

SEPTEMBER 2022

# PRACTICE ADVISORY:

## PRELIMINARY INJUNCTION IN *LUCAS R. v. BECERRA*



**National Center  
for Youth Law**



UNIVERSITY OF CALIFORNIA DAVIS SCHOOL OF LAW  
IMMIGRATION LAW CLINIC

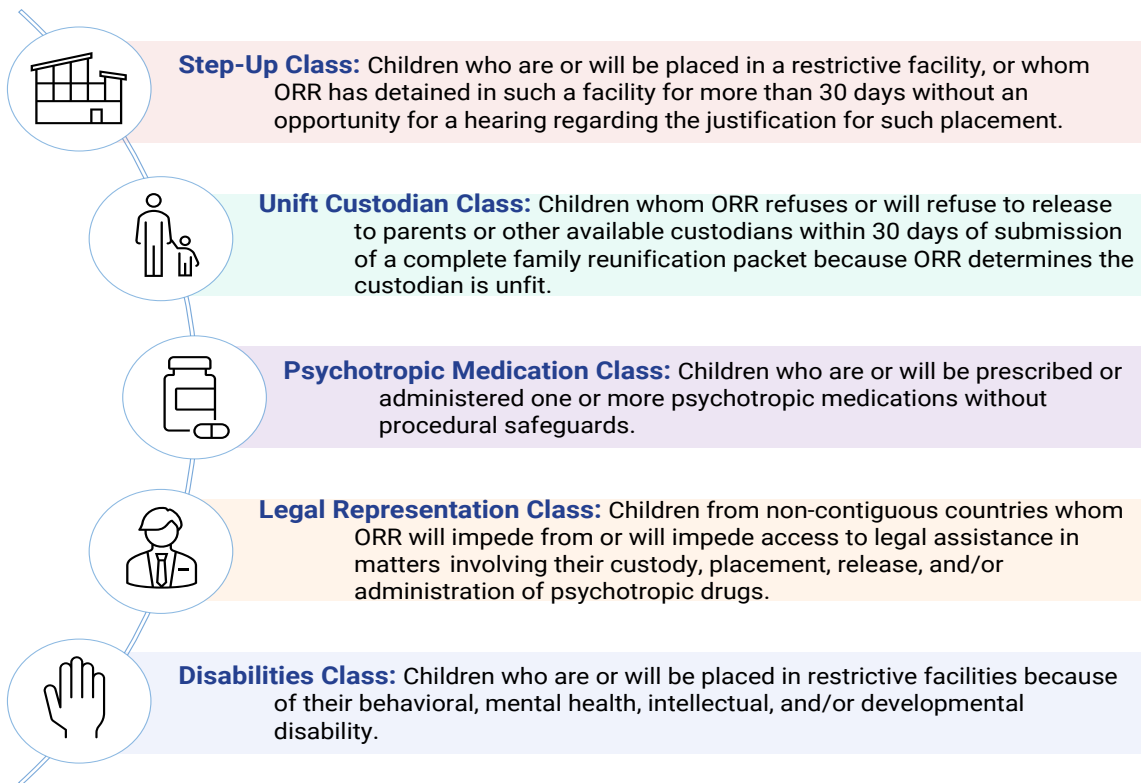
# INTRODUCTION

This practice advisory discusses the recent issuance of a [preliminary injunction](#) in *Lucas R. v. Becerra* which was filed by the Center for Human Rights and Constitutional Law, National Center for Youth Law, UC Davis Immigration Law Clinic, and Cooley LLP in June 2018. On August 30, 2022, Judge Gee of the Central District of California, issued the preliminary injunction following the Court's March 2022 order that partially granted Plaintiffs' Motion for Summary Judgment.

The preliminary injunction requires the Department of Health and Human Services Office of Refugee Resettlement ("ORR") to provide significant due process protections to children who are (1) detained in restrictive placements and/or (2) denied release to close family members attempting to sponsor them. The preliminary injunction goes into effect on **October 29, 2022**.

