

An Overview of Special Education Law—Part II

by Theresa Sidebotham

Special education law is relevant and important for children in the child welfare and juvenile justice systems. This article focuses on special education considerations for these children, and how they apply in practicing juvenile law.

Part I of this article, which was published in the January 2009 issue of *The Colorado Lawyer*,¹ provided an overview of the special education process, focusing primarily on the Individuals With Disabilities Education Improvement Act of 2004 (IDEA), and to some extent on Section 504 of the Rehabilitation Act. Part II examines aspects of special education law that apply particularly to child welfare and juvenile delinquency.

Why Special Education Is Relevant

Foster children are more likely to have a disability than children in the general population. A high percentage—30 to 40 percent—of foster children are in the special education system. This is a significantly higher percentage than for non-foster care children.² Children born with disabilities are more often abused and more often relinquished to the child welfare system than children without disabilities.³ Disabilities may be caused by abuse, and approximately 25 percent of developmental disabilities are estimated to be caused by abuse.⁴ Children with disabilities also remain in foster care longer.⁵

On the other hand, children in foster care sometimes are over-identified as special education students because they are troubled, and may be removed from the general school population.⁶ Special education is not a solution for problems not related to disability, and segregation into a special education program can be damaging.

Both youths with disabilities and youths in foster care are more likely to drop out of school. Both are at high risk of failing to make successful transition to adulthood.⁷

Youths in the juvenile justice system are far more likely than other juveniles to have both identified and undiscovered disabilities. Studies show varying results. Seventy percent of juveniles in the juvenile justice system may suffer from disabling conditions.⁸ A recent estimate in Colorado was that one-fourth to one-third of ju-

venile cases studied in 2002 involved mental health issues.⁹ Juveniles with disabilities are more likely to make poor decisions that lead to involvement in crime, are more likely to get caught, 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.¹⁰

Disabilities should be considered and addressed not only because of statutory rights, but also 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 21 years of age.¹¹

Child Welfare

Certain aspects of special education law are particularly applicable in child welfare. These are discussed below.

Initial Evaluation

In Colorado, interested persons initiating a referral for a special education evaluation must work with the parents or the appropriate administrative unit or state-operated program.¹² 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.”¹³ 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 parents’ right to make educational decisions has been removed

Coordinating Editors

Barbara Shaklee, Denver—(720) 944-2965,
barbara.shaklee@dhs.co.denver.co.us;
Linda Weinerman, Denver—(303) 860-1517,
lindaweinerman@coloradochildrep.org



About the Author

Theresa Sidebotham is a fourth-year law clerk for the Colorado Court of Appeals, and works for Hon. David M. Furman. After her clerkship ends in August 2009, she will practice law with Rothgerber Johnson & Lyons LLP—theresa.sidebotham@gmail.com.

Juvenile Law articles are sponsored by the CBA Juvenile Law Section and generally are intended to apprise practitioners of substantive and procedural information concerning the field of juvenile law. Readers who are interested in submitting articles should contact the Coordinating Editors.

by a judge in accordance with state law, and an individual appointed by a judge to represent the child has consented to an initial evaluation.¹⁴

An accurate diagnosis of the disability 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.¹⁵ 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.¹⁶

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.¹⁷ 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, related services under IDEA may provide some stability and equality of opportunity.¹⁸

Early Childhood Services

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.¹⁹ 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.²⁰ 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.”²¹

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.²² For that matter, anyone involved with the child can request a referral.²³

All Medicaid-eligible children from birth through 18 years can receive comprehensive health services under Early and Periodic Screening, Diagnosis, and Treatment (EPSDT). This includes all foster children.²⁴ Children receive medical, vision, hearing, and dental screens. Medical screens should include physical exams, including developmental assessments.²⁵ 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.”²⁶

Parents

When a disabled child is involved in dependency and neglect proceedings, educational needs should be considered, and someone should be prepared to make educational decisions on the child’s behalf. Determining this person can be complicated, and may require intervention from the courts. Usually, the person would be a parent.

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 not happening, a court could consider terminating educational decision-making rights. A clear appointment of educational decision-making rights by the court would assist the school districts in meeting the child’s special needs.²⁷

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.” Foster children experience routine lack of compliance with special education laws, partly because they often do not have the protection of a parental advocate.²⁸ Therefore, if no one can be identified as a parent under IDEA rules and regulations, an educational surrogate parent (ESP) should be appointed.

