

Rights of Children with Disabilities in ORR Custody

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Overview

A child with a disability in the custody of the Office of Refugee Resettlement (ORR) is entitled to be **free from discrimination** based on disability, receive **reasonable modifications** and additional services needed to accommodate their disability, be placed in the **least restrictive and most integrated setting** appropriate to their needs, and receive an **equal opportunity at prompt release**.

Despite these entitlements, all too often children with disabilities experience discrimination, including but not limited to ORR or the care provider: (1) failing to provide the services and reasonable modifications a child needs; (2) treating a child with a disability less well than other children in the program (e.g. limiting participation in activities); (3) placing a child in a more restrictive setting because of their disability-related behavior; (4) denying placement in foster care or the Unaccompanied Refugee Minor program because of the child's disability; or (5) unnecessarily delaying release to a sponsor.

If your client is facing discrimination because of their disability, they have legal rights under the following:

Statutes

- Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (applicable to ORR and its care providers)
- Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (applicable to ORR care providers)

Regulations

- 45 C.F.R. § 85.1, *et seq.* (Sec. 504 regulations applicable to ORR)
- 45 C.F.R. § 84.1, *et seq.* (Sec. 504 regulations applicable to recipients of ORR funding).
- 45 C.F.R. § 410.1000, *et seq.* (ORR Foundational Rule)

Court Orders

- Lucas R. Disability Claim Settlement ("Disability Settlement")

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

Overview

What You Can Do

If your client is facing discrimination because of their disability, 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 discriminatory practices are occurring, citing relevant laws, regulations, and policy provisions, and make specific requests for your client.
- **Report concerns to ORR** – Email uchearings@acf.hhs.gov to report concerns regarding discrimination based on disability or other violations of ORR's non-discrimination policy. See [ORR Nondiscrimination Notice](#); [ORR Policy Guide § 3.8](#); see also [Disability Settlement § VI.B.2](#).
- **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](#); UC Office of the Ombuds [website](#). The Ombuds can be reached at UC.Ombuds@acf.hhs.gov.
- **Consider filing litigation to enforce your client's rights or locating a disability rights attorney to represent your client's interests** – Reach out to NCYL at immigration@youthlaw.org if you would like assistance finding counsel for your client.

Determining Whether a Child Has a Disability

What does it mean to have a disability?

- The definition of disability is broad and covers both mental health and physical health issues that substantially impair a child's life activities.
- An individual has a disability if they "(A) [have] a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) [have] a record of such an impairment; or (C) [are] regarded as having such an impairment." [42 U.S.C. § 12102\(1\)](#).
- Major life activities include, among other things, sleeping, learning, concentrating, thinking, communicating, interacting with others, and the operation of major bodily functions. [45 C.F.R. § 84.4\(c\)](#); see also [42 U.S.C. § 12102\(2\)\(A\)](#).
- For example, "[m]ajor depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia each substantially limits brain function." [45 C.F.R. § 84.4\(d\)\(2\)\(iii\)\(K\)](#).
- The terms "disability" and "substantial limitation" are broadly construed. See [42 U.S.C. § 12102\(4\)\(A\)](#); [45 C.F.R. §§ 84.1\(b\), 84.4\(a\)\(2\), \(c\)\(2\), \(d\)](#).

Ali

Ali has post-traumatic stress disorder that substantially affects his ability to sleep and his interactions with others. In his home country, this is not considered a disability, and he does not consider himself to have a disability. Under U.S. federal law, however, he likely meets the definition of an individual with a disability and has additional legal rights.

Will my client be evaluated for disability?

- ORR care providers must assess all children's needs and service requirements. See [45 C.F.R. §§ 410.1106, 410.1302\(c\)\(2\)](#).
- A child will be evaluated for disability: (1) if the child requests an evaluation (including a request made through counsel); (2) the child is psychiatrically hospitalized or evaluated for psychiatric hospitalization; or (3) the child is considered for step-up to a residential treatment center or secure facility based on danger to self or others. See [ORR Policy Guide § 3.8.2](#); see also [Disability Settlement § II.A.2](#).

Determining Whether a Child Has a Disability

If my client has no identified disability but has heightened needs, what are their rights?