## LUCAS R. v. BECERRA

*Lucas R.* is a class action lawsuit, filed in the Central District of California, challenging the federal government's treatment of unaccompanied immigrant children in the custody of ORR. Specifically, *Lucas R.* addresses the Constitutional and statutory rights of five certified classes of children in immigration detention:



In October 2020, Plaintiffs filed a motion for summary judgment as to Plaintiffs' claims related to the step-up class, unfit custodian class, and legal representation class. In March 2022, the Court issued an order partially granting Plaintiffs' motion for summary judgment and the recent preliminary injunction orders ORR to begin providing procedural protections to children in their custody at the end of October 2022.

# WHAT DOES THE PRELIMINARY INJUNCTION MEAN FOR CHILDREN DETAINED IN RESTRICTIVE PLACEMENTS?

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The preliminary injunction requires ORR to implement various procedural protections for unaccompanied children who have been “stepped-up” or are being kept in restrictive facilities. The preliminary injunction defines “restrictive placement” to include: (1) juvenile detention facilities (aka “secure facilities”), (2) residential treatment centers, (3) out-of-network residential treatment centers, (4) staff-secure facilities, and (5) therapeutic staff-secure facilities. Moreover, the preliminary injunction requires ORR to clarify in its policy guidance that the standards and criteria for transfer or placement in RTC apply to transfer or placement in an out-of-network RTC.

ORR is required to provide the following procedural protections:

- ORR has the burden of proving by clear and convincing evidence that sufficient grounds exist for stepping up or continuing to hold a child in a restrictive placement. The evidence ORR relies on to meet this burden must be documented in the child’s case file.
- Within 48 hours of a step-up, ORR must provide the child with a Notice of Placement (NOP). A case manager must explain the NOP to the child in a language they understand.
- The NOP must:
  - o clearly and thoroughly set forth the reason(s) why the child was stepped-up, as well as a summary of the evidence upon which the decision was based
  - o inform the child of their right to contest their placement before a Placement Review Panel (PRP), an explanation of how to do so, and an explanation of all other available administrative procedures
  - o explain to the child that they are entitled to have an attorney represent them at the PRP (at no cost to the federal government)
- In addition to the initial NOP, ORR shall provide updated NOPs every 30 days until the child is no longer in the restrictive placement.
- ORR must automatically provide a copy of the NOP to the child’s counsel of record and to any parent or legal guardian of record within 48 hours of step-up.
  - o Service of the NOP on a parent or legal guardian is not required where there are child welfare reason(s) not to do so, where the parent/legal guardian cannot be reached, and where a youth who is 14 years or older requests that their parent/guardian not receive an NOP.
    - If an NOP is not provided to a parent or legal guardian, ORR must document, within the child’s case file, the child welfare reason(s) relied on.
- Placement Review Panel (PRP)
  - o PRPs will be available to children in any restrictive placement.
  - o A child can request a PRP as soon as they receive their NOP.
  - o A PRP hearing will be available within 7 days of the child’s request.
    - If the child prefers, they may contest their placement in a restrictive setting in writing rather than at a hearing.
  - o The child may be represented at the PRP hearing by counsel (at no cost to the federal government)
    - Where the child does not have an attorney, ORR shall encourage the grantee care provider to seek assistance for the child from a contracted legal service provider or child advocate.
  - o Before the PRP hearing, the child’s counsel has the right to inspect the evidence ORR relies on in support of step-up or continued restrictive placement.
    - The child’s case file must be provided to their counsel within a reasonable time (to be determined by ORR) following request.
  - o The child (or their attorney) may present evidence at the PRP including, but not limited to, putting on witnesses and/or cross-examining ORR’s witnesses if such witnesses voluntarily testify.

