

2021 CASE LAW AND LEGISLATIVE UPDATE

OFFICE OF THE CHILD'S REPRESENTATIVE

1

QUICK SUMMARY
Legislative Session

- Legislative session began in January, recessed due to COVID until mid-February and then proceeded full steam through early June.
- OCR monitored over 70 bills, testified on 10 and participated in stakeholder meetings for many more.
- Special thanks to the OCR Legislative Committee -
 - Elizabeth Martinez
 - Megan Curtiss
 - Josi McCauley
 - Laura Locke
 - Beth Padilla
 - Erin Cliftt
 - Brittany Radic
 - Jim Plunhoff
 - Jennifer Zamarippa
- Meanwhile, the courts continued to hear cases on a variety of issues, and the Colorado Child Welfare Appeals Workgroup submitted its report: [https://www.courts.state.co.us/Media/Opinion_Docs/Appellate%20Workgroup%20Final%20Report%20\(2021-04-23\).pdf](https://www.courts.state.co.us/Media/Opinion_Docs/Appellate%20Workgroup%20Final%20Report%20(2021-04-23).pdf).
- Interesting Federal Cases were also decided



2



STARTING WITH SOME VICTORIES . . .

3

PEOPLE IN INTEREST OF A.M., 480 P.3D 682 (COLO. 2021)

- Best interests, rather than adequacy, applies to a court's TPR decision.
 - Primary consideration of the child's physical, mental, and emotional condition and needs requires more than a mere assessment of adequacy in order to satisfy the overall interest of the Children's Code.
 - Adequacy standard is not necessary to satisfy a parent's due process rights. Once parental unfitness has been established at a termination hearing, the interests of the parent and child diverge and "the separate interests of the child outweigh the risk of erroneous termination of the parent-child relationship." Due process is satisfied by the trial court's consideration of the statutory criteria for termination.
 - The Court also holds that express consideration is better practice but not necessary to protect parents' due process rights.
- Also addresses standards of review—COA failed to apply clearly erroneous standard of review and improperly substituted its judgment for trial court.

Other cases in which LDA determination upheld: R.J.B., 2021 COA 4, B.H., 2021 CO 39

4

HB21-1094
*Transition Of Youth
 In Colorado's Foster
 Care System To
 Successful
 Adulthood*

Changes the way foster youth experience the system as they turn 18.

Establishes the voluntary Foster Youth in Transition Program which allows youth to re-enter or continue after the age of 18.

Attorneys will change from best-interest legal representation to client-directed legal representation when a young person turns 18.

See OCR resources for additional information (search 1094 on the Litigation Toolkit)

Effective June 25th, 2021

5



HB21-1084
Drivers' Licenses For Foster Children
 effective September 6, 2021

Requires the state department to reimburse the county for costs paid to a public or private driving school for driving instruction to a foster youth aged 15 – 21.

Clarifies that the county or state department is not liable for a foster youth who is driving.

Alerts us to the possibility of using exceptions processing at the DMV for youth with issues showing the required documents.

6



DIVERSITY, EQUITY, INCLUSION (DEI)

7

DEI RELATED LEGISLATION

SB21-181: Equity Strategic Plan Address Health Disparities	HB21-1266: Environmental Justice Disproportionate Impacted Community	HB21-1251: Appropriate Use of Chemical Restraints on a Person
HB21-1250: Measures to Address Law Enforcement Accountability	HB21-1212: Diversity of Governor's Appointments to Boards	HB21-1010: Diverse K-12 Educator Workforce Report

8

SB21-199
REMOVE BARRIERS TO CERTAIN PUBLIC OPPORTUNITIES

- Repeals requirements that a person must demonstrate lawful presence in the US to be eligible for certain public benefits.
- Effective July 1, 2022

HB21-1075
REPLACE THE TERM ILLEGAL ALIEN

- Replaces with "worker without authorization"
- Effective 9/6/21

HB21-1054
HOUSING PUBLIC BENEFIT VERIFICATION REQUIREMENTS

- Creates a public or assisted housing benefit exception to the requirement that an applicant for federal, state or local public benefits verify lawful presence in the US.
- Effective 4/15/21

