

## 2019 Case Law and Legislative Update

Sheri Danz and Ashley Chase, OCR

Photo credit: Colorado Space News



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## QUICK OVERVIEW

- Participated or monitored over 50 bills
- Thank you to Legislative Committee
- Saw significant changes both in legislation and case law around delinquency matters
- Prevention is a theme weaving through policy ahead of FFP3A
- Governor and party changes lead to interesting legislative sessions
- A lot to cover so hold on to your hats

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## HB19-1219 CHILD WELFARE PERMANENCY PLANNING

- Came out of PHOM work through CIP
- Updated and reorganized 19-3-702
- Removed 19-3-703 and incorporated into 19-3-702 (5)
- Timing of PPH for all children
- Report in 5 days
- Must consult with youth (for OPPLA goal must ask youth)

- OPPLA additions consistent with federal law
- Reasonable and Prudent Parent standard must be documented and reviewed
- Added requirements before case closes for youth aging out.
- Consistent burden of proof
- Created 19-3-702.5 for periodic reviews

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# HB19-1282 COURT APPOINTED SPECIAL ADVOCATE OVERSIGHT

- Came out of the legislative audit
- Removes CASA from the OCR's enabling legislation – now covered in 19-1-213
- Ensures appropriate oversight while maintaining CASA independence.

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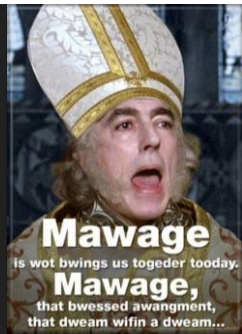
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## HB19-1251 Age of Marriage and Emancipation



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- Only those 18 or older or those 16-17 years of age with judicial approval may receive a marriage license
- Judicial Approval Process found in C.R.S. 14-2-108
- Requires a GAL be appointed for each youth to independently investigate whether the marriage is in the youth's best interests
- Requires a report from the GAL be submitted to the court
- Sets forth factors the court must consider in C.R.S. 14-2-108(2)(b)(II)
- Ensures an underage party has rights if they need to end the marriage in C.R.S. 14-2-109.3

## HB19-1316 MODERNIZING MARRIAGE LAWS FOR MINORS

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## SB19-178 Adoption Subsidy Bill

- 15-page bill derived from the CPO adoption subsidy report
- Intent was to make the process more consistent and transparent
- Starts at C.R.S. 26-7-101
- Aligned Colorado law with Federal Law
- Prospective adoptive parents have the right to have the GAL at the adoption subsidy negotiation

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## FINAL APPEALABLE ORDERS

### *People in Interest of H.T.*, 2018 COA 72

- Dispositional order alone is not final for purposes of appeal

### *People in Interest of R.J.*, 2019 COA 109

- Parent is not required to seek review of magistrate's dispositional order prior to filing an appeal of an adjudicatory order entered by a judge.
- Court violated CRJP 4.3(b) in giving each party 4 peremptory challenges and may have erred in exercising parties' unused peremptory challenges, but these errors were harmless

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## FINAL APPEALABLE ORDER, CON'T

### *People in Interest of L.R.B.*, 2019 COA 85

- Order denying a tribe's request to transfer jurisdiction to a tribal court is a final, appealable order
- Collateral order doctrine applies to decisions impacting rights are too important to be denied review and are too independent of the cause itself to require deferral of appellate consideration. To qualify, decision must:
  - Conclusively determine disputed question
  - Resolve an important issue completely separate from the merits of the action
  - Be effectively unreviewable on appeal from a final judgment

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## JUVENILE DELINQUENCY

- HB19-1092: Animal Ban for Cruelty to Animals Conviction
- HB19-1155: Additions to Definition of Sexual Contact
- HB19-1225: No Monetary Bail for Certain Low-Level Offenses
- HB19-1263: Offense Level for Controlled Substance Possession
- HB19-1310: Interest on Orders of Restitution
- HB19-1315: Admissibility of Statements by a Juvenile
- HB19-1335: Juvenile Record Expungement Clean-Up
- SB19-185: Protections for Minor Human Trafficking Victims
- SB19-191: Prompt Pretrial Liberty and Fairness
- SB19-108: Juvenile Justice Reform