- Evaluate whether to request an evaluation for disability based on your client's heightened needs. Note that if a child is determined to have a disability, ORR is required to conduct a home study prior to release. See [8 U.S.C. § 1232\(c\)\(3\)\(B\)](#).
- If your client is taking psychotropic medications, they very likely qualify as having a disability. For rights specific to psychotropic medications, see [Guide to Rights of Children Prescribed Psychotropic Medications](#).
- All children in ORR custody, regardless of disability status, are entitled to placement "in the least restrictive setting that is in the best interest of the child and appropriate to the unaccompanied child's age and individualized needs." [45 C.F.R. § 410.1103\(a\)](#).
- ORR must assess each unaccompanied child's individualized needs and "place the unaccompanied child, whenever possible, in a standard program in which the unaccompanied child with individualized needs can interact with children without those individualized needs to the fullest extent possible, but which provides services and treatment or equipment for such individualized needs." [45 C.F.R. § 410.1106](#).

Right to Reasonable Modifications

Is my client entitled to additional services or program modifications because of their disability?

- ORR must “make reasonable modifications to its programs, including the provision of services, equipment, and treatment, so that an unaccompanied child with one or more disabilities can have equal access to the UC Program in the most integrated setting appropriate to their needs.” [45 C.F.R. § 410.1311\(c\)](#); see also [45 C.F.R. § 84.68\(b\)\(7\)\(i\)](#) (recipients of HHS funding must make reasonable modifications).
 - But note that ORR and its care providers are not required to make reasonable modifications if they can demonstrate that it “would fundamentally alter the nature of a program or activity.” [45 C.F.R. § 410.1311\(c\)](#); see also [45 C.F.R. § 84.68\(b\)\(7\)\(i\)](#).

Is my client entitled to a service plan?

- ORR care providers must assess all children’s needs and service requirements. See [45 C.F.R. §§ 410.1106, 410.1302\(c\)\(2\)](#).
- If a child has a disability, ORR must assess the child’s potential need for reasonable accommodations, modifications, services, and/or supports and, if needed, develop and implement an individualized Section 504 Service Plan for the child. See [ORR Policy Guide § 3.8.3](#); see also [Disability Settlement § II.B](#).
- The child, the child advocate, the child’s attorney, and the child’s parent or legal guardian should be consulted in the development of the Section 504 Service Plan. See [ORR Policy Guide § 3.8.3](#); see also [Disability Settlement § II.B.3](#).

Right to Reasonable Modifications

What if my client is struggling in school because of their disability?

- A child with a disability is entitled to reasonable modifications to enable them to access educational services and these should be documented in the child's Section 504 Service Plan.
- In addition, care providers must provide "[e]ducational services appropriate to the unaccompanied child's level of development, communications skills, and disability, if applicable." 45 C.F.R. § 410.1302(c)(3).
- For more resources, see NCYL's toolkit on Educational Advocacy for Unaccompanied Immigrant Youth in California.

If my client is receiving additional services or program modifications, where should that be documented?

- ORR must document services, supports, or program modifications in the child's ORR case file. 45 C.F.R. § 410.1311(d); see also [Disability Settlement § II.C.1](#).
- Attorneys and child advocates are able to request the child's case file. 45 C.F.R. §§ 410.1308(e) (child advocates); 410.1309(c)(2), (3) (attorneys); see also [Disability Settlement § II.C.2](#).

Addressing Unequal Treatment by Care Provider

Can a care provider deny my client access to activities or outings because of their disability?

- Unlawful discrimination includes exclusion from participation in any program or activity conducted by ORR, denial of any aids, benefits, or services based on disability, or unequal aids, benefits, or services. [45 C.F.R. § 85.21\(a\), \(b\)\(1\)](#).
- ORR and the care provider must make reasonable modifications to enable a child with a disability to participate in the full range of services and benefits offered to children without disabilities.
- ORR and the care provider may limit a child's participation in the program if the child poses a "direct threat." [45 C.F.R. § 84.75\(a\)](#). The definition of "direct threat" is narrow and requires "individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk." [45 C.F.R. § 84.75\(b\)](#).

Can a care provider separate my client from other children in the program because of their disability?

