



## *Garcia Ramirez et al. v. U.S. Immigration and Customs Enforcement et al.*

### Frequently Asked Questions<sup>1</sup>

January 13, 2022

#### Overview of *Garcia Ramirez v. ICE*

*Garcia Ramirez v. Immigration and Customs Enforcement (ICE)* is a nationwide class action lawsuit in the District Court for the District of Columbia challenging the practice of transferring children who arrive in the United States without parents or legal guardians from the custody of the Department of Health and Human Services (HHS) to ICE-contracted jails and prisons on their 18th birthdays, without considering less restrictive placements.

In July 2020, following more than two years of litigation culminating in an 18-day bench trial, the court [ruled](#) that ICE's failure to consider less restrictive settings before transferring unaccompanied immigrant youth to ICE detention violates U.S. immigration laws. In its ruling, the district court found that the U.S. government routinely and systematically fails to adhere to the statutory provisions that require it to consider placement in the least restrictive setting available, and to provide meaningful alternatives to detention as required by amendments to the Trafficking Victims Protection Reauthorization Act (TVPRA).

Following the ruling, ICE issued new directives and training to its officers. Since the court's ruling, ICE has released the vast majority of young people on their own recognizance after they turn 18 in HHS custody.

In September 2021, the court [issued a permanent injunction](#) in the case, which was [amended](#) in November 2021 to clarify the length of aspects of the permanent injunction. In its accompanying [memorandum opinion](#), the court pointed to ICE's "pervasive violations" of the TVPRA and explained that its decision to grant injunctive relief was in part based on ICE's failure to comply with the statute constituting "a pattern of agency recalcitrance and resistance to the fulfillment of its legal duties."<sup>2</sup>

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<sup>2</sup> *Garcia Ramirez v. ICE*, No. CV 18-508 (RC), 2021 WL 4284530, at \*8, \*14 (D.D.C. Sept. 21, 2021).

The five-year permanent injunction requires ICE to:

- Comply substantively with the TVPRA, which requires ICE to consider placing unaccompanied immigrant children in settings less restrictive than ICE detention
- Re-train its officers and revise its policies and handbook on how to make custody determinations when youth in ORR custody turn 18
- Document its custody decisions on an “Age-Out Review Worksheet”
- Provide Age-Out Review Worksheets and monthly reports to class counsel

These FAQs are intended to guide legal representatives on the meaning of the *Garcia Ramirez* decision when representing unaccompanied children who are approaching their 18<sup>th</sup> birthdays, or those who have already turned 18 and are in ICE custody. These FAQs also incorporate best practices learned throughout the course of litigating this class action.

### **FAQs Regarding Custody Determinations for Youth Aging out of ORR Custody**

#### **1. Q. What does the court’s decision mean?**

A: The decision means that unaccompanied children who turn 18 and “age out” of ORR custody should generally not be transferred to ICE detention unless there is evidence that they are a flight risk, danger to themselves, or danger to the community, and that release, including release on an Alternative to Detention (ATD) program, would not mitigate these concerns.

#### **2. Q. What can I do to do prepare for my client’s 18<sup>th</sup> birthday?**

A: Remain in touch with shelter and ORR staff regarding the child’s potential reunification options, including any sponsors who were denied or who did not complete the family reunification process, and whether release is likely to happen before age-out. If the child does not have a sponsor, it is helpful to secure placement at a post-18 shelter and obtain a letter from the shelter confirming placement. This letter can be included in a post-18 plan or request for release to ICE.

#### **3. Q: What is a post-18 plan?**

A: A post-18 plan is information sent to ICE in preparation for a child’s 18<sup>th</sup> birthday. It should contain information about the child’s potential sponsors or placement options once they turn 18. This information is usually sent to ICE by the child’s ORR shelter case manager, but attorneys and other representatives can also submit post-18 plans to ICE.

#### **4. What is the National Age-Out Shelter List?**

A: The National Age-Out Shelter List is a list of shelters and post-18 placements to whom ICE will release young people aging out of ORR custody. ICE currently does not make the shelter list publicly available. If a youth does not have a proposed sponsor, the FOJC must reach out

to at least five shelters from the list to attempt to find a post-18 placement. See [ICE Age-Out Training PowerPoint](#) at 66.<sup>3</sup>

**5. Q. My client is unlikely to be released by ORR before they turn 18. What should I do if ORR has not prepared a post-18 plan?**