9

HB21-1072
Equal Access Services For Out-of-home Placements

- Requires providers of services related to child and youth OOH placement to provide fair and equal access to all available programs, benefits and services offered.
- Services must be culturally responsive to the complex social identity of the youth.
- Service provider is limited from denying any person the opportunity to become a foster or adoptive parent on the basis of real or perceived disability, race, creed, religion, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, ancestry or any communicable disease, including HIV.
- Effective 4/19/2021



10

PEOPLE IN INTEREST OF S.M. & E.M.
2021 COA 64

- Review of termination order by judge publicly censured for statements exhibiting racial bias.
- Parents' request for reversal based on censure/statements is denied.
- Limited remand for C.R.C.P. 60(b) motions.

11

FULTON V. PHILADELPHIA, 141 SCT 1868 (2021)
JUNE 17, 2021

Philadelphia's refusal to contract with Catholic Social Services for the provision of foster care services unless agency agrees to certify same-sex couples as parents violates the free exercise clause of the First Amendment.

Enforcing nondiscrimination laws is not in conflict with the First Amendment; the constitutional issues arose from an antidiscrimination contract provision that permitted exceptions at sole discretion of the governor. This mechanism for entirely discretionary exceptions makes non-discrimination provision not generally applicable and therefore subject to strict scrutiny review.

12

ICWA

People in Interest of K.C. v. K.C., 2021 CO 33

- Neither ICWA nor Colorado's implementing statute provide for an enrollment hearing.
 - Enrollment hearing conflicts with tribes' exclusive rights to determine membership
- Neither federal nor state law imposes on department any obligation to assist with enrolling eligible children.
 - Court acknowledges that assisting with enrollment and advising parents about enrollment may be a best practice.

People in Interest of My.K.M. and Ma.K.M., 2020COA33, certiorari granted No. 21SC245

- Whether the Court of Appeals erred in its analysis of the Indian Child Welfare Act (ICWA) in determining Department of Human Services ("DHS") did not make "active efforts" to provide services and programs designed to remediate the problems that caused DHS' involvement, rehabilitate parents, and prevent the breakup of the Indian family.

13

**HB21-1151
INDIAN TRIBES TO
CERTIFY OWN FOSTER
HOMES**

ALLOWS FEDERALLY RECOGNIZED TRIBES TO CERTIFY THEIR OWN FOSTER HOMES

14



15



19

HB21-1187
 Long-term Services
 And Support Case
 Management
 Redesign

- Redesigns the case management system through HCPF requiring Case Management Agencies and Person-Centered Support Plans.
- Rules must be established no later than July 1, 2024 and requires stakeholder input and planning
- New language around eligibility and disability determinations
- 60 page - bill effective 9/6/2021

20

HB21-1018
 Adoptive Parents
 Payments To Outside
 Providers

- Allows adoptive parents with an adoption assistance agreement to pay for medical services that would otherwise be reimbursable under the medical assistance program. Language added in 26-7-107 (3) and (5).
- (3)(b)(ii) IN ADDRESSING THE NEEDS OF AN ELIGIBLE ADOPTED CHILD OR YOUTH, ADOPTIVE PARENTS MAY KNOWINGLY TAKE ON ADDITIONAL COSTS FOR ITEMS OR SERVICES FOR THE CHILD OR YOUTH BEING ADOPTED, WHICH ITEMS OR SERVICES ARE OTHERWISE COVERED COSTS UNDER THE MEDICAL ASSISTANCE PROGRAM ESTABLISHED IN ARTICLES 4, 5, AND 6 OF TITLE 25.5 AND IDENTIFIED AS BENEFITS IN SECTION 25-7-505 (2)(b). THE LIMITATIONS ON RECIPIENT PAYMENTS CONTAINED IN SECTIONS 24-31-808 AND 25.5-4-301 DO NOT APPLY TO SUCH ADDITIONAL COSTS SO LONG AS THE ADOPTIVE PARENTS CONSENT TO BEAR THE COSTS AS PROVIDED IN SUBSECTION (3)(b)(ii) OF THIS SECTION, AND SO LONG AS THE PROVISIONS OF THIS SUBSECTION (3)(b) ARE NOT PROHIBITED UNDER FEDERAL LAW.
- Signed and became effective May 7th, 2021.