- o The PRP will be comprised of three ORR staff members with relevant experience. None of the PRP panel members may be an ORR Federal Field Specialist (“FFS”) involved in making the original restrictive placement decision.
- o The PRP will issue a written decision within 7 days of the hearing and submission of the evidence or, if no hearing or review of additional evidence is requested, within 7 days of receipt of the child’s written statement.
  - ORR may institute procedures to request clarification or additional evidence, if warranted, or to extend the 7-day deadline as necessary under specified circumstances.
- Additional Automatic Administrative Review
  - o ORR must conduct an automatic 30-day administrative review for all children in restrictive placements.
  - o ORR must conduct a “more intensive” 90-day review by ORR supervisory staff for children in secure facilities (which includes juvenile detention centers, RTCs, and OON RTCs).
  - o For children in RTCs, a psychiatrist or psychologist must make a determination as to whether the child should remain in the RTC every 30 days.

## WHAT DOES THE PRELIMINARY INJUNCTION MEAN FOR RELEASE PROCEDURES AND APPEAL OF DENIALS OF SPONSORS?

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The preliminary injunction requires ORR to implement various procedural protections for unaccompanied children to ensure prompt and safe release to Category 1 and 2 sponsors and to provide an opportunity to appeal the denial of release to Category 1 and 2 sponsors. The preliminary injunction defines (1) a “Category 1” sponsor as a parent or legal guardian, including qualifying step-parents that have legal or joint custody of the minor; (2) a “Category 2A” sponsor as an immediate relative, including a brother, sister, grandparent, or other close relative (aunt, uncle, first cousin) who previously served as the minor’s primary caregiver including biological relatives, relatives through legal marriage, and half-siblings; and a “Category 2B” sponsor as an immediate relative including an aunt, uncle, or first cousin who did not previously serve as the minor’s primary caregiver including biological relatives and relatives through legal marriage.

ORR is required to provide the following procedural protections:

- Absent unexpected delays, completed Family Reunification Applications (FRAs) should be processed within 10 calendar days of receipt for Category 1 and 2A sponsors and within 14 days for Category 2B sponsors.
- ORR must institute policies requiring automatic review of all pending FRAs by ORR supervisory staff. The first automatic review will happen 90 days after the FRA is submitted and an automatic review will occur every 90 days thereafter “to determine what steps are needed to accelerate the minor’s safe release.”
- The ORR Director (or a designee who is neutral and detached) is required to review all denials of Category 1 and Category 2 sponsors.
- Category 2 Sponsors, who ORR has denied release to, are entitled to the same notice and appeal process as Category 1 Sponsors as outlined in Policy Guide section 2.7.8.
- If ORR denies Category 1 or Category 2 sponsors, the ORR Director or a neutral designee must promptly give the sponsor written notice of the following:
  - o ORR’s reason for denial
  - o The evidence and information ORR contends supports its denial decision
  - o The sponsor may examine the evidence ORR relies on (upon request)
  - o The sponsor may request a hearing to appeal the release decision to the Assistant Secretary for Children and Families or a designee that is neutral and detached
  - o The sponsor may submit additional evidence, in writing before the hearing or orally during a hearing
  - o The sponsor may present witnesses and cross-examine ORR’s witnesses at the hearing, if such witnesses are willing to voluntarily testify
  - o The sponsor may have their own counsel for the hearing (at no cost to the federal government)

