OCR GRID UPDATE FOR EDUCATION LAW: RIGHTS AND ISSUES FACT SHEET

Early Release Copy

p. F69-70

Suggest deleting the sentence "The Colorado Department of Educaton provides training for ESPs…" or else providing a citation. I don't think this is true in general. CDE may provide training for people who volunteer to be put on a list of ESPs that are available when a school needs to select an individual unknown to a child, but to my knowledge they do not provide training for a known individual (eg GAL or foster parent) who is named as an ESP.

p. F70 – Advocating for School stability.

Suggest removing the old statistics starting from "On average, foster youth change…" to "…six months of educational attainment." Replace with:

The on time graduation rate for youth in foster care in Colorado is only 27.5%. MARTINEZ, JUDY & WHEELER, SHEREE, FOSTER CARE AND EDUCATION SUMMARY REPORT 2013-2013 4, (Colorado Department of Education, February 2014) (Hereinafter "MARTINEZ, FOSTER CARE & EDUCATION REPORT"). This is compared to 77.3% of Colorado youth overall. COLORADO DEPARTMENT OF EDUCATION, GRADUATION STATISTICS (2014).

The poor educational outcomes are undoubtedly related to the high frequency of school moves. In 2012-2013, 42.8 percent of youth in out-of-home placement changed schools during the school year. MARTINEZ, FOSTER CARE & EDUCATION REPORT 5-6. Youth in foster care have, by far, the highest mobility rates of any other special population in Colorado (e.g., gifted and talented, disabled, English language learners, Title I, migrant, and homeless students). *Id*.

p. F.72 – School stability Section 1

Insert after existing first complete paragraph on this page "The Fostering Connections…the best interests of the child [cite]" but before the McKinney Vento paragraph:

Educational agencies also have a reciprocal duty to collaborate with child welfare agencies to ensure that children in foster care can remain in their schools. U.S. DEPARTMENT OF EDUCATION & U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEAR CHIEF STATE SCHOOL OFFICERS AND CHILD WELFARE DIRECTORS 2 (May 30, 2014).

- **TIP:** Under Fostering Connections, the requirement to "ensure" a student can remain in their school is triggered by the presumptive fact that it is in the child's best interest to remain in the same school. Counties do not currently have in place processes to make these best interest determinations. As GAL, advocate for thoughtful and deliberate decision-making prior to any school moves.

Colorado law also has protections in place for all students who change residences during the school year. If a student moves out of the school district in the middle of a school year, the school district must allow

her to remain enrolled in her school until at least the end of the semester or term. § 22-32-116(1). Elementary school students and high school seniors must be permitted to remain enrolled until the end of the academic year. §116(1)-(2). Note that although this statute also permits Elementary school students to re-enroll in their schools in some circumstances, this was restricted by the decision in *Bradshaw v. Cherry Creek School District No. 5*, 98 P.3d 886 (Colo. App. 2003).

p. F73 - 1. Enrollment

<u>In the first paragraph, delete the sentence "The Children's Code provides that for determining residence…" This statement makes it seem like whoever has legal custody always determines residency for the child, but that is not the case. That is only one of several ways. Replace with:</u>

Determining residence is fact-specific and requires examination of multiple statutes. C.R.S. § 22-1-102 is the generally applicable statute for determining residence. This statute lists many ways a child may establish residence in a given school district. *Id.* The overall effect of the residency statute is that a child is usually a residence of the district where they actually live most of the time. *See id.*

One way a student can be a resident of a district is if "the legally appointed guardian of his person resides" in that district. § 22-1-102(2)(b). The Children's Code clarifies that this is "the person to whom legal custody has been granted by the court."

In some circumstances, residency for special education students is determined differently than for general education students. §22-20-107.5. Special education students who are living in group homes, residential treatment facilities, and some other facilities will be considered residents of the district where their parents live. *Id.*

<u>Insert at end of the first paragraph in this section:</u>

- **TIP:** A school district must enroll a student who becomes a resident of that district. There is no exception for reasons such as it being the end of the school year, the students are taking exams, etc.

P. F74 - 2. Transfer of Records

<u>Suggest renaming this subsection "Transferring to a New School"</u>

<u>Insert at end of this subsection:</u>

When special education students transfer schools, the new school must provide "comparable services" as those listed in a student's most recently implemented IEP. 34 C.F.R. 300.323(e).

- **TIP:** Enrollment delays are often due to a delay in transfer of special education records. To prevent this, always keep in your files a copy of special education students' most recent IEPs and triennial evaluation reports.
- The Uninterrupted Scholars Act allows caseworkers to access educational records, enabling them to facilitate timely transfer of records. See *infra* "Confidentiality of Records."

p. F76 – 2. Confidentiality of Records

The Uninterrupted Scholars Act amends FERPA to allow educational agencies to release education records to child welfare caseworkers without consent or a court order when the child welfare

agency is legally responsible for the student. PL 112-278 *codified at* 20 U.S.C. § 1232g(b)(1)(L). The caseworker may re-disclose educational records to individuals or agencies "engaged in addressing the student's education needs." *Id*.

p. F78 – c. Individualized education program

In the second sentence of this subsection, delete the second sentence. It is inaccurate to describe an IEP as a contract as it is not enforceable through contract law. It is only enforceable through the process described in the IDEA. Replace with the following:

An IEP is written document describing a student's educational needs, goals, and how the school district will provide the student a free appropriate public education. The IEP must be reasonably calculated to permit the student to receive more than *de minimis* benefit (also sometimes phrased "some benefit") from their education. *Urban by Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996) (interpreting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206 (1982) to require more than de minimis educational benefit); *Sytsema ex rel. Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008) (citing *Urban* for the same).

After the first sentence in the second paragraph, insert:

The IEP should also describe the placement where the child will receive services in his or her least restrictive environment. *Id*.

Delete the tip "advocates…memorialize promises…" This furthers the misconception that an IEP is a contract. Replace with:

- The district's complete offer and description of a free appropriate public education should be included in the written IEP document. To make your advocacy the most effective and efficient, request that the school provide you a copy of the draft IEP (schools almost always prepare a draft) a few days before the meeting. After the meeting, request that the final version be sent to you for review before the IEP is "locked" (i.e., finalized in the school district's computer system, making it difficult to revise).

p. F79 - 3. Americans with Disabilities Act

insert at the end of this subsection:

The ADA (42 U.S.C. § 12132) and Section 504 (29 U.S.C. § 794) have distinct requirements to protect students with disabilities from discrimination. Compliance with the IDEA does not necessarily ensure compliance with the ADA. *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1100 (9th Cir. 2013) *cert. denied*, 134 S. Ct. 1493 (2014). In some cases, the ADA's requirement to provide equal access may require a school district may have to provide additional services under Title II of the ADA that they would not have to provide under the IDEA. DEPARTMENT OF JUSTICE, OFFICE OF CIVIL RIGHTS, FAQS ON EFFECTIVE COMMUNICATION FOR STUDENTS WITH HEARING, VISION, OR SPEECH DISABILITIES, 64 IDELR 180 (November 12, 2014).