- Isolating a child is likely to constitute unlawful exclusion from full participation in programming, unless the program can demonstrate that your client meets the strict definition of "direct threat."
- A child with a disability is entitled 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." [45 C.F.R. § 84.10](#); see also [89 Fed. Reg. at 34,536](#) (Preamble to Foundational Rule).

Sofia

Sofia has attention deficit hyperactivity disorder and has trouble paying attention in class. She is sometimes disruptive and is frequently excluded from class and sent to sit in her room during class time. This is very likely unlawful discrimination. The care provider must make modifications to enable Sofia to fully participate in educational programming with other children to the greatest extent possible.

Restrictive Placement Based on Disability or Disability-Related Behavior

How can I contest the step up of a child with a disability to a restrictive setting?

- A restrictive placement is a segregated setting and is likely not “the most integrated setting appropriate to their needs.” [45 C.F.R. § 410.1311\(c\)](#); see also [45 C.F.R. § 85.21\(d\)](#); [45 C.F.R. § 84.76\(c\)](#) (definition of “segregated settings”).
- Before placing a child with a disability in a restrictive setting, ORR 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\(d\)](#).
- If reasonable modifications in the current program could address the child’s needs, they should not be stepped up to the more restrictive setting.
- Like all children placed in restrictive settings by ORR, children with disabilities can also challenge their placement through a Placement Review Panel. See [Guide to Rights of Children Placed in Restrictive Settings](#).

What if my client requires additional therapy or medication management that are only provided in a residential treatment center?

- If ORR can feasibly provide the same services in a less restrictive and more integrated setting, they must do so. Discrimination based on disability includes a “[f]ailure to provide community-based services that results in institutionalization or serious risk of institutionalization.” [45 C.F.R. § 84.76\(d\)\(4\)](#).
- Discrimination also includes “[p]roviding greater benefits or benefits under more favorable terms in segregated settings than in integrated settings.” [45 C.F.R. § 84.76\(d\)\(2\)](#).

Restrictive Placement Based on Disability or Disability-Related Behavior

If my client is currently in a restrictive placement, how can I advocate for step down?

- ORR must consider “reasonable modifications and auxiliary aids and services to facilitate less restrictive placement” during every restrictive placement case review. See [45 C.F.R. §§ 410.1105\(d\), 410.1901](#). You can advocate for modifications that you believe would facilitate your client’s placement in a less restrictive environment.
- “For unaccompanied children in residential treatment centers, the 30-day 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\(d\)\(3\)](#).
- Children with disabilities also have access to all the procedural protections available to children in ORR custody generally. See [Guide to Rights of Children Placed in Restrictive Settings](#).

If my client is placed in a non-restrictive therapeutic placement, do they have the right to challenge their placement?

- Under ORR regulations, a restrictive placement is a secure facility—including a residential treatment center—or a heightened supervision facility. See [45 C.F.R. § 410.1001](#). A child placed in another type of facility, such as a therapeutic group home, is not officially in a restrictive setting and does not have the same procedural rights to challenge their placement. *Cf.* [45 C.F.R. §§ 410.1105\(d\), 410.1901](#).
- Regardless of how ORR classifies a facility, however, a child with a disability has the right to be placed in the most integrated setting appropriate to their needs. See [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.” [45 C.F.R. § 84.10](#); see also [89 Fed. Reg. at 34,536](#) (Preamble to Foundational Rule). If your client is placed in a segregated therapeutic facility, you may be able to advocate for their transfer to a more integrated placement.

Restrictive Placement Based on Disability or Disability-Related Behavior

My client has been approved for step down but no less restrictive placement will accept them, what rights do they have?

- A care provider, including a foster care provider, must accept a placement if they have available bed space unless the provider can show that placement would conflict with their licensing rules, ORR has not provided medical clearance for a child with a significant illness, or “the care provider facility concludes it is unable to meet the child’s disability-related needs, without fundamentally altering the nature of its program, even by providing reasonable modifications and even with additional support from ORR.” [45 C.F.R. § 410.1103\(f\)](#); see also [ORR Policy Guide § 1.3.3](#).
- ORR has established a Care Provider Placement Acceptance Panel to review denials of placement for compliance with ORR policies. See [ORR Policy Guide § 1.3.3](#).
- Even if an individual shelter or long-term foster care (LTFC) program denies placement, this does not excuse ORR's independent obligation to ensure an integrated placement. See [45 C.F.R. § 410.1311\(c\)](#).