A: ICE should not rely on a lack of a post-18 plan as a reason for detention. See [Liability Order](#) at 143-44; 75 (“It stands to reason that ORR and third parties may have seen no reason to waste time submitting post-18 plans to offices that would detain all their age-outs regardless. If a causal relationship exists between submission of post-18 plans and detention rates, it strikes the Court that this causal relationship may plausibly run in either direction.”); [ICE Age-Out Training PowerPoint](#) at 66 (“Remember: ICE cannot rely solely on sponsorship decisions by ORR or the absence of sponsor information from ORR as a reason to short-circuit the VAWA 2013 inquiry and detain.”). ICE should reach out to ORR or shelter staff to request a post-18 plan if one is not provided. ICE should also take into account potential sponsors who are suggested by the child’s attorney, Young Center advocate, or other representative. Practitioners are encouraged to submit a post-18 plan or request for release with ICE. See Appendix A, Sample Release Request. However, even if a post-18 plan is not provided by ORR or the child’s attorney or representative, ICE is required to identify the least restrictive setting available and consider alternatives to detention. [Liability Order](#) at 160. This includes contacting at least five shelters on the National Age-Out Shelter List to see if they will accept the young person. See [ICE Age-Out Training PowerPoint](#) at 66, 28-29 (slides 27-28), 33-34 (slides 32-33).

**6. Who makes the Age-Out custody determination decision?**

A: The Field Office Juvenile Coordinator (FOJC) typically makes the Age-Out custody determination decision. Among the FOJC’s duties are to serve unaccompanied children with Notices to Appear (NTAs) and monitor the UC Portal for upcoming Age-Outs. The FOJC’s custody determination is then reviewed by the Supervisory Detention and Deportation Officer (SDDO). ICE’s Juvenile and Family Residential Management Unit (JFRMU) – an ICE headquarters unit – reviews any decision to detain a child aging out of HHS custody. See [Liability Order](#) at 20–21 (discussing ICE structure); [ICE Age-Out Training PowerPoint](#) at 46 (slide 45)

**7. Q: When do FOJCs begin planning to make an Age-Out custody determination?**

A: According to training FOJCs now receive, they should begin their work at least two weeks in advance of the child’s 18<sup>th</sup> birthday, if possible. See [ICE Age-Out Training PowerPoint](#) at 17 (slide 16), 44 (slide 43). We understand that typically these decisions are made the day (or night) before the child’s birthday, or even on the 18<sup>th</sup> birthday. Practitioners are encouraged

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<sup>3</sup> Due to inconsistent pagination within the document, all references to the ICE Age-Out Training PowerPoint within this FAQ are to the pdf page number at the top of the document. Please note, that the PowerPoint slides themselves are also numbered in the lower right corners of the slides and we have indicated in parenthesis when the issue is also discussed within the slide itself.

to contact the FOJC in advance of the child's 18<sup>th</sup> birthday to check on the status of the child's custody determination.

**8. Q: What information does ORR share with ICE when a child is about to turn 18?**

A: ORR is not a party to *Garcia Ramirez*, so there are no specific requirements stemming out of the litigation regarding what information they must share with ICE before a child turns 18. However, ORR's policies<sup>4</sup> require ORR to engage in post-18 planning. This typically means that ORR will share information with ICE regarding the child's potential sponsors, possibilities for release, and whether the child may be a flight risk or danger to themselves or others. The amount of information ORR shares with ICE depends on the particular shelter.

**9. What is the Age-Out Review Worksheet?**

A: The [Age-Out Review Worksheet](#) (AORW), is a form the FOJC must fill out for each young person nearing their 18<sup>th</sup> birthday. The form asks the FOJC to identify any potential sponsors or post-18 placements for the youth. It also includes an assessment of whether the person aging out is a flight risk, danger to self, or danger to the community.

**10. Q: Does ICE use the Risk Classification Assessment (RCA) Tool when determining whether to detain a young person aging out?**

A: No. Under the *Garcia Ramirez* decision, it is not appropriate for ICE to utilize the RCA tool when determining whether to detain a young person about to turn 18. Following the court's decision, ICE issued a [directive to the field](#) regarding the RCA tool and when it may and may not be used. ICE may only run the RCA tool *after* it has decided to detain a young person aging out of HHS custody. *See also* Question 30, *infra*.

**Identifying Potential Sponsors**

**11. Q: If ORR has denied an individual sponsor or found them not viable, can ICE still release my client to that sponsor?**

A: Yes, ORR has sponsorship requirements for unaccompanied children that are not applicable to young people aging out of the HHS system. [Liability Order](#) at 173–75. ICE cannot deny a sponsor solely because ORR did so. *See* [ICE Age-Out Training PowerPoint](#) at 15 (slide 14).

**12. Q: If ORR has not been able to verify the sponsor's relationship to my client, can ICE still consider this sponsor?**

A: Yes, the sponsor does not need to be related to or have a prior relationship with the young person who ages out for ICE to consider them. ORR's sponsorship requirements for

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<sup>4</sup> *See* Office of Refugee Resettlement Policy & Guidance, Section 3.3.2 Long Term and Concurrent Planning (Jan. 28, 2015), <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-3>.

unaccompanied children are not applicable for young people aging out of the HHS system. [Liability Order](#) at 173–75.