- If ORR denies Category 1 or Category 2 sponsors, ORR shall notify the child and child's counsel of its decision and of their right to inspect the evidence underlying ORR's decision (upon request).
  - If the sole reason for the denial of release to a Category 1 or Category 2 sponsor is that the child poses a danger to themselves or others, the ORR Director shall provide directly to the child and the child's counsel written notice of the following:
    - ORR's reason for denial
    - The evidence and information ORR contends supports its denial decision
    - The fact that the sponsor may examine the evidence ORR relies on (upon request)
    - The fact that the sponsor may request a hearing to appeal the release decision to the Assistant Secretary for Children and Families or a designee that is neutral and detached
    - The fact that the sponsor may submit additional evidence, in writing before the hearing or orally during a hearing
    - The fact that the sponsor may present witnesses and cross-examine ORR's witnesses at the hearing, if such witnesses are willing to voluntarily testify
    - The fact that the sponsor may have their own counsel for the hearing (at no cost to the federal government)
- The hearing for appeal of a denial of a Category 1 or Category 2 sponsor will include the following procedures:
  - ORR shall acknowledge receipt of request for a hearing within 5 business days.
  - ORR shall deliver the child's complete case file (apart from legally required redactions) to the sponsor or child's counsel within a reasonable timeframe (that ORR gets to determine).
  - The appeal process, including a notice of decision, shall be complete within 30 days of the request for a hearing, unless an extension is warranted under reasonable guidelines ORR is allowed to establish.
  - The hearing will be conducted, and the appeal determined by the Assistant Secretary for Children and Families or a designee who is a neutral and detached decision maker.
  - The proposed sponsor and child have the right to counsel throughout the appeal process, including at any hearing (at no cost to the federal government).
  - The decision following the appeal must be issued in writing and must either order release to the proposed sponsor within 30 days of the request for appeal (unless an extension of time is warranted under reasonable guidelines ORR creates) or must set forth detailed, specific, and individualized reasoning for the denial of the appeal.
  - ORR shall inform the sponsor and child of any rights to seek review of an adverse decision in the United States District Court.

# FREQUENTLY ASKED QUESTIONS

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## *Step-Up Related Questions*

### **Q:** *Which ORR facilities are considered “restrictive placements”?*

**A:** Each of these placements is considered “restrictive” for purposes of the Preliminary Injunction:  
(1) secure, (2) residential treatment centers, including out-of-network residential treatment centers,  
(3) staff-secure, (4) therapeutic staff-secure

### **Q:** *Can I challenge a transfer to restrictive placement, **before** the transfer occurs?*

**A:** Nothing in the Preliminary Injunction precludes youth from trying to appeal placement or transfer in a restrictive setting but the procedures set out in the Preliminary Injunction are all *post*-deprivation and therefore are triggered by receipt of the NOP which may take up to 48 hours after the transfer or placement occurs.

### **Q:** *What is a “reasonable time period” to receive a child’s case file?*

**A:** ORR is able to determine what a “reasonable time period” is but youth and their counsel should have access to all the information in the case file prior to appeal of placement and the appeal must be heard within 7 days of the request.

### **Q:** *What are “child welfare reasons” that preclude service of an NOP on a parent or legal guardian?*

**A:** Child welfare reasons that preclude service of an NOP on a parent or legal guardian include, but are not limited to: a finding that notice could endanger the child; potential abuse or neglect by the parent or legal guardian; a parent or legal guardian who resides in the U.S. but refuses to act as the minor’s sponsor; if the parent or legal guardian is non-custodial and the minor’s primary caregiver requests that notice be withheld.

### **Q:** *I have a client who is currently in a restrictive placement, am I able to utilize the PRP now?*

**A:** If your client is in a secure placement (SVJC or an RTC), PRP is already available. If your client is in a staff-secure or therapeutic staff-secure placement you can request a PRP now, but ORR has until October 29, 2022 to get the procedures fully in place and therefore ORR may delay the PRP hearing until that time.

### **Q:** *Who are the people on the PRP?*

**A:** The PRP is made up of three ORR staff members with relevant experience, but may not include any FFS involved in making the original restrictive placement decision. It may not be the same three people each time.

**Q: How long will it take to get a decision after the PRP?**

**A:** The PRP will issue a written decision within 7 days of a hearing and submission of evidence or 7 days following receipt of a child's written statement (if the appeal is done in writing). ORR is allowed to extend the 7-day deadline but only if warranted under specified circumstances and/or to request clarification or additional evidence.

**Q: What happens if my client is denied step-down after the PRP?**

**A:** The child must receive a 30-day administrative review for all restrictive placements and a more intensive 90-day administrative review by ORR supervisory staff if they are held in secure facilities (juvenile detention or RTC). Additionally, for children held in RTCs they must receive a review every 30 days by a psychiatrist or psychologist to determine whether the child should remain in restrictive residential care.

