report indicating that a child admitted to shoplifting, that alone would not be a qualifying admission under the LRA.

Moreover, as of February 2025, ORR prohibits sharing medical, mental health records, and behavioral reports with DHS or the immigration court for purposes of immigration proceedings or enforcement. *See* Policy Guide § 5.10.2; Notice of a Modified System of Records, 89 FR 100500,100505. For a child with a disability, ORR is prohibited by a court settlement from sharing clinical or mental health records or Significant Incident Reports with any component of the Department of Homeland Security (DHS) for purposes of immigration enforcement. *See* *Lucas R.* Disability Settlement §§ II.A.2.g, II.C.3. The term disability is broadly construed and includes children with mental health conditions such as post-traumatic stress disorder. *See* Guide to Rights of Children with Disabilities in ORR Custody. If you have reason to believe that ORR has violated this prohibition, please contact the National Center for Youth Law at immigration@youthlaw.org.

If DHS nonetheless asserts that a child (or any individual) is subject to mandatory detention under the LRA, the individual can **request a "*Joseph* hearing" to challenge that determination and argue that they do not fall within the LRA' s mandatory detention provision**. See NIPNLG Practice Advisory at 14-16; *see also Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999). There are serious due process concerns in *Joseph* hearings, however, and advocates could also explore seeking habeas relief. *See* NIPNLG Practice Advisory at 14-18. If an individual is successful in a *Joseph* hearing, they are not subject to mandatory detention but may still need to win a bond redetermination hearing to be released.

If a child is detained in ICE custody under the LRA, which provisions of the Flores Settlement Agreement would apply?

All children detained by Immigration and Customs Enforcement (ICE) are class members protected by the *Flores* Settlement Agreement. FSA ¶ 4. "The *Flores* Settlement Agreement [FSA] remains in full force and effect as to the DHS, including the U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement." *Flores v. Garland*, 2024 WL 3467715, at *9 (C.D. Cal. June 28, 2024). The provisions of the FSA that do not directly conflict with the requirements of the LRA will remain in effect as to these children. *Cf. Flores v. Sessions*, 862 F.3d 863, 867 (9th Cir. 2017) (holding that certain provisions of the FSA were valid after the passage of the Homeland Security Act and the Trafficking Victims Protection Reauthorization Act because neither law "explicitly terminates" that requirement).

Specifically, the FSA's requirements relating to **conditions of detention** remain in full force and effect because the LRA requires only that individuals be detained and does not address detention conditions. *See* 8 U.S.C. § 1226(c). The FSA requires placement in the least restrictive setting appropriate to the child's age and special needs and specifies minimum standards for the treatment of children. *See*, *e.g.*, FSA ¶¶ 11, 12, 23, Ex. 1.

The FSA prohibits placement in secure facilities unless children meet specific enumerated criteria. FSA ¶ 21. For example, the FSA expressly disallows secure placement based on isolated or petty offenses such as shoplifting. FSA ¶ 21.A. Thus, if a child is allegedly subject to the LRA because of an isolated or petty offense, that alone does not justify secure placement. Unless the child meets secure placement criteria for an independent reason, ICE must place the child in a non-secure licensed program. *Flores v. Garland*, 2024 WL 3467715, at *6 (C.D. Cal. June 28, 2024) ("The Court reads Paragraph 21.A of the FSA to disallow isolated or petty offenses to have any effect upon ORR's decision to place a child in a heightened supervision or secure facility."). A licensed program must have a state license to care for dependent (as opposed to delinquent) children. FSA ¶ 6.

If a child is placed in a secure facility based on alleged criminal conduct that is not an isolated or petty offense, **the government must have "probable cause** to believe that the individual has committed a specified offense." FSA ¶ 21.A; *see also Flores v. Sessions*, 2018 WL 10162328, at *14 (C.D. Cal. July 30, 2018) (discussing probable cause requirement). That a child was arrested for a specified offense under the Laken Riley Act does not justify secure detention unless DHS continues to have probable cause *at the time of detention*. For example, a child should not be placed in secure detention based on an arrest for assault on a law enforcement officer if video surveillance later reveals that the child was not the person who assaulted the officer.

Even if a child meets the criteria for secure placement under the FSA, the child cannot be placed in a secure facility unless there are no appropriate less restrictive alternatives. FSA ¶¶ 21, 23. In all cases children must be held separately from adults. FSA ¶ 21.

Further, **under the FSA all class members are entitled to a bond redetermination hearing**. FSA ¶ 24.A. The LRA should not be interpreted to terminate this right because *Flores* bond hearings are meaningfully different from bond hearings afforded to adults. *See Flores v. Sessions*, 862 F.3d 863, 867 (9th Cir. 2017). In particular, a favorable finding in a *Flores* bond hearing does not guarantee a child's release but does provide "meaningful rights and practical benefits," such as "compel[ling] the agency to provide its justifications and specific legal grounds for holding a given minor" and "ensur[ing] that they are not held in secure detention without cause." *Id*. at 867-68; *see also Flores v. Rosen*, 984 F.3d 720, 734-35 (9th Cir. 2020) (outlining "critical due process rights afforded by a bond hearing under the Agreement").