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## SB19-108 JUVENILE JUSTICE REFORM

- Establishes committee on juvenile justice reform
  - Adopt validated risk and needs assessment tool
  - Select a validated mental health screening tool (pre-disposition)
  - Select a validated risk screening tool to inform DA diversion
  - Identified shared outcome measures for probation, diversion, DYS, including common definition of recidivism
- Establishes working group for criteria for placement of juvenile offenders, including detention screening tool

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## SB19-108 JUVENILE JUSTICE REFORM, CON'T

- Strong findings regarding limits on use of detention
  - Only for children who pose substantial risk of serious harm or flight risk
  - Restrictions on detention prevent detention of juveniles (more restrictions in statute)
    - who have not committed delinquent act (unless contempt)
    - in county custody solely awaiting out of home placement
    - requiring medical care or treatment (including intoxication) beyond scope of facilities
    - Soley assessed as suicidal
    - Under 13 unless felony weapons charge
  - Specifies detention may not be used solely due to (more factors in statute):
    - Lack of supervision alternatives, service options, more appropriate facilities
    - Community's inability to provide treatment/services
    - Lack of supervision
    - To permit more convenient access

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**SB19-108****JUVENILE JUSTICE REFORM, CON'T**

- Development of statewide structured community-based graduated responses for probation officers to use in motivating juveniles and determining appropriate sanctions
- Eliminated some of statutory terms and conditions of probation and requires establishment of juvenile probation standards
- Relative information form to be developed for JD cases

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**HB19-1092****ANIMAL BAN  
FOR CRUELTY TO  
ANIMALS  
CONVICTION**

- Changes to C.R.S. 19-2-918.5
- Adds subsection 3.5 which allows the Court to enter an order prohibiting the youth from owning, possessing, or caring for a pet unless the treatment provider makes a specific recommendation not to impose the ban and the Court agrees.
- Implications for placement

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**HB19-1310****Interest on Restitution**

- Changes the interest rate on restitution to 8%
- Provides an exception for accruing interest when a defendant is in a Juvenile Delinquency case and under 21 years of age.
- Went into effect May 28, 2019

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**HB19-1335****Juvenile Record Expungement Cleanup**

- Adds other dispositions and alternatives to sentencing to the requirement to expunge the JV record within 42 days after dismissal or completion.
- When completing diversion prefiling, all records must be expunged (from all parties/providers) without requiring a court order.
- DA/Law Enforcement to notify schools and other entities when diversion is complete, and the records are expunged. All entities shall treat the records as expunged within 35 days of completing diversion.
- Supervising agencies are required to submit a report to the Court no earlier than 35 days prior to the end of supervision and no later than 14 days after the conclusion of supervision.
- Includes some provisions around discontinuation of registration.
- Provides for expungement of municipal court records.

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**SB19-185:  
PROTECTIONS FOR  
MINOR HUMAN  
TRAFFICKING  
VICTIMS**

Creates immunity for minors for prostitution related offenses if there is probable cause to believe the minor was a victim of human trafficking (C.R.S. 18-7-209)

*Went into effect May 6, 2019*

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**HB19-1315  
ADMISSIBILITY OF  
STATEMENTS BY A  
JUVENILE**

- Adds subsection (7) to C.R.S. 19-2-511
- Allows a juvenile to assert that statements made during a custodial interrogation are inadmissible because the responsible adult had an adverse interest.
- Burden is on the prosecution to show by a preponderance of the evidence that they reasonably believed the responsible adult was able to provide protective counseling to the juvenile about his or her rights.
- Effective August 3, 2019