**Q: What happens if my client is approved for step-down following the PRP but they are not moved?**

**A:** Please inform *Lucas R.* class counsel as we would like to address this potential problem should it become an issue.

**Q: Can I use the PRP more than once for the same client?**

**A:** Yes, nothing in the Preliminary Injunction prevents a child from utilizing PRPs after each NOP in a restrictive setting.

**Q: What should I do if ORR isn't following these procedures?**

**A:** You should document your attempts to utilize the procedures as best as you can and contact *Lucas R.* class counsel listed at the end of this practice advisory.

## **Custodial Vetting Related Questions**

**Q: How long will ORR have to make a decision on a completed Family Reunification Application?**

**A:** FRAs should be processed within 10 days of receipt for Category 1 and Category 2A sponsors and within 14 days for Category 2B sponsors. Additionally, youth are entitled to an automatic review of all pending FRAs by ORR supervisory staff after 90 days and every 90 days thereafter.

**Q: If my client's sponsor is a cousin who my client does not know well, can they appeal a denial of release?**

**A:** No, this preliminary injunction only applies to Category 1 and Category 2 sponsors. Unfortunately there are no appeal rights for Category 3 sponsors at this time.

**Q: What is a "reasonable time period" to receive a child's case file?**

**A:** ORR is able to determine what a "reasonable time period" is but this time frame should conform with the other requirements in the Preliminary Injunction and youth and their counsel should have access to all the information in the case file in order to appeal denial of release. If ORR is not sending case files in time for counsel or youth to use them in the appeal processes, please notify *Lucas R.* class counsel.

**Q:** *If my client wants to appeal denial of release, how long will it take to get a decision on the appeal?*

**A:** The entire process should be completed within 30 days of the sponsor's request for an appeal, unless an extension is warranted under "reasonable guidelines" that ORR is allowed to establish.

**Q:** *When is a child (as opposed to a sponsor) allowed to request an appeal?*

**A:** Children do not request appeals, the appeals should be requested by the sponsor who was denied. Children must be informed of ORR's decision to deny release to a Category 1 or Category 2 sponsor and be informed of their right to inspect the evidence underlying ORR's decision (upon request). And, children who are denied release solely on the basis of a finding that the child "poses a danger to themselves or others" are entitled to also be informed of the fact that a sponsor may request an appeal of the decision and that the sponsor may present additional evidence during the appeal.