“Parent” under IDEA and accompanying regulations. A “parent” under the Colorado State Board of Education Rules means:

- 1) a biological or adoptive parent of a child;
- 2) a foster parent, unless a foster parent is prohibited from acting as a parent by state law, regulations, or contractual obligations;
- 3) a guardian generally authorized to act as the child’s parent or to make educational decisions for the child, but not the state if the child is a ward of the state;
- 4) 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
- 5) an educational surrogate parent who has been assigned.²⁹

Despite the possibility of others serving as a parent, the biological or adoptive parent is presumed to be the parent unless he or she does not have legal authority to make educational decisions for the child.³⁰ 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 the parent for purposes of educational decision making.³¹

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

- 1) the “natural parent’s authority to make the decisions required of parents under the Act on has been extinguished under State law”;
- 2) the foster parent has “an ongoing, long-term parental relationship with the child”;
- 3) the foster parent is “willing to make the decisions required of parents under the Act”; and
- 4) the foster parent has “no interest that would conflict with the interests of the child.”³²

The term “extinguished under state law” applies when parental rights have been terminated.³³ Under these circumstances, “[c]ounty certified foster parents as well as foster parents with private, non-profit child placement agencies may be able to exercise legal authority over decisions related to special education.”³⁴

Best practice in a child welfare case would be to discuss with the parent any possible educational decisions, such as a referral for an evaluation or attendance at individualized education program (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.³⁵ 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.

Educational Surrogate Parent

When a child has a disability under IDEA, an 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.³⁶ 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.³⁷

Definition and duties of ESP. In Colorado, an ESP is defined as a person who:

- 1) 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;
- 2) has no personal or professional interest that conflicts with the interest of the child; and
- 3) has knowledge and skills to ensure adequate representation.³⁸

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 that a free appropriate public education (FAPE) is provided to the child.³⁹ This includes filing for mediation or due process if necessary.

Appointing an ESP. Primary responsibility for determining whether a child needs an ESP and for appointing one lies with the

administrative unit of attendance or state-operated program.⁴⁰ The state educational agency must make reasonable efforts to assign an ESP within thirty days after the determination that a child needs an ESP.⁴¹ In addition, the 2004 reauthorization of IDEA specifically allows judges to appoint ESPs. Therefore, the ESP may be appointed 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.⁴²

Best practice is that an ESP is someone, such as a guardian *ad litem*, who knows and has a relationship with the child.⁴³ If the court is considering appointing an ESP, it should check with the Exceptional Student Leadership Unit (ESLU) to see whether the child already has an ESP. If the court does appoint an ESP, it should let the ESLU know for its registry.⁴⁴ Also, training to be an ESP is available through the Colorado Department of Education. In the case of unaccompanied homeless youths, appropriate staff of emergency shelters and similar facilities may be appointed as temporary ESPs until a permanent ESP can be appointed.⁴⁵

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.⁴⁶ However, a social worker could attend and participate in the IEP meeting.⁴⁷ Also, a caseworker could be an educational decision maker for a child who does not have disabilities.

Treatment Plan and Special Education

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

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

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 that services 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."⁴⁸

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 16th birthday.⁴⁹ The plan must help the youth prepare for self-sufficiency and independent living.⁵⁰

The John H. Chafee Foster Care Independence Act of 1999, establishing the Chafee Foster Care Independence Program (CFCIP), provides a number of programs to youths who are aging out of the foster care system, including tutoring, peer support, career counseling, housing assistance, independent life skills training, and tuition vouchers for postsecondary education.⁵¹ Effective July 1, 2008, children for whom foster care maintenance or adoption assistance payments are made are eligible for medical assistance under Medicaid from age 18 until they turn 21.⁵²

Both the IEP and CFCIP provide transition services, but the two systems often operate independently, without coordination.⁵³ There may be almost no alignment of IDEA's IEP transition plan with the transition plan required by the child welfare system. Coordinating these plans is a worthwhile goal for the practitioner.⁵⁴

Fewer foster youths attend college, because they may not be prepared for the self-sufficiency and independent living required in college, or indeed for adult life in general.⁵⁵ This is true for non-foster youths as well, but they tend to have better support systems from parents. Institutionalized foster youths are especially vulnerable to being inadequately prepared, because the transition of leaving a group home on the 18th birthday can be extremely abrupt.⁵⁶

Juvenile Delinquency

When a juvenile who has a disability is charged with a crime, several issues and substantive rights may be involved. These are discussed below.