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- For youth previously committed to DYS; found in C.R.S. 23-3.3-1201
- Creates a scholarship program for these youth to pursue a postsecondary credential.
- Awards made on a need basis of up to \$10,000
- Creates a program coordinator to counsel and support scholarship recipients
- Will be repealed Sept. 1, 2022
- Passed with an appropriation

### SB19-231 SECOND CHANCE SCHOLARSHIP

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## JUVENILE DELINQUENCY CASE LAW

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## RIGHT TO COUNSEL

### **People in Interest of J.V.D., 442 P.3d 1030**

- Heightened inquiry applies to juveniles waiving right to counsel
  - 19-2-706 factors: maturity, understanding of sentencing, lack of coercion, availability of appointed counsel, consequences of adjudication
  - Court must make findings based on dialogue of juvenile
- Consideration of juvenile's waiver of constitutional rights must consider, in addition to adult totality of circumstances test, factors such as age, court experience, education, background, intelligence, capacity to understand rights and consequences of waiver
- Juvenile's waiver was voluntary but not knowing and intelligent

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## SPEEDY TRIAL

**People in Interest  
of G.S.S.,  
2019 COA 4**

- No-bond hold order at the initial detention hearing triggered the speedy trial clock and required trial within sixty days of that order.
- G.S.S.'s actions did not constitute a waiver of his speedy trial rights.
- COA rejects the prosecution's argument that defense counsel had an obligation to alert the court and prosecution to the speedy trial issue: "it is the court's and the prosecutor's duty, not a defendant's, to ensure that the speedy trial provisions are met."
- Dismissal was proper remedy.

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## COMPETENCY

**People in the interest of B.B.A.M., 19SA151 (pending)**

- Supreme Court issued a rule to show cause why the district court did not err in affirming the magistrate's order requiring the juvenile to undergo a second competency evaluation.
- Should be briefed by end of September.

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## SEX OFFENDER REGISTRY

**People in Interest of T.B., 2019 COA 89**

- Colorado Sex Offender Registration Act (CSORA) requirement of lifetime registration of juveniles who are twice adjudicated for unlawful sexual behavior constitutes a punishment.
- Excessiveness of the registration requirement as compared to its public safety justifications—because CSORA precludes any individualized assessment of whether the juvenile poses a risk to public safety, it is overly inclusive and therefore operates more like a punishment.
- COA considers:
  - Language in statute demonstrating legislature understood it may be punitive as applied to juveniles
  - Impacts of lifetime sex offender registration for juveniles,
  - Changing landscape of juvenile law
- COA remands to the juvenile court for findings as to whether the punishment is cruel and unusual.
- Division disagrees with *People in Interest of C.M.D.*, 2018 COA 172 and other decisions.

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## DIRECT FILE – PRIVILEGE AND TRANSFER

### **People v. Brown, 442 P.3d 428 (Colo. 2019)**

- Juvenile charged as adult may not partially waive privileges to allow introduction of evidence at reverse transfer hearing
- Decision does not change reasoning of *Johnson*, 2016 CO 69, that reverse transfer statute does not compel production of mental health records

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## YOUTH CENTERED LEGISLATION

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### **HB19-1023 FOSTER YOUTH DRIVER'S LICENSE**

- Allows minors over 16 to contract for their own motor vehicle insurance
- Added a third path for a foster youth to get a driver's license – if they have proof of car insurance, they do not need anyone to sign the waiver of liability.
- Allows foster youth with an instruction permit to drive with any person who is at least 21 with a valid driver's license.
- Removed "designated" from county official
- Requires the Interim Transportation Committee to continue exploring barriers

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### SB19-071 EXPAND CHILD HEARSAY EXCEPTION

- C.R.S. 13-25-129
- Criminal, Delinquency or Civil Proceedings
- Statement made by a child 13 years of age or younger admissible if it complies with sufficient safeguards
- Statement made by a youth 15 years of age or younger who is the subject of the action admissible when describing all or part of an offense of unlawful sexual behavior if it complies with sufficient safeguards.

