

**Serving Children With Disabilities**  
**Under the Jurisdiction of the Juvenile Court**

**Theresa Sidebotham**

**February 2009 Draft**

Theresa Sidebotham is a fourth year law clerk for the Colorado Court of Appeals. She raised several children with disabilities. She has accepted an offer from Rothgerber Johnson & Lyons LLP where she will practice law after her clerkship ends in August 2009.

Contact information:

theresa.sidebotham@gmail.com

719-271-2342 (cell)

# **Serving Children With Disabilities Under the Jurisdiction of the Juvenile Court**

## OUTLINE

- I. Statutory Overview of Educational Disability Law
  - A. Disability under the Individuals with Disabilities Education Improvement Act (IDEA)
    - 1. Purpose of IDEA
    - 2. Definitions of Disability Under IDEA
  - B. Disability under Section 504 of the Rehabilitation Act
  - C. Disability under the Americans With Disabilities Act of 1990 (ADA)
  - D. No Child Left Behind (NCLB) Overview
    - 1. Statement of Purpose in Title 1
    - 2. Requirements for Schools
    - 3. Options for Students when the Schools Fail
    - 4. At-Risk Children and Youth
    - 5. Reading Skills Under NCLB
  - E. McKinney-Vento Homeless Assistance Act
  - F. Family Educational Rights and Privacy Act (FERPA)
  - G. Adoption and Safe Families Act 2000 (ASFA)
- II. Child Find and Special Education Services
  - A. Child Find, Identification, and Evaluation
    - 1. Child Find Under IDEA
    - 2. Initial Referral and Evaluation Under IDEA
    - 3. Eligibility Meeting
    - 4. Evaluation under Section 504
  - B. IEP and Follow-Up
    - 1. Free Appropriate Public Education (FAPE)
    - 2. Least Restrictive Environment (LRE)
    - 3. The Individualized Education Program (IEP)
    - 4. Monitoring the IEP
    - 5. School Transfers
    - 6. Administrative Unit for Services

- C. Early Childhood Services
  - 1. Part C of IDEA
  - 2. Part B of IDEA
  
- D. School Discipline Under IDEA
  - 1. School Discipline and Disabilities
  - 2. Disciplining a Child With a Disability/ Manifestation Determination
  - 3. Appeal of a Manifestation Determination
  - 4. Change in Placement
  - 5. Preventing Discipline Problems
  - 6. Behavioral Intervention Plan
  - 7. School Discipline Under Section 504
  
- III. Parents, Surrogate Parents, and Educational Decision-Makers
  - A. “Parent” under IDEA and Accompanying Regulations
  
  - B. Educational Surrogate Parent (ESP) under IDEA and Regulations
    - 1. Definition and Duties of Educational Surrogate Parent (ESP)
    - 2. Appointing a Educational Surrogate Parent (ESP)
    - 3. Training for ESPs
    - 4. Children Without Disabilities
    - 5. Contrast with “Parent” as Defined under FERPA
  
- IV. Special Education and Child Welfare
  - A. Dependency or Neglect Proceedings
    - 1. Identifying the Educational Decision Maker/Parent
    - 2. Treatment Plan and Special Education
    - 3. Initial Placement in Foster Care
  
  - B. Special Education and Foster Care
    - 1. Disability Issues Among Children in Foster Care
    - 2. Interrelation Between Disability and Abuse
    - 3. General Education and Beyond
    - 4. Services for Youth in Foster Care
    - 5. Early Education and Foster Care
    - 6. Access to Educational Records
    - 7. Education Liaisons
    - 8. Changing Schools
    - 9. Mental and Emotional Disturbance
    - 10. Institutionalized Foster Care
    - 11. Adoption of Children with Disabilities

- V. Special Education and Juvenile Justice
  - A. Juveniles With Disabilities in Juvenile Justice
  - B. Special Education and the Schools
    - 1. Special Education Representation
    - 2. Zero Tolerance Policies
    - 3. School-Related Charges
  - C. Special Education Issues at Different Stages of Juvenile Justice Proceedings
    - 1. Intake
    - 2. Offenders with Mental Retardation
    - 3. Detention
    - 4. Transfer to Adult Criminal Court
    - 5. Presentence Investigations and Probation
    - 6. Trial and Evidentiary Issues
    - 7. Disposition and Sentencing
    - 8. Restorative Justice
    - 9. Institutional Settings and Youth Corrections
    - 10. Best Practices in a Prevention or Intervention Program
    - 11. Children and Youth Incarcerated as Adults under the IDEA
- VI. Transition—Foster Care and Juvenile Justice
  - A. Transition Overview
    - 1. Transition to Adulthood
    - 2. Special Education Transition in Colorado
    - 3. Transition and Section 504
    - 4. Transfer of Educational Rights
  - B. Transition Services Under the IDEA
    - 1. Statutory Requirements Under IDEA
    - 2. Implementing Educational Transition Under IDEA
    - 3. Other Agencies and Transition Planning for Disabilities
  - C. Transition From Foster Care
    - 1. John H. Chafee Foster Care Independence Act of 1999 (Chafee Act)
    - 2. Medicaid Eligibility
    - 3. Special Issues With Foster Care Transition
  - D. Transition from Incarceration
    - 1. Best Practices for Transition
    - 2. Transition Under NCLB

VII. Resources and Acknowledgements

- A. Annotated Resources
  - 1. Useful Websites
  - 2. Articles and Print Resources
  - 3. Organizations
- B. Acknowledgments

VI. Checklists and Practice Tips

- A. Identification and Evaluation
- B. IEP
- C. Section 504
- D. Early Education
- E. NCLB
- F. Parents/ Surrogate Parents
- G. Foster Care
- H. Transition
- I. School Discipline
- J. Delinquency Proceedings

## **I. Statutory Overview of Educational Disability Law**

Many children have special needs that affect their education. This is especially true of children under the jurisdiction of the juvenile court. Sometimes, the educational system works to meet these needs. Often, it does not. A parent, attorney, or other advocate needs to know what the law pertaining to special education provides and how the system should work for children with special needs, be able to identify where things go wrong, and use the legal process to fix it.

A number of federal and state statutes apply to children who have disabilities. The following sections discuss the statutes in a limited way, giving a brief overview of provisions that apply to children who have disabilities and who are also under the jurisdiction of the juvenile court.

### **A. Disability Under the Individuals with Disabilities Education Improvement Act (IDEA)**

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA) is by far the most important and detailed statute governing access to education for children with special needs. Certain provisions of IDEA, along with federal regulations and Colorado law, are particularly applicable to children in the juvenile justice system or the child welfare system, and to children involved with school attendance (truancy) issues. The Code of Federal Regulations interprets the IDEA. The Colorado Exceptional Children's Education Act (ECEA) governs the implementation of IDEA in Colorado.<sup>1</sup> The Rules for the Administration of the ECEA interpret the ECEA.<sup>2</sup> IDEA and all the accompanying rules are reauthorized or revised periodically, so check appropriate resources for updates. This section discusses the purpose of IDEA and definition of disability. IDEA sets forth the process for identifying a child with special needs, providing special education, and resolving any disputes that occur along the way. IDEA is driven by the concept of parent advocacy, and without parent advocacy, the system is less

effective. Other provisions, including how to make sure a parent advocate is available, are discussed in detail in the pertinent topic sections.

## **1. Purpose of IDEA**

The purpose of IDEA is:

to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living . . . [and] to ensure that the rights of children with disabilities and the parents of such children are protected . . .<sup>3</sup>

Special education is defined in IDEA as:

specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.<sup>4</sup>

## **2. Definitions of Disability under IDEA and Supporting Rules**

A “child with a disability” under IDEA is a child with one of the following:

- Mental retardation;
- Hearing impairments (including deafness);
- Speech or language impairments;
- Visual impairments (including blindness);
- Serious emotional disturbance (referred to simply as “emotional disturbance”);
- Orthopedic impairments;
- Autism;
- Traumatic brain injury;
- Other health impairments;

- Specific learning disabilities;<sup>5</sup>

To qualify for special education services, a child must have one or more of these disabilities, and also, because of the disability, need special education and related services.<sup>6</sup>

A specific learning disability “means a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.”<sup>7</sup> Included disorders are “perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.”<sup>8</sup> The disabilities are defined more extensively in 34 C.F.R. § 300.8.

An emotional disability is a condition exhibiting one or more of the following characteristics over a long period of time, and to a marked degree that adversely affects a child’s education performance:

- Inability to learn that cannot be explained by intellectual, sensory, or health factors;
- Inability to build or maintain satisfactory interpersonal relationships;
- Inappropriate types of behavior or feelings under normal circumstances;
- General pervasive mood of unhappiness or depression;
- Tendency to develop physical symptoms or fears associated with personal or school problems.
- Includes schizophrenia.<sup>9</sup>

Disability is defined in greater detail in the Rules for the Administration of the ECEA.<sup>10</sup> For instance, a child with a significant identifiable emotional disability “shall have social or emotional functioning which prevents the child from receiving reasonable educational benefit

from regular education.”<sup>11</sup> Emotional or social functioning is then described in great detail with respect to symptoms or behaviors.<sup>12</sup>

The definition of a “child with a disability,” for a child aged three through nine, at the discretion of the state and the local educational agency, may include a child experiencing developmental delays in one or more of the following areas:

- Physical development;
- Cognitive development;
- Communication development;
- Social or emotional development;
- Adaptive development;<sup>13</sup>

and who also, “by reason thereof, needs special education and related services.”<sup>14</sup>

Note that, if a child has a disability but does not need special education services, the child is not eligible for protection under IDEA but may be eligible for protection under Section 504 of the Rehabilitation Act.<sup>15</sup>

### **B. Disability Under Section 504 of the Rehabilitation Act**

Section 504 provides broader protection than IDEA, in the sense that it covers more people and extends into adulthood. However, the protections are not as detailed and 504 funding is minimal. The key portion of Section 504 of the Rehabilitation Act of 1973 states:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .<sup>16</sup>

Section 504 is a broad civil rights law.<sup>17</sup> However, it is important to note that it covers only employers, programs, agencies and facilities that receive federal funding.<sup>18</sup> This, of course, would include any public school.

“To be eligible for protection under section 504, an individual must have a physical or mental impairment that substantially limits at least one major life activity,” such as walking, seeing, hearing, breathing, reading, or caring for oneself.<sup>19</sup> If an individual has a record of having such an impairment, or is regarded as having such an impairment, he or she meets the definition.<sup>20</sup>

Therefore, a child who is disabled under IDEA is also protected under Section 504. If a child has an impairment that substantially limits one or more major life activities, but does not need special education services, the child is not protected under IDEA but is protected under Section 504.<sup>21</sup>

“Substantially limits” is defined by the school district.<sup>22</sup> Although Section 504 does not define “substantially limits,” the regulations implementing the Americans with Disabilities Act of 1990 offer the following definitions. A major life activity is substantially limited when a person is:

Unable to perform a major life activity that the average person in the general population can perform.<sup>23</sup>

or is:

Significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.<sup>24</sup>

Complaints under Section 504 are filed with the Office of Civil Rights, U.S. Department of Education, at the regional office in Denver.<sup>25</sup>

### **C. Disability Under the Americans With Disabilities Act of 1990 (ADA)**

The ADA also protects qualified persons with disabilities, but reaches beyond entities that receive federal funding.<sup>26</sup> Title II of the ADA prohibits discrimination in access to governmental services, and therefore covers school districts and school boards.<sup>27</sup> Title III of the ADA applies to privately operated public accommodations, such as private schools. However, rights under the ADA are not as extensive as those under IDEA.<sup>28</sup>

Complaints under the ADA also are filed with the Office of Civil Rights, U.S. Department of Education.<sup>29</sup>

### **D. No Child Left Behind (NCLB) Overview**

No Child Left Behind (NCLB), codified in Title 20 and Title 25 of the United States Code, is a lengthy, complicated Act. The following is an abbreviated discussion of certain provisions that impact children and youth, particularly those who have disabilities and special needs, in the juvenile justice system or child welfare system, or who are involved with school attendance/truancy issues.

#### **1. Statement of Purpose in Title I**

Title I of NCLB is “Improving the Academic Achievement of the Disadvantaged.”<sup>30</sup> The Statement of Purpose provides in part that the Act should “ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education.”<sup>31</sup> The purpose is to be accomplished in part by:

meeting the educational needs of low-achieving children in our Nation’s highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance . . .<sup>32</sup>

NCLB defines the meaning of reading, essential components of reading instruction, diagnostic reading assessments, and scientifically based reading research.<sup>33</sup>

## **2. Requirements for Schools**

Schools that accept Title 1 funds are required to achieve “Adequate Yearly Progress,” which is tested objectively.<sup>34</sup> Measurable objectives must include the achievement of economically disadvantaged students, students with disabilities, and students with limited English proficiency.<sup>35</sup> The number and percentage of schools identified for school improvement and for how long the schools have been so identified must be released in an annual local educational agency report card.<sup>36</sup>

Local educational agency plans for serving students with limited English proficiency, disabilities, or who are neglected or delinquent must be filed with the state educational agency.<sup>37</sup> They must describe educational services for neglected or delinquent children, both those living in local institutions and in community day school programs.<sup>38</sup> Funds must be reserved to serve both homeless children and neglected or delinquent children.<sup>39</sup>

Schools may receive Title 1 funds to provide targeted assistance to children identified as failing or at risk of failing, including children who are economically disadvantaged, children with disabilities, children who have limited English proficiency, neglected or delinquent children, and homeless children.<sup>40</sup> Children with truancy issues may fall into one of these categories. The components of a targeted assistance program are defined to assure quality and scope of educational opportunities.<sup>41</sup> The school must advise the parents of a child who is limited English proficient and who has disabilities how a language instruction program meets the child’s IEP goals and objectives.<sup>42</sup>

### **3. Options for Students When the Schools Fail**

If a school fails to make adequate yearly progress for two consecutive years, it must be identified for school improvement.<sup>43</sup> Students must then have the option to transfer to another public school, with priority given to the lowest achieving children from low-income families.<sup>44</sup> Also, if the school is identified as persistently dangerous, and cannot protect the child, a child may transfer to a new school.<sup>45</sup> The local educational agency must pay for transportation.<sup>46</sup>

In the alternative, the child must be given supplemental educational services.<sup>47</sup> These services may be selected by the parents, but the provider must be approved for that purpose by the State educational agency. After the parent selects the provider, the local educational agency enters into an agreement with the provider. In the case of a student with disabilities, this agreement must be consistent with the student's IEP.<sup>48</sup>

### **3. At-Risk Children and Youth**

Part D of Title 1, "Prevention and Intervention Programs for Children and Youth who are Neglected, Delinquent, or At-Risk," has the following purposes:

- Improve educational services for neglected or delinquent children and youth in institutions;
- Provide transition services so neglected or delinquent children can attend school or secure employment;
- Prevent at-risk youth from dropping out of school;
- Provide a support system to dropouts and juveniles who return from correctional facilities so they can continue their education.<sup>49</sup>

The purpose of this section, therefore, is to serve children and youth who are institutionalized, either because of dependency or neglect, or because of incarceration. A state

educational agency receiving funds under this subpart must submit an application that addresses needs of institutionalized children.

Under the Act, the state agency must designate: “an individual in each affected correctional facility or institution for neglected or delinquent children and youth to be responsible for issues relating to the transition of children and youth from such facility or institution to locally operated programs.”<sup>50</sup> The state agency works with institutionalized children and youth with disabilities to meet existing IEPs, and notifies the local school if a student is identified as in need of special education services, and intends to return to the local school.<sup>51</sup> If the child or youth has dropped out of school before entering the institution, the agency encourages him or her to reenter school, or provides the skills necessary to gain employment or continue education.<sup>52</sup> Teachers and other qualified staff in the institution must be trained to work with students with disabilities and special needs.<sup>53</sup>

## **5. Reading Skills Under NCLB**

There is a high correlation among poor reading skills, learning disabilities, and juvenile delinquency.<sup>54</sup> NCLB provides for coordination of reading programs from early childhood through adulthood. In Early Reading First, NCLB focuses on early identification of reading problems and early intervention through methods founded on scientifically based reading research.<sup>55</sup> The section targets preschool children, particularly those from low-income families.<sup>56</sup>

NCLB authorizes funds:

To provide assistance to State educational agencies and local educational agencies in establishing reading programs for students in kindergarten through grade 3 that are based on scientifically based reading research, to ensure that every student can read at grade level or above not later than the end of grade 3.<sup>57</sup>

Moreover, NCLB supports and provides funds for family-based literacy programs for families with need-related indicators such as poverty, illiteracy, unemployment, limited English proficiency, and domestic violence.<sup>58</sup>

These programs, called “Even Start,” combine early childhood education, adult literacy or basic education, and parenting education.<sup>59</sup> Even Start programs must provide screening and preparation of parents (including teenage parents) and children. Components of screening and preparation include “testing, referral to necessary counseling, other developmental and support services, and related services.”<sup>60</sup> Among other requirements, programs must “include high-quality, intensive instructional programs that promote adult literacy and empower parents to support the educational growth of their children, developmentally appropriate early childhood educational services, and preparation of children for success in regular school programs.”<sup>61</sup>

#### **E. McKinney-Vento Homeless Assistance Act**

The McKinney-Vento Homeless Education Assistance Act of 2001 is codified in Part C of Title X of NCLB.<sup>62</sup> School districts must ensure that all children who are homeless have access to school. Homeless children and youth are “individuals who lack a fixed, regular, and adequate nighttime residence.”<sup>63</sup> The definition includes children who are awaiting foster care placement.<sup>64</sup>

Homeless children should have the same free, appropriate public education as other children.<sup>65</sup> Schools must keep a homeless child in the school of origin except where doing so is contrary to the wishes of the child’s parent or guardian.<sup>66</sup> The Act requires that the “choice regarding placement shall be made regardless of whether the child or youth lives with homeless parents or has been temporarily placed elsewhere.”<sup>67</sup> Under this clause, a child who has been

temporarily placed with relatives or in some other temporary situation still may be entitled to attend the school of origin.<sup>68</sup>

If a homeless child still lives in the area served by the local educational agency (school district) in which the school of origin is located, the school district must provide the child's transportation to and from the school of origin.<sup>69</sup>

Sometimes the student will enroll at a new, more convenient school. Schools must immediately enroll homeless children, even if their medical, academic, and residency records are not available.<sup>70</sup> If there is a dispute about enrollment, the child "shall be immediately admitted to the school in which enrollment is sought, pending resolution of the dispute."<sup>71</sup>

Each school district must have a liaison or coordinator to help homeless children.<sup>72</sup> This person can be accessed through a school district's central office.<sup>73</sup> The school must ensure that the homeless liaison helps to make placement and enrollment decisions for an unaccompanied youth not in the physical custody of a parent or guardian.<sup>74</sup>

When dealing with a child who might fit the definition of homeless under this act, notify the McKinney-Vento liaison in the school district.<sup>75</sup>

#### **F. Family Educational Rights and Privacy Act (FERPA)**

The purpose of the Family Educational Rights and Privacy Act (FERPA) is to protect the privacy of students and parents.<sup>76</sup> Parents have the right to inspect and review the educational records of their children, as do children over eighteen to review their own records, and procedures must be in place for them to do so within forty-five days or a reasonable period of time.<sup>77</sup> They also have the right to challenge what is in the student's record.<sup>78</sup> A parent or eligible student may request amendment of an educational record if that person believes the records are inaccurate, misleading, or in violation of the student's right of privacy.<sup>79</sup>

“Educational records” are defined in FERPA as those records that are directly related to the student, and are maintained by an educational agency, or by a party acting for such agency. The definition includes records, files, documents and other material that contain information directly related to a student and are maintained by an educational agency or institution.<sup>80</sup> Records include “any information recorded in any way, including but not limited to handwriting, print, computer media, video or audiotape, film, microfilm and microfiche.”<sup>81</sup> It would encompass internet student record systems and automated phone calls and emails from the school district computer systems relating to unexcused absences, grades below a C, and discipline reports. Appropriate information may be included in the education record concerning disciplinary action taken against students for conduct that posed a significant risk to the safety or well-being of others.<sup>82</sup>

Educational records do not include personal notes and memory aids used only by the person who made them.<sup>83</sup> They do not include information from the “law enforcement unit” of a school or school district.<sup>84</sup> Educational records also do not include oral information based on personal knowledge, such as a teacher’s observations about classroom behavior.<sup>85</sup>

Generally, schools must obtain a parent’s written permission to disclose a student’s school records.<sup>86</sup> “Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written or electronic means.”<sup>87</sup>

However, there are some exceptions. Records may be released to school officials and teachers who have legitimate educational interests, officials of other schools or school systems in which the student intends to enroll, and state educational authorities.

Records also may be released to the juvenile justice system, if they are needed to serve the juvenile effectively before adjudication.<sup>88</sup> FERPA provides an exception to the parental consent requirement for the release of student educational records and authorizes the release of education records to comply with a court order or subpoena.<sup>89</sup> The educational agency may disclose identifiable information from an educational record of a student without the parental consent required by CFR § 99.30 if the disclosure is to comply with a judicial order or lawfully issued subpoena.<sup>90</sup> The agency or institution must make a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance so that the parent or eligible student may seek protective action.<sup>91</sup>

Therefore, a judge may order the release of these records to make decisions about a neglected or dependent child, or a youth's education.<sup>92</sup> Records may also be released for an emergency, to protect the health and safety of the child.<sup>93</sup>

Information, once released, may not be re-disclosed to anyone else, unless that disclosure also fits under a FERPA exception.<sup>94</sup> It is better to obtain records while considered as the parent, because then the prohibition against re-disclosure does not apply. In *Rios v. Reed*, 73 F.R.D 589 (1977) The Court ruled, in a FERPA context that, "when disclosure to a private party is directed by court order, it would seem sensible to require the disclosure order that the recipients of the student records avoid revealing the data to individuals unconnected with the litigation..."

Under the Adoption Assistance and Child Welfare Act (AACWA), agencies must keep educational records as part of their case plan. They also must share educational records with foster care providers at placement.<sup>95</sup> Colorado is one of the states with problems of these records not being in the case files or not given to foster parents.<sup>96</sup> Best practices are that, at a

minimum, all records necessary for school enrollment are kept in the child's file, to avoid delays if the child must be enrolled in a new school.<sup>97</sup>

### G. Adoption and Safe Families Act (2000)(ASFA)

To promote the adoption of children in foster care, Congress enacted the Adoption and Safe Families Act (ASFA).<sup>98</sup>

States must undergo child and family service reviews (CFSR) in the child welfare system. One well-being outcome to measure performance of a state is whether “[c]hildren receive appropriate services to meet their educational needs.”<sup>99</sup> If states do not achieve these outcomes, they risk losing federal funding.<sup>100</sup>

---

<sup>1</sup> § 22-20-101 through 118, C.R.S. 2007.

<sup>2</sup> State Bd. of Educ. Rule 2220-R-1.00 through 12.07, 1 Code Colo. Regs. 301-8 (2007).

<sup>3</sup> 20 U.S.C. § 1400(d) (2005).

<sup>4</sup> 20 U.S.C. § 1401(29) (2005).

<sup>5</sup> 20 U.S.C. § 1401(3)(A)(i).

<sup>6</sup> 20 U.S.C. § 1401(3)(A)(ii); 34 C.F.R. § 300.8(a)(1).

<sup>7</sup> 20 U.S.C. § 1401(30)(A).

<sup>8</sup> 20 U.S.C. § 1401(30)(B).

<sup>9</sup> 34 C.F.R. § 300.8(c)(4).

<sup>10</sup> Rule 2.08.

<sup>11</sup> Rule 2.08(5).

<sup>12</sup> Rule 2.08(5).

<sup>13</sup> 20 U.S.C. § 1401(3)(B)(i).

<sup>14</sup> 20 U.S.C. § 1401(3)(B)(ii).

<sup>15</sup> Peter W. D. Wright, Pamela Darr Wright, *Special Education Law*, 50 (Harbor House Law Press Inc. 2d ed. 2007).

<sup>16</sup> 29 U.S.C. § 794(a) (2002).

<sup>17</sup> Wright, *supra* note 15 at 291.

<sup>18</sup> Randy Chapman, *The Everyday Guide to Special Education Law*, 77 (The Legal Center for People with Disabilities and Older People 2005).

<sup>19</sup> Wright, *supra* note 15 at 292.

<sup>20</sup> 29 U.S.C. § 794(a); 42 U.S.C. § 12102(2) (2008).

<sup>21</sup> Wright, *supra* note 15 at 292.

<sup>22</sup> National Children's Law Network, *In School, the Right School, Finish School*, 24 (Holland & Hart and Rocky Mountain Children's Law Center 2007), *citing* 23 IDELR 504 (OCR 1994).

<sup>23</sup> 29 C.F.R. § 1630.2(j)(1)(i).

<sup>24</sup> 29 C.F.R. § 1630.2(j)(1)(ii).

<sup>25</sup> [www.ed.gov/about/offices/list/ocr/index.html](http://www.ed.gov/about/offices/list/ocr/index.html).

<sup>26</sup> 42 U.S.C. § 12101 et seq.

<sup>27</sup> Chapman, *supra* note 18 at 84-85.

<sup>28</sup> *Id.* at 85-86.

<sup>29</sup> Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Justice Bulletin* July 2000, at 2.

<sup>30</sup> 20 U.S.C. §§ 6301 through 6578.