School-Related Charges

If a crime is school-related, the court can consider whether the behavior was a manifestation of the disability, which should be evident after a manifestation determination. 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, the juvenile's rights under IDEA have been violated.

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.⁵⁷ Juveniles with emotional disturbance may be able to function well in school with "positive behavioral supports."⁵⁸ Moreover, the school district is required to comply with IDEA when the juvenile with a disability enters the juvenile justice system.⁵⁹

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.⁶⁰ The court should obtain a juvenile's educational history, especially as related to special education, either with parental consent or by court order.⁶¹ If it appears that a juvenile may have developmental disabilities or a mental illness, the court should order an eligibility determination or prescreening.⁶²

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.⁶³ Then, unless the court 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, it is required to order a screening.⁶⁴ A standardized screening procedure for the assessment of mental illness is available for juveniles in the juvenile justice system.⁶⁵ 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."⁶⁶

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.⁶⁷ These accommodations may include more time for the explanation of the charges and the juvenile's rights, providing written explanations of rights, and creating a quiet atmosphere in the courtroom.⁶⁸ If a juvenile is on medication and will continue to be detained, the court can enter an order providing for the administration of medication.⁶⁹

The juvenile's disability can be considered in the decision of whether to divert, and the diversion contract can reflect accommodations for the disability.⁷⁰ A disability may make it difficult for a 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.⁷¹ At a minimum, the juvenile may need special support to succeed in diversion programs.

Detention

Juveniles with disabilities are detained disproportionately, possibly because they lack the communication and social skills necessary to make a good presentation to arresting officers or probation officers, and their behavioral affect may seem inappropriate—for

example, the juvenile might be hostile, unconcerned, or overly emotional.⁷² Particularly if special education evaluation or adjustments in the IEP are needed, a program such as home detention may be appropriate.⁷³

Juvenile detention facilities must provide a broad array of educational and rehabilitative services.⁷⁴ Failure to provide services in a detention facility may be a violation of IDEA.⁷⁵ However, for a short-term confinement, it is sufficient to implement the existing IEP.⁷⁶ At detention facilities, staff should ask whether the juvenile is taking medications or has a valid disability.⁷⁷ 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.⁷⁸

Presentence Investigation and Probation

Special education needs should be part of the social study report prepared by the probation department. Statutorily, the presentence investigation may address the "juvenile's education history, including any special education history and any current individual education program the juvenile may have. . . ."⁷⁹ An order for probation may be more likely and a more appropriate resolution when a full range of special education services, formalized in an IEP, are available. If the probation department receives this information in advance of sentencing, it can determine how to incorporate the plan into the presentence report and what recommendation to make.⁸⁰

Trial Issues

The extent and nature of a disability and its effect on a youth's thinking and acting may be significant with respect to issues such as insanity, incompetence, intent to commit an offense, and validity of confessions. A juvenile with a disability might need special accommodation in court proceedings. For example, an auditory processing disorder might require clearer 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.⁸¹ Asking a juvenile to explain in his or her own words the information that has been conveyed may confirm understanding or reveal any problems.⁸²

Disposition and Sentencing

Pursuing educational support for the juvenile may offer the court a broader range of constructive choices.⁸³ 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 ADHD or bipolar disorder, affects behavior.⁸⁴ 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.⁸⁵

"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."⁸⁶ For some juveniles, rehabilitation will re-

quire a facility that can dispense medications where appropriate, and where the staff is trained to understand various diagnoses, such as ADHD and emotional disorders.⁸⁷

Restorative Justice

Restorative justice focuses on repairing the harm that crime does to people, communities, and relationships.⁸⁸ CRS § 19-1-103 mandates restorative justice for juveniles. 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.⁸⁹ An accommodation could be support in learning the cognitive skills necessary for this process.

Institutional Settings and Youth Corrections

The provisions of IDEA cover both juvenile and adult criminal corrections facilities, with certain exceptions for juveniles incarcerated in an adult criminal corrections facility.⁹⁰ Thus, the state must provide a FAPE in the least restrictive environment to juveniles who are otherwise institutionalized in public or private institutions.⁹¹

Under IDEA, Child Find obligates institutions to identify all juveniles with disabilities. In the Colorado Division of Youth Corrections (which falls under 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."⁹² Every student who enters the Division of Youth Corrections is assessed by a multidisciplinary team, and an IEP is developed if needed.⁹³

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.⁹⁴ 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."⁹⁵

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.