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### HB19-1288 FOSTER YOUTH SIBLING RIGHTS

- Changed definition of sibling group to mean biological sibling (and removed "who have been raised together").
- Created the "Foster Youth Sibling Bill of Rights" in C.R.S. 19-7-203
- Lays out 12 rights for foster youth siblings, unless they are not in the best interests of each sibling.
- Requires the GAL to advocate for frequent contact and visits with siblings unless the GAL independently determines it is not in the best interests of the youth.

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### CASE LAW: GRANDPARENT VISITS

#### ***People in Interest of C.N., 2018 COA 165***

- Grandmother's appeal of a juvenile court's order placing a child permanently with her foster parents and terminating the grandmother's visits.
- COA holds:
  - Grandmother did not have standing to assert issues regarding the mother or the child
  - Grandmother does not have a constitutionally protected interest in the care or custody of the child.
  - Grandmother was not entitled to notice of TPR
  - Juvenile court did not err in terminating visits, as the statutory definition of grandparent (for grandparent visits) excludes as grandparent the parent of a father or mother whose rights have been terminated
  - Juvenile court did not err in disallowing her petition for adoption in the D&N proceeding.
  - Subject matter jurisdiction and venue were proper.

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## CASE LAW: UCCJEA

### *People in Interest of A.B.A.*, 2019 COA 125

- Juvenile court lacked subject matter jurisdiction to terminate parental rights.
  - Iranian custody order in effect.
  - Court could exercise temporary emergency jurisdiction
  - Court did not have jurisdiction to terminate
    - Iranian order contains sufficient facts to demonstrate compliance with UCCJEA requirements of home state, notice, and opportunity to be heard.
    - Human rights exception does not apply.
- Juvenile court erred in allowing department to serve father by publication.
  - Evidence did not establish that department made efforts to locate father
  - Affidavit stated father was in Iran but court authorized publication in an Adams County newspaper.

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## UCCJEA CON'T

### *Parental Responsibilities of W.F.L.*, 2018 COA 164

- Issue: Colorado court's jurisdiction under the UCCJEA to enforce a parenting time order issued by another state.

#### Facts:

- GA enters parenting time order in 2011 and a modified parenting plan in 2012
- Mother and child relocated in 2014 to Colorado
- In 2016, father filed a verified motion under § 14-10-129.5, seeking enforcement of order.
- The district court registers the Georgia orders in Colorado but finds it lacked jurisdiction to grant father the enforcement remedies he sought.

Holding: District court did have jurisdiction to enforce order. See § 14-13-305(1) and § 14-13-306(1)

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## CASE LAW - EXPERTS

### *People in the Interest of A.N.-B.*, 2019 COA 46

- Attorney-client privilege does not protect report of a parent-child interactional conducted by an expert retained by the respondent mother.
  - Under circumstances of the evaluation, mother did not have an expectation of privacy in the evaluation
- Creation of ORPC did not alter analysis of *D.A.S. v. People*, 863 P.2d 291, 295 (Colo. 1993).
- Other arguments rejected: reasonable efforts, reasonable compliance with her treatment plan, sufficient time to comply with treatment plan.

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### JURY INSTRUCTIONS/ PARENT REFUSAL TO DRUG TEST

#### *People in Interest of M.H.-K., 2018 COA 178*

- The trial judge committed reversible error by reading the entire amended case history portion of the petition to the jury as part of its statement of the case instructions.
- Trial court erred in admitting evidence of Mother's refusal to agree to drug testing prior to the filing of the petition.
  - probative value only if the person has a duty to perform the act or it would have otherwise been natural under circumstances to perform the act.
- Trial court abused its discretion when it admitted evidence of mother's refusal of the caseworker's request to stop breastfeeding pending a drug test—no court order and mother had status as presumptively fit parent.

