

ICE Directive on Detention and Removal of Alien Parents or Legal Guardians (ICE Policy Number 11064.2)

On August 29, 2017 Immigration and Customs Enforcement (ICE) issued Policy Number 11064.2 on Detention and Removal of Alien Parents or Legal Guardians. This Directive was not made public until April 2018. This new Directive replaces ICE's 2013 Parental Interests Directive,¹ and eliminates certain key pieces of the 2013 policy, specifically the emphasis on applying prosecutorial discretion to parents and primary caregivers and the use of humanitarian parole to assist parents in returning to the U.S. to participate in proceedings that would lead to termination of their parental rights.

This document is a preliminary analysis of the new Directive current as of April 17, 2018 and may be updated as additional information becomes available. Women's Refugee Commission does not provide legal services and this document does not constitute legal advice.² Affected persons should consult a qualified immigration attorney for guidance on using the Directive in their individual case.

What is the Status of ICE's Policy Directives on Parental Interests?

On August 29, 2017 ICE Policy Number 11064.2 on Detention and Removal of Alien Parents or Legal Guardians superseded ICE Policy 11031.1 on Juveniles Encountered During Fugitive Operations (Aug. 24, 2007) and ICE Policy 11064.1 on Facilitating Parental Interests in the Course of Civil Immigration Activities (Aug. 23, 2013), aka the Parental Interests Directive.

In addition to the new Directive on Detention and Removal of Alien Parents or Legal Guardians, portions of ICE's 2000 National Detention Standards, 2008 Performance-Based National Detention Standards, and 2011 Performance-Based National Detention Standards address parental interests concerns such as visitation and access to family court proceedings. For full information on ICE's parental interests policies, see the agency's March 2018 fact sheet on Policies and Procedures Involving Detained Parents and Legal Guardians.³ In 2007, ICE also issued Guidelines for Identifying Humanitarian Concerns among Administrative Arrestees When Conducting Worksite Enforcement Operations⁴ (aka worksite raids guidelines). The current status of the worksite raids guidelines in the wake of the President's January 2017 executive orders is unclear.

What are the major differences between ICE's 2017 Directive on Detention and Removal of Alien Parents or Legal Guardians and ICE's 2013 Parental Interests Directive?

The 2017 Directive on Detention and Removal of Alien Parents or Legal Guardians eliminates the following key provisions from the 2013 Parental Interests Directive:

- Instructions to the field on identification of primary caregivers and the application of prosecutorial discretion to this population
- Guidance on facilitating the return of parents to participate in termination of parental rights hearings
- Guidance on outreach to and improving communication between ICE and child welfare authorities
- Training requirements on parental interests matters for ICE personnel in the field
- Removes use of the term "parental interests"

¹ Available at: <https://www.womensrefugeecommission.org/rights/gbv/resources/document/download/1631>

² Women's Refugee Commission does not accept any liability in connection with this analysis.

³ Available at: <https://www.womensrefugeecommission.org/rights/gbv/resources/document/download/1621>

⁴ Available at <http://library.niwap.org/wp-content/uploads/2015/IMM-Qref-HumanitarianConcernsGuidelines.pdf>. In 2009, ICE expanded the worksite raids guidelines to operations involving 25 or more individuals.

The 2017 Directive on the Detention and Removal of Alien Parents or Legal Guardians adds the following provisions not found in the 2013 Parental Interests Directive:

- Time of apprehension protocols that direct ICE personnel to accommodate parents' and legal guardians' efforts to make childcare arrangements of their choosing at the time of arrest
- Record-keeping provisions that require DHS to maintain records related to child welfare and family court cases, as well as minor children encountered during enforcement actions, for up to 100 years.

What Does the ICE Directive on Detention and Removal of Alien Parents or Legal Guardians Do?

ICE's Directive on Detention and Removal of Alien Parents or Legal Guardians instructs ICE personnel to "remain cognizant of the impact enforcement actions may have on a lawful permanent resident (LPR) or US citizen (USC) minor child(ren)." (Sec. 2) It further provides guidance to the field on policies and procedures when detention or removal causes separation from a child(ren) and/or a parent or legal guardian is dually involved in an immigration as well as a child welfare proceeding or family court case.

The Directive on Detention and Removal of Alien Parents or Legal Guardians does not contain the language that was in the 2013 directive directing personnel to consider the use of discretion in deciding whether to detain parents, legal guardians, and primary caretakers of minor children. At the same time, the new Directive does NOT prohibit the use of discretion in making detention decisions. It instructs ICE personnel to "remain cognizant of the impact enforcement actions may have on a Lawful Permanent Resident (LPR) or US citizen (USC) minor child(ren)" and allows ICE personnel "to make individual enforcement decisions on a case-by-case basis." (Sec. 2) Affected individuals can still request an exercise of discretion in their individual case.

The 2017 Directive retains language from the 2013 Parental Interests Directive on facilitating a parent or legal guardian's ability to visit with a child(ren), participate in a child welfare proceeding or family court case, and make arrangements for the long-term care of their child(ren) following removal.