- 
- <sup>31</sup> 20 U.S.C. § 6301 (2008).
- <sup>32</sup> 20 U.S.C. § 6301(2).
- <sup>33</sup> 20 U.S.C. § 6368 (2008).
- <sup>34</sup> Peter W. D. Wright, Pamela Darr Wright and Suzanne Whitney Heath, *No Child Left Behind*, 77 (Harbor House Law Press Inc. 2007); 20 U.S.C. § 6311(b)(2)(B).
- <sup>35</sup> 20 U.S.C. § 6311(b)(2)(C).
- <sup>36</sup> 20 U.S.C. § 6311(h)(2)(B)(i).
- <sup>37</sup> 20 U.S.C. § 6312(b)(1)(E)(ii) (2008).
- <sup>38</sup> 20 U.S.C. § 6312(b)(1)(I).
- <sup>39</sup> 20 U.S.C. § 6313(c)(3) (2008).
- <sup>40</sup> 20 U.S.C. § 6315 (b)(2) (2008).
- <sup>41</sup> 20 U.S.C. § 6315(c)(1).
- <sup>42</sup> Wright and Heath, *supra* note 34 at 165; 20 U.S.C. § 6312)(g)(1)(A).
- <sup>43</sup> 20 U.S.C. § 6316(b)(1)(A) (2008).
- <sup>44</sup> 20 U.S.C. § 6316(b)(1)(E).
- <sup>45</sup> 20 U.S.C. § 7912(a) (2008).
- <sup>46</sup> 20 U.S.C. § 6316(b)(9).
- <sup>47</sup> 20 U.S.C. § 6316(b)(6)(F).
- <sup>48</sup> 20 U.S.C. § 6316(e)(3).
- <sup>49</sup> 20 U.S.C. §§ 6421 through 6422 (2008); Wright and Heath, *supra* note 34 at 29.
- <sup>50</sup> 20 U.S.C. §6434(c)(11) (2008).
- <sup>51</sup> 20 U.S.C. § 6434(c)(15); 20 U.S.C. § 6455(2) (2008).
- <sup>52</sup> 20 U.S.C. § 6434(c)(16); 20 U.S.C. § 6455(4).
- <sup>53</sup> 20 U.S.C. § 6434(c)(17); 20 U.S.C. § 6455(5).
- <sup>54</sup> Wright and Heath, *supra* note 34 at 73.
- <sup>55</sup> *Id.* at 243.
- <sup>56</sup> 20 U.S.C. § 6371(a)(1) (2008).
- <sup>57</sup> 20 U.S.C. § 6361(1) (2008).
- <sup>58</sup> 20 U.S.C. 6381g(a)(1)(B).
- <sup>59</sup> 20 U.S.C. § 6381(1) and § 6381c(a).
- <sup>60</sup> 20 U.S.C. § 6381d(2) (2008).
- <sup>61</sup> 20 U.S.C. § 6381d(4).
- <sup>62</sup> 42 U.S.C. § 11431 through 11435.
- <sup>63</sup> 42 U.S.C. § 11434a(2).
- <sup>64</sup> 42 U.S.C. § 11434a(2).
- <sup>65</sup> 42 U.S.C. § 11431(1).
- <sup>66</sup> 42 U.S.C. § 11432(g)(3)(B).
- <sup>67</sup> 42 U.S.C. § 11432(g)(3)(F).
- <sup>68</sup> Dean B. Eggert, *Providing Special Education Services to Children and Youth in Homeless Situations*, April 16, 2004 (available at [http://www.wadleighlaw.com/articles/School/special\\_education\\_for\\_homeless.htm](http://www.wadleighlaw.com/articles/School/special_education_for_homeless.htm)) (last viewed May 5, 2008).
- <sup>69</sup> 42 U.S.C. § 11432(g)(1)(J).
- <sup>70</sup> 42 U.S.C. § 11432(g)(3)(C).
- <sup>71</sup> 42 U.S.C. § 11432(g)(3)(E).
- <sup>72</sup> 42 U.S.C. § 11432(g)(1)(J)(ii).
- <sup>73</sup> National Law Center of Homelessness and Poverty, *Educating Homeless Children and Youth: The Guide to Their Rights* 9 (August 2007) (available at [http://www.nlchp.org/content/pubs/Basic%20McKinney%20Booklet%20\(2007\)1.pdf](http://www.nlchp.org/content/pubs/Basic%20McKinney%20Booklet%20(2007)1.pdf)) (viewed on May 4, 2008).
- <sup>74</sup> 42 U.S.C. § 11432(g)(3)(B); 42 U.S.C. § 11434a(6).
- <sup>75</sup> Kathleen McNaught, *Learning Curves: Education Advocacy for Children in Foster Care* 28 (ABA Center on Children and the Law 2004).
- <sup>76</sup> Wright, *supra* note 15 at 307.
- <sup>77</sup> 20 U.S.C. § 1232g(a)(1)(A) (2008).
- <sup>78</sup> 20 U.S.C. § 1232g(a)(2).
- <sup>79</sup> 20 U.S.C. 1232g(a)(2).

- 
- <sup>80</sup> 20 U.S.C. § 1232g(a)(3).
- <sup>81</sup> 34 C.F.R. § 99.3.
- <sup>82</sup> 20 U.S.C. § 1232g(h).
- <sup>83</sup> Wright, *supra* note 15 at 307.
- <sup>84</sup> *A Guide to FERPA*  
Available at <http://www.fape.org/justice/sharing.html> (viewed on May 5, 2008).
- <sup>85</sup> McNaught, *supra* note 75 at 20-21.
- <sup>86</sup> National Council on Disability, *Youth with Disabilities in the Foster Care System: Barriers to Success and Proposed Policy Solutions*, at 57 (2008) available at [http://www.ncd.gov/newsroom/publications/2008/FosterCareSystem\\_Report.html](http://www.ncd.gov/newsroom/publications/2008/FosterCareSystem_Report.html) (viewed on April 17, 2008).
- <sup>87</sup> 34 C.F.R. § 99.3.
- <sup>88</sup> 20 U.S.C. 1232g(b)(1).
- <sup>89</sup> 20 U.S.C § 1232g(b)(1)(J).
- <sup>90</sup> 34 C.F.R. § 99.31(a)(9)(i).
- <sup>91</sup> *A Guide to FERPA supra* note 84.
- <sup>92</sup> National Council on Disability, *supra* note 86 at 57..
- <sup>93</sup> Angela J. Herrick and Helen D. Ward, *Advocating for the Educational Needs of Children in Out-of-Home Care* 2-11 Colorado Department of Human Services.
- <sup>94</sup> McNaught, *supra* note 75 at 21.
- <sup>95</sup> Kathleen McNaught, *Mythbusting: Breaking Down Confidentiality and Decision-Making Barriers to Meet the Education Needs of Children in Foster Care* 12, 31 (American Bar Association 2005). Available at <http://www.abanet.org/child/education/other-pub.shtml> (viewed on May 5, 2008); 42 U.S.C. § 675(5)(D).
- <sup>96</sup> *Id.* at 10.
- <sup>97</sup> *Id.* at 45.
- <sup>98</sup> Pub. L. 105-89 (1997).
- <sup>99</sup> 45 C.F.R. § 1355.34(b)(1)(iii)(B).
- <sup>100</sup> McNaught, *supra* note 75 at 2.

## **II. Child Find and Special Education Services**

### **A. Child Find, Identification and Evaluation**

#### **1. Child Find Under IDEA**

“Child find” is part of IDEA. “Child find requires school districts to identify, locate, and evaluate all children with disabilities, including children who are home schooled, homeless, wards of the state, and children who attend private schools.”<sup>1</sup> This includes children suspected of having a disability and needing special education, even though they may be advancing from grade to grade.<sup>2</sup>

In Colorado, child identification is the responsibility of the administrative unit in which the child attends school (public or private), or if the child is not in school, the unit where the child resides.<sup>3</sup>

Child find also applies to students ages 17 to 21 who are out of school, and who may have a disability.<sup>4</sup>

#### **B. Initial Referral and Evaluation Under IDEA**

Under IDEA, “a parent of a child, or a State educational agency, another State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.”<sup>5</sup> However, in Colorado, interested persons initiating a referral must work with the parent or the appropriate administrative unit or state-operated program.<sup>6</sup> The school must obtain informed parental consent before conducting the initial evaluation.<sup>7</sup> If the parents do not provide consent for the initial evaluation, the district may request a due process hearing.<sup>8</sup>

If the child is a ward of the state, the agency must “make reasonable efforts to obtain the informed consent from the parent . . . for an initial evaluation to determine whether the child is a

child with a disability.”<sup>9</sup> However, the agency is not required to obtain informed consent from the parents if: (1) the agency cannot discover where the parents are; (2) the rights of the parents have been terminated; or (3) the parent’s right to make educational decisions has been removed by a judge in accordance with state law, and an individual appointed by the judge to represent the child has consented to an individual evaluation.<sup>10</sup> If the agency cannot obtain consent from the parents, there are rules to determine whether someone else is acting as a parent or to appoint an educational surrogate parent (ESP). These rules are discussed more fully in the section on Parents and Surrogate Parents.

Initial evaluations must be completed within sixty days of receiving parental consent.<sup>11</sup> If the child enrolls in a school of another public agency after the sixty days has begun, and prior to a determination by the previous public agency as to whether the child has a disability, the time frame does not apply if the current public agency is making sufficient progress, and the parent and the public agency agree to a specific time when the evaluation will be completed. The time frame also does not apply if the parents have repeatedly refused to produce the child for evaluation.<sup>12</sup> However, assessments of children with disabilities who transfer schools should be coordinated between prior and subsequent schools and expedited.<sup>13</sup>

If the parents (or surrogate parent) disagree with the evaluation, they may obtain an independent educational evaluation.<sup>14</sup> Parents may request an independent evaluation at the school district’s expense. The school district must either grant the request for an evaluation, or provide an administrative hearing to review the existing evaluation.<sup>15</sup>

### **3. Eligibility Meeting**

After the evaluation, a meeting takes place with a multidisciplinary teams of evaluators and parents to determine if a child is eligible for special education services. Advocates and

parents should ask for copies of the evaluation before the eligibility meeting,<sup>16</sup> although with the short timelines under IDEA, they may not be available.

A multidisciplinary team determines eligibility. This team must include:

- at least one teacher or other specialist with knowledge in the area of the suspected disability;
- other qualified professionals as necessary; and
- a parent.<sup>17</sup>

Other advocates also may be invited,<sup>18</sup> at the discretion of parent or school.

An advocate for the child should consider:

- Are the right individuals present?
- Have procedural safeguards been followed?
- Are evaluations appropriate?
- Is the eligibility decision a team decision?
- Do the definitions of a disability fit IDEA?<sup>19</sup>

After the child is determined eligible under the IDEA, an IEP will be created. Usually, determining eligibility and creating an IEP is a successful collaborative process when the right individuals are present. The eligibility meeting and creation of the IEP may occur at the same or different meetings,<sup>20</sup> depending partly on whether evaluations and IEP proposals have been available to all parties in advance.

However, if parents or an educational surrogate parent disagree with the decisions made by the IEP team, procedural safeguards protects their rights. Parents may file a request for a due process administrative hearing, may request mediation with or without filing for a due process

hearing, or may file an IDEA complaint with the state department of education.<sup>21</sup> *See* 20 U.S.C. § 1415 for more details.

#### **4. Evaluation under Section 504**

Section 504 requires the school to perform an evaluation, and if needed, develop a 504 plan, which need not be in writing. Under Section 504, a free appropriate public education is “the provision of regular or special education and related aids and services that . . . are designed to meet individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met . . .”<sup>22</sup> Section 504 requires that a child be provided with equal access to an education, and focuses on accommodations. Like IDEA, Section 504 addresses placing students with disabilities in the least restrictive environment.<sup>23</sup> This includes access to nonacademic and extracurricular activities and services, such as meals, recess, recreational athletics, and transportation.<sup>24</sup>

Impartial hearings also are available under Section 504, but there are fewer procedural safeguards.<sup>25</sup> However, parents can file a complaint with the Office of Civil Rights, U.S. Department of Education, which will perform a thorough investigation.<sup>26</sup>

### **B. IEP and Follow-Up**

#### **1. Free Appropriate Public Education (FAPE)**

Bitter though bloodless battles have been waged over conflicting understandings of what constitutes a free appropriate public education (FAPE). According to IDEA, FAPE means special education and related services that:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under Section 1414(d) of this title.<sup>27</sup>

In Colorado, “special education” is “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.”<sup>28</sup> The specific instruction that can be provided is detailed in ECEA Rule 2.43.

Under case law, FAPE need not be the best program, nor a program designed to maximize a child’s potential.<sup>29</sup> A parent or child advocate should never ask for what is “best” but for what is “appropriate.” Although new language in the statute does mandate educating children with disabilities “to the maximum extent possible,” case law has not caught up with the statutory change.<sup>30</sup>

Related services means transportation and developmental, corrective, and other supportive services such as the following examples:

- speech-language pathology and audiology;
- interpreting services;
- psychological services;
- physical and occupational therapy;
- recreation, including therapeutic recreation;
- social work services;
- school nurse services;
- counseling services;
- medical services, for diagnostic and evaluation purposes only.<sup>31</sup>

If a child may have been denied FAPE, or the parents and school disagree on an IEP, procedural protections and processes are outlined in 20 U.S.C. § 1415(b) through (j) and 34 C.F.R. §§ 300.500 through 518. For instance, the school district is required to give written notice to the parents, covering specific elements, when it proposes to or refuses to initiate or change the identification, evaluation, or educational placement of a student with disabilities.<sup>32</sup>

However, if the parties disagree on the IEP, it may be worthwhile to begin a temporary interim placement with the services the parties do agree on.<sup>33</sup> In any case, if an IEP already exists, the student would continue to receive services under that IEP until the dispute is resolved.

## **2. Least Restrictive Environment (LRE)**

Children with disabilities are entitled to be educated in the least restrictive environment (LRE) possible, that is, with non-disabled children.<sup>34</sup> “Educating children in the least restrictive environment in which they can receive a free appropriate public education is one of the IDEA’s most important substantive requirements.”<sup>35</sup> Before placing students in a separate environment from students without disabilities, such as special classes or separate schools, schools must consider using supplementary aids and services to help them succeed in the regular classroom.<sup>36</sup> Children should be provided with special classes, separate schooling, or other removal from the regular educational environment only to the extent that they cannot be educated in regular classes with the use of supplementary aids and services, due to the nature or severity of their disability.<sup>37</sup>

## **3. The Individualized Education Program (IEP)**

An IEP is a written statement for each child with a disability that includes:

- a statement of the child’s present level of academic achievement and functional performance;
- a statement of measurable annual goals, including academic and functional goals;

- a description of how the child's progress toward meeting the annual goals will be measured;
- a statement of the special education and related services to be provided to the child;
- an explanation of the extent, if any, to which the child will not participate with children in regular classes and activities;
- a statement of appropriate accommodations;
- an explanation of alternative assessments, if applicable;
- the date for the beginning of services, and frequency, location, and duration of those services; and
- transition goals.<sup>38</sup>

More details about the IEP are provided in 20 U.S.C. § 1414(d)(1)(A) and 34 C.F.R. § 300.320 and 324.

Whether children should be educated in regular classes or in self-contained special education settings will vary on a case by case basis. Parents or primary caretakers will have unique and important insights into a child's coping skills and how the child reacts to an educational environment.<sup>39</sup>

An IEP should be highly specific in terms of present levels of performance, services, and progress to be achieved.

The IEP team must include:

- the parents of the child;
- at least one regular education teacher;
- at least one special education teacher;
- a representative of the local educational agency;

- someone who can interpret instructional implications of evaluations;
- other individuals at the discretion of the parent or agency;
- the child if appropriate.<sup>40</sup>

Because people who have special knowledge or expertise regarding the child should be present, either the school or the parents should invite anyone involved with the child, such as a foster parent, caseworker, guardian ad litem, or therapist, to participate on the IEP team.<sup>41</sup>

An IEP should address special factors, such as limited proficiency in English or behavioral problems. “If the student’s behavior impedes the student’s learning or the learning of other students, then positive behavioral interventions and supports and other strategies should be considered to address that student’s behavior.”<sup>42</sup>

#### **4. Monitoring the IEP**

The implementation of the IEP and the student’s progress should be monitored.

Under IDEA, the IEP is reviewed on an annual basis.<sup>43</sup> Also, at a minimum, the student must be thoroughly evaluated at a triennial review (cognitive/psychological/social).<sup>44</sup> However, it is not necessary to wait for either an annual or a triennial review to address problem.

If there is a problem, such as improper implementation of the IEP, or a need for additions or changes, a parent or educational surrogate parent can request an IEP meeting even before the annual review. For example, a child may have additional disabilities, or a disability may have been misdiagnosed.<sup>45</sup> A change of disability or other eligibility may be made only after reevaluation.<sup>46</sup>

#### **5. School Transfers**

If a child with a disability who has an IEP transfers school districts within the state during the academic year, the school must provide the child with comparable services until the old IEP

is adopted or a new IEP is developed and implemented.<sup>47</sup> Both schools must take reasonable steps to transfer the child's records promptly.<sup>48</sup>

## **6. Administrative Unit for Services**

Somewhat complex rules determine which administrative unit is responsible for providing services.<sup>49</sup> For instance, normally a child is a resident of the administrative unit where the parent or guardian resides, even if the child attends school in another district.<sup>50</sup> However, there are exceptions. For instance, if the child is in a foster care home, the child is a resident of the administrative unit where the foster care home is located.<sup>51</sup> When a student is placed in a residential treatment facility, the administrative unit of residence is determined by where the parent or guardian resides, unless the student is an "educational orphan," in which case the administrative unit of attendance, based on where the facility is located, is responsible.<sup>52</sup> Place of residence is defined completely in ECEA Rule 2.02.

## **C. Early Childhood Services**

Different sections of IDEA cover services for young children, depending on their age. These are discussed below.

### **1. Part C of IDEA**

Part C of IDEA governs early intervention services for infants and toddlers under age three. Congress found an urgent and substantial need for services:

- "to enhance the development of infants and toddlers with disabilities, to minimize their potential for developmental delay, and to recognize the significant brain development that occurs during a child's first 3 years of life;"

- “to reduce the educational costs to our society, including our Nation’s schools, by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age;”
- “to enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities; and”
- “to enhance the capacity of State and local agencies and service providers to identify, evaluate, and meet the needs of all children, particularly minority, low-income, inner city, and rural children, and infants and toddlers in foster care.”<sup>53</sup>

An infant or toddler with a disability is defined as an individual under the age of three who needs early intervention services because of:

- developmental delays in one or more of a number of areas;
- a diagnosed physical or mental condition that has a high probability of resulting in developmental delay;
- at a state’s discretion, at-risk infants and toddlers, who would be at risk of experiencing a substantial developmental delay if early intervention services are not provided; and/or
- at a state’s discretion, children with disabilities who are eligible for services under preschool grants.<sup>54</sup>

Developmental delays are described in more detail in Rule 2.08(10)(a), as are various “identifiable conditions known to have a high probability of resulting in significant developmental delays.”<sup>55</sup> Examples are low birth weight, Down’s syndrome, and fetal alcohol syndrome.

Under Part C, early intervention services must be available to infants and toddlers with disabilities who are homeless or who are wards of the State.<sup>56</sup> Effective August 5, 2008, House

Bill (H.B.) 1366 reorganized and recodified statutory provisions related to early intervention services, clarifying the division of responsibilities between the department of human services and the department of education, and coordinating payment.<sup>57</sup> State policy may include “a referral for evaluation for early intervention services of a child who experiences a substantiated case of trauma due to exposure to family violence.”<sup>58</sup>

Under the Child Abuse Prevention and Treatment Act (CAPTA), child welfare caseworkers can make referrals for early intervention services for substantiated abuse and neglect cases.<sup>59</sup> For that matter, anyone involved with the child can request a referral.<sup>60</sup>

Colorado has a well-established Early Intervention Program. “The Colorado Department of Human Services, Division for Developmental Disabilities (DDD) is the lead agency for Part C in Colorado, and the program is referred to as Early Childhood Connections.”<sup>61</sup> In Colorado, Child Find responsibilities are shared between the DDD and the Colorado Department of Education. Generally, school districts identify and evaluate children, and local Community Centered Boards (CCB) provide service coordination and IFSP services and coordinate efforts among interagency groups that cover a county or counties.

Under Part C Early Childhood Services, an Individualized Family Service Plan (IFSP) is developed. “The IFSP process emphasizes services to meet the child’s and family’s needs and considers the resources, priorities and concerns of the family.”<sup>62</sup> The IFSP addresses the following in writing: (1) a child’s strength and needs; (2) the resources and priorities of the family related to the child; (3) outcomes to measure the child’s progress; and (4) necessary supports and services to achieve the outcomes. The IFSP is reviewed at least every six months.<sup>63</sup> Early intervention services should be provided in natural environments, such as home and community settings.<sup>64</sup>

An infant or toddler with a disability must be provided with:

- “a multidisciplinary assessment of the unique strengths and needs of the infant or toddler and the identification of services appropriate to meet such needs;”
- “a family-directed assessment of the resources, priorities, and concerns of the family and the identification of the supports and services necessary to enhance the family’s capacity to meet the needs of the infant or toddler; and”
- “a written individualized family service plan developed by a multidisciplinary team, including the parents.”<sup>65</sup>

For more details on the content of an IFSP, *see* 20 U.S.C. § 1436(d). Parents must give informed written consent before the child can be provided with services.<sup>66</sup>

The IFSP will identify a Service Coordinator, who is responsible for implementing the plan, and who coordinates a variety of local service providers and service agencies.<sup>67</sup> The plan must be reevaluated and reviewed at certain intervals.

The transition from Part C Early Intervention Services must be planned, including whether the child is eligible for preschool services under Part B, or entitled to FAPE and an IEP under Part B.<sup>68</sup> The IFSP can be continued for children age three to five, if appropriate.<sup>69</sup>

Part C also includes certain procedural safeguards.<sup>70</sup>

## **2. Part B of IDEA**

IDEA funds may be used under Part B for preschool grants, for children with disabilities aged three through five, inclusive, and, at the state’s discretion, for two year old children with

disabilities who will turn three during the school year.<sup>71</sup> Children with developmental delays, or conditions “associated with significant delays in development” are included in Colorado.<sup>72</sup> IDEA funds may also be used for early intervention services, with a particular emphasis on students in kindergarten through grade three, “who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment.”<sup>73</sup>

#### **D. Due Process**

An entire section of IDEA is devoted to procedural safeguards protecting the rights of children with disabilities and their parents. These procedural safeguards must be outlined in a detailed annual notice that the school is required to give parents.<sup>74</sup> The school district is also required to give “prior written notice” to the parents, covering specific elements, when it proposes to or refuses to initiate or change the identification, evaluation, or educational placement of a student with disabilities.<sup>75</sup>

If parents disagree with a school’s decision, such as an evaluation, a change in evaluation, or a denial of services, a good place to start is the informal dispute resolution procedures in the school, such as a conference with the director of special education. IDEA does not require that administrative procedures be exhausted, but if issues can be resolved at a lower and local level, it may serve the child better and preserve relationships.

Parents may file a due process complaint notice, which usually, but not always, would be in response to a prior written notice from the school district.<sup>76</sup> The due process complaint notice may be filed any time from immediately to within two years of the date the parent knew or should have known of the alleged basis for the complaint. The notice triggers a strict timeline.<sup>77</sup> Any issues not raised in the complaint may not be addressed unless the school district agrees, or

the notice is formally amended.<sup>78</sup> Once a due process complaint has been filed, generally either a mediation or a resolution session must take place.<sup>79</sup> In the rather rare event (in Colorado) that the case goes into due process, the impartial due process hearing is a full-blown administrative hearing in front of a hearing officer.<sup>80</sup> Either side can appeal the decision to the Colorado Department of Education, which will conduct an impartial review under an administrative law judge.<sup>81</sup> After that, the matter can be appealed to federal or state district court. Parents, or in some cases the school district, may seek attorney fees—certainly in federal court, and possibly in state court.<sup>82</sup>

If the parties disagree on the IEP, it may be worthwhile to begin an interim placement with the services the parties do agree on.<sup>83</sup> In any case, if an IEP already exists, the student would continue to receive services under that IEP until the dispute is resolved under the “stay put” provision.<sup>84</sup> The most effective advocacy for a child builds constructive relationships in the system. Resources exist for doing so.<sup>85</sup>

Parents may also, or alternatively, file a complaint with the Colorado Department of Education. This triggers an investigation rather than a hearing. CDE can require the school district to remedy or correct the violation, including compensatory services, monetary reimbursement, and appropriate future provision of services.<sup>86</sup>

### **E. School Discipline Under IDEA**

Due process rights regarding school discipline exist for all students. Discipline under IDEA and Section 504 is much more complex, and attorneys should be prepared to advocate for a student’s due process rights.<sup>87</sup> Strict timelines also exist for this process. Filing a complaint with the CDE is best for clear violations of IDEA rather than disagreements over services.<sup>88</sup>

## 1. When IDEA Applies to Discipline

When a child with a disability violates a code of student conduct, IDEA provides a special framework for discipline. “School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.”<sup>89</sup> Congress added this language to clarify “that school officials may use discretion and consider each individual situation carefully, and [rebut] arguments by administrators who refuse to exercise discretion.”<sup>90</sup> This may “encourage flexibility, rather than a zero tolerance approach, to disciplining students with disabilities.”<sup>91</sup> The American Bar Association opposes “zero tolerance” policies in principle.<sup>92</sup>

IDEA procedures and protections apply to a child who has a disability and is eligible for special education and related services. However, a child who has not yet been determined eligible, and has violated a code of student conduct, still may assert these protections if the local educational agency had knowledge that the child has a disability.<sup>93</sup> A local educational agency shall be deemed to have knowledge that a child has a disability if, before the behavior that precipitated the disciplinary action:

- a parent has expressed concern in writing to a teacher or the administration that the child is in need of special education and related services;
- a parent has requested an evaluation of the child under IDEA (with some exceptions);
- behavior or performance of the child demonstrates a need for services; and/or
- a teacher or other personnel has expressed concerns about the child to supervisory personnel of the agency.<sup>94</sup>

However, these exceptions do not apply if a parent has not allowed an evaluation of the child, or has refused services.<sup>95</sup>

Even if the local educational agency did not have knowledge that the child has a disability, an evaluation may be requested when the child is subject to disciplinary measures, and “shall be conducted in an expedited manner.” If the child is determined to have a disability, that child receives all rights and protections under IDEA.<sup>96</sup>

If parents disagree with decisions regarding placement in the discipline context, they may request a due process hearing. With the exception of certain dangerous behavior, the child has a right to “stay put” in the current educational placement during this process.<sup>97</sup>

## **2. Disciplining a Child With a Disability/Manifestation Determination**

School investigation of misconduct also must accommodate the disabilities of the student. During questioning, for example, provision must be made to accommodate disabilities such as deafness or cognitive impairment.<sup>98</sup>

School personnel may suspend a child with a disability who violates a code of student conduct, or remove the child from the current placement to an appropriate interim alternative educational setting for not more than ten consecutive school days.<sup>99</sup>

However, if the disciplinary consequences will result in a change in placement that would exceed ten school days, the school district must determine whether the behavior was a manifestation of the child’s disability.<sup>100</sup> Note that if there is doubt as to whether the alleged misconduct occurred, it may be necessary to have a pre-hearing to determine whether the child committed the act, before holding a manifestation determination as to whether the conduct was a manifestation of the disability. A student has a constitutional right to due process in school discipline.<sup>101</sup>