**13. Q: The sponsor was unable or unwilling to be fingerprinted by ORR. Can ICE still consider this sponsor?**

A: Yes, fingerprints are not a requirement for ICE to consider a sponsor. [Liability Order](#) at 75–76. Fingerprinting is an ORR sponsorship requirement for unaccompanied children that is not applicable for young people aging out.

**14. Q: My client’s sponsor is not a U.S. citizen or lawful permanent resident. Can ICE still consider this sponsor?**

A: Yes, lawful status is not necessary for sponsorship of young people aging out of HHS custody. [Liability Order](#) at 77–78; [ICE Age-Out Training PowerPoint](#) at 16 (slide 15). We understand that certain ICE field offices imposed this requirement in the past, but they should no longer do so under the *Garcia Ramirez* decision.

**Flight Risk Concerns**

**15. Q: My client lacks a fixed or permanent address in the United States. Are they automatically a flight risk?**

A: No, most unaccompanied children lack a fixed or permanent address in the United States because they are recent arrivals to the country and have been housed in ORR custody. This alone does not constitute a flight risk. Though ICE requires a fixed or permanent U.S. address when releasing adults, custody determinations for children aging out cannot be made under the same standards used for adults. See [ICE Age-Out Training PowerPoint](#) at 12, 14 (slides 11, 13).

**16. Q: My client has been in ORR custody for an extended period of time. Can ICE detain them based on this?**

A: No, length of stay in ORR custody is not a relevant factor for Age-Out custody determinations. Long length of stay does not indicate that the young person lacks a viable sponsor, as ORR’s sponsorship requirements are not applicable to ICE. [Liability Order](#) at 53, 172. Moreover, youth with long lengths of stay in ORR custody may be awaiting placement in long-term foster care or are already in foster care. Youth in foster care have already demonstrated an ability to live in the community and ICE should generally not detain them. *Id.* at 53.

**17. Q: My client absconded or attempted to abscond from ORR custody. Are they a flight risk?**

A: Not necessarily. See [ICE Age-Out Training PowerPoint](#) at 58-60 (slides 57-58). In those cases, practitioners should make sure to emphasize any mitigating factors in their client's case, such as:

- What were the circumstances that led to the child's attempt to abscond?
- Has the young person demonstrated good behavior in ORR custody since the attempt to abscond?
- Was the escape attempt linked to mental health issues for which they are now being treated?
- Are they eligible for immigration relief and/or have an application for relief on file? See [Liability Order](#) at 54.
- Are there any other mitigating factors, such as a sponsor that will ensure attendance at future hearings? *Id.*

**18. Q: My client has been accepted at a shelter or group home but has family in the United States. Can ICE consider this a flight risk factor?**

A: No, having family in the United States is a positive factor that indicates ties to the community. See [ICE Age-Out Training PowerPoint](#) at 42. The fact that your client has not reunified with these family members does not indicate that they will fail to comply with future immigration obligations. In the past, some field offices considered this a flight risk factor for youth who planned to go to post-18 shelters, but that is not appropriate under the *Garcia Ramirez* decision.

**Danger to Self**

**19. Q: My client has a history of mental health concerns or self-harm. Will ICE find that they are a danger to themselves?**

A: Young people aging out should not be detained simply because of mental health concerns or self-harm. See [ICE Age-Out Training PowerPoint](#) at 16 (slide 15), 70 (slide 64). In assessing the least restrictive setting for a youth with mental health concerns and a history of self-harm, ICE should evaluate whether the non-detention setting will mitigate any potential safety concerns. *Id.* They should assess whether there is a release plan in place that outlines services the young person could access if released. *Id.* They should also consider the recency of any self-harm incidents. *Id.*

**20. Q: A shelter or group home is available to house my client. Can ICE detain them because of concerns that they will be a danger to themselves because they will be at risk of homelessness?**

A: No, according to ICE training materials, it is not appropriate for ICE to find that a young person is a danger to themselves in this situation. See [ICE Age-Out Training PowerPoint](#) at 16 (slide 15).

**21. Q: Does the fact that the young person aging out is unable to support themselves make them a danger to themselves?**

A: No, it is not appropriate for ICE to find that inability to support oneself renders a young person aging out a danger to themselves. See [ICE Age-Out Training PowerPoint](#) at 16 (slide 15).