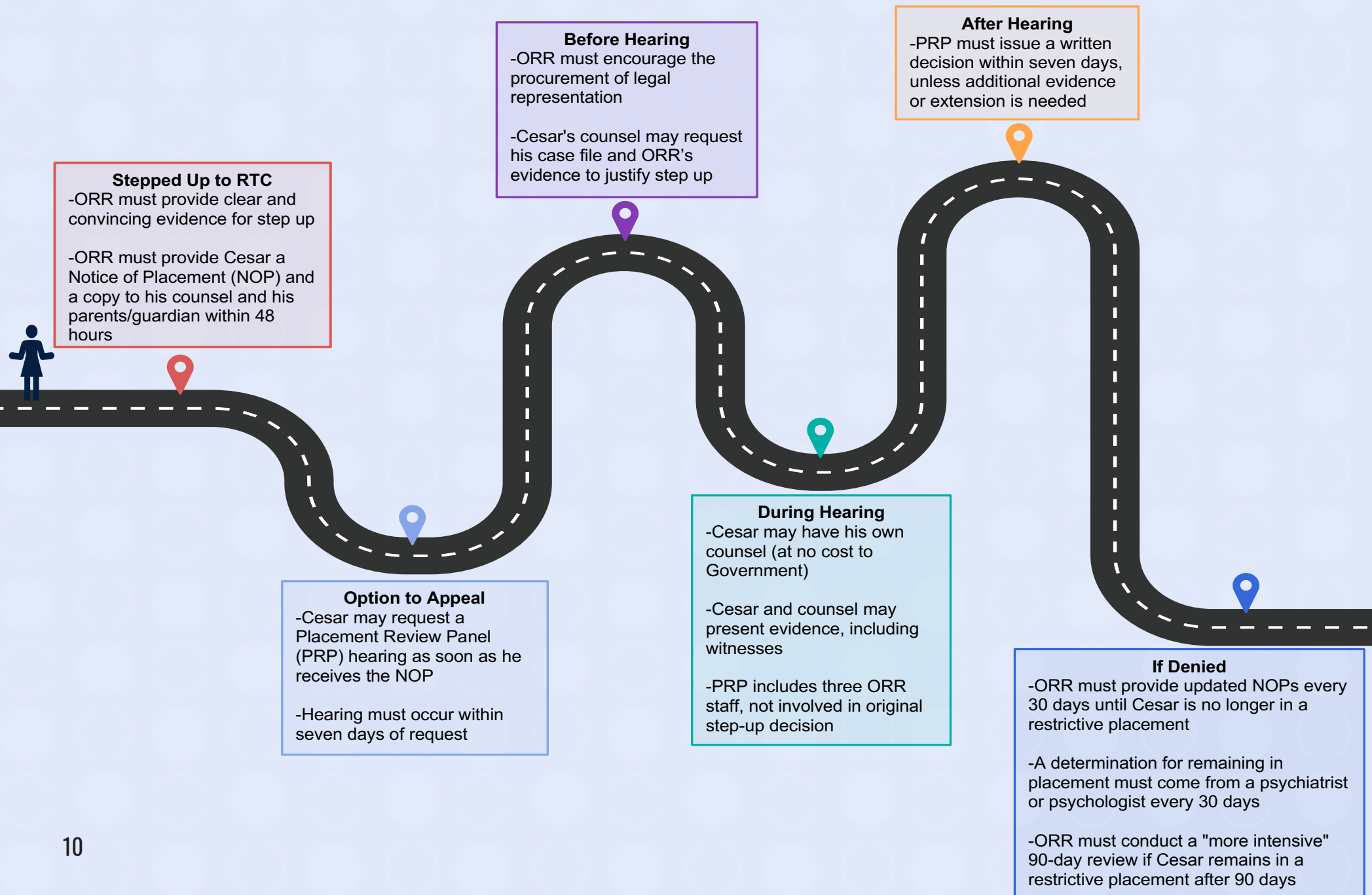
**Q:** *What should I do if ORR isn't following these procedures?*

**A:** You should document your attempts to utilize the procedures as best as you can and contact *Lucas R.* class counsel listed at the end of this practice advisory.



# CASE EXAMPLES

# CESAR: STEPPED UP TO RTC



# SOFIA:

## CONSIDERED FOR STEP UP TO STAFF SECURE

### Stepped up to Staff Secure

-Sofia can contest placement in writing after receiving NOP in Staff Secure placement

### Appeal

-PRP includes three ORR staff, not involved in original step-up decision

-PRP must issue a written decision within seven days, unless additional evidence or extension is needed