The manifestation determination is carried out by the local educational agency (LEA), the parent, and relevant members of the IEP team. Effectively, it is an IEP meeting that will

determine the manifestation determination issue.<sup>102</sup> The team reviews all relevant information in the student's file, including the IEP and information from teachers and parents.<sup>103</sup> It determines whether "the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability . . . ."<sup>104</sup> It also determines whether "the conduct in question was the direct result of the local educational agency's failure to implement the IEP."<sup>105</sup> If either of these is the case, the conduct is a manifestation of the child's disability.<sup>106</sup>

If the conduct in question was the direct result of the LEA's failure to implement the IEP, the agency must take immediate steps to remedy the deficiencies.<sup>107</sup> If the behavior was not a manifestation of the disability, the LEA may discipline in the same manner as it would discipline a student without a disability.<sup>108</sup>

To prepare for a manifestation determination, a parent or child advocate could obtain a comprehensive psycho-educational evaluation of the child by an expert in the disability (for example, autism or bipolar disorder). The evaluator should analyze the relationship, if any, between the child's disability and the behavior, and submit a detailed report that describes the disability, the basis for determining the behavior was a manifestation of the disability, and recommendations for an appropriate program. The evaluator may attend the manifestation determination hearing.<sup>109</sup>

In determining whether inappropriate behaviors are a manifestation of the disability, the IEP team should consider any medical, psychological or psychiatric reports available. If needed at this stage, a functional behavioral assessment can provide more information. This assessment collects data on the behavior such as the setting, timing, environment, reinforcement, and interventions attempted or not attempted to answer the question of why the behavior occurred.<sup>110</sup> A functional behavioral assessment should include interviews and rating scales. It should be

performed by an expert who directly observes the child's behavior in his or her natural environment, and the events that immediately precede and follow the problem behavior.<sup>111</sup>

If the behavior was a manifestation of the disability, the IEP team shall:

- conduct a functional behavioral assessment (if not previously performed);
- implement a behavioral intervention plan (BIP);
- review any current behavioral intervention plan and modify it as needed to address the behavior; and
- return the child to the previous placement, unless special circumstances exist, or unless the parents and local educational agency agree to a change of placement.<sup>112</sup>

These special circumstances, which prevent the return of the child to the previous placement, exist when the child, while at school, on school premises, or at a school function:

- carried or possessed a dangerous weapon, capable of causing death or serious bodily injury;<sup>113</sup> (bodily injury means “bodily injury which involves--a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. . .”).<sup>114</sup>
- knowingly possessed or used illegal drugs (a controlled substance that is not legally possessed), or sold or solicited the sale of a controlled substance at school;
- inflicted serious bodily injury on another person.<sup>115</sup>

Under these circumstances, even if the behavior was a manifestation of the disability, the student may be removed to an interim alternative educational setting (IAES) for not more than forty-five days.<sup>116</sup> The setting is determined by the IEP team.<sup>117</sup>

Whether or not the behavior was a manifestation of the child's disability, the following must occur:

- If the child has been removed from the current placement for more than ten school days in the same school year, during any further removal, the child must continue to receive educational services and progress towards meeting the goals set out in the IEP.<sup>118</sup> (Note: the ten days need not be consecutive.)
- The child shall receive, as appropriate, “a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.”<sup>119</sup>

### **3. Appeal of a Manifestation Determination**

A parent may request a hearing to appeal either the result of the manifestation determination or the decision regarding placement in an interim alternative educational setting (IAES).<sup>120</sup> The school also can request a hearing if it believes “maintaining the current placement of the child is substantially likely to result in injury to the child or to others.”<sup>121</sup> During the appeal, the child remains in the IAES.<sup>122</sup> The hearing process is expedited, and must occur within twenty school days of the date the hearing is requested, with a determination within ten school days after the hearing.<sup>123</sup> More details are in the ECEA Rules.<sup>124</sup>

### **4. Change in Placement**

If the student is removed for more than ten days, regardless of whether the misbehavior was a manifestation of the disability, and whether the student is being disciplined in the same manner as a student without disabilities, the extended removal is a change in placement. In this situation, the school must continue providing educational services consistent with the IEP.<sup>125</sup>

### **5. Preventing Discipline Problems**

Children with disabilities often need proactive attention to prevent discipline problems from developing because of their frustration or inadequate social skills. For many children with

disabilities, it is unrealistic that the child “work it out” or “tough it out.” The child may not understand the situation or how to deal with it. Moreover, children with disabilities often are a target for bullying, and are then not uncommonly blamed for “inappropriate responses.” The following steps may be helpful:

- make sure the child understands the school rules and which rules are to be taken seriously (see zero tolerance policies);
- monitor the child’s progress and intervene when issues occur that cause the child anxiety, such as bullying or other incidents;
- obtain assistance from an anti-bullying program, such as through a community agency, may be helpful;
- if not a breach of confidentiality, notify the school when something particularly upsetting has happened in the child’s life;
- develop good ongoing relationships with school personnel;
- connect the child with an ongoing outside mentor;
- if there is a pattern of misbehavior, request an evaluation for a disability;<sup>126</sup>
- try to identify a teacher or counselor the child can talk to regularly. A child who believes there is a way to solve problems is less likely to melt down or explode.

### **6. Behavioral Intervention Plan (BIP)**

A behavioral intervention plan (BIP) is designed to manage a student’s behavior and prevent the circumstances that precipitated the behavior. It should include:

- ways to reduce stress, such as finding a quiet place to go when the student is overwhelmed, with a prearranged signal that will allow the student to leave the classroom or other stressful setting;

- ways that teachers can recognize a problem is developing (for example, physical signs such as shaking or twitching, bright red ears, raised voice);
- positive reinforcement for good behaviors;<sup>127</sup>
- education for the student on how to manage his or her own behavior by recognizing escalating stress and learning strategies to cope.

Sometimes, when the student knows a highly structured plan exists, including positive steps that the student can control, the incidence of stress-induced inappropriate behavior is drastically reduced. If support staff provides regular training in problem solving and conflict management each time a conflict situation arises, the student not only internalizes the positive strategies, but approaches life with growing hope that problems may have a solution. Hope is a powerful motivator for positive behavior.

## **7. School Discipline Under Section 504**

Discipline under Section 504 is similar to but not as closely regulated as under IDEA. Schools may not punish students for misconduct related to their disability.<sup>128</sup> Excluding a student from school for more than ten consecutive school days, or a series of suspensions that totals more than ten days in a school year, is likely to be a significant change in placement that requires a re-evaluation and a manifestation determination meeting.<sup>129</sup> If the misconduct is related to the disability, the student may not be continually suspended or expelled, with certain exceptions for emergencies.<sup>130</sup> The student is protected whether or not the school has identified the disability.<sup>131</sup>

Parents may challenge an evaluation by requesting an impartial due process hearing. However, unlike under IDEA, there is no “stay put” provision while waiting for a due process hearing.<sup>132</sup> Under Section 504 alone, when IDEA does not apply, if a child’s misbehavior is not a

manifestation of a disability, the child can be expelled, and the school is not required to continue providing FAPE.<sup>133</sup>

---

<sup>1</sup> Peter W. D. Wright, Pamela Darr Wright, *Special Education Law*, 72 (Harbor House Law Press Inc. 2d ed. 2007); See 20 U.S.C. § 1412(a)(3) (2008); 34 C.F.R. § 300.111(a); § 22-20-103, C.R.S. 2008.

<sup>2</sup> 34 C.F.R. § 300.111(c).

<sup>3</sup> State Bd. of Ed. Rule 4.02(1)(a)(i) and (ii), 1 Code Colo. Regs. 301-8 (2007).

<sup>4</sup> Rule 4.02(2)(c)(iv).

<sup>5</sup> 20 U.S.C. § 1414(a)(1)(B) (2008).

<sup>6</sup> Rule 4.02(3)(a)(ii).

<sup>7</sup> 20 U.S.C. § 1414(a)(1)(D)(i).

<sup>8</sup> 20 U.S.C. § 1414(a)(1)(D)(ii).

<sup>9</sup> 20 U.S.C. § 1414(a)(1)(D)(iii).

<sup>10</sup> 20 U.S.C. § 1414 (a)(1)(D)(iii)(II).

<sup>11</sup> Wright, *supra* note 1 at 93; 20 U.S.C. § 1414(a)(1)(C).

<sup>12</sup> 34 C.F.R. § 300.301(d).

<sup>13</sup> 34 C.F.R. § 300.304(c)(5).

<sup>14</sup> 20 U.S.C. § 1415(b)(1)(2005).

<sup>15</sup> Randy Chapman, *The Everyday Guide to Special Education Law*, 27 (The Legal Center for People with Disabilities and Older People 2005); 20 U.S.C. § 1415.

<sup>16</sup> Kathleen McNaught, *Learning Curves: Education Advocacy for Children in Foster Care* 50 (ABA Center on Children and the Law 2004).

<sup>17</sup> Rule 4.02(6)(b)(i).

<sup>18</sup> McNaught, *supra* note 16 at 50.

<sup>19</sup> *Id.* at 51.

<sup>20</sup> Rule 4.02(6).

<sup>21</sup> McNaught, *supra* note 16 at 62-63.

<sup>22</sup> 34 C.F.R. § 104.33(b)(1).

<sup>23</sup> Chapman, *supra* note 15 at 79.

<sup>24</sup> *Id.* at 79; 34 C.F.R. § 104.34(b) and 104.37(a).

<sup>25</sup> Wright, *supra* note 1 at 293.

<sup>26</sup> [www.ed.gov/about/offices/list/ocr/index.html](http://www.ed.gov/about/offices/list/ocr/index.html).

<sup>27</sup> 20 U.S.C. § 1401(9) (2008).

<sup>28</sup> Rule 2.43(1)(a).

<sup>29</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); Wright, *supra* note 1 at 51.

<sup>30</sup> 20 U.S.C. § 1400(c)(5)(A) (2005).

<sup>31</sup> Chapman, *supra* note 15 at 5-6.; 20 U.S.C. § 1401(26).

<sup>32</sup> 20 U.S.C. § 1415(b).

<sup>33</sup> Joseph B. Tulman and Joyce A. McGee, eds., *Special Education Advocacy for Children in the Juvenile Delinquency System* 9-16 (University of the District of Columbia School of Law Juvenile Law Clinic, 1998).

<sup>34</sup> 34 C.F.R. § 300.114(a); § 22-20-108, C.R.S. 2008.

<sup>35</sup> *L.B. and J.B. v. Nebo School Dist.*, 379 F.3d 966, (10th Cir. 2004).

<sup>36</sup> 20 U.S.C. § 1412(a)(5) (2005); Chapman, *supra* note 15 at 13.

<sup>37</sup> 34 C.F.R. § 300.114(a).

<sup>38</sup> 20 U.S.C. § 1414(d)(1)(A) (2005).

<sup>39</sup> Email from Brad Bittan, Juvenile Law Attorney (May 22, 2008)(on file with author).

- 
- <sup>40</sup> 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321.
- <sup>41</sup> Kathleen McNaught, *Mythbusting: Breaking Down Confidentiality and Decision-Making Barriers to Meet the Education Needs of Children in Foster Care* 22 (American Bar Association 2005). Available at <http://www.abanet.org/child/education/other-pub.shtml> (viewed on May 5, 2008)
- <sup>42</sup> Chapman, *supra* note 15 at 34-35.
- <sup>43</sup> 20 U.S.C. § 1414(d)(4)(A).
- <sup>44</sup> 20 U.S.C. § 1414(a)(2)(A) and (B).
- <sup>45</sup> McNaught, *supra* note 16 at 24.
- <sup>46</sup> Rule 4.02(6)(c).
- <sup>47</sup> 20 U.S.C. § 1414(2)(C)(1).
- <sup>48</sup> 20 U.S.C. § 1414(2)(C)(ii).
- <sup>49</sup> *See* § 22-20-109, C.R.S. 2008; § 22-20-107.5, C.R.S. 2008.
- <sup>50</sup> Rule 2.02(1)(d).
- <sup>51</sup> Rule 2.02(1)(c).
- <sup>52</sup> Email from Maureen Wirth, Colorado Department of Education (May 19, 2008, 9:27 a.m.)(on file with author).
- <sup>53</sup> 20 U.S.C. § 1431(a) (2005).
- <sup>54</sup> 20 U.S.C. § 1432(5) (2005).
- <sup>55</sup> Rule 2.08(10)(a).
- <sup>56</sup> 20 U.S.C. § 1434(1) (2005).
- <sup>57</sup> 20 U.S.C. § 1435(a)(3) (2005); *See* § 27-10.5-701, C.R.S. 2008; § 27-10.5-702, C.R.S. 2008; § 27-10.5-703, C.R.S. 2008; § 27-10.5-704, C.R.S. 2008.
- <sup>58</sup> 20 U.S.C. § 1435(c)(2)(G).
- <sup>59</sup> *See* 42 U.S.C. § 5106a(b)(2)(A)(xxi) (2003).
- <sup>60</sup> Angela J. Herrick & Helen D. Ward, *Advocating for the Educational Needs of Children in Out-of-Home Care 6-7* Colorado Department of Human Services.
- <sup>61</sup> Colorado State Plan Under Part C of the Individuals With Disabilities Education Act, p. 1, Department of Human Services, Division of Developmental Disabilities (2007).
- <sup>62</sup> Chapman, *supra* note 15 at 93.
- <sup>63</sup> Colorado State Plan Under Part C, *supra* note 56 at pp. 20-21.
- <sup>64</sup> Chapman, *supra* note 15 at 93, 96.
- <sup>65</sup> 20 U.S.C. § 1436(a)(3) (2005).
- <sup>66</sup> 20 U.S.C. § 1436(e).
- <sup>67</sup> Chapman, *supra* note 15 at 98.
- <sup>68</sup> *Id.* at 98-99; 20 U.S.C. § 1436(d)(8); 20 U.S.C. § 1437(a)(9)(A)(i) (2005).
- <sup>69</sup> McNaught, *supra* note 16 at 79.
- <sup>70</sup> Chapman, *supra* note 15 at 100-101; 20 U.S.C. § 1439(a) (2005).
- <sup>71</sup> 20 U.S.C. § 1419(a) (2005).
- <sup>72</sup> Rule 2.08(9).
- <sup>73</sup> 20 U.S.C. § 1413(f)(1) (2005).
- <sup>74</sup> 20 U.S.C. § 1415(d).
- <sup>75</sup> 20 U.S.C. § 1415(b)(3) and (c).
- <sup>76</sup> 20 U.S.C. § 1415(c)(2).
- <sup>77</sup> 20 U.S.C. § 1415(c) and (f).
- <sup>78</sup> 20 U.S.C. § 1415(c)(2)(E) and (f)(3)(B).
- <sup>79</sup> 20 U.S.C. § 1415(e) and (f)(1)(B).
- <sup>80</sup> 20 U.S.C. § 1415(f) and (h).
- <sup>81</sup> 20 U.S.C. § 1415(g).
- <sup>82</sup> 20 U.S.C. § 1415(i); Wright, *supra* note 1 at 117.
- <sup>83</sup> Tulman, *supra* note 33 at 9-16.
- <sup>84</sup> 20 U.S.C. § 1415(j).
- <sup>85</sup> Wright and Wright, *supra* note 84.
- <sup>86</sup> 34 C.F.R. § 300.151(b).
- <sup>87</sup> McNaught, *supra* note 16 at 17.
- <sup>88</sup> Randy Chapman, *The Everyday Guide to Special Education Law*, 59 (The Legal Center for People with Disabilities and Older People 2008)

- 
- <sup>89</sup> 20 U.S.C. § 1415(k)(1)(A) (2005); 34 C.F.R. § 300.530(a).
- <sup>90</sup> Wright, *supra* note 1 at 118.
- <sup>91</sup> Chapman, *supra* note 15 at 64-65.
- <sup>92</sup> McNaught, *supra* note 16 at 93.
- <sup>93</sup> 20 U.S.C. § 1415(k)(5).
- <sup>94</sup> 20 U.S.C. § 1415(k)(5)(B); 34 C.F.R. § 300.534(b).
- <sup>95</sup> 20 U.S.C. § 1415(k)(5)(C); 34 C.F.R. § 300.534(c).
- <sup>96</sup> 20 U.S.C. § 1415(k)(5)(D); Wright, *supra* note 1 at 122; 34 C.F.R. § 300.534(d).
- <sup>97</sup> 20 U.S.C. § 1415(j).
- <sup>98</sup> Tulman, *supra* note 33 at 4-8.
- <sup>99</sup> 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1).
- <sup>100</sup> 20 U.S.C. § 1415(k)(1)(C) & (E).
- <sup>101</sup> Tulman, *supra* note 33 at 4-15.
- <sup>102</sup> Email from Brad Bittan, Juvenile Law Attorney (May 22, 2008)(on file with author).
- <sup>103</sup> 20 U.S.C. § 1415(k)(1)(E)(i).
- <sup>104</sup> 20 U.S.C. § 1415(k)(1)(E)(i)(I); 34 C.F.R. § 300.530(e).
- <sup>105</sup> 20 U.S.C. § 1415(k)(1)(E)(i)(II).
- <sup>106</sup> 20 U.S.C. § 1415(k)(1)(E)(ii).
- <sup>107</sup> 34 C.F.R. § 300.530(e)(3).
- <sup>108</sup> Chapman, *supra* note 15 at 63.
- <sup>109</sup> Wright, *supra* note 1 at 119.
- <sup>110</sup> *Unique Challenges, Hopeful Responses: A Handbook for Professionals Working With Youth With Disabilities in the Juvenile Justice System* 52 (Pacer Center, Minneapolis, MN 1997).
- <sup>111</sup> Stephen Starin, *Functional Behavioral Assessments: What, Why, When, Where, and Who?* Available at <http://www.wrightslaw.com/info/discipl.fab.starin.htm> (last viewed May 6, 2008).
- <sup>112</sup> 20 U.S.C. § 1415(k)(1)(F)(i) through (iii); 34 C.F.R. § 300.530(f).
- <sup>113</sup> 18 U.S.C. § 930(g)(2) (2008).
- <sup>114</sup> 18 U.S.C. § 1365(h)(3) (2002).
- <sup>115</sup> 20 U.S.C. § 1415(k)(1)(G) and (k)(7); 34 C.F.R. § 300.530(g) & (i).
- <sup>116</sup> 20 U.S.C. § 1415(k)(1)(G).
- <sup>117</sup> 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.531.
- <sup>118</sup> 20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(b)(2) and (d).
- <sup>119</sup> 20 U.S.C. § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(d)(1)(ii).
- <sup>120</sup> 20 U.S.C. § 1415(k)(3)(A).
- <sup>121</sup> 20 U.S.C. § 1415(k)(3)(A).
- <sup>122</sup> 20 U.S.C. § 1415(k)(4); 34 C.F.R. § 300.533.
- <sup>123</sup> 20 U.S.C. § 1415(k)(4).
- <sup>124</sup> Rule 6.02(7).
- <sup>125</sup> Chapman, *supra* note 15 at 63.
- <sup>126</sup> Herrick and Ward, *supra* note 60 at 5-3.
- <sup>127</sup> *Id.* at 5-12.
- <sup>128</sup> Chapman, *supra* note 15 at 83.
- <sup>129</sup> *Id.* at 83.
- <sup>130</sup> *Id.* at 83.
- <sup>131</sup> Tulman, *supra* note 33 at 4-22.
- <sup>132</sup> *Id.* at 4-21.
- <sup>133</sup> Wright, *supra* note 1 at 293.

### **III. Parents, Surrogate Parents, and Educational Decision-Makers**

When a disabled child is involved in dependency and neglect proceedings, educational needs should be considered from the beginning. The child should have a person who can make educational decisions on his or her behalf. In the child welfare system, determining this person can be complicated, and may require intervention from the courts. Usually the person would be a parent. If the parents of the child are not known, or may not act in the child's best interests, other alternatives exist.

Various laws determine who is a parent and who can make educational decisions. The authority to make educational decisions is defined more restrictively under IDEA than for general educational decision making. Moreover, special education law is structured in such a way that it is crucial that someone act as a parent. Therefore, if no one can be identified as a parent under IDEA rules and regulations, an educational surrogate parent (ESP) should be appointed.

#### **A. "Parent" under IDEA and Accompanying Regulations:**

A "parent" under IDEA means:

- (A) a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent);
- (B) a guardian (but not the State if the child is a ward of the State);
- (C) an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or
- (D) except as used in Sections 1415(b)(2) of this title and 1439(a)(5) of this title, an individual assigned under either of those sections to be a surrogate parent.<sup>1</sup>

A “parent” under the Colorado ECEA Rules means:

- “A biological or adoptive parent of a child”;
- “A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent”;
- “A guardian generally authorized to act as the child’s parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);”
- “An individual acting in the place of a biological or adoptive parent (including a grandparent, step-parent or other relative) with whom the child lives, or an individual who is legally responsible for the child’s welfare; or”
- “An educational surrogate parent who has been assigned. . . .”<sup>2</sup>

Despite the possibility of others serving as a parent, the biological or adoptive parent is presumed to be the parent unless that parent does not have legal authority to make educational decisions for the child.<sup>3</sup> If a court orders a specific person to act as a parent or to make educational decisions on behalf of a child, this person is considered to be the parent for purposes of educational decision making.<sup>4</sup>

Under the federal regulations, the foster parent may act as the parent in the following circumstances:

- the “natural parent’s authority to make the decisions required of parents under the Act on has been extinguished under State law”; and
- the foster parent has “an ongoing, long-term parental relationship with the child;”
- the foster parent is “willing to make the decisions required of parents under the Act; and”
- the foster parent has “no interest that would conflict with the interests of the child.”<sup>5</sup>

The term “extinguished under state law” applies when parental rights have been terminated.<sup>6</sup> Under these circumstances, “[c]ounty certified foster parents as well as foster parents with private, nonprofit child placement agencies may be able to exercise legal authority over decisions related to special education.”<sup>7</sup>

In a child welfare case, if parental rights have not been terminated, a court may need to consider whether to remove a parent’s educational decision-making authority so that a foster parent or other statutorily authorized person may act as the parent, or so that an educational surrogate parent may be appointed. This decision may depend on whether the parent will act in the child’s best interests.

Best practice in a child welfare case would be to discuss carefully any possible educational decisions with the parents, such as a referral for an evaluation or attendance at IEP meetings. Sometimes parents who are reluctant to cooperate change their minds when their fears about the process have been alleviated. If appropriate, properly exercising educational decision making rights can be part of the treatment plan.<sup>8</sup> However, if this process clarifies that the parent is not likely to act in the child’s best interests, the court might consider removing educational decision making authority from the parent and appointing an ESP.

### **B. Educational Surrogate Parent (ESP) under IDEA and Regulations**

When a child has a disability under IDEA, a educational surrogate parent (ESP) may be appointed if: (1) the parents of the child are not known or cannot be located; (2) the child is a ward of the state; or (3) the child is an unaccompanied homeless youth under the McKinney-Vento Homeless Assistance Act.<sup>9</sup> This may be necessary if no one fits one of the definitions of a parent under IDEA.

A ward of the state, in Colorado, is a foster child, or in the custody of a public child welfare agency. However, if the foster parent meets the definition of “parent” discussed above, the child is not a ward of the State under IDEA/ECEA.<sup>10</sup>

### **1. Definition and Duties of Educational Surrogate Parent (ESP)**

In Colorado, an ESP is defined as a person who:

- is **not** an employee of: the Department of Education, the administrative unit of attendance or residence, a state-operated program, or any other public agency involved in the education or care of the child;
- has no personal or professional interest that conflicts with the interest of the child; and
- has knowledge and skills to ensure adequate representation.<sup>11</sup>

The duties of an ESP are to represent the child in all matters relating to the “identification, evaluation, and educational placement of the child” and to make certain a free appropriate public education (FAPE) is provided to the child.<sup>12</sup> This includes filing for mediation or due process if necessary.

### **2. Appointing an Educational Surrogate Parent (ESP)**

Primary responsibility for determining whether a child needs an ESP, and for appointing one, is with the administrative unit of attendance or state-operated program.<sup>13</sup> The state educational agency must make reasonable efforts to assign an ESP within thirty days after the determination that a child needs an ESP.<sup>14</sup> The Colorado Department of Education maintains a registry of each child with a disability needing an ESP and the person assigned to that child.<sup>15</sup> Note that, because school districts are locally controlled and act independently, the rules for appointing an ESP may vary from district to district.<sup>16</sup>

In addition, the 2004 reauthorization of IDEA specifically allows judges to appoint ESPs. Therefore, the ESP may be appointed either by the Department of Education or, if the child is in the legal custody of the Colorado Department of Human Services (DHS), by the court overseeing the child's care.<sup>17</sup> Typically, the ESP is selected through the special education office of the school district, which asks the Colorado Department of Education to appoint that person officially. An ESP appointed in this way will have been trained, but will probably not know anything about the child.<sup>18</sup>

Best practice is that an ESP is someone, such as a guardian *ad litem* (GAL) who knows and has a relationship with the child.<sup>19</sup> A court may be in a better position to identify such a person, or alternatively, those working with the child may suggest to the school district an appropriate ESP. A guardian *ad litem* may be the ideal person to serve as an ESP, if the court assigns the GAL responsibility for educational decision-making in a written order.<sup>20</sup>

If the court is considering appointing an ESP, it should check with the Exceptional Student Leadership Unit (ESLU) to see if the child already has an ESP. If the court does appoint an ESP, it should let the ESLU know for its registry.<sup>21</sup>

In the case of unaccompanied homeless youth, appropriate staff of emergency shelters and similar facilities may be appointed as temporary ESPs until a permanent ESP can be appointed.<sup>22</sup>

An ESP may also be assigned for an infant or toddler under Part C of IDEA.<sup>23</sup>

Because the ESP may not be an employee of the state educational agency or any other agency involved in the education or care of the child, a case worker or social worker employed by DHS may not be an ESP.<sup>24</sup> However, a social worker can still attend and participate in the IEP meeting.<sup>25</sup>

### **3. Training for ESPs**

The Colorado Department of Education trains ESPs. Best practice is for an ESP to participate in the CDE training if not already knowledgeable about the following areas:

- Understand ESP responsibilities (which are to learn about the student's educational needs, participate in school meetings, give consent for assessment and initial placement, monitor delivery of services and the student's development, and represent the student when necessary)
- Learn about relevant laws (IDEA, FERPA, Section 504, NCLB, ADA, Colorado Exceptional Children's Educational Act (ECEA));
- Learn about the special education process (referral, assessment, IEP development, implementation of services, revision of IEP);
- Learn to communicate with schools (methods, preparation, procedural safeguards and dispute resolution, meeting with other parents);
- Understand special education terminology and abbreviations.<sup>26</sup>

A court could choose an ESP from the list maintained by the Colorado Department of Education, or a person who already has a relationship with the child could request the training.