The following are some best practices for transition:

1. Help a juvenile in a community setting practice new behaviors in increasingly difficult situations, beginning with staff support, then gradually with less monitoring.
2. 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.
3. Continue with family and service providers.
4. Train family and others how to provide reinforcement for positive behavior.
5. Schedule booster sessions with care providers.⁹⁶
6. Gather and transfer records of credits earned in the correctional setting.

7. In developing a new IEP for the school setting, discuss and clarify guidelines about rules and school expectations, including modifications and coping skills.⁹⁷
8. If there are mental health or emotional disturbance issues, be sure juveniles reconnect with the education system and are provided proper intervention and support.⁹⁸

Additional Statutory Protections

Additional statutes have special applicability in the juvenile justice system. These are discussed below.

No Child Left Behind

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 a few provisions that have particular application in the juvenile justice system.

Purpose. Title I of NCLB is “Improving the Academic Achievement of the Disadvantaged.”⁹⁹ 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.”¹⁰⁰ 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. . . .¹⁰¹

Requirements for schools. Schools that accept Title 1 funds are required to achieve “Adequate Yearly Progress,” which is objectively tested.¹⁰² Measurable objectives must include the achievement of economically disadvantaged students, students with disabilities, and students with limited English proficiency.¹⁰³ 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.¹⁰⁴

Funds must be reserved to serve both homeless children and neglected or delinquent children.¹⁰⁵ 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.¹⁰⁶ Children with truancy issues may fall into one of these categories.

Options for students when schools fail. If a school fails to make adequate yearly progress for two consecutive years, it must be identified for school improvement.¹⁰⁷ Students then must have the option to transfer to another public school, with priority given to the lowest achieving children from low-income families.¹⁰⁸ Also, if the school is identified as persistently dangerous and cannot protect the child, a child may transfer to a new school.¹⁰⁹ The local educational agency must pay for transportation.¹¹⁰

In the alternative, the child must be given supplemental educational services.¹¹¹ In the case of a student with disabilities, this agreement must be consistent with the student’s IEP.¹¹²

At-risk children and youths. Part D of Title 1, “Prevention and Intervention Programs for Children and Youth who are Neglected, Delinquent, or At-Risk,” has the purpose of serving children and youths who are institutionalized, either because of dependency or neglect, or because of incarceration.¹¹³ Under the Act, the state educational 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.¹¹⁴ The state agency works with institutionalized children and youths 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.¹¹⁵ 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.¹¹⁶ Teachers and other qualified staff in the institution must be trained to work with students with disabilities and special needs.¹¹⁷

The state agency must reserve a certain portion of funds granted by NCLB for transition services. These services facilitate transition of institutionalized children and youths, including incarcerated youths, to local schools or to postsecondary education or vocational and technical training programs.¹¹⁸ The agency provides essential support services, such as counseling, job and educational placement services, and assistance obtaining financial aid.¹¹⁹

Reading skills under NCLB. There is a high correlation among poor reading skills, learning disabilities, and juvenile delinquency.¹²⁰ NCLB provides for coordination of reading programs from early childhood through adulthood. 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.¹²¹

McKinney-Vento Homeless Assistance Act

The McKinney-Vento Homeless Education Assistance Act of 2001 is codified in Part C of Title X of NCLB.¹²² School districts must ensure that all children who are homeless have access to school. Homeless children and youths are “individuals who lack a fixed, regular, and adequate nighttime residence.”¹²³ The definition includes children who are awaiting foster care placement.¹²⁴

Keeping a school placement may be the only stability a foster child has. 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.¹²⁵ 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.”¹²⁶ 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.¹²⁷

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.¹²⁸ Sometimes, the student will enroll in a new, more convenient school. Schools must immediately enroll homeless children, even if their medical, academic, and residency records are not available.¹²⁹ 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.”¹³⁰

Each school district must have a liaison or coordinator to help homeless children.¹³¹ This person can be accessed through a school district’s central office.¹³² The school must ensure that the liaison helps to make placement and enrollment decisions for an unaccompanied youth who is not in the physical custody of a parent or guardian.¹³³

Family Educational Rights and Privacy Act

The purpose of the Family Educational Rights and Privacy Act (FERPA) is to protect the privacy of students and parents.¹³⁴ Generally, schools must obtain a parent’s written permission to disclose a student’s school records.¹³⁵ 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 effectively serve the juvenile before adjudication.¹³⁶ 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.¹³⁷ Therefore, a judge may order the release of these records to make decisions about a neglected or dependent child or about a youth’s education.¹³⁸ CRS §§ 19-1-302 and -303 require sharing information in juvenile delinquency and dependency and neglect cases.

