

§ 410.1903 Risk determination hearings.

(a) All unaccompanied children in restrictive placements based on a finding of dangerousness shall be afforded a hearing before an independent HHS hearing officer, to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released, unless the unaccompanied child indicates in writing that they refuse such a hearing. Unaccompanied children placed in restrictive placements shall receive a written notice of the procedures under this section and may use a form provided to them to decline a hearing under this section. Unaccompanied children in restrictive placements may decline the hearing at any time, including after consultation with counsel.

(b) All other unaccompanied children in ORR custody may request a hearing under this section to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released. Requests under this section must be made in writing by the unaccompanied child, their attorney of record, or their parent or legal guardian by submitting a form provided by ORR to the care provider facility or by making a separate written request that contains the information requested in ORR's form.

(c) In hearings conducted under this section, ORR bears the burden of proof to establish by clear and convincing evidence that the unaccompanied child would be a danger to self or to the community if released.

(d) In hearings under this section, the unaccompanied child may be represented by a person of their choosing. The unaccompanied child may present oral and written evidence to the hearing officer and may appear by video or teleconference. ORR may also present evidence at the hearing, whether in writing, or by appearing in person or by video or teleconference.

(e) Within a reasonable time prior to the hearing, ORR shall provide to the unaccompanied child and their attorney of record the evidence and information supporting ORR's determination, including the evidentiary record.

(f) A hearing officer's decision that an unaccompanied child would not be a danger to self or to the community if released is binding upon ORR, unless the provisions of paragraph (e) of this section apply.

(g) A hearing officer's decision under this section may be appealed by either the unaccompanied child or ORR to the Assistant Secretary of ACF, or the Assistant Secretary's designee.

(1) Any such appeal request shall be in writing and must be received by ACF within 30 days of the hearing officer decision.

(2) The Assistant Secretary, or the Assistant Secretary's designee, shall review the record of the underlying hearing, and will reverse a hearing officer's decision only if there is a clear error of fact, or if the decision includes an error of law.

(3) If the hearing officer's decision found that the unaccompanied child would not pose a danger to self or to the community if released from ORR custody, and such decision would result in ORR

releasing the unaccompanied child from its custody (e.g., because the only factor preventing release was ORR's determination that the unaccompanied child posed a danger to self or to the community), an appeal to the Assistant Secretary shall not effect a stay of the hearing officer's decision, unless the Assistant Secretary issues a decision in writing within five business days of such hearing officer decision that release of the unaccompanied child would result in a danger to self or to the community. Such a stay decision must include a description of behaviors of the unaccompanied child while in ORR custody and/or documented criminal or juvenile behavior records from the unaccompanied child demonstrating that the unaccompanied child would present a danger to self or to the community if released.

(h) Decisions under this section are final and binding on the Department, and an unaccompanied child who was determined to pose a danger to self or to the community if released may only seek another hearing under this section if the unaccompanied child can demonstrate a material change in circumstances. Similarly, ORR may request the hearing officer to make a new determination under this section only if ORR can show that a material change in circumstances means the unaccompanied child should no longer be released due to presenting a danger to self or to the community.

(i) This section cannot be used to determine whether an unaccompanied child has a suitable sponsor.

(j) Determinations made under this section will not compel an unaccompanied child's release; nor will determinations made under this section compel transfer of an unaccompanied child to a different placement. Regardless of the outcome of a risk determination hearing or appeal, an unaccompanied child may not be released unless ORR identifies a safe and appropriate placement pursuant to subpart C of this part; and regardless of the outcome of a risk determination hearing or appeal, an unaccompanied child may only be transferred to another placement by ORR pursuant to requirements set forth at subparts B and G of this part.