### **4. Children Without Disabilities**

Note that, if a child does not have disabilities, and is not suspected of having disabilities, the court may need to appoint an educational decision maker, but the process is not nearly as complicated. A general educational decision maker does not have to meet the specific requirements of IDEA, and need not be an ESP.<sup>27</sup> For instance, a caseworker could be an educational decision maker.<sup>28</sup> The school district does not appoint educational decision makers.<sup>29</sup>

## 5. Contrast with “Parent” As Defined Under FERPA

Under FERPA, a parent “includes a legal guardian or other person standing in loco parentis (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the welfare of the child).”<sup>30</sup> This is a broader definition of “parent” than under IDEA, and child welfare workers may be considered parents to access students’ educational records.<sup>31</sup>

Usually, in Colorado, school districts will allow caseworkers to sign a release for school records under FERPA.<sup>32</sup> However, the natural parents also retain rights under FERPA unless the court has revoked those specific rights.<sup>33</sup>

To see how a person who is not a parent, such as an advocate, may obtain educational records, see the section on FERPA.

---

<sup>1</sup> 20 U.S.C. § 1401(23) (2008).

<sup>2</sup> State Bd. of Educ. Rule 2.33(1), 1 Code Colo. Regs. 301-8 (2007).

<sup>3</sup> Rule 2.33(2)(a).

<sup>4</sup> Rule 2.33(2)(b).

<sup>5</sup> 34 C.F.R. § 303.19.

<sup>6</sup> Kathleen McNaught, *Learning Curves: Education Advocacy for Children in Foster Care* 45 (ABA Center on Children and the Law 2004).

<sup>7</sup> Angela J. Herrick & Helen D. Ward, *Advocating for the Educational Needs of Children in Out-of-Home Care* 4-6 Colorado Department of Human Services.

<sup>8</sup> Interview with Laura Writebol, Colorado Department of Human Services (May 14, 2008).

<sup>9</sup> 20 U.S.C. § 1415(b)(2)(A) (2005); 34 C.F.R. § 300.519; 42 U.S.C. § 11434a(6) (2002); Rule 2.13.

<sup>10</sup> Rule 2.53(1) and (2); 20 U.S.C. § 1401(36).

<sup>11</sup> Rule 6.02(8)(e)(iii); 34 C.F.R. § 300.519(d)(2)(ii) and (iii).

<sup>12</sup> Rule 6.02(8)(i); 34 C.F.R. § 300.519(g).

<sup>13</sup> Rule 6.02(8)(c).

<sup>14</sup> 34 C.F.R. § 300.519(h).

<sup>15</sup> Rule 6.02(8)(b).

<sup>16</sup> Interview with Laura Writebol, Colorado Department of Human Services (May 14, 2008).

<sup>17</sup> 20 U.S.C. § 1415(b)(2)(A)(i); 34 C.F.R. § 300.519(c); Rule 6.02(8)(d).

<sup>18</sup> Herrick & Ward, *supra* note 7 at 4-6.

<sup>19</sup> Kathleen McNaught, *Mythbusting: Breaking Down Confidentiality and Decision-Making Barriers to Meet the Education Needs of Children in Foster Care* 37 (American Bar Association 2005). Available at <http://www.abanet.org/child/education/other-pub.shtml> (viewed on May 5, 2008).

- 
- <sup>20</sup> Herrick & Ward, *supra* note 7 at 4-5.
- <sup>21</sup> Telephone interview with Keith Kirchubel, Principal Consultant, Dispute Resolution, Colorado Department of Education in Denver Colorado (March 2008); contact Jennifer Rodriguez, 303-866-6889, for the ESP registry.
- <sup>22</sup> 34 C.F.R. § 300.519(f).
- <sup>23</sup> 20 U.S.C. § 1439(a)(5) (2005).
- <sup>24</sup> 20 U.S.C. § 1415(b)(2)(A); 34 C.F.R. 300.519(d)(2)(i).
- <sup>25</sup> Randy Chapman, *The Everyday Guide to Special Education Law*, 47 (The Legal Center for People with Disabilities and Older People 2005).
- <sup>26</sup> Email from Keith J. Kirchubel, Principal Consultant, Dispute Resolution, Colorado Department of Education, to Theresa Sidebotham (March 17, 2008, 3:40 p.m.)(on file with author).
- <sup>27</sup> McNaught, *supra* note 19 at 9.
- <sup>28</sup> *Id.* at 17.
- <sup>29</sup> *Id.* at 16.
- <sup>30</sup> 20 U.S.C. § 1232h(c)(6)(D) (2002).
- <sup>31</sup> National Council on Disability, *Youth with Disabilities in the Foster Care System: Barriers to Success and Proposed Policy Solutions*, at 57 (2008) available at [http://www.ncd.gov/newsroom/publications/2008/FosterCareSystem\\_Report.html](http://www.ncd.gov/newsroom/publications/2008/FosterCareSystem_Report.html) (viewed on April 17, 2008).
- <sup>32</sup> Herrick & Ward, *supra* note 7 at 2-11.
- <sup>33</sup> McNaught, *supra* note 6 at 22.

## **IV. Special Education and Child Welfare**

### **A. Dependency or Neglect Proceedings**

The question of whether special education law and principles are relevant for a particular child should be considered at various points in the course of dependency or neglect proceedings, particularly in determining the child's needs, forming the treatment plan, and obtaining services for the child. Although the following discussion is framed primarily in terms of foster care, the same legal and social principles apply to the entire course of child welfare proceedings.

#### **1. Identifying Educational Decision Maker/Parent**

A child's educational needs should be considered from the beginning of dependency or neglect proceedings. Whether or not the child is disabled, it is important that someone considering the child's best interests make educational decisions. Because so many of the rights and procedures under IDEA involve the parent, identifying a parent or educational surrogate parent (ESP) is even more crucial when the child has a disability under IDEA.

Typically, a parent's educational decision-making rights are terminated only at the final termination of parental rights. If parents are willing to make educational decisions in the child's best interests, or can be educated and supported to do so as part of a treatment plan, no other action is required. However, if reasonable parental cooperation with a treatment plan is unlikely, or is in fact not happening, a court could consider terminating educational decision-making rights, which would allow a foster parent or other caregiver to serve as parent, or allow an ESP to be appointed.

A clear appointment of educational decision making rights by the court would assist the school districts in meeting the child's needs.<sup>1</sup> Schools cannot provide services under IDEA without both parental consent for evaluation (though the school district may be able to override

lack of parental consent for evaluation with a due process request, in the unlikely event it is willing to invest the energy and money), and parental consent for services.

## **2. Treatment Plan and Special Education**

In creating a treatment plan, the court can consider ordering one or more of the following:

- regular educational updates;
- referral for a special education evaluation under Part B or Part C;
- parents' agreement to allow at least a special education evaluation (or the court can limit parents' educational decision-making rights);
- a copy of the IEP produced for the court;
- parents' attendance at IEP meetings. If a parent is incarcerated, a conference call is still a possibility.

## **3. Initial Placement in Foster Care**

For non-emergency placement, the court or public agency is mandated to work cooperatively with both the child's current school and the prospective school to ensure that appropriate special education services are available for the child.<sup>2</sup> Emergency placement for the safety of the child may be done without this coordination.<sup>3</sup> However, "[i]n no event shall a child be placed in an eligible facility or an administrative unit that is unable to ensure the provision of special education services that are appropriate for the child."<sup>4</sup>

### **B. Special Education and Foster Care**

#### **1. Disability Issues Among Children in Foster Care**

Foster children are more likely to have a disability than children in the general population. Thirty to forty percent of foster children are in the special education system, a significantly higher percentage than for non-foster care children.<sup>5</sup> Thus, between twenty and

sixty percent of children entering foster care have developmental disabilities or delay, compared with about ten percent of the general population.<sup>6</sup> Children with disabilities also remain in foster care longer.<sup>7</sup> Moreover, there may be significant underreporting of youth with disabilities in foster care, unless all youth are screened, as the National Council on Disability recommends.<sup>8</sup>

A study of children in foster care in one state showed the following:

- 44% had learning problems.
- 35% had attention deficit disorder.
- 37% were slow learners.
- 16% had mental retardation or developmental delay.
- 18% had speech or language problems.<sup>9</sup>

A study of foster youth alumni found that over half had mental health problems.<sup>10</sup> One in four foster alumni experienced post-traumatic stress disorder (PTSD) in a twelve month period, a rate approximately twice as high as for U.S. war veterans.<sup>11</sup>

On the other hand, children in foster care are sometimes over-identified as special education students because they are troubled, and may be removed from the general school population.<sup>12</sup> Special education is not a solution for problems not related to disability, and segregation into a special education program can be very damaging.

Both youth with disabilities and youth in foster care are more likely to drop out of school. Both are at high risk of failing to make successful transition to adulthood.<sup>13</sup> Youth in foster care with “unmet education needs are at higher risk for homelessness, poverty, public assistance, and juvenile or adult court involvement.”<sup>14</sup> For instance, only about twenty percent of foster youth go to college, and only five percent complete college, compared to a twenty percent completion rate for adults under age twenty-five overall.<sup>15</sup>

The employment rate is lower for alumni from foster care, as compared to the general population. One study showed one-third of foster care alumni had household incomes at or below the poverty level (three times the national poverty rate), and more than one in five experienced homelessness after leaving foster care.<sup>16</sup> Outcomes for foster youths with disabilities are significantly poorer than for their peers without disabilities.<sup>17</sup>

## **2. Interrelation Between Disability and Abuse**

Children born with disabilities are more often abused and more often relinquished to the child welfare system than children without disabilities.<sup>18</sup> One study shows that children with disabilities are abused at about twice the rate of children without disabilities, and other studies document an increased risk of abuse for children with disabilities between four and ten times that of the general population.<sup>19</sup> Children who have disabilities may be at increased risk for abuse, partly because they may be more vulnerable.<sup>20</sup> Another factor is that children with certain disabilities may be very difficult to handle, causing extraordinary stress on parents and family. The presence of the disability can exacerbate existing dysfunctions in the family system and trigger inappropriate responses on the part of caregivers.

Child abuse can also cause disabilities, and in fact, is estimated to cause about twenty-five percent of all developmental disabilities. Over fifty percent of child victims of severe neglect sustain permanent disabilities.<sup>21</sup> After foster care placement, the experience of former abuse continues to have a detrimental effect on the emotional, social, and physical development of children.<sup>22</sup>

Recognizing that children who have been abused or neglected are at a higher risk for mental health or behavioral issues, HB 08-1391, effective May 14, 2008, instituted a pilot

program to provide mental health screenings, evaluations, and services for any child ages four through ten, who has been subject of a substantiated case of abuse or neglect.<sup>23</sup>

### **3. General Education and Beyond**

States must “address the educational needs of children in the child welfare system as one of the child well being indicators the federal government uses to measure states’ performance” under the Adoption and Safe Families Act (ASFA).<sup>24</sup>

Extra services may be available to children through the school system. Among other possibilities, a school failing under NCLB may be required to provide supplemental services. Guidance counselors may be of great assistance. Sometimes special counseling groups, after school enrichment, or special classes may be available. Resources may exist in the community, such as tutoring or summer programs.<sup>25</sup>

Colorado’s new Response to Intervention model may be helpful for students who are struggling, whether or not they have disabilities. RTI “involves multiple tiers of research-based instruction and services including ones universally provided to all students, targeted interventions for those who are not able to make progress in general education and more intensive services for students with complex needs.”<sup>26</sup> With RTI, the student need not fail before intervention is provided. When any problem presents itself, the teacher uses an intervention, then collects data to see if the student is responding to the intervention. If not, the level of intervention is changed. RTI is expected to serve many children who are slow in learning, but do not have disabilities. As it is implemented throughout Colorado, RTI could help both to solve the problem of over-identification for special education and to provide more timely intervention for children with disabilities.<sup>27</sup>

Specific interventions also exist for reading problems, whether or not they are related to disability. For instance, under the Colorado Basic Literacy Act of 1996, Colorado children in the early grades who test below grade level in reading are provided with an Individual Literacy Plan (ILP), which spells out goals and services the child will receive.<sup>28</sup> An ILP is provided whether or not the child has a disability.

A foster child may also be gifted and talented either globally or in certain specific areas, and thus may qualify for special services as a gifted child. Developing a child's gifts and talents can be life-transforming. Failure to identify giftedness can cause as much failure and frustration as failure to identify disabilities. Nor are the two exclusive. Many children are Twice Exceptional. Twice Exceptional students are gifted and also identified as having a disability.<sup>29</sup> These students need services in both areas to succeed.

Educational plans for foster children with disabilities should include higher education, where appropriate. Many of these children fall victim to low expectations.<sup>30</sup> General and special education services can be designed to prepare students for college.

#### **4. Services for Youth in Foster Care**

Where children need to be served by multiple agencies, wraparound services, where the individualized plan is coordinated between agencies, are the most effective.<sup>31</sup> Strong collaboration between the courts, child welfare, and health and mental health systems is essential to serve a foster child with disabilities.<sup>32</sup> Educational evaluations should be specific and thorough so that disabilities are not over-identified or wrongly identified.

Foster children experience routine lack of compliance with special education laws, partly because they often lack the protection of a parental advocate.<sup>33</sup> IDEA is designed around a parental advocate, and cannot be implemented without one. Often, foster parents have no

involvement in the special education process<sup>34</sup> or training in dealing with disabilities. Foster parents should be instructed in the basics of IDEA. Also, ideally, foster families should be trained in positive behavior supports for children with significant disabilities.<sup>35</sup>

Related services under IDEA can include, among other things, social work services at home and in school; parent training and counseling; therapy (including psychological, occupational, and physical); and recreation services.<sup>36</sup> Children who have experienced abuse, neglect, and the trauma of being removed from the home may need psychological services. For children in out-of-home care, many of the related services may provide some stability and equality of opportunity.<sup>37</sup>

An accurate diagnosis is essential. For example, many foster children are diagnosed as having attention deficit hyperactivity disorder (ADHD), which has symptoms similar to post-traumatic stress disorder (PTSD). The three types of trauma most likely to cause PTSD are rape, childhood physical abuse, and childhood neglect, meaning that large numbers of foster children suffer from the disorder.<sup>38</sup> Unfortunately, although the symptoms can be quite similar, the treatment, including the medication therapy, is different, so that treating a PTSD sufferer for ADHD can be ineffective or even detrimental.<sup>39</sup>

Each foster child should have an educational advocate, whether a parent, an educational surrogate parent (ESP) appointed by the court or department of education, his or her caseworker, or a Court Appointed Special Advocate. Juvenile court judges should also consider foster children's educational needs.<sup>40</sup> For instance, judges can ensure IDEA timelines are enforced for prompt evaluation and provision of services.

Child welfare workers, guardians ad litem, and CASA workers should be sufficiently familiar with disabilities to know when a child needs screening, and with whom to collaborate in

obtaining services.<sup>41</sup> Children with disabilities are often more difficult to interact with and to understand, but need positive interaction even more than children without disabilities.

Although child welfare workers cannot serve as educational surrogate parents (ESPs), they can serve an important role as advocates for education, both with the IEP team and with the juvenile courts.<sup>42</sup> The caseworker may be the only person at the IEP meeting who knows the history of the child, and may have useful strategies to include in the IEP to help reach its objectives.<sup>43</sup>

### **5. Early Education and Foster Care**

Forty percent of all children entering foster care are less than five years old.<sup>44</sup> Many of these children experience, or are at risk of experiencing, developmental delay, which makes them eligible for services under IDEA. Possible educational programs include Early Head Start, Head Start, and early intervention services under IDEA.<sup>45</sup>

Child welfare agencies and attorneys should push for early identification, thorough assessments, and appropriate services and programs. Judges should ask whether developmental and mental health screening have been completed, and about enrollment in early childhood programs.<sup>46</sup>

All Medicaid-eligible children from birth through eighteen years can receive comprehensive health services under Early and Periodic Screening, Diagnosis, and Treatment (EPSDT). This includes all foster children.<sup>47</sup> Children receive medical, vision, hearing and dental screens. Medical screens should include physical exams, including developmental assessments.<sup>48</sup> EPSDT also covers “necessary health care, diagnostic services, treatment, and other measures . . . to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening service.”<sup>49</sup>

A court can order screening under EPSDT, including screening, diagnosis, and treatment services.<sup>50</sup>

Head Start provides full education services to low-income families. Head Start programs must also screen children, and if appropriate, arrange medical services and follow-up treatment. Children in foster care are automatically eligible for Head Start, though they may not have priority in enrollment. However, a provision in Head Start regulations requires that at least 10% of slots be set aside for children with special needs.<sup>51</sup>

Early Head Start includes pregnant women and children up to age three.<sup>52</sup> Early Head Start will include screening for developmental disabilities and delays, as well as other problems.<sup>53</sup>

IDEA Early Intervention under Part C may be appropriate for young children in foster care with disabilities or developmental delays, or a high probability of developmental delays. These services are provided through the school system.<sup>54</sup> Determining the educational decision maker for a foster child before exploring Part C services is crucial, because if a parent rejects services under Part C, there is no statutory procedure to override the parent's decision.<sup>55</sup>

## **6. Access to Educational Records**

Access to accurate school records is necessary for all involved with children in foster care (courts, guardians ad litem, respondent counsel, caseworkers, foster parents, and other advocates).<sup>56</sup> A child's grades and test scores are one of the best indicators of educational progress.<sup>57</sup>

Section 19-1-303(1)(a), C.R.S. 2008, addresses the exchange of information in delinquency and dependency and neglect cases and states:

(1)(a) The *judicial department* or *any agency* that performs duties and functions under this title with respect to juvenile

delinquency or dependency and neglect cases or any other provision of this title may exchange information, to the extent necessary, for the acquisition, provision, oversight, or referral of services and support with the judicial department or any other agency or individual that performs duties and functions under this title with respect to such cases. In order to receive such information the judicial department or the agency shall have a need to know for the purposes of investigations and case management in the administration of their respective programs. The judicial department or the agencies shall exchange information in accordance with paragraph (b) of this subsection (1).

(b) The judicial department or agency described in paragraph (a) of this subsection (1) shall exchange information with the judicial department or similar agencies who have a need to know to the extent necessary for the acquisition, provision, oversight, and referral of services and support and if provided in the course of an investigation or for case management purposes.

Section 19-1-302, C.R.S. 2008, specifically requires schools and school districts to share information with those charged with performing duties under Title 19 of the Children's Code in both juvenile delinquency and dependency and neglect cases. This would include court appointed guardians ad litem,<sup>58</sup> court appointed CASA volunteers,<sup>59</sup> the department of human services,<sup>60</sup> probation officers,<sup>61</sup> the judicial department,<sup>62</sup> respondent counsel,<sup>63</sup> and defense counsel.<sup>64</sup>

House Bill 08-1019, section 22-32-138, C.R.S. 2008, has various provisions to speed up transfer of records and enrollment for children in out-of-home placement, including special education notification.

Records should be maintained in the case files, and included in the case plan. For instance, in one initiative begun by the Office of the Guardian Ad Litem in El Paso County, the GAL regularly files paperwork for each child so the GAL will be permitted to access Parent Connect and similar programs, which are online databases to monitor students' grades and other information. The Office of the Guardian Ad Litem checks students' grades and other academic

information weekly to flag any signs of trouble. See Sample Order to the School District Authorizing Release of Educational Information.<sup>65</sup>

The Order to the School District Authorizing Release of Educational Information allows the school to release the educational records to the following persons, agencies and their representatives who are connected to the case:

- school district;
- El Paso County Department of Human Services;
- Court Appointed Special Advocate;
- court-appointed guardian ad litem;
- presiding judicial official;
- respondent counsel;
- defense counsel;
- child's probation officer.

The order is presented to the school district. Those persons, agencies and their representatives who are connected with the case are not only given access to the records but also have "authorization to exchange educational records and information" among themselves.

In conjunction with the forms, the Office of the Guardian Ad Litem in Colorado Springs also uses the following steps:

- Calls the school district: In El Paso County, a School District Communication Protocol established a single point of contact in each school district for requesting access to school internet systems such as Parent Connect.<sup>66</sup>

- Faxes a cover letter requesting that the GAL be notified of attendance, grades, and behavior issues, attaching the Order of Appointment. (See Sample Form Letter to School Registrar Request for Internet Access.)<sup>67</sup>

The school district will usually give contact information, such as PIN and password to log on to the internet system. The Office of the Guardian Ad Litem reports it is easier to add subsequent schools in the district.<sup>68</sup>

The following are possible ways to release educational information so that the child can be better served.

- Get parental consent for the release of educational information for persons involved with the child (see Sample Informed Consent Release Regarding Educational Records);<sup>69</sup>
- Obtain records through the child welfare agency or the foster parents if they are viewed as the parents;
- Obtain a court order allowing access.<sup>70</sup> (See Sample Order Appointing Guardian ad Litem.)<sup>71</sup> (See Sample Order to the School District Authorizing the Release of Educational Information.);<sup>72</sup>
- Court order for the school to release records, such as report cards and education evaluations, to the court (See Sample Order Request for Completion of Educational Checklist)<sup>73</sup>;
- Court order for agency to bring records to the next hearing;
- A educational surrogate parent (ESP)(appointed by the court or the educational agency if the child is under IDEA and has no parent available to advocate), who commits to maintain educational records.

To serve the child better, schools and child welfare professionals should collaborate. Attorneys involved in a child welfare case can talk to school staff about the child (if there is consent from a parent, an educational surrogate parent, or a court order).

Where parents retain educational rights, they and their attorneys should consider cooperating with releasing information in child welfare proceedings. The child is more likely to receive appropriate academic programming when current caregivers have full knowledge. Moreover, it shows the parents' concern and may aid their reunification case.<sup>74</sup>

## **7. Education Liaisons**

Either a school system or child welfare agency may appoint an education liaison, as is already done in Denver County. Schools can designate a staff member as a liaison between the child welfare system and the courts.<sup>75</sup>

House Bill 08-1019, enacted as 22-32-138, C.R.S. 2008, provides:

(2)(a) Each school district and the state charter school institute, created pursuant to section 22-30.5-503, shall designate an employee of the school district or the institute to act as the child welfare education liaison for the district or for state charter schools. In lieu of designating an employee, a school district or the state charter school institute may contract with an individual to act as the child welfare education liaison. The child welfare education liaison shall be responsible for working with child placement agencies, county departments, and the state department to facilitate the prompt and appropriate placement, transfer, and enrollment in school of students in out-of-home placements within the school district or who are enrolled or enrolling in institute charter schools.

According to section 22-32-138, the duties of the education liaison include:

- Working with social workers, juvenile probation officers and foster care parents on prompt school enrollment and prompt transfer of educational records (2)(a)(I);
- Ensuring that records are delivered to a student's new school within five days of receiving a request from a county department (2)(a)(II).

In addition, an education liaison has typically performed some or all of the following functions:

- Arrange training for school staff on academic and social issues faced by children in out-of-home care;
- Give information to caseworkers navigating the educational system (including special education);
- Help develop agreements between systems at the local level (i.e. identifying who can sign permission slips);
- Serve on the anti-bullying committee at the school;
- Attend IEP meetings;
- Organize college and vocational tours for youth in care;
- Keep track of documents and ensure children who are changing school are enrolled promptly;
- Make sure records are timely transferred to the new school;
- Act as liaison to school staff who track attendance, to address truancy issues quickly;
- Support foster parents in helping children with education;
- Arrange peer support groups for children in out-of-home care;
- Help recruit foster parents;
- Connect children in out-of-home care with tutoring and extracurricular opportunities.<sup>76</sup>

## **8. Changing Schools**

Foster children change schools frequently, which “reinforces a cycle of emotional trauma and abandonment and repeated separations from adults and friends.”<sup>77</sup> Foster children may lose four to six months of educational progress every time they change schools.<sup>78</sup> Foster children

with disabilities change foster home placements more often than foster children without disabilities,<sup>79</sup> and thus it is likely that they change schools more often as well. If records transfer is delayed, a new school may not be aware that a student has an IEP and may not provide special education services.<sup>80</sup>

Those working with foster children should consider school stability as an important goal. Keeping a school placement may be the only stability the child has. Children awaiting foster care placement may be protected from changing schools under the McKinney-Vento Homeless Assistance Act.<sup>81</sup> It may be possible for a child to stay enrolled even if placed outside the school's jurisdiction.<sup>82</sup> Even after a foster home is found, the Act requires school districts to allow the child to finish the school year in the old school. Discuss the situation with the McKinney-Vento liaison at the school district.<sup>83</sup>

House Bill 08-1019 has revised section 19-3-213, C.R.S. 2008, dealing with foster placement, with the addition of a new paragraph, which requires that:

Prior to the change of placement of a child, all parties shall attempt to promote educational stability for the child by taking into account the child's existing educational situation and, to the extent possible and in accordance with the child's best interests, selecting a change of placement that enables the child to remain in the existing educational situation or to transfer to a new educational situation that is comparable to the existing situation.

Colorado School Choice law may allow a child to be enrolled in a school outside the neighborhood, but does not require the school district to provide transportation.<sup>84</sup> The NCLB Act may allow the child to be transferred to a different school if the neighborhood school has been designated a "poorly performing school" for two consecutive years, or is a "persistently dangerous school."<sup>85</sup> If the new school is performing poorly, or if it is dangerous, the child may

be able to remain in the old school with the new school providing transportation to and from the foster home.<sup>86</sup>

Judges should question the educational impact of moving a child, and weigh carefully the potential negative impact of a changed school placement.<sup>87</sup>

The following are steps that may be taken to avoid changing schools:

- First, ask children what they would prefer;
- Address any safety issues with the new school, whether the child can be protected, and whether that is a reason to stay in the old school;
- Try to locate a foster home in the same neighborhood;
- Try to keep children in the same school under the applicable laws;
- See if the child can at least finish the school year;
- Be creative in looking for before/after school care, if that is the problem;
- Be creative in dealing with the problem of foster parents dropping students at multiple schools that start at the same time. Child supervision may be needed for only a few minutes.<sup>88</sup>

If the child must change schools, make sure the new school keeps the timelines required under IDEA.<sup>89</sup>

When a child with an IEP changes schools, the new school has several options:

- If a copy of the IEP is provided, the school could provide all services immediately;
- Provide the child with interim services agreed to by the statutory parent and Director of Special Education while waiting for a copy of the IEP;
- Refer the child for a complete assessment and planning, and in the meantime, provide interim services according to the last IEP or as agreed.<sup>90</sup>

Significant delay is not permitted under IDEA.