Community Placement

Is a foster care placement the most integrated setting?

- Yes, the most integrated setting is almost always a community-based placement.
- Under HHS regulations, 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.” [45 C.F.R. § 84.10](#); see also [89 Fed. Reg. at 34,536](#) (Preamble to Foundational Rule).
- Integrated “settings provide opportunities to live, work, and receive services in the greater community, like individuals without disabilities; are located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; and afford individuals choice in their daily life activities.” [45 C.F.R. § 84.10](#).
- Discrimination against children with disabilities includes the “unjustified isolation” of individuals with disabilities in institutional rather than community settings. *Olmstead v. L.C. ex. rel. Zimring*, 527 U.S. 581, 597 (1999); see also *id.* at 600.

Can my client be denied placement in foster care because of their disability?

- It is unlawful to create eligibility criteria for community-based placement that excludes children with disabilities. Federal law prohibits “criteria or methods of administration” that subject individuals to discrimination or “defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals” with disabilities. [45 C.F.R. § 85.21\(b\)\(3\)](#).
- If foster care is the least restrictive and most integrated placement appropriate and the child is otherwise eligible (e.g. has no available sponsor), ORR must place the child in foster care unless it can demonstrate that doing so would require a fundamental alteration of its program. See [45 C.F.R. §§ 410.1311\(b\), \(c\)](#).

Community Placement

Can my client be denied placement in foster care because of their disability? (continued)

- Care providers, including foster care providers, must accept a placement if they have available bed space unless the provider can show that placement would conflict with their licensing rules, ORR has not provided medical clearance for a child with a significant illness, or “the care provider facility concludes it is unable to meet the child’s disability-related needs, without fundamentally altering the nature of its program, even by providing reasonable modifications and even with additional support from ORR.” [45 C.F.R. § 410.1103\(f\)](#); see also [ORR Policy Guide § 1.3.3](#). ORR has established a Care Provider Placement Acceptance Panel to review denials of placement for compliance with ORR policies. See [ORR Policy Guide § 1.3.3](#).
- A denial based on disability might be explicit (i.e. a program says they cannot accept children with heightened mental health needs) but may also be less obvious. If a child is denied foster care placement because they have too many behavioral reports, for example, this might be discrimination based on disability if the behavior is a manifestation of their disability.

Nicolas

Nicolas is currently placed in a residential treatment center because of his major depressive disorder and he takes prescription psychotropic medication. He does not have a sponsor and is a victim of trafficking with an eligibility letter from the Office of Trafficking in Persons (OTIP). Nicolas is approved for step down but his case manager told him that he needs to demonstrate stable behavior in a shelter before he will be considered for foster care or placement in the Unaccompanied Refugee Minors (URM) program and that most foster placements will not be able to manage his medication. This is likely unlawful discrimination. Nicolas is immediately entitled to the least restrictive and most integrated setting appropriate to his needs, which may be a therapeutic foster care placement with medication management services. The URM program and foster care providers are also obligated to make reasonable modifications to accommodate his disability-related needs.

- Even if an individual LTFC program denies placement, this does not excuse ORR's independent obligation to ensure an integrated placement. See [45 C.F.R. § 410.1311\(c\)](#).

Community Placement

What if my client needs extra support to do well in a foster care placement?

- A child with a disability is entitled to reasonable modifications, which could include therapeutic foster care and/or intensive mental health services in the community. See [45 C.F.R. § 84.76\(d\)\(4\)](#) (discrimination includes “[f]ailure to provide community-based services that results in institutionalization or serious risk of institutionalization.”); [89 Fed. Reg. at 40,106](#) (Preamble to HHS Rule) (“[W]e reiterate that all children with disabilities in foster care are entitled to receive services in the most integrated setting appropriate to their needs, and congregate care is virtually never the most appropriate long-term setting for children.”); see *also* Department of Justice investigations of [Maine](#) at pp. 14-15, [Nevada](#) at p. 24, and [Alaska](#) at pp. 10-12.