### Appeal

-Counsel may assist Sofia in writing her appeal

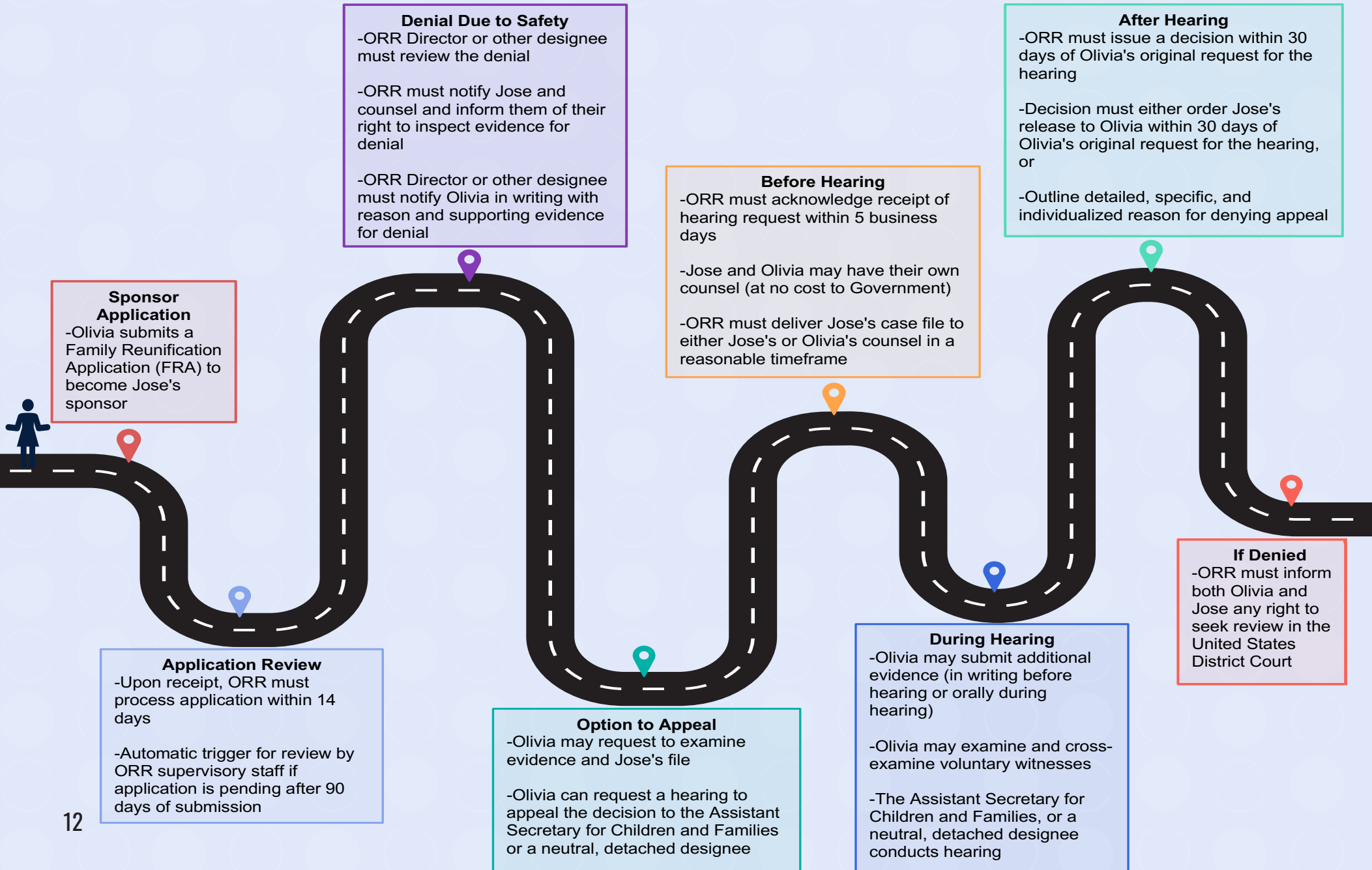
-Sofia can inspect her case file and ORR's evidence to justify step up