### **9. Mental and Emotional Disturbance**

Many children with serious emotional disturbance do not receive the services to which they are entitled under IDEA. “Under IDEA, children with emotional or behavioral disabilities that interfere with their ability to learn are entitled to special education services, including any related mental health services and supports that enable them to benefit from their education.”<sup>91</sup>

For foster children and others eligible for Medicaid, the Early Periodic Screening, Diagnosis and Treatment (EPSDT) is an ideal vehicle for screening for and treating mental health problems.<sup>92</sup>

### **10. Institutionalized Foster Care**

Children in group homes and other institutional settings experience more problems than those in family foster care settings. The latter attain higher levels of education, have fewer problems with the law and substance abuse, and generally experience a more positive outcome. Although it cannot be determined that residential placement causes negative characteristics and outcome, most child welfare experts believe that foster children with disabilities should be placed in non-institutional environments when possible.<sup>93</sup> For instance, even for children with severe emotional disabilities, therapeutic foster care may be beneficial.<sup>94</sup>

Although some children are properly placed in non-public schools, which provide special education services to students on the basis of their IEPs, studies have shown that children with disabilities are over-identified as needing this type of placement, which is quite restrictive.<sup>95</sup> Foster children with disabilities experience more restrictive special education placements compared to other children with disabilities.<sup>96</sup>

Undue institutional isolation of persons with disabilities, such a mental disabilities, is a form of discrimination. “First, institutional placement of persons who can handle and benefit from community settings perpetrates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.”<sup>97</sup> “Second, confinement in an institutional severely diminishes the everyday life activities of individuals. . . .”<sup>98</sup> Thus, children should be placed in the least restrictive setting appropriate for their disabilities, as is required under IDEA.<sup>99</sup>

### **11. Adoption of Children with Disabilities**

An adoption subsidy may be available to help meet the special needs of children with disabilities, based on the needs of the child and the circumstances of the adoptive family.<sup>100</sup> Although this can normally be no higher than the amount the child is eligible for under foster care, it may be higher if the child is eligible for “specialized foster care,” if that form of care is available in the state.<sup>101</sup>

Federal adoption assistance may be an entitlement if certain criteria are met:

- The child was eligible for one of two federal programs; foster care or adoption assistance under Title IV-E or Supplemental Security Income;
- The child has special needs (which may include disabilities or membership in certain groups);
- The child could not be placed without the subsidy;
- There has been a judicial determination that the child should not be returned home.<sup>102</sup>

Adoption subsidies usually consist of a monthly payment and medical assistance. In certain circumstances, agencies and families negotiate about medical services beyond what

Medicaid covers, such as mental health services, educational services, respite care, specialized day care, or in house support.<sup>103</sup>

---

<sup>1</sup> Telephone interview with Keith Kirchubel, Principal Consultant, Dispute Resolution, Colorado Department of Education in Denver Colorado (March 2008).

<sup>2</sup> State Bd. of Educ. Rule 9.02(1)(a), 1 Code Colo. Regs. 301-8 (2007).

<sup>3</sup> Rule 9.02(1)(b).

<sup>4</sup> Rule 9.02(2).

<sup>5</sup> National Council on Disability, *Youth with Disabilities in the Foster Care System: Barriers to Success and Proposed Policy Solutions*, at 4 (2008) available at [http://www.ncd.gov/newsroom/publications/2008/FosterCareSystem\\_Report.html](http://www.ncd.gov/newsroom/publications/2008/FosterCareSystem_Report.html) (viewed on April 17, 2008).

<sup>6</sup> *Id.* at 11.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 53.

<sup>9</sup> Mason Burley and Mina Halpern, *Educational Attainment of Foster Youth 8* (Washington State Institute for Public Policy 2001) available at <http://www.wsipp.wa.gov/rptfiles/FCEDReport.pdf> (viewed on May 14, 2008).

<sup>10</sup> National Council on Disability, *supra* note 5 at 4.

<sup>11</sup> Foster Care Alumni Studies, *Improving Family Foster Care: Findings from the Northwest Foster Care Alumni Study 1*, 32 (March 2005) available at <http://www.casey.org/Resources/Publications/NorthwestAlumniStudy.htm> (viewed on May 5, 2008).

<sup>12</sup> Kathleen McNaught, *Learning Curves: Education Advocacy for Children in Foster Care 11* (ABA Center on Children and the Law 2004).

<sup>13</sup> National Council on Disability, *supra* note 5 at 32.

<sup>14</sup> McNaught, *supra* note 12 at 2.

<sup>15</sup> National Council on Disability, *supra* note 5 at 4.

<sup>16</sup> Foster Care Alumni Studies, *supra* note 11 at 2.

<sup>17</sup> Sarah Geenen and Laurie E. Powers, *Are We Ignoring Youths with Disabilities in Foster Care? An Examination of Their School Performance 234*, Social Work 51.3 (July 2006).

<sup>18</sup> National Council on Disability, *supra* note 5 at 4.

<sup>19</sup> National Resource Center for Respite and Crisis Care Services, *Factsheet Number 36: Abuse and Neglect of Children with Disabilities*, 1 (September 1994) available at <http://www.archrespite.org/archfs36.htm> (last viewed May 5, 2008).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 2.

<sup>22</sup> Brandy Miller, *Falling Between the Cracks: Why Foster Children are Not Receiving Appropriate Special Education Services*, 5 Whittier J. Child & Fam. Advoc. 547, 566 (2006).

<sup>23</sup> § 19-3-208.5, C.R.S. 2008

<sup>24</sup> Angela J. Herrick and Helen D. Ward, *Advocating for the Educational Needs of Children in Out-of-Home Care I-4* Colorado Department of Human Services; See 42 U.S.C. § 675.

<sup>25</sup> McNaught, *supra* note 12 at 9-11.

<sup>26</sup> Herrick and Ward, *supra* note 24 at 3-19.

<sup>27</sup> Interview with Laura Writebol, Colorado Department of Human Services in Denver, Colorado (May 14, 2008).

<sup>28</sup> Herrick and Ward, *supra* note 24 at 3-11.

<sup>29</sup> Rule 12.01(17)(b)(1).

<sup>30</sup> National Council on Disability, *supra* note 5 at 30.

<sup>31</sup> *Id.* at 18.

<sup>32</sup> *Id.* at 48.

<sup>33</sup> Geenen and Powers, *supra* note 17 at 234.

<sup>34</sup> *Id.* at 233.

<sup>35</sup> National Council on Disability, *supra* note 5 at 20.

<sup>36</sup> Miller, *supra* note 22 at 566.

<sup>37</sup> Cynthia Godsoe, *Caught Between Two Systems: How Exceptional Children in Out-of-Home Care are Denied Equality in Education*, 19 Yale L. & Pol'y Rev. 81, 95 (2000).

- 
- <sup>38</sup> Miller, *supra* note 22 at 569.
- <sup>39</sup> *Id.* at 570.
- <sup>40</sup> National Council on Disability, *supra* note 5 at 31.
- <sup>41</sup> *Id.* at 48.
- <sup>42</sup> *Id.* at 26.
- <sup>43</sup> Herrick and Ward, *supra* note 24 at 4-11.
- <sup>44</sup> McNaught, *supra* note 12 at 6.
- <sup>45</sup> *Id.* at 7.
- <sup>46</sup> *Id.*
- <sup>47</sup> *Id.* at 29.
- <sup>48</sup> *Id.* at 28.
- <sup>49</sup> 42 U.S.C. § 1396d(r)(5) (2008).
- <sup>50</sup> McNaught, *supra* note 12 at 29.
- <sup>51</sup> Herrick and Ward, *supra* note 24 at 6-4.
- <sup>52</sup> McNaught, *supra* note 12 at 29.
- <sup>53</sup> *Id.* at 69.
- <sup>54</sup> *Id.* at 30.
- <sup>55</sup> *Id.*
- <sup>56</sup> *Id.* at 2.
- <sup>57</sup> Miller, *supra* note 22 at 554.
- <sup>58</sup> §19-3-203, C.R.S. 2008.
- <sup>59</sup> §19-1-206, C.R.S. 2008.
- <sup>60</sup> §19-3-100.5, C.R.S. 2008.
- <sup>61</sup> §19-2-913, C.R.S. 2008.
- <sup>62</sup> §19-1-303(1)(a), C.R.S. 2008.
- <sup>63</sup> §19-1-105, C.R.S. 2008.
- <sup>64</sup> §19-2-706, C.R.S. 2008.
- <sup>65</sup> Provided by El Paso County Best Practices Court Education Committee f/k/a El Paso County Model Court Education Committee and the El Paso County Model Court Steering Committee.
- <sup>66</sup> Magistrate Regina Walter, Chairperson of the El Paso County Model Court Truancy Committee, established the contacts in each school district.
- <sup>67</sup> Created and provided by Sherri Piccione, Legal Secretary, El Paso County Office of Guardian ad Litem.
- <sup>68</sup> Interview with Ed Rodgers, Office of the Guardian ad Litem, in Colorado Springs, CO (March 19, 2008).
- <sup>69</sup> Written and contributed by Ed Rodgers, Office of the Guardian ad Litem, El Paso County.
- <sup>70</sup> Kathleen McNaught, *Mythbusting: Breaking Down Confidentiality and Decision-Making Barriers to Meet the Education Needs of Children in Foster Care* 13 (American Bar Association 2005) available at <http://www.abanet.org/child/education/other-pub.shtml> (viewed on May 5, 2008).
- <sup>71</sup> Written and contributed by Ed Rodgers, Office of the Guardian ad Litem, El Paso County.
- <sup>72</sup> Provided by El Paso County Best Practices Court Education Committee f/k/a El Paso County Model Court Education Committee and the El Paso County Model Court Steering Committee.
- <sup>73</sup> Provided by El Paso County Best Practices Court Education Committee f/k/a El Paso County Model Court Education Committee and the El Paso County Model Court Steering Committee.
- <sup>74</sup> McNaught, *supra* note 12 at 6.
- <sup>75</sup> *Id.* at 3-4.
- <sup>76</sup> Herrick and Ward, *supra* note 24 at 2-2, 2-3.
- <sup>77</sup> National Council on Disability, *supra* note 5 at 28; citing Sarah Woodward, *California Moves to Improve Group Home Schools*, XXV, 4 Youth Law News (National Center for Youth Law), October-December 2004, Executive Summary at vi.
- <sup>78</sup> Mason Burley and Mina Halpern, *Educational Attainment of Foster Youth* 9 (Washington State Institute for Public Policy 2001) available at <http://www.wsipp.wa.gov/rptfiles/FCEDReport.pdf> (viewed on May 14, 2008).
- <sup>79</sup> Geenen and Powers, *supra* note 17 at 238.
- <sup>80</sup> Andrea Zetlin, *The Experiences of Foster Children and Youth in Special Education* 163, *Journal of Intellectual & Developmental Disability* 31.3 (Sep. 2006).
- <sup>81</sup> 42 U.S.C. § 11431, *et seq.*
- <sup>82</sup> McNaught, *supra* note 12 at 5.

- 
- <sup>83</sup> Herrick and Ward, *supra* note 24 at 3-5.
- <sup>84</sup> *Id.* at 3-4, 3-5; § 22-36-101, C.R.S. 2008.
- <sup>85</sup> *Id.* at 3-5.
- <sup>86</sup> *Id.*
- <sup>87</sup> McNaught, *supra* note 12 at 6.
- <sup>88</sup> Herrick and Ward, *supra* note 24 at 3-3, 3-4.
- <sup>89</sup> *Id.* at 3-9.
- <sup>90</sup> *Id.* at 4-20.
- <sup>91</sup> Testimony of the National Council on Disability, *Juvenile Detention Centers: Are They Warehousing Children with Mental Illness?* 4 (July 7, 2004) available at [http://www.ncd.gov/newsroom/testimony/2004/juvenile\\_07-07-04.htm](http://www.ncd.gov/newsroom/testimony/2004/juvenile_07-07-04.htm) (viewed on May 4, 2008).
- <sup>92</sup> *Id.* at 4-5.
- <sup>93</sup> National Council on Disability, *supra* note 5 at 16-17.
- <sup>94</sup> *Id.* at 18.
- <sup>95</sup> *Id.* at 27.
- <sup>96</sup> Geenen and Powers, *supra* note 17 at 238.
- <sup>97</sup> *Olmstead v. Zimring*, 527 U.S. 581, 600 (1999).
- <sup>98</sup> *Olmstead v. Zimring*, 527 U.S. 581, 601 (1999).
- <sup>99</sup> 20 U.S.C. § 1412(a)(5) (2005).
- <sup>100</sup> 42 U.S.C. § 673(a)(2)(A) (amended 2008 by PL 110-351); Cecilia Fiermonte and Jennifer L. Renne, *Making It Permanent: Reasonable Efforts to Finalize Permanency Plans for Foster Children* 109 (ABA Center on Children and the Law 2002).
- <sup>101</sup> *Id.*
- <sup>102</sup> *Id.* at 110-111.
- <sup>103</sup> *Id.* at 112.

## **V. Special Education and Juvenile Justice**

### **A. Juveniles with Disabilities in Juvenile Justice**

Juveniles in the juvenile justice system are far more likely than other juveniles to have identified as well as undiscovered disabilities. Studies show varying results. One fairly recent study showed that 45.2% of detained or incarcerated juveniles were reported to have a disability.<sup>1</sup> (The percentage of children and youth with disabilities in the general population was only 8.82%.)<sup>2</sup> Seventy percent of juveniles in the juvenile justice system may suffer from disabling conditions.<sup>3</sup> As many as ninety percent may have a mental health disorder.<sup>4</sup> About twenty percent have a serious mental disorder.<sup>5</sup> A recent estimate in Colorado was that one fourth to one third of juvenile cases studied in 2002 involved mental health issues.<sup>6</sup>

Juveniles with disabilities are more likely to make poor decisions that lead to involvement in crime, and more likely to get caught. They may have social skill deficits that result in harsher treatment in the justice system, and may have learning difficulties that make it more difficult for them to be rehabilitated.<sup>7</sup>

Learning disabilities and emotional disorders are the two most common disabilities found in the juvenile justice system.<sup>8</sup> Twenty percent of students with emotional disabilities are arrested at least once before even leaving school.<sup>9</sup> By the time disabled juveniles have been out of school for three to five years, thirty-one percent of those with learning disabilities and fifty-eight percent of those with emotional disturbance have been arrested.<sup>10</sup>

The behavioral disorders most commonly co-occurring with delinquency are Attention Deficit Hyperactivity Disorder (ADHD) and conduct disorder.<sup>11</sup> (See definitions under IDEA.) Conduct problems reflect improper regulation of the anxiety and anger systems, and may reflect a variety of anger and mood disorders, including Post Traumatic Stress Disorder (PTSD).<sup>12</sup>

When information about a juvenile's disability is relevant:

- to determine whether formal delinquency proceedings should proceed;
- to direct investigation and case strategy;
- to explain behavior and suggest constructive intervention;
- to achieve disposition that is rehabilitative and complies with IDEA.<sup>13</sup>

Disabilities should be considered and addressed not only because of statutory rights, but because society benefits if a juvenile deals with underlying problems and becomes a productive citizen. For a juvenile with disabilities, justice and rehabilitation goals can be best served by pursuing solutions within the special education framework, as well as through the juvenile justice system. Even a juvenile who has dropped out of school is eligible for special education services under IDEA until he or she reaches twenty-one years of age.<sup>14</sup>

Juvenile judges should take some time to acquaint themselves with special education law as it applies to the juvenile justice system. Attorneys advocating for juveniles should either devote time to learning special education law or collaborate with outside special education attorneys.

## **B. Special Education and the Schools**

Special education proceedings and juvenile justice proceedings take place in completely different settings, with different rules, but may be interrelated. First, they may concern the identical offense, as criminal charges may be filed for something the juvenile did at school. Second, even if not directly related, the result of special education proceedings might shed light on the juvenile's actions and the rehabilitative process, and might be valuable for the juvenile court.

## 1. Special Education Representation

Either a defense attorney or an outside attorney can advocate for educational rights. Special education representation may add to the overall cost of representation, but depending on the stage of litigation, special education litigants who prevail are entitled by statute to file for attorney fees at market rate.<sup>15</sup>

An attorney must honor the juvenile's perception of his or her best interest and maintain confidentiality. Therefore, it is important to have the juvenile's agreement to pursue special education representation. Some clients feel the stigma of special education labels or the revelation of family secrets are not worth the advantages.

Many special education rights, particularly procedural ones, belong to the parents rather than the juvenile. Representing both parent and juvenile is not necessarily a conflict of interest, but the limits of the representation, and what to do in the case of a disagreement, should be carefully worked out in advance.<sup>16</sup> Conflict at home and failure at school are likely for a juvenile involved in the delinquency system, but resolving disagreements in the family and solving educational needs may also be critical steps towards rehabilitation.<sup>17</sup>

The following are the steps counsel should take in beginning special education representation in a delinquency case:

- File a request for educational records, with a release from the parents and a cover letter.<sup>18</sup>
- Consult with the juvenile about a possible special education strategy, and the need to engage a parent as a client for the special education representation.
- Execute a retainer agreement with parent and juvenile.
- Discuss the goals of the client both educationally and for the delinquency case.

- Obtain all relevant records to investigate the educational, medical, and social history.
- Chart the educational history, organizing the information year by year, and by category.<sup>19</sup>  
Sometimes, this process can unearth a long history of educational neglect.
- Start the process of requesting evaluations or reevaluations and work with the school district to formulate an IEP suitable for the juvenile's needs.
- If the offense occurred at school and school discipline is also involved, pursue a manifestation determination through the IDEA process.
- Combine the special education strategy with the delinquency defense strategy.
- Engage expert witnesses or consultants to evaluate and testify about the disability.<sup>20</sup>

## **2. Zero Tolerance Policies**

Schools' zero tolerance policies can be especially punitive for students with disabilities. Zero tolerance has become a one-size-fits-all solution to the problems that schools confront. It has redefined students as criminals, with unfortunate consequences. Zero tolerance is theoretically directed at students who misbehave intentionally, yet it also applies to those who misbehave as a result of emotional problems or other disabilities, or who merely forget what is in a pocket after legitimate non-school activities.<sup>21</sup> Originally intended as a response to a student with a gun, it now covers the gamut of student misbehavior, including giving an aspirin to a classmate, or saying, "I'm going to get you if you eat all the potatoes" (in that case, the child was arrested for terroristic threats and was incarcerated for two weeks awaiting trial).<sup>22</sup>

"Some research and anecdotal evidence suggests that as schools have become more restrictive and punitive (e.g. zero tolerance approaches to misbehavior), they have increasingly pushed greater numbers of juveniles with disabilities into the juvenile justice system."<sup>23</sup> Perhaps because of this, at times courts have dismissed cases when the school district has failed to

develop and implement an appropriate educational setting for a student with special needs, and has not given the student the support needed to behave well, but has instead filed criminal charges against the student for the misbehavior.<sup>24</sup>

It is not unusual for juveniles with disabilities to be victims of bullying or criminal behavior. In fact, the juvenile's misbehavior, or behavior characterized as misbehavior, may be triggered because he is a victim of bullying. (One youth with emotional disabilities became upset when a fellow student on a field trip insisted on waving a dinner knife in his face. He grabbed the blade of the knife, at which point the fellow student yanked the knife away, scratching the youth's hand. The school's investigation centered around the "misbehavior" of the disabled youth.)

### **3. School-Related Charges**

When charges spring from school-related behavior, special education issues may be closely involved. Juvenile justice professionals should consider the need for a special education eligibility evaluation, modification of an IEP, a functional behavioral analysis, or other appropriate action under IDEA.<sup>25</sup> Even if there has been an evaluation under IDEA, a more comprehensive disability or mental health evaluation may be needed.<sup>26</sup> If there has been no evaluation, it is worth considering if the juvenile has shown a history of behavioral or learning problems that warrants a disability evaluation, and how the family or school has addressed these problems.<sup>27</sup>

If the school should have known the juvenile had disabilities and did not evaluate or provide services, or if the school provided an IEP that was inadequately formulated or implemented, then the juvenile's rights under IDEA have been violated. This may be relevant to the charges if a nexus exists between the disability and the behavior.

When a juvenile is in the juvenile justice system for an incident that occurred at school, it is worth asking whether the failure was the juvenile's or the school's. At times, school districts that have failed to provide preventive services under IDEA have treated juveniles with emotional disturbance as behavior problems.<sup>28</sup> Juveniles with emotional disturbance may be able to function well in school with "positive behavioral supports."<sup>29</sup>

A juvenile advocate can work actively with the juvenile's family and the school to develop or modify an IEP that will meet the juvenile's needs and perhaps give the court a solid basis for dismissing the case.<sup>30</sup> Advocates should also ensure the prosecution and probation officers have access to information about the juvenile's educational status.<sup>31</sup>

If a crime is school-related, the court can consider whether the behavior was a manifestation of the disability, as well as whether the school district has properly met the requirements of IDEA. See the section on School Discipline Under IDEA. Moreover, the school district is still required to comply with IDEA when the juvenile with a disability enters the juvenile justice system.<sup>32</sup>

If the case involves a juvenile with a suspected or identified disability, the disability may make it difficult for the juvenile to understand or comply with programs developed for low-risk delinquent juveniles, such as diversion or probation. The juvenile may have better success with special education behavioral interventions under IDEA.<sup>33</sup> At a minimum, the juvenile may need special support to succeed in these programs.

The juvenile court may wish to consider:

- continuing or deferring formal prosecution pending the outcome of special education manifestation hearing and related proceedings;

- placing first-time and less serious offenders in diversion programs while special education proceedings move forward; and/or
- dismissing the case in the interests of justice, especially where the offense is minor, the juvenile suffers from mental illness, emotional disturbance, or mental retardation, and the juvenile will receive special education services.<sup>34</sup>

## **B. Special Education Issues at Different Stages of Juvenile Justice Proceedings**

### **1. Intake**

If a juvenile has a disability, counsel should notify the court and present information about the disability, including information relevant to a decision for further detention.<sup>35</sup> The court should obtain a juvenile's educational history, especially as related to special education, either with parental consent or by court order.<sup>36</sup> Under IDEA, if the school district has reported the crime, it must provide special education records to authorities:

An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.<sup>37</sup>

If it appears that a juvenile may have developmental disabilities or a mental illness, the court should order an eligibility determination or prescreening.<sup>38</sup> Indeed, at any stage of delinquency proceedings, if “the court, prosecution, probation officer, guardian *ad litem*, parent, or legal guardian has reason to believe that the juvenile could benefit from mental health services,” that person is required to advise the court immediately.<sup>39</sup> The court, unless it already has sufficient information to determine whether the juvenile could benefit from mental health services, or a screening has been completed within the last three months, then is required to order a screening.<sup>40</sup> A standardized screening procedure for the assessment of mental illness is available for juveniles in the juvenile justice system.<sup>41</sup> If the juvenile does have developmental

disabilities or a mental illness, and is then placed in treatment or receives services, “the court may suspend the proceedings or dismiss any actions pending in the juvenile justice system.”<sup>42</sup>

The court and a juvenile advocate should consider whether there is a possibility that, because of a disability, the juvenile does not understand the charges and needs accommodations.<sup>43</sup> These accommodations may mean more time for the explanation of rights, providing written explanations of charges and the juvenile’s rights, and creating a quiet atmosphere in the court room.<sup>44</sup> If a juvenile is on medication and will continue to be detained, the court can enter an order providing for the administration of medication.<sup>45</sup>

The juvenile’s disability can be considered in the decision of whether to divert, and the diversion contract can reflect accommodations for the disability.<sup>46</sup>

## **2. Offenders with Mental Retardation**

Research shows that offenders with mental retardation often fare poorly in the juvenile justice system for reasons related to their disability. The following may be true. Offenders with mental retardation:

- “May not understand the implications of the rights being read to them;
- May confess quickly when arrested and say what they think another person wants to hear;
- May have difficulty communicating with a lawyer and other court personnel;
- May not be recognized as mentally retarded by lawyers and other court personnel;
- Are more likely to plead guilty, are more often convicted of the arresting offense, and are less likely to plea bargain for a reduced sentence than a person without retardation;
- Are less likely to have their sentences appealed;
- Are less likely to receive pretrial psychological examinations;
- Are less frequently placed on probation or in other diversionary non-institutional programs;

- Once in a correctional facility, are slower to adjust to the routine, have more difficulty learning regulations, and accumulate more rule infractions, thus limiting access to programs and parole opportunities;
- Are less likely to take part in rehabilitation programs;
- Are often the recipients of practical jokes and sexual harassment in correctional institutions; and
- Are more frequently denied parole and serve longer sentences than non-retarded offenders incarcerated for the same crimes.<sup>47</sup>

### 3. Detention

Juveniles “taken into secure custody at the time of arrest are entitled to judicial review of the detention decision within a statutory time period.”<sup>48</sup> Juveniles with disabilities are detained disproportionately, possibly because they lack the communication and social skills to make a good presentation to arresting officers or probation officers, and their behavioral affect may seem inappropriate—for example, hostile, unconcerned, or overly emotional.<sup>49</sup> Both judges and attorneys should explore the existence of disabilities, and whether a juvenile’s difficulties with listening, thinking, and speaking may be creating an inaccurate impression of dangerousness or flight risk.<sup>50</sup>

Particularly if special education evaluation or adjustments in the IEP are needed, a program such as home detention may be appropriate.<sup>51</sup> A juvenile’s eligibility for educational services that will reduce the risk of dangerousness or flight, such as counseling and other supports, may impact the detention decision. Even if the juvenile’s IEP does not require those services, the juvenile’s parent can request that the multi-disciplinary team reevaluate the IEP.<sup>52</sup>

Juvenile detention facilities must provide a broad array of educational and rehabilitative services.<sup>53</sup> The educational process in the detention center is administered differently from the Division of Youth Corrections (DYC). In Colorado, schools in the detention centers are administered by the school district in which the detention center is located.<sup>54</sup> The school districts count these students for purposes of financing.<sup>55</sup> Once a juvenile is sentenced, education falls under the DYC. Thus, although detained and sentenced juveniles may be at the same facility, a different administrative body is responsible for their education.<sup>56</sup> The Colorado Department of Education works closely with both the DYC and the Department of Corrections (DOC) to provide technical support and assistance to enhance academic standards and implement a Response to Intervention model.<sup>57</sup> The juvenile's advocate should be aware of exactly who is responsible for implementing the IEP or performing evaluations.