### **Danger to Others**

**22. Q: My client has been arrested, has a history of juvenile delinquency, or a criminal history. Will ICE find that they are a danger to the community?**

A: Not necessarily. ICE should consider mitigating factors when determining whether the young person is a danger to the community and the associated least restrictive setting. See [ICE Age-Out Training PowerPoint](#) at 22-23 (slides 21-22). Practitioners are encouraged to emphasize the following factors in their client's release request:

- The circumstances of the arrest and whether it involved violence against another person.
- The recency of the arrest and their client's age at the time.
- Evidence of good behavior while in ORR custody.
- Any other mitigating factors, such as a supportive sponsor or group home environment.
- In some situations, ICE may want to interview your client to assess risk of danger. Attorneys should request that ORR and/or ICE keep them apprised of any such interview so that the attorney can be present and the young person knows what to expect.

**23. Q: My client is detained at a staff-secure or secure ORR shelter. Is this a sufficient reason for ICE to detain them?**

A: No, ORR shelter level is not a reason for ICE to detain a young person aging out. ICE should look to the individual factors of the person's case and the circumstances or reasons for



placement in a staff-secure or secure shelter. Practitioners are encouraged to submit evidence of mitigating factors in cases where the young person may present behavioral concerns.

**24. Q: My client has significant incident reports (SIRs). Is this a sufficient reason for ICE to detain them?**

A: No, SIRs alone are not a reason for ICE to detain. See [Liability Order](#) at 29 n.9. Like with ORR shelter level, ICE should look to the individual factors of the person’s case and the circumstances of the SIRs. Practitioners are encouraged to submit evidence of mitigating factors in cases where the young person may present behavioral concerns.

**Release Options**

**25. Q: When is it appropriate for ICE to release a young person aging out of HHS custody under their own recognizance (OREC)?**

A: OREC may be the least restrictive setting when the young person has no final order of removal. See [Liability Order](#) at 159–61. OREC is the appropriate release option for most young people who do not present a significant danger to others after consideration of any mitigating factors. *Id.*

**26. Q: My client has a removal order. Can they be released when they turn 18?**

A: Yes, ICE may release your client on an Order of Supervision (OSUP) if they have an existing order of removal. The *Garcia Ramirez* decision states that OSUP is an appropriate release option for young people aging out who have removal orders. [Liability Order](#) at 23, 160-61.

**27. Q: What are the options for release under the ATD program?**

A: ICE’s ATD program is largely surveillance-based and includes a spectrum of reporting and surveillance obligations, include tracking by ankle monitor or by smartphone application, or telephonic reporting. [Liability Order](#) at 24. ATD programs are operational throughout the country. *Id.*

**28. Q: In what situations would my client be released under the ATD program?**

A: ATD should only be used in situations where *significant* flight risk concerns may warrant additional supervision and after consideration of mitigating factors. See [ICE Age-Out Training PowerPoint](#) at 8 (slide 7), 59-60 (slide 58).

**29. Q: May ICE release a young person aging out of HHS custody to a sponsor (individual or organizational) that is outside their current Area of Responsibility (AOR)?**

A: Yes, a young person may be released to a sponsor anywhere in the United States, even if the sponsor is located outside of the ICE field office’s AOR. See [ICE Age-Out Training PowerPoint](#) at 66.



## Detention

**30. Q: ICE has decided to detain my client. How do they determine the level of security in which to place them?**

A: ICE should run the RCA tool *after* determining to detain your client because the RCA tool always recommends detention. ICE may *only* utilize the RCA for the limited purpose of determining the level of detention (e.g., low, medium, high). See [ICE Age-Out Training PowerPoint](#) at 13 (slide 12).

**31. Q: If ICE determines to detain my client, is there any additional level of review?**

A: Any case where the FOJC decides to detain a youth who has aged out of HHS custody will require JFRMU concurrence prior to detention. See [ICE Age-Out Training PowerPoint](#) at 46 (slide 45). The FOJC must contact JFRMU by email to discuss the case and provide information and records regarding your client.

**32. Q: I believe ICE has wrongfully decided to detain my client. What should I do?**

A: If you have not already done so, practitioners are encouraged to contact the FOJC who made the decision as soon as possible to obtain information about the basis for the decision. If there is mitigating evidence available, this should be sent to the FOJC with a request that the young person be released and an explanation as to why they are neither a flight risk, danger to self or to others. To the extent your client they have some history of flight risk or danger to self or others, practitioners should explain or submit evidence to show that such concerns can be mitigated by a non-detention placement. It is advisable to contact the FOJC before the custody determination is made, particularly if your client presents any potential factors that could lead ICE to find them to be a flight risk, danger to self, or danger to others. For a sample Age-Out custody determination release request, please see the attached appendix.

If you believe ICE has wrongfully detained a youth who has aged out of HHS custody, contact class counsel for assistance at [clearinghouse@immcouncil.org](mailto:clearinghouse@immcouncil.org). Practitioners may also consider filing a petition for habeas corpus in district court if there is evidence that ICE failed to consider the least restrictive setting available.