-Sofia can present new evidence in her appeal

### If Denied

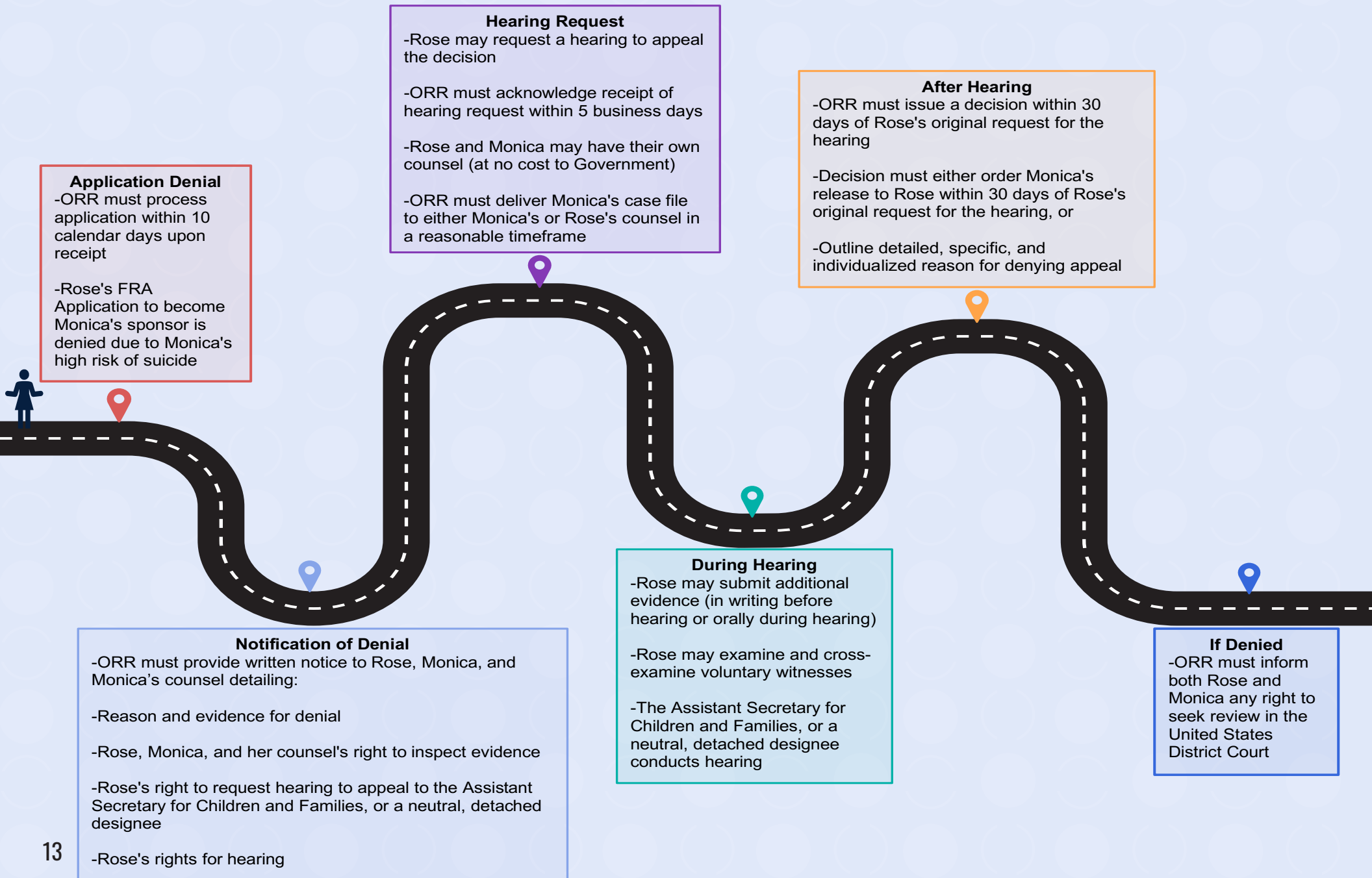
-ORR must provide updated NOPs every 30 days until Sofia is no longer in a restrictive placement

# JOSE: DENIED RELEASE TO AUNT, OLIVIA, DUE TO SAFETY CONCERNS



# MONICA:

## DEEMED A "DANGER TO SELF OR OTHERS" AND DENIED RELEASE TO MOTHER, ROSE



If you have questions about the preliminary injunction, feel free to reach out to:

- Holly Cooper ([hscooper@ucdavis.edu](mailto:hscooper@ucdavis.edu)) at the UC Davis Immigration Law Clinic
- Neha Desai ([ndesai@youthlaw.org](mailto:ndesai@youthlaw.org)) or Mishan Wroe ([mwroe@youthlaw.org](mailto:mwroe@youthlaw.org)) at the National Center for Youth Law
- Carlos Holguín ([crholguin@centerforhumanrights.email](mailto:crholguin@centerforhumanrights.email)) at the Center for Human Rights and Constitutional Law