Under the Adoption Assistance and Child Welfare Act, agencies must keep educational records as part of their case plan. They also must share educational records with foster care providers at placement.¹³⁹

Conclusion

Although special education law is somewhat complicated, it is important and deserving of attention from attorneys working with children in child welfare and juvenile justice. The material covered in this article is available in considerably expanded form, with a long list of resources, in the “Special Education” section of the upcoming edition of the *Juvenile Law Benchbook*, or by e-mailing the author.

Notes

1. Sidebotham, “An Overview of Special Education Law—Part I,” 38 *The Colorado Lawyer* 25 (Jan. 2009).
2. National Council on Disability, “Youth with Disabilities in the Foster Care System: Barriers to Success and Proposed Policy Solutions” 4 (2008), available at www.ncd.gov/newsroom/publications/2008/FosterCareSystem_Report.html.
3. *Id.*
4. *Id.* at 10.
5. *Id.* at 11.
6. McNaught, *Learning Curves: Education Advocacy for Children in Foster Care* 11 (American Bar Association (ABA) Center on Children and the Law, 2004).
7. National Council on Disability, *supra* note 2 at 32.
8. Burrell and Warboys, “Special Education and the Juvenile Justice System,” 1 *Office of Juvenile Justice and Delinquency Prevention Juvenile Justice Bulletin* (July 2000).
9. Schrader, “Second Chance for Mentally Ill Teens,” *The Denver Post* (March 11, 2008).
10. Children’s Law Center, “The Special Needs of Youth in the Juvenile Justice System: Implications for Effective Practice” (2001), available at www.cjcl.org/pdf/special_needs.pdf.
11. *Unique Challenges, Hopeful Responses: A Handbook for Professionals Working With Youth With Disabilities in the Juvenile Justice System* 47 (Pacer Center, 1997).
12. State Board of Education Rule (Rule) 4.02(3)(a)(ii).
13. 20 U.S.C. § 1414(a)(1)(D)(iii).
14. 20 U.S.C. § 1414 (a)(1)(D)(iii)(II).
15. Miller, “Falling Between the Cracks: Why Foster Children are Not Receiving Appropriate Special Education Services,” 5 *Whittier J. Child & Fam. Advoc.* 547, 569 (2006).
16. *Id.* at 570.
17. *Id.* at 566.
18. 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).
19. 20 U.S.C. § 1434(1). “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.” Colorado State Plan Under Part C of the Individuals With Disabilities Education Act at 1, Department of Human Services, DDD (2007).
20. 20 U.S.C. § 1435(a)(3). See CRS §§ 27-10.5-701 to -704.
21. 20 U.S.C. § 1435(c)(2)(G).
22. See 42 U.S.C. § 5106a(b)(2)(A)(xxi).
23. Herrick and Ward, “Advocating for the Educational Needs of Children in Out-of-Home Care” 6-7 (Colorado Department of Human Services) (on file with author).
24. McNaught, *supra* note 6 at 29.
25. *Id.* at 28.
26. 42 U.S.C. § 1396d(r)(5).
27. Telephone interview with Keith Kirchubel, Principal Consultant, Dispute Resolution, Colorado Department of Education, in Denver, Colorado (March 2008).