Under IDEA, Child Find obligates institutions to identify all juveniles with disabilities. This should occur even in short-term facilities such as detention centers, partly because useful information can later be shared, and partly because some juveniles end up spending long periods of time in short-term facilities.<sup>58</sup> Failure to provide services in a detention facility may be a violation of IDEA.<sup>59</sup> However, for a short-term confinement, it is sufficient to implement the existing IEP.<sup>60</sup>

At detention facilities, staff should ask if the juvenile is taking medications or has a valid disability.<sup>61</sup> Possible accommodations for a disability could include providing a clear explanation of detention rules with a written copy, contacting the juvenile's school for the IEP, and making needed accommodations in programs.<sup>62</sup>

#### **4. Transfer to Adult Criminal Court**

The determination as to whether a juvenile offense should be direct filed in adult court may be impacted by the existence of disabilities, and the possibility of addressing them through special education and related services available through the Division of Youth Corrections or other facilities for the secure confinement of serious juvenile offenders.<sup>63</sup> The determination may also be impacted by proving that the juvenile never received services to which he or she was statutorily entitled, and that receiving those services might affect the potential for rehabilitation.<sup>64</sup>

#### **5. Pre-sentence Investigations and Probation**

Special education needs should be part of the social study report prepared by the probation department. Statutorily, the pre-sentence investigation may address the “juvenile’s education history, including any special education history and any current individual education program the juvenile may have . . .”<sup>65</sup> Whether or not the probation department recommends probation, special education needs should be part of the social study report.<sup>66</sup>

However, an order for probation may be a more likely and a more appropriate resolution, when a full range of special education services, formalized in an IEP, is available. If the probation department receives this information in advance of sentencing, it can determine how to incorporate the plan into the pre-sentence report, and what recommendation to make.<sup>67</sup>

If a court orders probation, “the court may order the juvenile to comply with his or her individual education program, taking into account the intellectual functioning, adaptive behavior, and emotional behaviors associated with the juvenile’s disabilities, and subject to a manifestation determination . . .”<sup>68</sup>

The court would always want to have DHS involved to make a public placement, and DHS would want to notify the school district. “If a court or public agency makes a public placement but fails to provide the required written notice, such court or public agency shall be responsible for the tuition costs for the child until such time as the required notification is made.”<sup>69</sup>

## **6. Trial and Evidentiary Issues**

The extent and nature of a disability, and its effect on a youth’s thinking and acting, may be significant in determining evidentiary issues. For each of these evidentiary determinations, an accurate special education evaluation and diagnosis would be helpful.

- **Insanity:** when mental illness or mental status affect functioning to the point that a juvenile may be legally insane under State law (emotional disturbance, traumatic brain injury, etc.)
- **Incompetence:** when a juvenile is unable to understand the nature of juvenile court proceedings, unable to assist the defense attorney, or unable to make decisions to exercise or waive important rights (low level of intellectual functioning, emotional disturbance, distractibility, perceptual or communication problems).<sup>70</sup> Sections 19-2-1301 – 1305, C.R.S. 2008, control issues of juvenile competency. When a juvenile is incompetent, the juvenile may not be tried or sentenced.<sup>71</sup> The motion may be raised by any one of a number of people, and the court must determine competency.<sup>72</sup>
- **Intent to commit the offense (mens rea):** may be affected by a disability, especially one involving limited mental functioning or severe emotional disturbance.
- **Confessions:** admissibility of confessions in terms of validity of *Miranda* waivers may be affected by a number of disabilities (comprehension of written materials, mental

retardation, involuntary confession by emotionally disturbed juveniles).<sup>73</sup> Studies of male adolescents' ability to understand *Miranda* warnings indicate that "young people with lower IQ levels and those with learning disabilities misunderstand rights intended to guard against self-incrimination."<sup>74</sup>

A juvenile with a disability might need special accommodation in court proceedings. For example, an auditory processing disorder might require more clear communication and feedback, such as calling the juvenile up to the bench. Careful and simple explanations and extra discussion from judges and attorneys may help, as may parental assistance.<sup>75</sup> Asking a juvenile to explain in his or her own words the information that has been conveyed may confirm understanding or reveal any problems.<sup>76</sup>

## **7. Disposition and Sentencing**

Pursuing educational support for the juvenile may offer the court a broader range of constructive choices.<sup>77</sup> If a youth has an IEP, the court can ask if the juvenile received appropriate services and if the IEP was implemented.<sup>78</sup> If a mental health screening was ordered, the court may also continue a dispositional or sentencing hearing to await the results.<sup>79</sup>

The court can also consider any manifestation determination held by the school for "probative evidence about whether conduct was, in fact, a manifestation of disability."<sup>80</sup> The answer may have bearing on a just disposition.

A disposition order should reflect special education evaluations as well as goals and services under the IEP. Appropriate medication and mental health services may greatly change how a disability such as attention deficit hyperactivity disorder (ADHD) or bipolar disorder affects behavior.<sup>81</sup> An IEP may give the sentencing judge insight about the juvenile's current

level of intellectual functioning, as well as other concerns related to mental health and social issues.<sup>82</sup>

“Research has shown that the programs most likely to rehabilitate youthful offenders address key risk factors that contribute to their antisocial behavior, including disabling conditions that affect behavior and learning.”<sup>83</sup> A large number of juveniles are incarcerated for non-violent offenses (estimates range around two-thirds to three-quarters) and so alternative dispositions may be appropriate.<sup>84</sup> These non-violent offenders are better served by a system of closely supervised community-based services, which may include elements of the following: “prevention, early identification and intervention, assessment, outpatient treatment, home-based services, wraparound services, family support groups, day treatment, residential treatment, crisis services and inpatient hospitalization.”<sup>85</sup> Although costly, evaluations of community-based services show they are highly effective and still less costly than alternative residential services.<sup>86</sup>

Family and community based interventions have positive outcomes that:

- reduce long-term rates of re-arrest
- improve family functioning and school performance
- decrease substance use and psychiatric symptoms
- reduce rates of out-of-home placements
- save significantly on financial costs to the state.<sup>87</sup>

The court should consider whether a correctional setting being considered can accommodate and address the juvenile’s disability. For instance, the type of disability may affect a juvenile’s ability to cope in certain settings, such as a large dormitory in an institution.<sup>88</sup> For some juveniles, rehabilitation will require a facility that can give medications where appropriate, and where the staff is trained to understand various diagnoses such as ADHD and emotional

disorders.<sup>89</sup> Juvenile justice professionals should follow up to ensure juveniles with disabilities receive services ordered at disposition, and that special education rights under IDEA are protected.

Depending on the nature of the disorder, when a juvenile must be institutionalized, hospitalization may be more appropriate than incarceration.<sup>90</sup> Also, if the juvenile could not be educated in the public school, a residential placement for educational purposes under IDEA may be more appropriate than incarceration. Therapeutic and educational services may be available there that would not be available in a detention facility.<sup>91</sup>

## **8. Restorative Justice**

Restorative justice focuses on repairing the harm that crime does to people, communities, and relationships.<sup>92</sup> The goal of restorative justice is repentance for the offender and healing for the victim and community. Approaches to restorative justice include: victim-offender mediation and dialogue, various community decision-making processes, restorative community service, restitution, victim and community impact statements, victim awareness panels, crime repair crews, victims intervention programs, family group conferencing, peacemaking circles, victim empathy classes for offenders, and victim-directed and citizen-involved community service by the offender.<sup>93</sup> Restorative justice policies “provide higher levels of victim and offender satisfaction and a greater likelihood of successful restitution completion by the offender than traditional justice programs,” as well as a reduction of fear for the victim, and greater rehabilitative effect for the offender.<sup>94</sup>

Because juvenile offenders with disabilities may have difficulty understanding the connection between their actions and the consequences, requiring them to make direct restitution to the victims can help establish the link between actions and consequences and help build

restorative relationships.<sup>95</sup> Because a juvenile with a disability may take much longer than average to understand the connections between choices and consequences, an ongoing rehabilitative program that focuses on restorative justice and allows the juvenile to confront the consequences of his choices and the impact on the victim may be very effective. An accommodation could be support in learning the cognitive skills necessary for this process.

Effective March 31, 2008, HB 1117 added a new subsection to section 19-1-103, C.R.S. 2008, to define restorative justice as follows:

“Restorative justice” means those practices that emphasize repairing the harm to the victim and the community caused by criminal acts. Restorative justice practices may include victim-offender conferences attended voluntarily by the victim, a victim advocate, the offender, community members, and supporters of the victim or the offender that provide an opportunity for the offender to accept responsibility for the harm caused to those affected by the crime and to participate in setting consequences to repair the harm. Consequences recommended by the participants may include, but need not be limited to, apologies, community service, restoration, and counseling. The selected consequences are incorporated into an agreement that sets time limits for completion of the consequences and is signed by all participants.

HB 1117 also has amended various statutes to integrate restorative justice practices into diversion, advisement, entry of plea, sentencing, and probation.<sup>96</sup>

### **9. Institutional Settings and Youth Corrections:**

“Institutional education has a clear, positive effect in reducing recidivism and increasing post-release success in employment and other life endeavors.”<sup>97</sup> Juveniles with disabilities are the least likely to have skills needed to hold a job. Special education and related services provided through the institution are critically important.<sup>98</sup> The provisions of IDEA cover both juvenile and adult criminal corrections facilities, with certain exceptions for juveniles incarcerated in an adult criminal corrections facility.<sup>99</sup> (See 20 U.S.C. § 1414 (d)(7)(A) & (B);

34 C.F.R. § 300.324(d)(1) & (2); 34 C.F.R. § 300.102(a)(2); 34 C.F.R. § 300.114(a).) Thus, the state must provide a FAPE in the least restrictive environment to juveniles who are otherwise institutionalized in public or private institutions.<sup>100</sup>

However, juvenile correctional institutions serve a number of perhaps competing purposes: rehabilitation, incapacitation, and punishment. Correctional education programs may also face difficulties beyond those of regular public schools with respect to adequate funding and trained personnel. They are working with a challenging population of students, usually in an overcrowded environment. Thus, it is not uncommon for the provision of special education services to be impeded.<sup>101</sup>

Under IDEA, Child Find obligates institutions to identify all juveniles with disabilities. In the Colorado Division of Youth Corrections (DYC) (which falls under the Colorado Department of Human Services (DHS)), “[e]ach juvenile committed to the custody of the department of human services shall be examined and evaluated by the department prior to institutional placement or other disposition.”<sup>102</sup> Every student who enters the DYC is assessed by a multi-disciplinary team. This team includes education diagnosticians who research prior school placements, and obtain transcripts and/or IEPs (if appropriate). Within thirty days, a staffing is held (which includes the team, the guardians and the student). At this point, a Personal Learning Plan or an IEP (transfer, annual, or triennial, depending on the timelines) is developed. If the student has not been identified as a special education student and there is reason to believe that he/she could possibly have a disability, a referral can be made.<sup>103</sup>

A parent or advocate can request an evaluation from the correctional facility, can assist in the timely transfer of school records, and can be involved in developing the IEP plan, in person

or by teleconference.<sup>104</sup> If a parent is not available, an educational surrogate parent (ESP) may be appointed.<sup>105</sup>

When a juvenile comes to a facility with an IEP, the facility must implement the existing IEP or hold a new IEP meeting, just as a school district would.<sup>106</sup> The NYC is responsible for IEP meetings for incarcerated juveniles, but the NYC invites the administrative unit of residence to attend.<sup>107</sup> Failure to request or transfer educational records, by either the facility or the school district, may be a procedural violation that results in a denial of a free appropriate public education (FAPE).<sup>108</sup> “Under the IDEA and FERPA, neither parental nor juvenile consent is required for the school districts to forward school records to a juvenile detention facility when a [j]uvenile is confined there.”<sup>109</sup> As in a regular school, special education students should be educated with non-disabled students where appropriate. Juveniles with disabilities should be informed of due process protections under IDEA, which are distinct from institutional grievance procedures.<sup>110</sup>

If a detention facility cannot provide the services needed by a juvenile under his or her IEP, the facility “can, and has a duty to, petition the Juvenile Court for educational release for the child as a means of complying with the Individuals with Disabilities Education Act.”<sup>111</sup> The school district then has a duty to accept the juvenile unless it follows the proper due process procedures set out in IDEA for changing the educational placement of the juvenile.<sup>112</sup>

The use of a lockdown or restricted setting for a juvenile with disabilities depends on the facility and the situation. The Code of Federal Regulations provides for modifications of IEPs for a juvenile incarcerated in an adult criminal corrections facility when there is a “bona fide security or compelling penological interest.”<sup>113</sup> This would probably permit lockdowns or restricted settings at times. No such modification is provided for juvenile corrections facilities.

Therefore, if a lockdown or restricted setting is being considered, the normal rules for modifying IEPs would seem to apply, such as the procedural safeguards surrounding a change of placement. These procedural safeguards include review of behavioral intervention plans, functional behavioral assessments, manifestation determinations, and time limits on exclusions, along with the procedural rights to challenge changes in placement.<sup>114</sup> Appropriate behavioral intervention strategies may also reduce the need for lockdown or restricted settings.<sup>115</sup>

Transition services may be the most neglected aspect of corrections special education.<sup>116</sup> Transition services under the IEP (beginning at least by age fifteen in Colorado), should be closely coordinated with institutional planning for parole or release of juvenile offenders.<sup>117</sup> If the juvenile is transitioning back into the home school district, it may help to coordinate further services under the IDEA with the local educational agency.<sup>118</sup> For more detailed information, see the section on transition.

If a juvenile is not eligible for special education services under IDEA, but meets the guidelines under Section 504, a “504 plan” must be developed that specifies accommodations that will be provided to help the juvenile participate in the general curriculum.<sup>119</sup>

#### **10. Best Practices in a Prevention or Intervention Program<sup>120</sup>**

- Assess juvenile to determine skill needs in social, family communication, psychological, academic, and vocational areas;
- Plan goals in these areas and strategies to attain the goals;
- Plan how progress will be monitored regularly;
- Change goals with progress (or failure to progress);

- Interventions that may be successful in teaching skills and dealing with underlying behavior;
  - counseling that teaches problem solving or social skills;
  - cognitive therapy or social cognitive training;
  - social skills training program, including interaction skills, cognitive social skills, and self-control skills;
  - academic intervention in a context suitable for juveniles with disabilities, including a highly structured routine with clear transitions and academic accommodations;
  - vocational training, especially coupled with other interventions;
  - medical intervention where legitimately needed, and in combination with instruction on appropriate skills;
  - substance abuse programs where needed;
  - behavioral system with natural and logical consequences, a continuum of desired incentives, and direct application to the overall intervention plan (many facilities in Colorado use Dialectical Behavioral Therapy, an indepth cognitive behavioral approach);
  - family involvement and family counseling.

### **11. Children and Youth Incarcerated as Adults Under the IDEA**

Either the state educational agency or another public agency has the responsibility to ensure that the requirements of IDEA are met “with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.”<sup>121</sup> The Department of Corrections is responsible for all IEP meetings for juveniles incarcerated in adult facilities.<sup>122</sup>

Certain requirements of IDEA do not apply to juveniles with disabilities incarcerated in adult prisons.<sup>123</sup> IDEA also limits the rights of juveniles with disabilities who are incarcerated in adult correctional facilities in the following ways:

- While a juvenile with a disability generally must be educated in the least restrictive environment, this does not apply to a juvenile with a disability in an adult prison.<sup>124</sup>
- Special education services to juveniles with disabilities, age eighteen through twenty-one, need only be made for juveniles who previously had an IEP or at least were actually identified as being a juvenile with a disability under the IDEA, prior to the incarceration in an adult correctional facility. (However, “states must make FAPE available to students with disabilities in adult prisons who do not fall into those exceptions.”<sup>125</sup>)
- Juveniles with disabilities in adult correctional facilities need not participate in general testing programs.
- Transition services do not apply to individuals whose eligibility under IDEA will end because of their age before they will be released from prison.<sup>126</sup>
- “[T]he educational program and placement of eligible youth with disabilities who are convicted as adults and in adult prisons can be modified if the State shows bona fide security or compelling penological interests that cannot otherwise be accommodated.”<sup>127</sup>

This would include situations where the juvenile poses an immediate threat to self or others. “[T]his specific provision contemplates post-conviction incarcerations.”<sup>128</sup>

Despite these limitations, the U.S. Department of Education has stated that “providing special education to incarcerated youth with disabilities is good public policy.”<sup>129</sup>

[E]ducation has a positive effect on reducing recidivism and a positive effect on post-release employment success. This is hardly surprising in light of the fact that nationwide, the literacy of prisoners is very low. . . Young prisoners with disabilities are

among the least likely to have the skills they need to be able to hold a job. For them, education is probably the only opportunity they have to become productive, independent members of society.<sup>130</sup>

Therefore, best practice is for young prisoners to be provided general and special education where possible.

---

<sup>1</sup> Center for Effective Collaboration and Practice (CECP) & EDJJ, The National Center on Education, Disability, and Juvenile Justice, *Addressing Invisible Barriers: Improving Outcomes for Youth with Disabilities in the Juvenile Justice System* 9 (June 2002) available at [http://cecp.air.org/juvenilejustice/juvenile\\_justice.asp](http://cecp.air.org/juvenilejustice/juvenile_justice.asp) (viewed April 29, 2008).

<sup>2</sup> *Id.*

<sup>3</sup> Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin July 2000, at 1.

<sup>4</sup> Center for Effective Collaboration and Practice (CECP) & EDJJ, The National Center on Education, Disability, and Juvenile Justice, *Best Practices for Serving Court Involved Youth with Learning, Attention and Behavior Disabilities* 3 (June 2002) available at [http://cecp.air.org/juvenilejustice/juvenile\\_justice.asp](http://cecp.air.org/juvenilejustice/juvenile_justice.asp) (last viewed April 29, 2008).

<sup>5</sup> National Center for Mental Health and Juvenile Justice, *Models for Change: Key Issues* 1 available at <http://www.ncmhjj.com/faqs/default.asp> (last viewed on May 2, 2008).

<sup>6</sup> Ann Schrader, *Second Chance for Mentally Ill Teens*, Denver Post, March 11, 2008.

<sup>7</sup> *The Special Needs of Youth in the Juvenile Justice System: Implications for Effective Practice*, Children's Law Center, Covington, Kentucky (2001), Available at [http://www.cjci.org/pdf/special\\_needs.pdf](http://www.cjci.org/pdf/special_needs.pdf) (viewed June 26, 2008).

<sup>8</sup> Burrell and Warboys, *supra* note 3 at 2.

<sup>9</sup> *Id.* at 1.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> CECP and EDJJ, *supra* note 1 at 18.

<sup>12</sup> *Id.* at 17-18.

<sup>13</sup> Burrell and Warboys, *supra* note 3 at 1.

<sup>14</sup> *Unique Challenges, Hopeful Responses: A Handbook for Professionals Working With Youth With Disabilities in the Juvenile Justice System* 47 (Pacer Center, Minneapolis, MN 1997).

<sup>15</sup> Joseph B. Tulman and Joyce A. McGee, eds., *Special Education Advocacy for Children in the Juvenile Delinquency System* 1-4 (University of the District of Columbia School of Law Juvenile Law Clinic, 1998).

<sup>16</sup> *Id.* at 1-8.

<sup>17</sup> *Id.* at 1-9.

<sup>18</sup> *Id.* at 11-3.

<sup>19</sup> *Id.* at 2-17.

<sup>20</sup> *Id.* at 7-3.

<sup>21</sup> Ralph C. Martin, II, *Zero Tolerance Policy Report* 1, American Bar Association, ABA Juvenile Justice Policies (February 2001) available at <http://www.abanet.org/crimjust/juvjus/zerotolreport.html> (viewed on April 17, 2007).

<sup>22</sup> *Id.* at 2.

<sup>23</sup> Testimony of the National Council on Disability, *Juvenile Detention Centers: Are They Warehousing Children with Mental Illness?* 13 (July 7, 2004) available at [http://www.ncd.gov/newsroom/testimony/2004/juvenile\\_07-07-04.htm](http://www.ncd.gov/newsroom/testimony/2004/juvenile_07-07-04.htm) (viewed on May 4, 2008).

<sup>24</sup> Tulman and McGee, *supra* note 15 at 2-3.

<sup>25</sup> Burrell and Warboys, *supra* note 3 at 7.

<sup>26</sup> CECP and EDJJ, *supra* note 1 at 3.

<sup>27</sup> *Id.* at 4.

<sup>28</sup> Testimony of the National Council on Disability, *supra* note 23 at 7.

- 
- <sup>29</sup> *Id.*
- <sup>30</sup> Tulman and McGee, *supra* note 15 at 2-7
- <sup>31</sup> *Id.* at 2-9.
- <sup>32</sup> Burrell and Warboys, *supra* note 3 at 7.
- <sup>33</sup> *Id.* at 7-8.
- <sup>34</sup> *Id.*
- <sup>35</sup> CECP and EDJJ, *supra* note 1 at 20.
- <sup>36</sup> Burrell and Warboys, *supra* note 3 at 7.
- <sup>37</sup> 20 U.S.C. § 1415(k)(6)(B) (2005).
- <sup>38</sup> § 19-3-506(1), C.R.S. 2008.
- <sup>39</sup> § 19-2-710(1), C.R.S. 2008.
- <sup>40</sup> § 19-2-710(2), C.R.S. 2008.
- <sup>41</sup> § 16-11.9-102(1), C.R.S. 2008.
- <sup>42</sup> § 19-3-506(3)(c), C.R.S. 2008.
- <sup>43</sup> CECP and EDJJ, *supra* note 1 at 3.
- <sup>44</sup> *Id.* at 20.
- <sup>45</sup> *Id.*
- <sup>46</sup> *Id.*
- <sup>47</sup> Center for Effective Collaboration and Practice (CECP) and EDJJ, The National Center on Education, Disability, and Juvenile Justice, *Youth with Disabilities in the Correctional System: Prevalence Rates and Identification Issues* 17 (June 2002) available at [http://cecp.air.org/juvenilejustice/juvenile\\_justice.asp](http://cecp.air.org/juvenilejustice/juvenile_justice.asp) (last viewed April 29, 2008).
- <sup>48</sup> Burrell and Warboys, *supra* note 3 at 8.
- <sup>49</sup> *Id.*
- <sup>50</sup> Tulman and McGee, *supra* note 15 at 1-5.
- <sup>51</sup> Burrell and Warboys, *supra* note 3 at 8.
- <sup>52</sup> Tulman and McGee, *supra* note 15 at 2-10.
- <sup>53</sup> The National Center on Education, Disability and Juvenile Justice, *Special Education in Correctional Facilities*, 6 available at [http://www.edjj.org/Publications/list/osep\\_rehabsvrs-1999.html](http://www.edjj.org/Publications/list/osep_rehabsvrs-1999.html) (viewed on May 7, 2008).
- <sup>54</sup> Telephone interview with Barb Taylor, Special Education Director, Division of Youth Corrections, in Denver, Colorado (June 9, 2008).
- <sup>55</sup> Amended Rules for the Administration of the Public School Finance Act 2254-R-5.16, 1 Code Colo. Regs. 301-39 (2007).
- <sup>56</sup> Telephone interview with Barb Taylor, *supra* note 54
- <sup>57</sup> Email from Maureen Wirth, Colorado Department of Education (May 19, 2008, 9:27 a.m.)(on file with author).
- <sup>58</sup> Burrell and Warboys, *supra* note 3 at 10.
- <sup>59</sup> 31 IDELR 250 (child who was sentenced to detention facility was denied free, appropriate public education because: 1) the child was in the detention facility off and on for a number of weeks, for different offenses, but he was not evaluated for special education eligibility, nor was his existing IEP followed at any time; 2) the facility offered no special education instruction, no instruction in daily living skills, and no self care or study skills instruction in clear violation of the IDEA. The child was entitled to compensatory education.)(Note that this 1999 case interpreted IDEA 1997, but the relevant provisions of IDEA 2004 are quite similar.)
- <sup>60</sup> *Alexander S. v. Boyd*, 876 F.Supp. 773, 802, 22 IDELR 139 (D.S.C. 1995).
- <sup>61</sup> CECP and EDJJ, *supra* note 1 at 19.
- <sup>62</sup> *Id.* at 19-20.
- <sup>63</sup> Burrell and Warboys, *supra* note 3 at 8.
- <sup>64</sup> Tulman and McGee, *supra* note 15 at 5-13.
- <sup>65</sup> § 19-2-905(1)(a)(VI), C.R.S. 2008.
- <sup>66</sup> Burrell and Warboys, *supra* note 3 at 9.
- <sup>67</sup> Tulman and McGee, *supra* note 15 at 5-14.
- <sup>68</sup> § 19-2-925(2)(d), C.R.S. 2008.
- <sup>69</sup> State Bd. of Educ. Rule 9.03(2)(a)(ii), 1 Code Colo. Regs. 301-8 (2007).
- <sup>70</sup> Thomas Grisso, *Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform* 5 (American Bar Association) available at <http://www.abanet.org/crimjust/juvjus/12-3gris.html> (viewed on May 7, 2008).
- <sup>71</sup> § 19-2-1301(2), C.R.S. 2008.
- <sup>72</sup> § 19-2-1301(3), C.R.S. 2008.