The Directive on Detention and Removal of Alien Parents or Legal Guardians does not apply to Customs and Border Protection (CBP) operations. However, the provisions apply to any parent in ICE detention who may have been separated from a child. In particular, section 5.3 on participation in family court proceedings, section 5.4 on visitation, and section 5.5 on coordinating care or travel of a child(ren) may be invoked by detained parents and legal guardians who were separated from children at the border. These sections may also apply in certain circumstances involving parents and legal guardians of undocumented children who were reunified with a sponsor or are otherwise in the U.S.

Does the Directive affect ICE's enforcement, detention or deportation authority?

No. The Directive merely instructs ICE personnel on measures they should consider when detaining a parent or legal guardian of a minor child(ren).

Does the Directive prevent ICE from applying prosecutorial discretion in cases where a minor child(ren) will be affected by the arrest of a parent or legal guardian?

No. The Directive does not address discretion and removes references to discretion that had been included in the 2013 Parental Interests Directive. The Directive states that the policy "in no way limits the ability of ICE personnel to make individual enforcement decisions on a case-by-case basis."⁵ (Sec. 2)

⁵ While the ICE Directive on the Detention and Removal of Parents or Legal Guardians does not address discretion, the January 25, 2017 executive order on Enhancing Public Safety in the Interior of the United States, February 20, 2017 (available at: <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>), DHS Implementing Memo on Enforcement of Immigration Laws to Serve the National Interest (available at: https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf), and February 21, 2017 Memorandum to ICE employees on Implementing the President's Border Security and Interior Immigration Enforcement Policies (available at: <https://www.documentcloud.org/documents/3889695-doc00801320170630123624.html>) indicate that discretion will be more difficult to obtain than in the past.

Detained parents and legal guardians and their attorneys can continue to request that ICE exercise discretion when detention or removal poses a risk of harm to a minor child(ren), especially when a parent or legal guardian is a primary caregiver.

Does the Directive provide guidance on facilitating parents' and legal guardians' temporary return to the U.S. to participate in proceedings affecting their parental rights?

No. The Directive does not include the language in the 2013 Parental Interests Directive on facilitation of return. However, though the granting of parole has been severely curtailed humanitarian parole still exists in statute. All removed parents and legal guardians retain the right to apply for parole for humanitarian reasons, including the right to participate in child welfare or family court proceedings.⁶

Removed parents with child custody concerns should notify the family or dependency court that they have been removed, request that any order to appear in person for court proceedings be made in writing, and consult a qualified immigration lawyer about applying for temporary humanitarian parole if needed. If humanitarian parole is granted, the parent or legal guardian must cover their own travel costs, will only be admitted to the U.S. for a fixed period of time, and may be required to waive their right to apply for asylum or other forms of relief.

Does the Directive address the ability of parents and legal guardian to make childcare arrangements at the time they are taken into ICE custody?

Yes. The ICE Directive on Detention and Removal of Alien Parents or Legal Guardians instructs ICE personnel to accommodate an apprehended parent or legal guardian's efforts to make care arrangements for their USC or LPR child(ren), absent indications of child abuse or neglect.

The Directive replaces ICE's 2007 fugitive operations guidance that instructed fugitive operations teams to contact child welfare authorities or local police if a child was present during a parent's apprehension, and preferences allowing parents to make care arrangements of their choosing. The 2017 Directive's time of apprehension provisions apply in all ICE enforcement actions.

The Directive does not specify or limit the amount of time a parent must be given to make arrangements, does not limit a parent's efforts to the use of a telephone, and states clearly that a parent's efforts to make care arrangements for his or her child(ren) should be accommodated to the extent practicable.

Does the Directive include language on initial detention placements and transfers?

Yes. When a child(ren) and/or family court proceeding is in the same ICE area of responsibility (AOR) as that in which a parent or legal guardian was apprehended, the Directive instructs ICE to detain the parent or legal guardian within that AOR and to refrain from transferring them away from that area unless "operationally necessary." (Sec. 5.2)

Does the Directive allow for parent-child visitation and appearance in family court?

Yes. The Directive instructs ICE to facilitate visitation between children and their parent or legal guardian, including within 30 days at facilities where there are not typically provisions for visits by minors. It does not specify that such visits should be contact unless contact visits are required as part of a child welfare case plan. However, parents and legal guardians do not need to be involved in a child welfare or family court proceeding to benefit from the visitation provisions.

The Directive preserves language from the 2013 Parental Interests Directive regarding parents' and legal guardians' in-person or telephonic participation in child welfare or family court proceedings. Appearance in family court is further provided for in ICE's 2011 Performance-Based National Detention Standards at Sec. 5.2. Detained parents and legal guardians who wish to participate in court proceedings should ask the family or dependency court to provide a written request for their appearance.

⁶ Parole authority is set forth at INA §212(d)(5)(A). Language in the February 20, 2017 memorandum Implementing the President's Border Security and Immigration Enforcement Improvements on parole suggests that such authority will be more narrowly applied. (See section K Proper Use of Parole Authority Pursuant to Section 212(d)(5) of the INA at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf). However, the statutory authority to grant parole remains.