28. Geenen and Powers, "Are We Ignoring Youths with Disabilities in Foster Care? An Examination of Their School Performance," *Social Work* 51.3 at 234 (July 2006).
29. Rule 2.33(1), 1 C.C.R. 301-8 (2007).
30. Rule 2.33(2)(a).
31. Rule 2.33(2)(b).
32. 34 C.F.R. § 303.19.
33. McNaught, *supra* note 6 at 45.
34. Herrick and Ward, *supra* note 23 at 4-6.
35. Interview with Laura Writebol, Colorado Department of Human Services, in Denver, Colorado (May 14, 2008).
36. 20 U.S.C. § 1415(b)(2)(A); 34 C.F.R. § 300.519; 42 U.S.C. § 11434a(6); Rule 2.13.
37. Rule 2.53(1) and (2); 20 U.S.C. § 1401(36).
38. Rule 6.02(8)(e)(iii); 34 C.F.R. § 300.519(d)(2)(ii) and (iii).
39. Rule 6.02(8)(i); 34 C.F.R. § 300.519(g).
40. Rule 6.02(8)(c).
41. 34 C.F.R. § 300.519(h).
42. 20 U.S.C. § 1415(b)(2)(A)(i); 34 C.F.R. § 300.519(c); Rule 6.02(8)(d).
43. McNaught, "Mythbusting: Breaking Down Confidentiality and Decision-Making Barriers to Meet the Education Needs of Children in Foster Care" 37 (ABA, 2005), available at www.abanet.org/child/education/other-pub.shtml.
44. Kirchubel, *supra* note 27. Contact Jennifer Rodriguez at (303) 866-6889 for the educational surrogate parent (ESP) registry.
45. 34 C.F.R. § 300.519(f).
46. 20 U.S.C. § 1415(b)(2)(A); 34 C.F.R. 300.519(d)(2)(i).
47. Chapman, *The Everyday Guide to Special Education Law* 47 (The Legal Center for People with Disabilities and Older People, 2005).
48. Child Welfare Services Reg. No. 7.301.23(A), 12 C.C.R. 2509-4.
49. Child Welfare Services Reg. No. 7.301.21(C).
50. Child Welfare Services Reg. No. 7.301.24(K).
51. Herrick and Ward, *supra* note 23 at 7-5.
52. See also CRS § 25.5-5-101(1); S.B. 08-099.
53. National Council on Disability, *supra* note 2 at 6.
54. *Id.* at 30.
55. *Id.* at 31.
56. *Id.* at 38.
57. Testimony of the National Council on Disability, "Juvenile Detention Centers: Are They Warehousing Children with Mental Illness?" 7 (July 7, 2004), available at www.ncd.gov/newsroom/testimony/2004/juvenile_07-07-04.htm.
58. *Id.*
59. Burrell and Warboys, *supra* note 8 at 7.
60. Center for Effective Collaboration and Practice (CECP) and The National Center on Education, Disability, and Juvenile Justice (EDJJ), "Addressing Invisible Barriers: Improving Outcomes for Youth with Disabilities in the Juvenile Justice System" 20 (June 2002), available at cecp.air.org/juvenilejustice/juvenile_justice.asp.
61. Burrell and Warboys, *supra* note 8 at 7.
62. CRS § 19-3-506(1).
63. CRS § 19-2-710(1).
64. CRS § 19-2-710(2).
65. CRS § 16-11.9-102(1).
66. CRS § 19-3-506(3)(c).
67. CECP and EDJJ, *supra* note 60 at 3.
68. *Id.* at 20.
69. *Id.*
70. *Id.*
71. Burrell and Warboys, *supra* note 8 at 7-8.
72. *Id.* at 8.
73. *Id.*
74. The National Center on Education, Disability and Juvenile Justice, "Special Education in Correctional Facilities" 6 (1999), available at www.edjj.org/Publications/list/osep_rehabsrvs-1999.html.
75. 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 individualized education program (IEP) followed at any time; and (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 Individuals With Disabilities Education Improvement Act of 2004; the child was entitled to compensatory education). (Note that this 1999 case interpreted IDEA 1997, but the relevant provisions of IDEA 2004 are similar.)
76. *Alexander S. v. Boyd*, 876 F.Supp. 773, 802, 22 IDELR 139 (D.S.C. 1995).
77. CECP and EDJJ, *supra* note 60 at 19.
78. *Id.* at 19-20.
79. CRS § 19-2-905(1)(a)(VI).
80. Tulman and McGee, eds., *Special Education Advocacy for Children in the Juvenile Delinquency System* 5-14 (University of the District of Columbia School of Law Juvenile Law Clinic, 1998).
81. Grisso, "Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform" 10 (ABA), available at www.abanet.org/crimjust/juvjus/12-3gris.html.
82. Frost and Shepherd, Jr., "Mental Health Issues in Juvenile Delinquency Proceedings" 3 (ABA, 1996), available at www.abanet.org/crimjust/juvjus/cjmental.html.
83. Tulman and McGee, *supra* note 80 at 3-8.
84. Burrell and Warboys, *supra* note 8 at 9.
85. Bittan, "The Mandate to Use Special Education at Juvenile Delinquency Sentencing," 32 *The Colorado Lawyer* 99, 100 (Oct. 2003).
86. CECP and EDJJ, *supra* note 60 at 8.
87. *Id.* at 22.
88. Stenhjem, "Youth with Disabilities in the Juvenile Justice System: Prevention and Intervention Strategies," 4 National Center on Secondary Education and Transition February (Feb. 2005), available at www.ncset.org/publications/viewdesc.asp?id=1929.
89. CECP and EDJJ, *supra* note 60 at 8.
90. Burrell and Warboys, *supra* note 8 at 10; *Alexander*, *supra* note 76 at 800-04 (state correctional facilities also responsible to meet requirements under § 504 and Americans with Disabilities Act). See 20 U.S.C. § 1414(d)(7)(A) and (B); 34 C.F.R. § 300.324(d)(1) and (2); 34 C.F.R. § 300.102(a)(2); 34 C.F.R. § 300.114(a).
91. 34 C.F.R. § 300.118.
92. CRS § 19-2-922(1)(a).
93. E-mail from Barb Taylor, Division of Youth Corrections (June 11, 2008) (on file with author).
94. Burrell and Warboys, *supra* note 8 at 10.
95. 31 IDELR 250.
96. CECP and EDJJ, *supra* note 60 at 21-22.
97. *Unique Challenges, Hopeful Responses*, *supra* note 11 at 49.
98. Testimony of the National Council on Disability, *supra* note 57 at 9.
99. 20 U.S.C. §§ 6301 to 6578.
100. 20 U.S.C. § 6301.
101. 20 U.S.C. § 6301(2).
102. Wright *et al.*, *No Child Left Behind* 77 (Harbor House Law Press Inc., 2007); 20 U.S.C. § 6311(b)(2)(B).
103. 20 U.S.C. § 6311(b)(2)(C).
104. 20 U.S.C. § 6311(h)(2)(B)(i).
105. 20 U.S.C. § 6313(c)(3).
106. 20 U.S.C. § 6315 (b)(2).
107. 20 U.S.C. § 6316(b)(1)(A).
108. 20 U.S.C. § 6316(b)(1)(E).
109. 20 U.S.C. § 7912(a).
110. 20 U.S.C. § 6316(b)(9).
111. 20 U.S.C. § 6316(b)(6)(F).
112. 20 U.S.C. § 6316(e)(3).
113. 20 U.S.C. §§ 6421 to 6422; Wright, *supra* note 102 at 29.