- 
- <sup>73</sup> Burrell and Warboys, *supra* note 3 at 8-9.
- <sup>74</sup> Tulman and McGee, *supra* note 15 at 2-13.
- <sup>75</sup> Thomas Grisso, *Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform* 10 (American Bar Association) available at <http://www.abanet.org/crimjust/juvjus/12-3gris.html> (viewed on May 7, 2008).
- <sup>76</sup> Lynda E. Frost and Robert E. Shepherd, Jr., *Mental Health Issues in Juvenile Delinquency Proceedings* 3 (American Bar Association 1996) available at <http://www.abanet.org/crimjust/juvjus/cjmental.html> (viewed on May 7, 2007).
- <sup>77</sup> Tulman and McGee, *supra* note 15 at 3-8
- <sup>78</sup> CECP and EDJJ, *supra* note 1 at 3
- <sup>79</sup> § 19-2-710(2), C.R.S. 2008.
- <sup>80</sup> Brad Bittan, *The Mandate to Use Special Education at Juvenile Delinquency Sentencing*, 32 Colo. Law. 99, 101 (2003).
- <sup>81</sup> Burrell and Warboys, *supra* note 3 at 9.
- <sup>82</sup> Brad Bittan, *supra* note 80 at 100
- <sup>83</sup> Center for Effective Collaboration and Practice & EDJJ, The National Center on Education, Disability, and Juvenile Justice, *Advocating for Children with Disabilities in the Juvenile Justice System* 8 (June 2002) available at [http://cecp.air.org/juvenilejustice/juvenile\\_justice.asp](http://cecp.air.org/juvenilejustice/juvenile_justice.asp) (viewed on May 14, 2008).
- <sup>84</sup> National Center for Mental Health and Juvenile Justice, *Models for Change: Key Issues* 2 available at <http://www.ncmhjj.com/faqs/default.asp> (last viewed on May 2, 2008).
- <sup>85</sup> Testimony of the National Council on Disability, *supra* note 23 at 8.
- <sup>86</sup> *Id.* at 10.
- <sup>87</sup> National Center for Mental Health and Juvenile Justice, *Models for Change: Key Issues* 3 available at <http://www.ncmhjj.com/faqs/default.asp> (viewed on May 2, 2008).
- <sup>88</sup> Burrell and Warboys, *supra* note 3 at 9.
- <sup>89</sup> CECP and EDJJ, *supra* note 1 at 22.
- <sup>90</sup> CECP and EDJJ, *supra* note 83 at 9.
- <sup>91</sup> Tulman and McGee, *supra* note 15 at 10-5.
- <sup>92</sup> Pam Stenhjem, *Youth with Disabilities in the Juvenile Justice System: Prevention and Intervention Strategies* National Center on Secondary Education and Transition February 2005, Vol. 4, Issue 1 available at [www.ncset.org](http://www.ncset.org) (last viewed May 4, 2008).
- <sup>93</sup> *Id.*
- <sup>94</sup> *Id.*
- <sup>95</sup> CECP and EDJJ, *supra* note 83 at 8.
- <sup>96</sup> § 19-2-303, C.R.S. 2008; § 19-2-706, C.R.S. 2008; § 19-2-708, C.R.S. 2008; § 19-2-907, C.R.S. 2008; § 19-2-925, C.R.S. 2008.
- <sup>97</sup> Burrell and Warboys, *supra* note 3 at 10
- <sup>98</sup> *Id.*
- <sup>99</sup> *Id.*; *Alexander v. Boyd*, 876 F.Supp. 773, 800-04 (S.D. S.C. 1995)(State correctional facilities also responsible to meet requirements under Section 504 and ADA).
- <sup>100</sup> 34 C.F.R. § 300.118.
- <sup>101</sup> Sheri Meisel, et al., *Collaborate to Educate: Special Education in Juvenile Correctional Facilities* (The National Center on Education, Disability and Juvenile Justice 1998) available at [http://www.edjj.org/Publications/list/meisel\\_henderson\\_cohen\\_leone-1998.html](http://www.edjj.org/Publications/list/meisel_henderson_cohen_leone-1998.html) (viewed on May 7, 2008).
- <sup>102</sup> § 19-2-922(1)(a), C.R.S. 2008.
- <sup>103</sup> E-mail from Barb Taylor, Division of Youth Corrections (June 11, 2008)(on file with author).
- <sup>104</sup> National Children's Law Network, *In School, the Right School, Finish School* 30 (Holland & Hart and Rocky Mountain Children's Law Center 2007).
- <sup>105</sup> *Id.*
- <sup>106</sup> Burrell and Warboys, *supra* note 3 at 10.
- <sup>107</sup> Rule 8.06(1)(a).
- <sup>108</sup> 31 IDELR 250.
- <sup>109</sup> 31 IDELR 250 (however, the school district should provide reasonable notice to the parents that the records have been transferred); *Alexander S. v. Boyd*, 876 F.Supp. 773, 802, 22 IDELR 139 (D.S.C. 1995).
- <sup>110</sup> Burrell and Warboys, *supra* note 3 at 11.
- <sup>111</sup> 31 IDELR 250.

---

<sup>112</sup> 31 IDELR 250.

<sup>113</sup> 20 U.S.C. § 1414(d)(6)(B) (2005); 34 C.F.R. § 300.324 (d)(2).

<sup>114</sup> Burrell and Warboys, *supra* note 3 at 11.

<sup>115</sup> *Id.*

<sup>116</sup> The National Center on Education, Disability and Juvenile Justice, *Special Education in Correctional Facilities*, 8 available at [http://www.edjj.org/Publications/list/osep\\_rehabsvrs-1999.html](http://www.edjj.org/Publications/list/osep_rehabsvrs-1999.html) (viewed on May 7, 2008).

<sup>117</sup> 20 U.S.C. § 1414(d)(1)(A)(i)(VIII). This is an example of a state making a more stringent administrative rule. In lieu of 34 C.F.R. § 300.320(b), Rule 4.03(6)(d)(i) requires the transition plan begin no later than the age of 15, rather than 16.

<sup>118</sup> Burrell and Warboys, *supra* note 3 at 11.

<sup>119</sup> Sheri Meisel, et al., *supra* note 101 at 3.

<sup>120</sup> CECF and EDJJ, *supra* note 4 at 5-21.

<sup>121</sup> 20 U.S.C. § 1412(a)(11)(C) (2005).

<sup>122</sup> Rule 8.06(1)(b).

<sup>123</sup> 20 U.S.C. § 1414(d)(7)(B); 34 C.F.R. 300.324(d)(2).

<sup>124</sup> 34 C.F.R. § 300.114(a).

<sup>125</sup> 34 C.F.R. § 300.102(a)(2); 39 IDELR 270 (but see 33 IDELR 6, holding that the Washington Department of Corrections had no obligation to provide public or special education to any individuals between 18 and 22 years of age.)

<sup>126</sup> 20 U.S.C. § 1414 (d)(7)(A) & (B); 34 C.F.R. 300.324(d)(1); 30 IDELR 607 (Note that this 1998 letter from the Federal Office of Special Education Program interprets IDEA 1997, but because the prison provisions are quite similar, the post-2004 IDEA may be read as retaining those concepts.).

<sup>127</sup> 30 IDELR 607; 20 U.S.C. § 1414(d)(7)(B).

<sup>128</sup> 39 IDELR 270; 20 U.S.C. § 1414(d)(6).

<sup>129</sup> 30 IDELR 607.

<sup>130</sup> 30 IDELR 607.

## **VI. Transition—Foster Care and Juvenile Justice**

### **A. Transition Overview**

#### **1. Transition to Adulthood**

The National Collaborative on Workforce and Disability for Youth has made recommendations for transition to adulthood.

All youth may need:

- mental or physical health services;
- transportation;
- tutoring;
- financial planning and management;
- structured arrangements in postsecondary institutions and adult service agencies.

Youth with disabilities may need in addition:

- appropriate assistive technologies;
- community orientation and mobility training;
- exposure to post-program supports such as independent living services;
- personal assistance services (such as interpreters);
- benefits planning counseling.

Foster youth may need in addition:

- opportunity to obtain a driver's license, library card, voter registration, birth certificate, medical records;
- adults to help navigate systems;
- transitional and long term housing;
- access to financial aid for college;

- health care information;
- foster care caseworkers helping youth make connections in work and community.<sup>1</sup>

## **2. Special Education Transition in Colorado**

Colorado's State Performance Plan for fiscal years 2005-10 reports that 2.1 percent "of youth with disabilities aged 16 and above were estimated to have an IEP that includes coordinated, measurable, annual IEP goals and transition services that will reasonably enable the student to meet the post-secondary goals."<sup>2</sup> Deficiencies included the following: transition documentation was lacking in IEPs (possibly omitting transition preparation that had actually occurred); Post School Goals were often lacking or not coordinated, and linkage with Adult Service agencies was lacking.<sup>3</sup>

The Colorado Department of Education has provided a number of educational and training opportunities to improve transition planning.<sup>4</sup> Also, the Colorado Department of Education Exceptional Student Leadership Unit has a variety of resources for transition planning (see Resources). Adequate transition planning should be the concern of all involved with a child in the child welfare or juvenile justice system.

## **3. Transition and Section 504**

Transition services under Section 504 means a coordinated set of activities that may include a number of important services, such as vocational training or supported employment.<sup>5</sup> However, the structure of these services is not defined as it is under IDEA.

## **4. Transfer of Educational Rights**

Under FERPA and IDEA, students over 18 have control of their educational records and educational decisions. Under FERPA, consent to release of records must come from the student,

though a notice of disclosure is sent to both student and parent.<sup>6</sup> Under IDEA, states transfer rights to the student unless the student is determined to be incompetent.<sup>7</sup>

## **B. Transition Services Under the IDEA**

### **1. Statutory Requirements Under IDEA**

Transition services “means a coordinated set of activities for a child with a disability that”:

- (A) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
- (B) is based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests; and
- (C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.<sup>8</sup>

These services are to begin no later than when the child is fifteen, or the end of the ninth grade.<sup>9</sup> The IEP must include “[a]ppropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills. . . .”<sup>10</sup> In Colorado, the IEP includes the transition services needed to assist the child in reaching the above goals.<sup>11</sup> The child also must be informed at least a year before the age of majority of transfer of educational rights.<sup>12</sup>

A child with a disability who has graduated from high school with a regular high school diploma, as opposed to graduating with a modified diploma, is no longer eligible for a free appropriate public education (FAPE) under IDEA.<sup>13</sup>

## **2. Implementing Educational Transition Under IDEA**

Starting around age fourteen, an IEP team, consisting of the child, parents or educational surrogate parent (ESP), school personnel, the child's guardian ad litem if applicable, and representatives from agencies such as vocational rehabilitation or child welfare, convenes to discuss the child's goals after high school and what services are necessary to support this transition. Each year, the IEP team should consider what transition services are needed for that year so the student will be fully prepared by the time he or she leaves high school.<sup>14</sup> These services may include additional classes, independent living skills, employment skills, and connections to other agencies.<sup>15</sup>

Students with disabilities have challenges in higher education. They may have difficulty taking on a heavy workload of work and classes.<sup>16</sup> Some institutions provide good support for students with disabilities, while others do not.

For entering the workforce, youth with disabilities need to:

- “understand the relationships between benefits planning and career choices;
- learn to communicate their disability-related work support and accommodation needs;
- learn to find, formally request, and secure appropriate supports and reasonable accommodations in education, training and employment settings.”<sup>17</sup>

Note that while IDEA does not extend past the age of 21, Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act still provide protections.

## **3. Other Agencies and Transition Planning for Disabilities**

Other agencies may be involved in transition planning and may attend the IEP transition planning meetings:

- Division of Vocational Rehabilitation (DVR) provides services to people with disabilities to help reach employment goals. Qualifications for DVR are less stringent than under IDEA.
- Division for Developmental Disabilities and the Community Centered Board System is responsible for services for people who have a developmental disability, typically those with an IQ score of 70 or less, and adaptive behavior needs. Add the child's name to the waiting list at the age of fourteen, because the list is long.
- Division of Mental Health and Community Mental Health Centers services persons with mental health needs who are Medicaid eligible or have no or limited health insurance.<sup>18</sup>
- The School to Work Alliance Program (SWAP) was developed through collaborative agreements among the Colorado Department of Education, the Division of Vocational Rehabilitation and community organizations. It provides many job development, job placement, and job training services.<sup>19</sup>

Other agencies also provide help in general transition planning that could be incorporated into IEP transition planning. The Carl D. Perkins Vocational and Applied Technology Education Act<sup>20</sup> provides funds to states and school system for vocational education programs. Under the Perkins Act, special populations, such as those with disabilities and other disadvantages, have access to vocational education programs, supplementary services, and career counseling.<sup>21</sup>

The School-to-Work Opportunities Act<sup>22</sup> provides schools and communities with funds to create school to work programs that integrate vocational and educational goals and help with job placement.<sup>23</sup>

### **C. Transition from Foster Care**

In addition to educational transition under IDEA, foster children must transition out of foster care. DHS is responsible for drafting a plan, called a Family Service Plan, for transition from foster care to independent living and emancipation. It must be based on the individual needs of the child and be in the best interests of the child. The Family Service Plan must document services that are to be provided for the areas of need. The services are described “in terms of specific, measurable, agreed upon, realistic, time-limited objectives and action steps to be accomplished by the parents, child, service providers and county staff.”<sup>24</sup>

For children age 16 and older in out-of-home placement, the transition plan must be completed within sixty calendar days of the child’s sixteenth birthday.<sup>25</sup> The plan must assist the youth in preparation for self-sufficiency and independent living.<sup>26</sup>

#### **1. John H. Chafee Foster Care Independence Act of 1999 (Chafee Act)**

The Act, which is intended to help young adults transition out of foster care to independent living, sets forth five types of programs and provides federal funds for states to implement the programs.<sup>27</sup>

- Transition help for children likely to remain in foster care until age eighteen in the areas of daily living and health skills;
- Transition help for children likely to remain in foster care until age eighteen in training and education to obtain employment;
- Transition help for children likely to remain in foster care until age eighteen in preparation for post-secondary education;
- Transition help in the form of personal and emotional support to children aging out of foster care;

- Transition help to former foster children between eighteen and twenty-one years of age in finance, housing, counseling, employment, and education.<sup>28</sup>

The Chafee Foster Care Independence Program (CFCIP) enables states to provide independent living programs and services to foster youth “aging out” of the foster care system, and the services extend to age 21.<sup>29</sup> The following youth are eligible for assistance:

- youth in out-of-home care, under the age of 16, who have a permanency goal;
- youth in out-of-home care, ages 16-21, who have a permanency goal;
- youth ages 16-21 who have been dually adjudicated both delinquent and abused or neglected, and who have been, at some point, in the care of the Department of Human Services;
- young adults ages 18-21 who were in out-of-home care on their 18th birthday.<sup>30</sup>

Chafee also provides an Educational and Training Voucher Program for Youth Aging Out of Foster Care, which provides education and training funds for postsecondary education.<sup>31</sup> Some services offered under CFCIP are:

- tutoring;
- peer support;
- career counseling;
- housing assistance;
- independent life skills training;
- tuition vouchers for post secondary education.<sup>32</sup>

If youth are in a Residential Treatment Center, the RTC is responsible for providing independent living skills.<sup>33</sup>

## **2. Medicaid Eligibility**

Effective July 1, 2008, Senate Bill 08-099, section 25.5-5-201(1), C.R.S. 2008, provides that children receiving foster care maintenance or adoption assistance payments are eligible for medical assistance under Medicaid from when they turn eighteen until they turn twenty-one.<sup>34</sup>

## **3. Special Issues With Foster Care Transition**

The Chafee Act doubles the amount of federal funds provided to the states for services for teens leaving the child welfare system.<sup>35</sup>

Potential problems for IEP transition for youth in foster care are 1) lack of coordination with CFCIP transition planning; 2) lack of postsecondary education goals; 3) lack of parent participation without provision of an educational surrogate parent (ESP); and 4) less advocate involvement.<sup>36</sup>

Both the IEP and CFCIP provide, or should provide, transition services, but the two systems often operate independently, without coordination.<sup>37</sup> There may be almost no alignment of IDEA's IEP transition plan with the transition plan required by the child welfare system, even though coordination is critical.<sup>38</sup>

Fewer foster youth go to college compared to youth who are not in the child welfare system. Special problems faced by foster youth may be that they are not prepared for the self-sufficiency and independent living required in college, or even adult life in general.<sup>39</sup> This is true for non-foster youth as well, but they tend to have better support systems from parents.

Institutionalized foster youth are especially vulnerable to being inadequately prepared because the transition of leaving the group home on the eighteenth birthday can be extremely abrupt.<sup>40</sup>

## **D. College Transition**

For students with disabilities and those aging out of foster care, or both, the transition to college can be difficult.

Students with disabilities may need special education support in college. Postsecondary institutions that receive any federal grant money (most of them) are obligated to provide accommodations under the Americans With Disabilities Act and Section 504. However, students must file paperwork to request accommodations, and document their disabilities.<sup>41</sup> When a student graduates with a regular diploma, or ages out of IDEA, the school must provide the student with a summary of the child's academic achievement and functional performance, which must include recommendations on how to assist the student to meet postsecondary goals.<sup>42</sup> If the last IEP is well written, and includes this summary, that should be adequate to establish disability documentation. Students with disabilities should also request needed accommodations.

Colleges vary greatly in their level of support for students with disabilities. Ideally, a disability counselor should be available to support the student, to help solve problems, and to advocate for the student with professors and other personnel. The counselor should meet with the student perhaps once a week initially. Other services such as tutoring should be available as needed. Accommodations for the student should be readily available. If the student and parents discuss the disability issue with different schools, they will be able to discern which schools support disability issues with enthusiasm and which ones pay lip service to the concept. One of the author's sons attends a school with an enthusiastic, pro-active disability counselor, who meets with him as often as required, and has advocated for him. He chose not to attend a school that asked to know what his disabilities were before they accepted him!

Special problems faced by foster youth may be that they are not prepared for the self-sufficiency and independent living required in college.<sup>43</sup> This is true for non-foster youth as well, of course, but they tend to have better support systems from parents. Institutionalized foster youth are especially vulnerable because the transition of leaving the group home on the eighteenth birthday can be extremely abrupt.<sup>44</sup>

Programs focusing on success for foster youth in college are growing but not widely available.<sup>45</sup> Considerations for foster youth transitioning to college include:

- support for college planning and filling out paperwork, which can be overwhelming
- where they will live, because they need year-round housing;
- help applying for financial aid, and access to funds available for foster youth (such as through Chafee Education Training Vouchers);
- support system in college;
- medical coverage, through Medicaid or through the school;
- transportation issues (or a college that does not require private transportation);
- technology access (such as a laptop through Chafee ETV).

Needs of students with disabilities and foster youth are similar in many ways, and must be addressed for the students to succeed in higher education.

### **E. Transition from Incarceration**

To prevent relapse, juveniles with disabilities coming out of incarceration need ongoing care. The court can ask whether those involved with the juvenile, such as family, employers, and teachers, understand the juvenile's disability-related needs and can provide support to help the juvenile transition back into the community.

#### **1. Best Practices for Transition**

The following are some best practices for transition.

- Help a juvenile in a community setting practice new behaviors in increasingly difficult situations, with staff support at first, then gradually with less monitoring.
- Prepare a transition plan with possible hazards for relapse and ways to overcome these; this could include specifically planning what the juvenile will do every day for the first two weeks after release.
- Continue with family and service providers.
- Train family and others how to provide reinforcement for positive behavior.
- Schedule booster sessions with care providers.<sup>46</sup>
- Gather and transfer records of credits earned in the correctional setting.
- In developing a new IEP for the school setting, discuss and clarify guidelines about rules and school expectations, including modifications and coping skills.<sup>47</sup>
- If there are mental health or emotional disturbance issues, be sure juveniles reconnect with the education system and are provided proper intervention and support.<sup>48</sup>

## **2. Transition Under NCLB**

The state agency must reserve a certain portion of funds granted by NCLB for transition services. These services facilitate transition of institutionalized children and youth, including incarcerated youths, to local schools or to postsecondary education or vocational and technical training programs.<sup>49</sup> The agency provides essential support services, such as counseling, job and educational placement services, and assistance obtaining financial aid.<sup>50</sup>

Correctional facilities receiving funds under NCLB shall, where feasible, coordinate educational programs with a student's home school, particularly with respect to an IEP.<sup>51</sup>

Transition assistance to help a juvenile stay in school includes "coordination of services for the

family, counseling, assistance in accessing drug and alcohol abuse prevention programs, tutoring, and family counseling.”<sup>52</sup>

---

<sup>1</sup> National Council on Disability, *Youth with Disabilities in the Foster Care System: Barriers to Success and Proposed Policy Solutions*, at 37 (2008) available at [http://www.ncd.gov/newsroom/publications/2008/FosterCareSystem\\_Report.html](http://www.ncd.gov/newsroom/publications/2008/FosterCareSystem_Report.html) (viewed on April 17, 2008); Guidepost documents at [http://www.ncwd-youth.info/resources\\_&\\_Publications/guideposts/](http://www.ncwd-youth.info/resources_&_Publications/guideposts/) (viewed on April 17, 2008).

<sup>2</sup> Colorado Department of Education Exceptional Student Services Unit, *Colorado FFY 2005-2010 State Performance Plan for Special Education*, at 84 (2005, updated February 2008) available at [www.cde.state.co.us/cdesped/download/pdf/sipCO\\_SPP\\_2005\\_Final.pdf](http://www.cde.state.co.us/cdesped/download/pdf/sipCO_SPP_2005_Final.pdf) (viewed on February 6, 2009).

<sup>3</sup> *Id.* at 89.

<sup>4</sup> *Id.* at 91-93; see Exceptional Student Services Unit homepage at <http://www.cde.state.co.us/cdesped/> for contact information.

<sup>5</sup> 29 U.S.C. § 705(37) (1998).

<sup>6</sup> Kathleen McNaught, *Learning Curves: Education Advocacy for Children in Foster Care* 31 (ABA Center on Children and the Law 2004).

<sup>7</sup> *Id.* at 30.

<sup>8</sup> 20 U.S.C. § 1401(34) (2008).

<sup>9</sup> 20 U.S.C. § 1414(d)(1)(A)(i)(VIII) (2005). This is an example of a state making a more stringent administrative rule. In lieu of 34 C.F.R. § 300.320(b), State Bd. of Educ. Rule 4.03(6)(d)(i), 1 Code Colo. Regs. 301-8 (2007) requires the transition plan begin no later than the age of 15, rather than 16.

<sup>10</sup> 34 C.F.R. § 300.320(b).

<sup>11</sup> Rule 4.03(6)(d)(iii).

<sup>12</sup> Rule 4.03(6)(e).

<sup>13</sup> 34 C.F.R. § 300.102(a)(3).

<sup>14</sup> Joseph B. Tulman and Joyce A. McGee, eds., *Special Education Advocacy for Children in the Juvenile Delinquency System* 9-8 (University of the District of Columbia School of Law Juvenile Law Clinic, 1998).

<sup>15</sup> National Council on Disability, *supra* note 1 at 35.

<sup>16</sup> *Id.* at 31.

<sup>17</sup> National Collaborative on Workforce and Disability, *Guideposts for Success* 4 available at [http://www.ncwd-youth.info/resources\\_&\\_Publications/guideposts/](http://www.ncwd-youth.info/resources_&_Publications/guideposts/) (viewed on May 2, 2008).

<sup>18</sup> Angela J. Herrick & Helen D. Ward, *Advocating for the Educational Needs of Children in Out-of-Home Care* 7-14 Colorado Department of Human Services.

<sup>19</sup> *School to Work Alliance Program* available at [http://www.cdhs.state.co.us/dvr/par\\_SWAP.htm](http://www.cdhs.state.co.us/dvr/par_SWAP.htm) (viewed on June 12, 2008).

<sup>20</sup> 20 U.S.C. § 2301 *et seq.* (2006).

<sup>21</sup> *Special Education Advocacy*, *supra* note 14 at 9-10.

<sup>22</sup> 20 U.S.C. § 6101 *et seq.* (2008).

<sup>23</sup> *Special Education Advocacy*, *supra* note 14 at 9-11.

<sup>24</sup> Child Welfare Services Reg. No. 7.301.23(A), 12 Code Colo. Regs. 2509-4.

<sup>25</sup> Child Welfare Services Reg. No. 7.301.21(C).

<sup>26</sup> Child Welfare Services Reg. No. 7.301.24(K).

<sup>27</sup> National Children’s Law Network, *In School, the Right School, Finish School* 27 (Holland & Hart and Rocky Mountain Children’s Law Center 2007).

<sup>28</sup> 42 U.S.C. § 677(a)(5) (2002).

<sup>29</sup> 42 U.S.C. § 677.

<sup>30</sup> Herrick & Ward, *supra* note 18 at 7-6.

<sup>31</sup> National Council on Disability, *supra* note 1 at 29.

<sup>32</sup> Herrick & Ward, *supra* note 18 at 7-5.

- 
- <sup>33</sup> *Id.* at 7-5 to 7-6.
- <sup>34</sup> § 25.5-5-101, C.R.S. 2008.
- <sup>35</sup> McNaught, *supra* note 6 at 30.
- <sup>36</sup> National Council on Disability, *supra* note 1 at 35.
- <sup>37</sup> *Id.* at 6
- <sup>38</sup> *Id.* at 30.
- <sup>39</sup> *Id.* at 31.
- <sup>40</sup> *Id.* at 38.
- <sup>41</sup> Cheryl Sahlen and Jean Lehmann, *Requesting Accommodations in Higher Education*, Teaching Exceptional Children, Vol. 38, No. 3, pp. 28-34 (2006).
- <sup>42</sup> 20 U.S.C. § 1414(c)(5)(B)(ii).
- <sup>43</sup> National Council on Disability, *Youth with Disabilities in the Foster Care System: Barriers to Success and Proposed Policy Solutions*, at 31 (2008) available at [http://www.ncd.gov/newsroom/publications/2008/FosterCareSystem\\_Report.html](http://www.ncd.gov/newsroom/publications/2008/FosterCareSystem_Report.html) (viewed on April 17, 2008).
- <sup>44</sup> National Council on Disability, *Youth with Disabilities in the Foster Care System: Barriers to Success and Proposed Policy Solutions*, at 38 (2008) available at [http://www.ncd.gov/newsroom/publications/2008/FosterCareSystem\\_Report.html](http://www.ncd.gov/newsroom/publications/2008/FosterCareSystem_Report.html) (viewed on April 17, 2008).
- <sup>45</sup> John Emerson, *From Foster Care to College: Supporting Independent Students*, NASPA Leadership Exchange, Vol. 4, Issue 4 (Winter 2007).
- <sup>46</sup> Center for Effective Collaboration and Practice & EDJJ, The National Center on Education, Disability, and Juvenile Justice, *Best Practices for Serving Court Involved Youth with Learning, Attention and Behavior Disabilities* 21-22 (June 2002) available at [http://cecp.air.org/juvenilejustice/juvenile\\_justice.asp](http://cecp.air.org/juvenilejustice/juvenile_justice.asp) (last viewed April 29, 2008).
- <sup>47</sup> *Unique Challenges, Hopeful Responses: A Handbook for Professionals Working With Youth With Disabilities in the Juvenile Justice System* 49 (Pacer Center, Minneapolis, MN 1997).
- <sup>48</sup> Testimony of the National Council on Disability, *Juvenile Detention Centers: Are They Warehousing Children with Mental Illness?* 9 (July 7, 2004) available at [http://www.ncd.gov/newsroom/testimony/2004/juvenile\\_07-07-04.htm](http://www.ncd.gov/newsroom/testimony/2004/juvenile_07-07-04.htm) (viewed on May 4, 2008).
- <sup>49</sup> 20 U.S.C. § 6438(a)(1) & (2) (2002).
- <sup>50</sup> 20 U.S.C. §6438(2)(C)(a).
- <sup>51</sup> 20 U.S.C. § 6455(1) (2002).
- <sup>52</sup> 20 U.S.C. § 6455(3).