Does the Directive address the need for parents facing removal to make long-term care arrangements for their children?

Yes. The Directive retains the language from the 2013 Parental Interests Directive regarding coordination of care and travel arrangements for children. Parents and legal guardians do not need to be involved in child welfare or family court proceedings to request accommodation under this provision. ICE does not have to delay removal to allow a parent or legal guardian to make travel or care arrangements for their children; however, attorneys, advocates, and consular officials can make this request, referencing Sec. 5.5 of the Directive.

Is the Directive legally enforceable?

No. However, this Directive along with ICE's 2000 National Detention Standards, 2008 Performance-Based National Detention Standards, and 2011 Performance-Based National Detention Standards provide policy guidance that attorneys and advocates can and should point to when assisting a detained parent or legal guardian of a minor child in the U.S. It can also be used in filing complaints to the agency for non-compliance with their own policies.

Who Does the ICE Directive on Detention and Removal of Alien Parents or Legal Guardians Apply To?

ICE's Directive on Detention and Removal of Alien Parents or Legal Guardians applies to "alien parents and legal guardians of minor child(ren)" (Sec. 1) who are in ICE custody. While it expressly includes those parents who "have a direct interest in family court or child welfare proceedings in the United States," (Sec. 1) it does not require that a parent or legal guardian be involved in child welfare proceedings or a family court case to benefit from many aspects of the policy.

Unlike the 2013 ICE Parental Interests Directive, the Directive on Detention and Removal of Alien Parents or Legal Guardians does not use the term primary caregiver. Per the direct language of the Directive, most of the Directive's provisions apply to ALL parents and legal guardians in ICE custody. The only sections that do not apply to all parents and legal guardians are Sec. 5.1 on minors encountered during enforcement actions (this section speaks only to parents and legal guardians of USC, LPR, and otherwise not removable children), Sec. 5.3 on participation in child welfare proceedings, and the provisions of Sec. 5.4 related to child welfare or court-mandated visits.

Are parents of undocumented children covered by the Directive?

Yes. The Directive explicitly refers to the impact of enforcement on USC and LPR minor children. However, it does not exclude parents or legal guardians of undocumented children or those whose children have valid immigration status.

It may not be advisable, however, to invoke certain sections of the Directive, for example Sec. 5.4 on visitation, when a child(ren) lacks legal status in the U.S. unless that child is in proceedings and compliant with their release requirements. Consult a qualified immigration attorney for guidance in cases where the child(ren) of a detained parent or legal guardian is undocumented.

How Do I Use the ICE Directive on Detention and Removal of Alien Parents and Legal Guardians?

Attorneys, advocates, child welfare personnel, family court judges, and consular officials should familiarize themselves with the Directive and request that ICE comply with its provisions in cases where the detention of a parent or legal guardian affects that individual's ability to care for or maintain a relationship with their child(ren), preserve their parental rights, and/or make arrangements for what will happen to children in the event the parent or legal guardian is removed.

Are there designated Points of Contact within ICE for matters related to the Directive?

Yes. The Directive requires each field office to designate a Field Point of Contact charged with responding to public inquiries related to the detention of parents and legal guardians. Initial requests that the agency comply with the Directive and concerns about failure to do so should be directed to the Field Point of Contact. However, concerns can also be elevated to the ICE Child Welfare Coordinator in Washington, D.C. via the ICE Detention Reporting and Information Line (DRIL) at 1-888-351-4024 or through the ICE Parental Interests mailbox at: parental.interests@ice.dhs.gov. If contacting the DRIL line related to the Directive, request help with a "parental interests" matter.

How can parents and legal guardians use the Directive from detention?

Parents and legal guardians in ICE custody who are concerned about the welfare of their child(ren), need to participate in child welfare or family court proceedings, or require assistance in arranging visitation or obtaining documents for their children's long-term care can contact the DRIL line at 1-888-351-4024 and ask ICE to facilitate these processes. Parents who contact the DRIL line should refer to the Directive on Detention and Removal of Alien Parents or Legal Guardians and request help with a "parental interests" matter.

The DRIL line can also be used by parents and legal guardians who cannot locate or communicate with a child(ren) from whom they were separated at the border. ICE can help determine whether a child(ren) is in the custody of the Office of Refugee Resettlement (ORR) and, if so, can work with ORR to facilitate communication between the family members. Parents, legal guardians, and their attorneys and advocates can also direct inquiries about children who were separated from parents at the border to the ORR Helpline at: 1-800-203-7001 | information@ORRNCC.com.

For additional information on what parents can do if they are detained or deported see Detained or Deported: What About My Children, WRC's comprehensive toolkit on protecting parental rights.

English: <https://www.womensrefugeecommission.org/rights/gbv/resources/document/download/1023>

Spanish: <https://www.womensrefugeecommission.org/rights/gbv/resources/document/download/1025>