Release from ORR Custody

If my client is identified as having a disability, will that delay their release?

- The Trafficking Victims Protection Reauthorization Act requires a home study for a child with a disability. See [8 U.S.C. § 1232\(c\)\(3\)\(B\)](#). This may result in some delay in release.
- If a child with a disability does require a home study, ORR must conduct the home study as expeditiously as possible and should conduct background checks concurrently with the home study to minimize the delay in release. See [Disability Settlement § V.A.](#)
- Apart from the home study requirement, ORR cannot deprive a child with a disability of the benefits of timely family reunification or otherwise discriminate against a child with a disability in the release process because of their disability. See [45 C.F.R. § 85.21\(a\), \(b\)\(1\)](#); [45 C.F.R. § 410.1311](#). For more information on general rights to release, see [Guide to Rights of Children to Prompt Release](#).
- ORR must also make reasonable modifications during the release process. [45 C.F.R. § 410.1311\(e\)\(2\)](#).

Can my client be denied release because their sponsor is unable to meet their disability-related needs?

- ORR considers a sponsor's ability to provide for the child's disability-related needs in the sponsor vetting process. See [45 C.F.R. § 410.1311\(e\)\(1\)](#). But ORR must also "consider the potential benefits to the child of release to a community-based setting." *Id.*
- Further, ORR must "affirmatively support and assist otherwise viable potential sponsors in accessing and coordinating appropriate post-release community-based services and supports available in the community to support the sponsor's ability to care for a child with one or more disabilities." [45 C.F.R. § 410.1311\(e\)\(2\)](#).

Ana

Ana wishes to be released to her aunt. Ana has multiple serious health conditions and her aunt is unsure how to care for her and where to find the support she will need post-release. The fact that Ana's aunt does not currently know how she will care for Ana should not be the basis for a negative home study and denial of release. Instead, ORR must affirmatively assist Ana's aunt in developing a post-release plan.

Key Terms

- An **individual with a disability** is someone who “(A) [has] a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) [has] a record of such an impairment; or (C) [is] regarded as having such an impairment.” [42 U.S.C. § 12102\(1\)](#). If a child is “regarded as” having a disability but does not have an actual disability or record of disability, the child is not entitled to reasonable modifications. See [42 U.S.C. § 12201\(h\)](#); see also [45 C.F.R. §§ 84.4\(a\)\(2\)\(iii\), 84.68\(b\)\(7\)\(ii\)](#).
- The **most integrated setting** “means a setting that provides individuals with disabilities the opportunity to interact with nondisabled persons to the fullest extent possible.” [45 C.F.R. § 84.10](#); see also [89 Fed. Reg. at 34,536](#) (Preamble to Foundational Rule). Integrated “settings provide opportunities to live, work, and receive services in the greater community, like individuals without disabilities; are located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual’s choosing; and afford individuals choice in their daily life activities.” [45 C.F.R. § 84.10](#).
- **Segregated settings** “include but are not limited to congregate settings that are populated exclusively or primarily with individuals with disabilities and may be characterized by regimentation in daily activities; lack of privacy or autonomy; or policies or practices limiting visitors or limiting individuals’ ability to engage freely in community activities and to manage their own activities of daily living.” [45 C.F.R. § 84.76\(c\)](#).
- **Direct threat** means “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.” [45 C.F.R. § 84.10](#). “[I]n determining whether an individual poses a direct threat, a recipient must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.” [45 C.F.R. § 84.75\(b\)](#).

Key Terms

- **Fundamental alteration** is a defense to non-discrimination requirements. ORR or a care provider are not required to take requested actions if they meet their burden to establish that a requested modification or other action would fundamentally alter the nature of the program or activity. [45 C.F.R. § 410.1311\(b\), \(c\)](#); [45 C.F.R. § 84.76\(e\)](#).

**FOR MORE INFORMATION,
CONTACT NCYL**

immigration@youthlaw.org

WWW.YOUTHLAW.ORG

contact@youthlaw.org
1212 Broadway, Suite 600
Oakland, CA 94612