## VII. Resources and Acknowledgements

### A. Annotated Resources

#### 1. Useful Websites

Bazelon Center for Mental Health Law

[www.bazelon.org](http://www.bazelon.org) (viewed April 17, 2008)

Online informational publications, legal briefs and analyses, and advocacy primers relating to youth with mental disabilities.

Casey Life Skills

[www.caseylifekills.org](http://www.caseylifekills.org) (viewed April 17, 2008)

Assessments that evaluate independent living skills for different age groups, in English, Spanish, and French.

Colorado Department of Education Exceptional Student Leadership Unit Website

Homepage is: <http://www.cde.state.co.us/cdesped/index.asp> (last viewed April 29, 2008)

Transition resources are at: <http://www.cde.state.co.us/cdesped/TransResources.asp> (last viewed April 29, 2008).

The website has a wealth of resources covering many topics. Sometimes it can be a little tricky to navigate, but the search engine works well. Variety of useful information. Go to “Laws and Regulations” for IDEA, Exceptional Children’s Educational Act Rules, and others. Also, Department employees are helpful and have a wealth of expertise.

Early Intervention Colorado

Available at [www.eicolorado.org](http://www.eicolorado.org) (viewed Feb. 24, 2009)

Early intervention supports and services for infants, toddlers, and their families.

1-888-777-4041

Another contact: Division for Developmental Disabilities, Colleen Head 303-866-7262

This is where you want to start if you are advocating for a child under the age of three with possible disabilities.

Mountain Plains Regional Resource Center

Available at <http://www.rfcnetwork.org/mprrc> (viewed June 24, 2008)

Federally funded resource center on special education to help states improve programs and services.

The National Center on Education, Disability, and Juvenile Justice

[www.edjj.org](http://www.edjj.org) (viewed April 15, 2008)

Useful materials on the website about the intersection of disability and the juvenile justice system.

National Information Center for Children and Youth With Disabilities (NICHCY)  
[www.nichcy.org](http://www.nichcy.org) (viewed April 15, 2008)

National information and referral center for families, educators and advocates on specific disabilities, special education and related services, and educational rights. Numerous useful articles. Information also available in Spanish.

Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S.  
Department of Justice

[www.ojjdp.ncjrs.org](http://www.ojjdp.ncjrs.org) (viewed April 15, 2008)

Wide range of information on juvenile justice issues, including education-related resources.

Wrightslaw

[www.wrightslaw.com](http://www.wrightslaw.com) (viewed April 17, 2008)

Probably the most comprehensive and easy to use resource available for special education and advocating for children with disabilities. Numerous articles and resources, free email Special Ed Advocate, excellent publications.

Yellow Pages for Kids With Disabilities

<http://www.yellowpagesforkids.com> (viewed Sept. 30, 2008)

Separate listings for each state and territory. Lists disability information groups; state agencies; support groups, advocacy groups, and more.

## 2. Articles and Print Resources

*Abuse and Neglect of Children with Disabilities* Factsheet Number 36

Arch National Resource Center for Respite and Crisis Care Services available at

<http://www.archrespite.org/archfs36.htm> (viewed May 14, 2008).

American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (approved February 1996) available at

<http://www.abanet.org/child/repstandwhole.pdf> (viewed May 4, 2008). Valuable document for those representing children.

*Asking the Right Questions: A Judicial Checklist to Ensure That the Educational Needs of Children and Youth in Foster Care are Being Addressed* Permanency Planning for Children Department (April 2005) available at

<http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/2005educationchecklistfulldoc.pdf> (viewed July 22, 2008). Handy short resource that includes brief overview and explanation of what judges should consider, plus relevant checklists.

Brad Bittan, Esq., *The Mandate to Use Special Education at Juvenile Delinquency Sentencing*, 32 Colo. Law. 99, 100 (2003).

Brad Bittan, Esq., *Juvenile Delinquency: A Protocol for Youth With Disabilities* (2007). (Attached to this document.)

Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin July 2000. Available at [http://www.ncjrs.gov/html/ojjdp/2000\\_6\\_5/contents.html](http://www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html) (viewed August 25, 2008).

Useful article.

Center for Effective Collaboration and Practice & EDJJ, The National Center on Education, Disability, and Juvenile Justice, *Monograph Series* (June 2002)

[http://cecp.air.org/juvenilejustice/juvenile\\_justice.asp](http://cecp.air.org/juvenilejustice/juvenile_justice.asp) available at (viewed April 29, 2008).

These seven juvenile justice monographs are an excellent overview of youth with disabilities in the juvenile justice system.

Randy Chapman, *The Everyday Guide to Special Education Law* (The Legal Center for people with Disabilities and Older People 2008).

Excellent short book surveying education law; clear and easy to understand; new edition in 2008; also available in Spanish. Check out blog as well, at <http://randychapman.wordpress.com/about/>.

Colorado Department of Education Exceptional Student Services Unit, *Colorado FFY 2005-2010 State Performance Plan for Special Education* (2005, updated February 2008) available at

[http://www.cde.state.co.us/cdesped/download/pdf/CO\\_PartB\\_SPP\\_2005\\_Feb2008\\_v2.pdf](http://www.cde.state.co.us/cdesped/download/pdf/CO_PartB_SPP_2005_Feb2008_v2.pdf)

(viewed April 17, 2008).

Fairly technical but informative.

Colorado Department of Human Services, Division of Developmental Disabilities, Early Childhood Connections. Not only the *Colorado Early Intervention State Plan* but other pertinent documents and resources. Available at

<http://www.earlychildhoodconnections.org/index.cfm?fuseaction=Documents.content&linkid=349> (viewed June 19, 2008).

The State Plan is a detailed, indepth overview and indispensable resource for anyone who is involved with early childhood intervention. As the DDD's policy and procedure document, it not only gives concrete detail, but provides the standard by which the Federal Office of Special Education Programs judges Colorado's compliance.

Jennifer Pokempner and Lourdes M. Rosado, *Dependent Youth Aging out of Foster Care: A Guide for Judges*, Juvenile Law Center (2003)

Available at [www.JLC.org](http://www.JLC.org) (viewed June 26, 2008).

Overview and checklists for permanency hearings.

*A Guide to FERPA*, FAPE: Helping Parents and Advocates Improve Educational Results for Children with Disabilities

Available at <http://www.fape.org/justice/sharing.html> (viewed May 5, 2008).

Detailed guide to FERPA, including complete list of exceptions to prior consent requirement and procedural details on disclosing information under FERPA. Includes the text of the regulations implementing the statute.

Angela J. Herrick & Helen D. Ward, *Advocating for the Educational Needs of Children in Out-of-Home Care* Colorado Department of Human Services.  
Excellent manual for caseworkers and supervisors that has material useful for anyone advocating for children in the child welfare system.

Kathleen McNaught, *Learning Curves: Education Advocacy for Children in Foster Care* (ABA Center on Children and the Law 2004).  
Invaluable resource on special education and children in foster care, packed with details and checklists. Essential reference for judges, advocates, attorneys, and anyone involved in the child welfare system.

Kathleen McNaught, *Mythbusting: Breaking Down Confidentiality and Decision-Making Barriers to Meet the Education Needs of Children in Foster Care* (American Bar Association 2005) available at <http://www.abanet.org/child/education/other-pub.shtml> (viewed May 5, 2008).  
Detailed and useful article with links to laws and examples. Invaluable. Also has a great list of resources at the end.

National Center for Mental Health and Juvenile Justice  
Available at <http://www.ncmhjj.com/> (viewed April 17, 2008).  
“The *National Center for Mental Health and Juvenile Justice* was established in July 2001 to assist the field in developing improved policies and programs for youth with mental health disorders in contact with the juvenile justice system, based on the best available research and practice.”

National Children’s Law Network, *In School, the Right School, Finish School* (Holland & Hart and Rocky Mountain Children’s Law Center 2007).  
“A guide to improving educational opportunities for court-involved youth.” A good overview of the different laws that apply.

National Council on Disability, *Improving Educational Outcomes for Students with Disabilities* (May 14, 2004) available at <http://www.ncd.gov/newsroom/publications/2004/educationoutcomes.htm> (viewed April 17, 2008).

National Council on Disability Testimony, *Juvenile Detention Centers: Are They Warehousing Children with Mental Illness?* (July 7, 2004) available at [http://www.ncd.gov/newsroom/testimony/2004/juvenile\\_07-07-04.htm](http://www.ncd.gov/newsroom/testimony/2004/juvenile_07-07-04.htm) (viewed May 4, 2008).

National Council on Disability, *Youth with Disabilities in the Foster Care System: Barriers to Success and Proposed Policy Solutions* (2008) available at [http://www.ncd.gov/newsroom/publications/2008/FosterCareSystem\\_Report.html](http://www.ncd.gov/newsroom/publications/2008/FosterCareSystem_Report.html) (viewed April 17, 2008).  
Long, detailed, and highly informative.

National Law Center on Homelessness and Poverty, *Educating Homeless Children and Youth: The Guide to Their Rights* (August 2007) available at [http://www.nlchp.org/content/pubs/Basic%20McKinney%20Booklet%20\(2007\)1.pdf](http://www.nlchp.org/content/pubs/Basic%20McKinney%20Booklet%20(2007)1.pdf) (viewed April 18, 2008)  
<http://www.nlchp.org/index.cfm> (home for NLCHP)(viewed April 18, 2008).

National Secondary Transition Technical Assistance Center *A Checklist for Improving Your Annual Performance Report for Indicator 13* (May 2007) available at [http://www.nsttac.org/?FileName=indicator13\\_checklist](http://www.nsttac.org/?FileName=indicator13_checklist) (viewed April 28 2008).  
Checklist for transition planning under IDEA.

*Parent and Child Rights in Special Education: Procedural Safeguards Notice*, Colorado Department of Education available at <http://www.cde.state.co.us/spedlaw/download/ProceduralSafeguards2007.pdf> (viewed May 14, 2008)  
Excellent short handbook that explains procedural safeguards under provisions of IDEA and the Colorado Rules for the Administration of the Exceptional Children's Educational Act (ECEA).

Stephen Starin, *Functional Behavioral Assessments: What, Why, When, Where, and Who?* Available at <http://www.wrightslaw.com/info/discipl.fab.starin.htm> (viewed May 6, 2008).

*Special Education Advocacy for Children in the Juvenile Delinquency System* (Joseph B. Tulman & Joyce A. McGee eds., University of the District of Columbia School of Law Juvenile Law Clinic, 1998).  
Although it does not include the IDEA 2004 amendments, this is an excellent and detailed book on advocating for juveniles with disabilities in the juvenile justice system. Key resource for anyone defending or trying to rehabilitate juveniles.

*The Special Needs of Youth in the Juvenile Justice System: Implications for Effective Practice*, Children's Law Center, Covington, Kentucky (2001). Available at [http://www.cjcj.org/pdf/special\\_needs.pdf](http://www.cjcj.org/pdf/special_needs.pdf) (viewed June 26, 2008).  
Excellent, fairly lengthy, detailed handbook for representing juveniles with disabilities. Addresses many aspects and problems.

*Unique Challenges, Hopeful Responses: A Handbook for Professionals Working with Youth with Disabilities in the Juvenile Justice System* (Pacer Center, Minneapolis, MN 1997).  
Covers most of the major disabilities, symptoms, implications, and possible treatments.

Peter W.D. Wright, Pamela Darr Wright, *From Emotions to Advocacy*, (Harbor House Law Press Inc. 2008).  
Excellent resource guide for special education advocates that not only explains the process, but how to meet a child's needs and how to build relationships.

Peter W. D. Wright, Pamela Darr Wright & Suzanne Whitney Heath, *No Child Left Behind* (Harbor House Law Press Inc. 2007).  
Comprehensive discussion of NCLB.

Peter W. D. Wright, Pamela Darr Wright, *Special Education Law* (Harbor House Law Press Inc. 2d ed. 2007).

Excellent all in one handbook on special education law; contains actual statutes with commentary. See also the [www.wrightslaw.com](http://www.wrightslaw.com) website.

### 3. Organizations

Colorado CASA

1490 Lafayette St. Suite 207

Denver, CO 80218

303-623-5380

[ColoradoCASA@coloradocasa.org](mailto:ColoradoCASA@coloradocasa.org)

<http://www.coloradocasa.org/> (viewed April 29, 2008)

Court appointed special advocates help abused and neglected children throughout Colorado.

Colorado Cross-Disability Coalition

655 Broadway, Suite 775

Denver CO 80203

303-839-1775

303-839-0015 TTY

[www.ccdconline.org](http://www.ccdconline.org)

Organization is dedicated to promoting social justice and enforcing civil rights for people with all kinds of disabilities. Particularly impressive is the Resource Center, with detailed lists and contacts for many local resources.

Council of Parent Attorneys and Advocates

Special education rights and advocacy. Has listservs (one for attorneys) and discussion groups; annual conference. \$150 a year for attorneys or \$400 for an organization.

[www.copaa.org](http://www.copaa.org) (viewed October 17, 2008).

Destination Future

<http://www.nrcys.ou.edu/conferences/df06/index.html> (viewed April 17, 2008)

An annual youth leadership conference for youth in or transitioning out of foster care. “Youth ages 16 through 20 who are receiving independent/transitional living services, and have demonstrated leadership abilities.”

Learning Disabilities Association (LDA)

[www.ldanatl.org](http://www.ldanatl.org) (viewed April 15, 2008)

National nonprofit organization with chapters in all states and a broad range of information and publications on specific learning disabilities, legal issues, and advocacy.

Learning Disabilities Association of America

<http://www.lidaamerica.org/about/index.asp> (viewed April 17, 2008)

“The membership, composed of individuals with learning disabilities, family members and concerned professionals, advocates for the almost three million students of school age with

learning disabilities and for adults affected with learning disabilities.” Useful material and articles on the site.

The Legal Center for People with Disabilities and Older People

455 Sherman St., Suite 130

Denver, CO 80203-4403

[www.thelegalcenter.org](http://www.thelegalcenter.org)

303-722-0300 (Voice and TTY)

“The Legal Center is an independent public interest non-profit specializing in civil rights and discrimination issues. We protect the human, civil and legal rights of people with mental and physical disabilities, people with HIV, and older people throughout Colorado.”

Very knowledgeable about special education issues and very helpful. A key resource.

Marriott Foundation for People with Disabilities

<http://www.marriott.com/foundation/default.mi> (viewed April 17, 2008)

Bridges from School to Work “develops and supports mutually beneficial job placements to meet the workforce needs of local employers and the vocational goals of young people.”

National Collaborative on Workforce and Disability

[http://www.ncwd-youth.info/about\\_us/index.html](http://www.ncwd-youth.info/about_us/index.html) (viewed April 17, 2008)

Assists state and local workforce development programs to serve youth with disabilities.

National Youth Leadership Network

[www.nyln.org](http://www.nyln.org) (viewed April 17, 2008)

National voice for young leaders with disabilities. Includes a newsroom, resources, and youth experts.

YouthBuild U.S.A.

[www.youthbuild.org](http://www.youthbuild.org) (viewed April 17, 2008)

“YouthBuild is a youth and community development program that simultaneously addresses core issues facing low-income communities: housing, education, employment, crime prevention, and leadership development. In YouthBuild programs, low-income young people ages 16-24 work toward their GED or high school diploma, learn job skills and serve their communities by building affordable housing, and transform their own lives and roles in society.”

Youth Transition Funders Group

<http://www.ytfg.org/> (viewed April 17, 2008)

“The Youth Transition Funders Group is a network of grant-makers whose mission is to help all youth make a successful transition to adulthood by age 25.”

Articles and resources; appears to focus mainly on social policy.

## **B. Acknowledgements**

For questions and suggestions on improvement, please contact Theresa Sidebotham, Theresa.Sidebotham@gmail.com.

I would like to thank the following people for their invaluable assistance and the information they gave on the Special Education chapter, including, in many cases, reading over the draft for errors. There is not space to thank everyone I spoke to while pursuing resources, but I am grateful to all of them.

Any mistakes, legal and practical, are mine alone.

- The Honorable Barbara Bosley and her law clerk Kristin Marburg, from the Denver Juvenile Court;
- Brad Bittan, juvenile law attorney;
- Mary Griffin from the Child Welfare Office of the Department of Human Services;
- Colleen Head, CDHS-Division for Developmental Disabilities;
- Keith Kirchubel from the Colorado Department of Education on the subject of educational surrogate parents;
- Thom Miller and Randy Parcel from the Legal Center for People with Disabilities and Older People for advice, research, and resources;
- Ed Rodgers and Sherri Piccione from the Office of the Guardian Ad Litem in Colorado Springs for resources, suggestion and corrections, and the forms developed by their office;
- Shari Shink from the Rocky Mountain Children's Law Center;
- Barb Taylor, Division of Youth Corrections, for interviewing and making corrections to the draft;

- Maureen Wirth from the Colorado Department of Education on the subject of out of district children;
- Laura Writebol from the Colorado Department of Human Services on education and child welfare.

## **IX. Checklists and Practice Tips**

### **A. Identification and Evaluation**

- Identify children in foster care with disabilities.<sup>1</sup>
- Talk with the child to determine the child's feelings about special education.<sup>2</sup>
- Where appropriate, advocate for the child to receive services through the school system
- Determine who the educational decision maker is and if a surrogate parent is needed.<sup>3</sup>
- Consider if a young child should be screened for early intervention services under Part C of IDEA.
- Consider Section 504 eligibility for children with disabilities who are not eligible for services under IDEA.<sup>4</sup>
- Consider if a child is eligible for services under NCLB.

### **B. IEP**

Preparation for an IEP meeting for parents or advocates:

- Consider what the child should accomplish in the next year;
- Bring relevant documentation;
- Ask for copies of records and evaluations from the school;
- If you are an attorney, notify the school that you will be attending the meeting. The school then has the right to have its attorney present.<sup>5</sup>

At the IEP meeting:

- Participate and listen.
- Taping can be a good way to review and document what is said. Be sure to notify the school in advance.

- The parent or educational surrogate parent should not sign the IEP until he or she understands and agrees.
- For an initial IEP, services cannot begin until the document is signed. The school must provide services under the old IEP until the new one is signed.<sup>6</sup> The school can implement a revised IEP without the parents' signature unless they file for due process.

### **C. Section 504**

- Section 504 violations are not always taken seriously, because there is no federal funding under Section 504, but the Office of Civil Rights will investigate a case thoroughly.
- Requesting an administrative hearing or filing a civil action is also possible under Section 504.<sup>7</sup>

### **D. Early Education**

- Advocate for Head Start or Early Head Start enrollment.<sup>8</sup> Certain health care services are available through Head Start as well.<sup>9</sup>
- Advocate for EPSDT if needed, and if the child is eligible, make sure all facets of care available under EPSDT are provided.<sup>10</sup>
- Determine if early services under IDEA, such as under Part C, are appropriate for young children who have disabilities, developmental delays, or the high probability of developmental delays. Work with the school system to obtain screening and services.<sup>11</sup>
- Make Part C referrals for screening when there has been a finding of substantiated abuse or neglect.<sup>12</sup>
- Determine the educational decision maker, and if an educational surrogate parent is needed.<sup>13</sup>
- Work on providing smooth transition from Part C services to Part B services.<sup>14</sup>

## **E. NCLB**

- Keep track of schools in the district that may be “in need of improvement” and how long they have had the status. Also keep track of schools identified as “persistently dangerous.”<sup>15</sup>
- Explore outside tutoring programs that meet the state standards.<sup>16</sup>
- Advocate for school transfers, and/or additional services if students are entitled to them under NCLB.<sup>17</sup>

## **F. Parents/ Surrogate Parents**

Under IDEA, a child must have a parent or educational surrogate parent to access services. Although an advocate can request an evaluation of special education needs, only a parent or an educational surrogate parent (ESP) can consent to the evaluation and to services.

For a child with special needs, someone involved with the child should be able to do each of the following if needed:

- give permission for an educational evaluation;
- give permission for special education services;
- attend parent-teacher conferences;
- request modifications to an IEP; and
- perform other functions of a parent under IDEA.

To identify a person who can perform these roles, the following steps may be helpful.

- See if anyone fits the definition of “parent” under IDEA.<sup>18</sup>
- Incarcerated parents can be given the opportunity to participate in IEP meetings by telephone.

- Someone should take the responsibility of advocating at the school when a parent cannot be present.
- If educational rights have been extinguished, a foster parent may act as the parent under certain circumstances.
- If a parent is unavailable or is unlikely to consent to what the child needs, an educational surrogate parent (ESP) may be needed.<sup>19</sup>
- Possible ESPs: foster parent, relative, court appointed special advocate (CASA), guardian ad litem (GAL).<sup>20</sup> It is best if an ESP knows the child and knows about the child's needs.<sup>21</sup>
- Where the child has been determined to have no disabilities, these same persons could act as an educational decision maker.
- When there is ambiguity, a judge should make a clear appointment of an ESP or educational decision maker, as needed.

### **G. Foster Care**

- If there is time before a placement, gather information about the child's educational status, particularly if there is an IEP.<sup>22</sup>
- Make sure the child's attorney, the caseworker, and the foster parent are invited to the IEP annual review meeting and any other IEP meetings.
- Determine who will take the lead in meeting the child's educational needs. This can vary depending if the family will be reunited, whether biological parents or foster parents have the ability to play that role, who is knowledgeable about general and special education, and who has a good relationship with school staff.<sup>23</sup>

- Keep school districts informed when a child changes schools or placements, both to make sure the child's records are transferred smoothly, and so that the right school district (rather than the child welfare agency) is held responsible for special education costs.<sup>24</sup>
- Consider whether the child should change schools, and how McKinney-Vento applies.

Judges can consider questions about the child's educational status:

- "Has the child been identified with a disability by the school?"
- Does the child have an IEP?
- What services are being provided?
- How is the child performing academically?"<sup>25</sup>

Judges can take the following actions:

- order an evaluation of the child, either with parental consent, or overriding parental consent (but a judge cannot order that services be provided under IDEA unless an evaluation discloses a disability and there is parental consent).
- use a court/school liaison to speed information exchange when appropriate.<sup>26</sup>
- appoint an educational advocate/consultant/attorney to pursue services if none of the other parties can pursue educational needs for the child.<sup>27</sup>

## **H. Transition**

- Caseworkers, attorneys, and child advocates should become familiar with programs and financial supports available in the community and should discuss them with their clients.
- Judges can encourage youth to think about their futures and make positive decisions.<sup>28</sup>
- Judges can use the *Dependent Youth Aging Out of Foster Care: A Guide for Judges*.<sup>29</sup>

- Use the NSTTAC Checklist listed in Resources for preparing an IEP that adequately addresses transition.<sup>30</sup> It takes a parent or advocate through the process step by step with a series of questions.
- For incarcerated juveniles, identify the person responsible for transition under NCLB.

### **I. School Discipline**

- When a child is in foster care, make sure school authorities account for the fact, particularly because administrative officials have discretionary power in determining sanctions.<sup>31</sup>
- Consult with the child before revealing personal details to school personnel.<sup>32</sup> Foster children, for instance, may not want personal information shared with the school system.<sup>33</sup>
- If a child who has misbehaved may have an identified disability, request an evaluation under IDEA.
- If there are behavioral problems, work with the school to explore accommodations that include behavioral modification techniques and interventions. Include these in the IEP.<sup>34</sup>
- The best time to have a Functional Behavioral Assessment and Behavioral Intervention Plan is before there has been a discipline problem.<sup>35</sup>
- If a child with an IEP or § 504 plan has been suspended more than ten consecutive days, or ten days total in the school year, be sure a manifestation determination meeting is scheduled, and if not, request one in writing.<sup>36</sup>
- Request a manifestation determination if the school knew or should have known the child has a disability under IDEA or Section 504.<sup>37</sup>

- If there is a disciplinary hearing or manifestation determination, have an attorney represent the child. Be aware of the interaction between the school hearing process and any criminal charges.<sup>38</sup>
- Consider having caseworkers, therapists, medical providers, or other advocates at the manifestation meeting.<sup>39</sup>

Questions for a manifestation determination meeting:

- Was there an appropriate IEP?
- Was the IEP fully implemented?
- Was there a nexus between the behavior and the disability?<sup>40</sup>
- If the child is placed in an interim alternative education setting, or is suspended or expelled, be sure the IEP is still being implemented.

### **J. Delinquency Proceedings**

See the excellent and comprehensive protocol developed by Brad Bittan. *Juvenile Delinquency: A Protocol for Youth With Disabilities*.

---

<sup>1</sup> Kathleen McNaught, *Learning Curves: Education Advocacy for Children in Foster Care* 24 (ABA Center on Children and the Law 2004).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 60.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 24.

<sup>8</sup> *Id.* at 29.

<sup>9</sup> *Id.* at 69.

<sup>10</sup> *Id.* at 29.

<sup>11</sup> *Id.* at 30.

<sup>12</sup> *Id.* at 78.

<sup>13</sup> *Id.* at 30.

<sup>14</sup> *Id.* at 79.

<sup>15</sup> *Id.* at 27.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 43.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 76.

<sup>22</sup> Angela J. Herrick & Helen D. Ward, *Advocating for the Educational Needs of Children in Out-of-Home Care 2-6* Colorado Department of Human Services.

<sup>23</sup> *Id.* at 2-8.

<sup>24</sup> *Id.* at 4-19.

<sup>25</sup> McNaught, *supra* note 1 at 45.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 9.

<sup>29</sup> Jennifer Pokempner and Lourdes M. Rosado, *Dependent Youth Aging out of Foster Care: A Guide for Judges*, Juvenile Law Center (2003), available at <http://www.JLC.org> (viewed June 26, 2008).

<sup>30</sup> National Secondary Transition Technical Assistance Center *A Checklist for Improving Your Annual Performance Report for Indicator 13* (May 2007) [http://www.nsttac.org/?FileName=indicator13\\_checklist](http://www.nsttac.org/?FileName=indicator13_checklist) (last viewed April 28 2008).

<sup>31</sup> McNaught, *supra* note 1 at 26.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 100.

<sup>34</sup> *Id.* at 94.

<sup>35</sup> *Id.* at 97.

<sup>36</sup> *Id.* at 99.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 95.

<sup>39</sup> *Id.* at 99.

<sup>40</sup> *Id.*