114. 20 U.S.C. § 6434(c)(11).
115. 20 U.S.C. §§ 6434(c)(15) and 6455(2).
116. 20 U.S.C. §§ 6434(c)(16) and 6455(4).
117. 20 U.S.C. §§ 6434(c)(17) and 6455(5).
118. 20 U.S.C. § 6438(a)(1) and (2).
119. 20 U.S.C. § 6438(2)(C)(a).
120. Wright, *supra* note 102 at 73.
121. 20 U.S.C. § 6381g(a)(1)(B).
122. 42 U.S.C. §§ 11431 to 11435.
123. 42 U.S.C. § 11434a(2).
124. *Id.*
125. 42 U.S.C. § 11432(g)(3)(B).
126. 42 U.S.C. § 11432(g)(3)(F).
127. Eggert, "Providing Special Education Services to Children and Youth in Homeless Situations" (April 16, 2004), available at www.wadleighlaw.com/articles/School/special_education_for_homeless.htm.
128. 42 U.S.C. § 11432(g)(1)(J).
129. 42 U.S.C. § 11432(g)(3)(C).
130. 42 U.S.C. § 11432(g)(3)(E).
131. 42 U.S.C. § 11432(g)(1)(J)(ii).
132. National Law Center of Homelessness and Poverty, "Educating Homeless Children and Youth: The Guide to Their Rights" 9 (Aug. 2007), available at [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).
133. 42 U.S.C. §§ 11432(g)(3)(B) and 11434a(6).
134. Wright and Wright, *Special Education Law* 307 (2d ed., Harbor House Law Press, Inc., 2007).
135. National Council on Disability, *supra* note 2 at 57.
136. 20 U.S.C. § 1232g(b)(1).
137. 20 U.S.C. § 1232g(b)(1)(J).
138. National Council on Disability, *supra* note 2 at 57.
139. McNaught, *supra* note 43 at 12, 31; 42 U.S.C. § 675(5)(D). ■