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### SB19-043 INCREASING THE # OF DISTRICT COURT JUDGES

- Increased the number of district court judges by 15 across the state
- Districts getting new Judge positions: 2<sup>nd</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 13<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup> and 21<sup>st</sup>.
- 53.7 FTE

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### HB19-1042: Expanding Jurisdiction for Vulnerable Youth

- Partnered with RMAIN
- Allows youth 18-21 who are requesting SIJS to get guardianship or allocation of parental rights orders. (Including the underlying orders required to pursue SIJS)

#### **HB19-1196: Financial Aid Assistance for Students Classified as In-State for Tuition**

These in-state students do not have to provide verification of lawful presence in the U.S. when applying for state student financial assistance

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## CASE LAW: ICWA

### **People in Interest of M.V., 2018 COA 163**

- Lack of compliance with ICWA's notice provisions does not deprive the court of subject matter jurisdiction to enter adjudicatory and dispositional orders.
- While an adjudicatory order does not constitute a foster care placement under ICWA, a dispositional order does.
  - Department should have sent notice of the hearing to the Sioux tribes
  - Court should have made the necessary findings under 25 U.S.C. §1912(a) and (e).
- Trial court erred in admitting video recordings that had been anonymously delivered because no witness could independently verify the accuracy/reliability.

### **HB19-1232: Aligning ICWA Requirements**

- Aligned the Colorado ICWA statutes with the 2016 federal ICWA guidance

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## ICWA, CON'T

### **People in Interest of L.R.B., 2019 COA 85**

- Juvenile court erred in denying tribe's motion to transfer jurisdiction during adoption proceeding
  - Court acknowledges that ICWA only acknowledges request to transfer jurisdiction during foster care placement and TPR proceedings and does not mention preadoptive or adoptive proceedings
  - Section 19-1-126 at the time permitted juvenile court to consider transfer request
  - All parties who had standing to oppose transfer agreed to transfer
- Former foster parents lacked standing to oppose tribe's request for transfer of jurisdiction
  - No longer have intervenor status
  - Do not have constitutionally protected liberty interest
  - Civil joinder rules cannot confer standing
- Court's denial of tribe's request to transfer jurisdiction is final, appealable order

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## ICWA, CON'T

### **People in Interest of Z.C., 2019 COA 71M**

- On remand from COA, department sends notice to eight tribes. Problems with receipts:
- Two receipts signed but undated notices: department's return date stamp supported juvenile court's findings that those tribes received timely notice
- One receipt unsigned: insufficient evidence in record to support findings of timely notice
- No return receipt from the last tribe: insufficient evidence in record to support findings of timely notice

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## HB19-1104 RESPONDENT PARENT COUNSEL

- Clean up bill run by ORPC
- Added RPC to the list of court appointed attorneys allowed statewide read-only data access (C.R.S. 19-1-307(d))
- Clarified that in a parental reinstatement case the petitioner is entitled counsel through ORPC (C.R.S. 19-3-612(5))

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## People in Interest of A.R., 18SC919 (certiorari granted on 2018 CO 176)

- Whether the court of appeals, in departing from the decisions of other divisions of the court of appeals, correctly designated "fundamental fairness" as the best means to apply second prong of *Strickland* on appeal of TPR.
- Whether an appellate court may vacate a trial court's decision in a dependency and neglect case without remanding the case to the trial court to make findings under *Strickland*.
- Whether an appellate court, in a direct appeal from a judgment terminating parental rights, may consider a claim of ineffective assistance of counsel based on counsel's performance at an adjudicatory hearing.
- (note that first prong of *Strickland* is also impacted by COA decision)

## INEFFECTIVE ASSISTANCE OF COUNSEL

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## People in Interest of A.L.W., 19 SC 370 (pending)

- Fundamental fairness as best means of analysis of *Strickland*'s second prong?
- Whether RPC "electing to do nothing" during a TPR is sufficient evidence of ineffectiveness so that COA can vacate without "unnecessary delay" of remand
- Whether appellate court may vacate termination without remand for findings under *Strickland*.