What are the rights of unaccompanied children (UCs) allegedly subject to the Laken Riley Act?

- **If a UC is currently in ORR custody and is alleged to be subject to the LRA, will they be transferred from ORR to ICE custody?**

ORR should not transfer an unaccompanied child to ICE custody. The relevant provision of the LRA requires DHS to take custody of certain individuals "when the [individual] is released," not to take over custody from another government agency. 8 U.S.C. § 1226(c)(1); *see also id*. § 1226(c)(3). Moreover, nothing in the LRA undermines the Trafficking Victims Protection Reauthorization Act's (TVPRA) mandate that HHS has responsibility for the care and custody of unaccompanied children. *See* 8 U.S.C. § 1232(b)(1).

If a child is discharged from ORR custody after an arrest, they may be subject to temporary detention by ICE before they are returned to ORR custody. *See* Guide to Rights of Children in ORR Custody Placed in Restrictive Settings at 20-22.

- **If a UC is detained by ICE, do they have a right to be transferred to ORR?**

ICE should promptly transfer all unaccompanied children to ORR. The LRA requires that certain individuals be taken into custody and not released, but it does not prohibit a transfer to ORR. *See* 8 U.S.C. § 1226(c). The TVPRA gives HHS responsibility for "the care and custody of all unaccompanied [] children, including responsibility for their detention, where appropriate . . . ." 8 U.S.C. § 1232(b)(1). All other federal agencies are required to transfer unaccompanied children to HHS. *Id*. § 1232(b)(3). Nothing in the LRA supersedes this clear statutory command.

- **How long can ICE lawfully detain a UC before transferring them to ORR?**

The TVPRA requires ICE to notify HHS within 48 hours of the apprehension or discovery of an unaccompanied child and **transfer an unaccompanied child to ORR within 72 hours of determining that they are an unaccompanied child, "[e]xcept in the case of exceptional circumstances."** 8 U.S.C. §§ 1232(b)(2), (3). The ORR regulations define "exceptional circumstances" to include the referral of an unaccompanied child who "(i) [p]oses a danger to self or others; or (ii) [h]as 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).

ICE must make an immediate effort to transfer the child by notifying ORR but under its regulations ORR could delay placement of a child allegedly subject to the LRA because of a criminal charge. 45 C.F.R. § 410.1101(d)(6). The exception for a criminal charge is paired with the need to determine an appropriate placement, however, and therefore ORR should accept the child as soon as they have the necessary information to determine an appropriate placement. Additionally, with the end of *Chevron* deference, ORR's interpretation of the TVPRA in its regulations is not entitled to deference. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412-13 (2024). Depending on the facts of a child's case, advocates can argue that there are no exceptional circumstances warranting delay in ORR placement.

Importantly, **children also have a right to transfer under the *Flores* Settlement Agreement**. If a child does not meet the FSA's criteria for secure placement, the child is entitled to placement in a state-licensed non-secure facility (*see above: If a child is detained in ICE custody under the LRA, which provisions of the Flores Settlement Agreement would apply?*). A child must generally be transferred to a licensed placement within 3 days. FSA ¶ 12.A. Because ICE does not have any state-licensed placements for dependent children, it would most likely be required to transfer the child to ORR.

- **Once a child is transferred to ORR custody, can they be released to a sponsor?**

After taking custody of an unaccompanied child, **HHS is required to promptly place the child "in the least restrictive setting that is in the best interest of the child,"** such as with "a suitable family member." 8 U.S.C. § 1232(c)(2)(A). ORR is not an immigration enforcement agency and its obligations are governed by the TVPRA's best interest standard, not the Immigration and Nationality Act as amended by the LRA. *See, e.g., J.E.C.M. v. Lloyd*, 352 F. Supp. 3d 559, 583 (E.D. Va. 2018); *see also* 6 U.S.C. § 279(b)(1)(B) (requiring ORR to consider the interests of the child in care and custody decisions).

- **What are the due process rights of UCs previously released to a sponsor by ORR and then taken back into custody under LRA?**

There are strong legal arguments that the child is entitled to a prompt hearing to determine the lawfulness of their detention. In *Saravia v. Sessions*, UCs previously released to sponsors by ORR challenged the lawfulness of their detention after they were re-arrested by ICE based on gang allegations and transferred back to ORR custody. 280 F. Supp. 3d 1168 (N.D. Cal. 2017), *aff'd sub nom. Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th Cir. 2018). The federal court held that "[t]he minors and their sponsors have the right to participate in a prompt hearing before an immigration judge in which the government's evidence of changed circumstances is put to the test. By shipping the minors across the country for indefinite detention in a high-security facility before providing that hearing, the government has violated their due process rights." *Id*. at 1177. The court found these children were entitled to a hearing **within seven days of arrest** and must be released to their previously approved sponsor if they were not a danger to the community or themselves or a flight risk. *Saravia*, 905 F.3d at 1143, 1145.

UCs previously released to a sponsor and later detained under the Laken Riley Act could make similar arguments for a prompt hearing. Because the child was previously released to an approved sponsor, these hearings should be held more quickly than ordinary bond redetermination hearings and a favorable determination should result in an order of release. *Saravia*, 905 F.3d at 1144.

- **What are the rights of UCs aging out of ORR custody and allegedly subject to the LRA?**

Under the TVPRA, if an unaccompanied child turns 18 and is transferred to DHS custody, **DHS must "consider placement in the least restrictive setting available** after taking into account" the former UC's "danger to self, danger to the community, and risk of flight." 8 U.S.C. § 1232(c)(2)(B). UCs who age out of ORR custody "shall be eligible to participate in alternative to detention programs." *Id*. Because this provision of the TVPRA specifically addresses the situation of UCs aging out of ORR custody, it should govern over the general provisions of the Laken Riley Act. See *Morales v. Trans World Airlines*, 504 U.S. 374,384 (1992)("[I]t is a commonplace of statutory construction that the specific governs the general.").

Although ICE may argue that an offense under the Laken Riley Act indicates that an individual is a danger to the community, a robust post-18 plan can help establish that the former UC is not a danger. For more information about the rights of children aging out of ORR custody, see American Immigration Council & National Immigrant Justice Center, *Garcia Ramirez et al. v. U.S. Immigration and Customs Enforcement et al. Frequently Asked Questions* (Feb. 2025).

Who qualifies as an unaccompanied child?

- **How are children initially designated as unaccompanied children?**

The Homeland Security Act (HSA) defines an unaccompanied child as a child who:
(A) has no lawful immigration status in the United States;
(B) has not attained 18 years of age; and
(C) with respect to whom—
i) there is no parent or legal guardian in the United States; or
ii) no parent or legal guardian in the United States is available to provide care and physical custody.

6 U.S.C. § 279(g)(2). The TVPRA requires that federal officials who discover a UC transfer the child to HHS custody, indicating that the federal officials who first encounter UCs are tasked with making a UC designation. 8 U.S.C. § 1232(b)(3).

DHS assumes the authority and responsibility for designating children it encounters and/or arrests as UCs. U.S. Customs and Border Protection (CBP) designates children as UCs upon apprehension if they meet the definition of a UC at the time of apprehension. ICE can also make designations when it encounters and arrests immigrant children in the interior of the United States, particularly if the child was not previously encountered by CBP or if the child entered lawfully but no longer has lawful status (e.g., a child who overstayed their visa).

When a child turns 18 years old or obtains lawful status in the United States, they are no longer a UC under the definition in the HSA.

- **If a child was formerly a UC but then gets released to a parent in the community and later picked up under the LRA, would they end up back in HHS custody?**

ICE sometimes re-evaluates a child's "unaccompanied" designation if the child was reunified with a parent or legal guardian after entering the United States as a UC. **Federal law does not require agencies to re-evaluate a child's designation following the initial designation as a UC**. If a child does not reunify with a parent or legal guardian after entering the United States, and a legal guardian is not appointed by a state court, the child continues to meet the definition of a UC until they turn 18 or obtain lawful status.

Currently, it appears that the practice of re-evaluating UC designation varies by ICE field office. NCYL has seen at least one case of a child released from ORR custody to their parents later arrested following criminal charges, re-designated as an accompanied child, and placed in ICE custody. Other children previously released to their parents remain designated as UCs and transferred to ORR custody. In 2017, when ICE re-arrested children for alleged gang membership, these children maintained their UC designations and were transferred to ORR custody. *See Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1177 (N.D. Cal. 2017).

Notably, USCIS is not currently permitted to re-evaluate UC designations for the purposes of asylum applications under the final settlement in *J.O.P. v. U.S. Department of Homeland Security*, No. 19-cv-01944, ECF 199-2 (D. Md. July 30, 2024); *see also J.O.P. v. U.S. Dep't of Homeland Sec*., 409 F. Supp. 3d 367 (D. Md. 2019). If a child is re-designated as an accompanied child but placed alone in ICE custody, there could be similar legal arguments against an ICE policy of re-evaluating UC designations.

It is unclear what ICE's policy is or will be in the future, or whether these decisions will be left to the discretion of individual ICE field offices. If a child originally designated as a UC is detained by ICE, advocates can argue that the child should maintain their unaccompanied status. If the child maintains their UC status, they would be transferred from ICE custody to ORR custody as prescribed by the HSA and TVPRA.

- **Would a child separated from their parents and detained alone by ICE be deemed unaccompanied?**

It is unclear what ICE's policy is or will be, or whether these decisions will be left to the discretion of individual ICE field offices.

From a practical standpoint, DHS does not currently have licensed facilities for dependent children separated from their parents and detained alone. This is likely one reason why under the Zero Tolerance policy that led to family separation during the first Trump administration, children were designated as unaccompanied and transferred to ORR custody. However, under Zero Tolerance, parents who were separated from their children were not available to provide care and custody in the United States because they were detained and prosecuted for illegal entry. Whether a child detained alone would be deemed unaccompanied might depend on whether the child is separated from parents or legal guardians in the interior of the United States or at the border, and whether the child's parents or legal guardians are separately detained by DHS.

Please reach out to NCYL at immigration@youthlaw.org with any questions or concerns.

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