## INEFFECTIVE ASSISTANCE OF COUNSEL, CON'T

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## GAL for Parent

### People in Interest of T.M.S., 2019 COA 134

- Appeal of a termination order in which GAL for parent presented argument and testimony in favor of termination
- Juvenile court erred in not granting parents' motion to remove GAL and in permitting GAL's closing argument but error was harmless
  - GAL has an assistive role of facilitating communication between parent and counsel and helping parent participate
  - GAL for parent does not participate as a party or party's advocate in D&N proceedings
    - GAL lacked standing to file a response to mother's motion
    - GAL should not have participated in closing argument
- GAL improperly advocated against mother's goal of protecting fundamental liberty interests
- Court must make findings to support appointment of GAL on basis of mental impairment
- Implications for GALs for children?
  - Court notes that legislature has recognized differences between "respective disabilities and legal incapacities of children and mentally disabled adults."
- Other holdings
  - No error in denying motion to continue termination hearing to secure witnesses
  - No error in denying motion to continue termination hearing to give more time to work on treatment
  - No ineffective assistance of counsel

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### People in Interest of S.K., 2019 COA 36

- For parents with qualified disabilities under the ADA, a juvenile court must consider reasonable accommodations in deciding the appropriateness of a treatment plan and reasonable efforts.
- Department must provide appropriate screenings and assessments, but only has responsibility to accommodate known or obvious disabilities.
- Parent has a responsibility to disclose information disability and to identify modifications
- Determination of reasonable accommodations is based on an individualized assessment and includes consideration of the child's health, safety, and need for permanency.

## PARENTS WITH DISABILITIES

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## HB19-1308

### FOSTER CARE PREVENTION SERVICES

- Colorado's Family First Prevention Services Bill
- Adds definitions in Title 26 around prevention services, QRTP and trauma informed care
- Ensures CDHS can use funding for prevention and implementation of FFPSA
- Specifically states that the sections added through this bill are not effective until Colorado's Title IV-E Prevention Plan is approved by the federal government

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**HB19-1308****FOSTER CARE PREVENTION SERVICES, CON'T**

- Adds definitions in Title 19 around prevention services, QRTP, and trauma informed care.
- Adds provisions around QRTP in C.R.S. 19-1-115
- Adds prevention services to those counties are required to provide pursuant to C.R.S. 19-3-208
- Adds C.R.S. 27-66-110 – Requires the Office of Behavioral Health to establish care standards and an approval process for QRTPs to ensure a trauma informed treatment model

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**SB19-258  
Prevention  
and  
Intervention  
Funding**

- JBC Bill
- Necessary to extend the repeal date of the Title IV-E waiver (to June, 2020)
- Also used to codify Title IV-E funding for attorney services
- Requires the state IV-E agency to pursue this funding
- Creates a cash fund for the money drawn down
- Ensures OCR and ORPC can receive disbursements from the fund in accordance with an MOU between each agency and CDHS

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**Prevention-Like Legislation**

- HB19-1017 Kindergarten through 5th Grade Social and Emotional Health Act
- HB19-1333 Colorado Child Abuse Response and Evaluation Network
- HB19-1142 Safe Family Option for Parents
- HB19-1193 Behavioral Health Supports for high-risk families
- SB19-010 Professional Behavioral Health Services for Schools
- SB19-195 Child and Youth Behavioral Health System Enhancements

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- Narrows out of school suspension for students in preschool through second grade in C.R.S. 22-33-106.1
- Requires school to consider a set of factors (set forth in C.R.S. 22-33-106 (1.2) on a case by case basis before suspending or expelling the student.
- Limits out of school suspensions to three days without further approval from the executive officer or chief administrator
- Requires annual review of data

#### HB19-1194 SCHOOL DISCIPLINE PRESCHOOL – 2ND GRADE

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#### HB19-1206 Higher Ed Supplemental Academic Instruction

- Aimed to reduce equity gaps in higher education by ensuring more students have access to supplemental academic instruction
- Targets gateway English and math courses and maximizing a student's successful completion within 1 year.
- C.R.S. 23-1-113

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