21

TREATMENT RELATED BILLS

HB21-1021: Supporting Peer Support Professional Workforce: Requires CDHS to develop a procedure for recovery support services organizations to be approved, establishes requirements and a cash fund. Purpose is to expand the use of peer supports for treatment (effective 9/6/21).

HB21-1258: Rapid Mental Health Response for Colorado Youth: Establishes a temporary program to facilitate youth mental health services through the Office of Behavioral Health (OBH). Reimburses providers for up to 3 mental health sessions (or more depending on funding). Portal is being developed (effective 6/18/21).

SB21-056: Expand Cannabis-based Medicine at Schools: Requires school districts to implement policies for the storage, possession and administration of cannabis-based medicine by school personnel (effective 9/6/21).

SB21-154: Suicide Prevention Lifeline Network: Implements the national 988 suicide prevention lifeline network in Colorado (effective 9/6/21).

22

Additional Resources	HB21-1033 – STATE APPRENTICESHIP AGENCY
	HB21-1264 – FUNDS WORKFORCE DEVELOPMENT INCREASE WORKER SKILLS
	SB21-027 – EMERGENCY SUPPLIES FOR COLORADO BABIES AND FAMILIES
	SB21-232 – DISPLACED WORKERS GRANT

23



FAMILY CONNECTIONS, VISITS

24



APR, PARENTAGE, CHILD SUPPORT

28

CHILD SUPPORT/PARENTAGE

People in Interest of E.Q., 2020 COA 118

- Juvenile court had jurisdiction to issue child support orders after approving parties stipulation regarding parental responsibilities.
- Juvenile courts ordering child support pursuant to 19-1-104(6) must follow the child support provisions set forth in 19-6-106, which require compliance with the child support guidelines set forth in 14-10-115.
- Juvenile court erred in entering orders regarding designation of representative payee for SSDI benefits—Commissioner of Social Security must make that determination.

People in Interest of K.L.W., 2021 COA 56

- UPA does not allow recognition of more than two legal parents for a child
- COA upholds court's parentage determination, holding that the court properly considered the children's best interests and other pertinent factors in making its determination.
- Standard of proof for parentage determination; parentage presumption may only be rebutted by clear and convincing evidence; preponderance standard applies to parentage determination if no presumption.

29

PEOPLE IN INTEREST OF J.G., 2021 COA 47

- Grandmother had standing to seek APR order
- Children's Code provisions rather than UDMA provisions govern APR analysis in D&N case
- Troxel presumption of fitness can be restored in a D&N case
 - When applicable, juvenile court must determine whether presumption has been overcome by CBC evidence AND/OR explain how special factors justified interfering with parent's determination of best interests.
- Granting sole decision-making authority to a nonparent over a fit parent's objection does not automatically infringe on parent's constitutional rights; Troxel presumption serves as adequate protection.



30



31

- Testimony of department employees re observations, statements, and conclusions of hospital personnel was inadmissible hearsay.
- "Rules of Evidence are not mere exercises in formalism; they, like our other rules of procedure, are designed to ensure the substantive integrity of the process and to elicit reliable evidence."
- Children's Code does not allow adjudication based on parents' criminal charges alone; court's findings and record do not establish link between charges and needs of the child.

PEOPLE IN
INTEREST OF
D.M.F.D., 2021
COA 95

Hearsay/Experts

32



COUNSEL ISSUES

LB-H-P, 2021 COA 5

- For counsel's medical condition to constitute excusable neglect for late filing, the party must show that counsel's condition or need for care was so disabling that it prevented counsel from filing the petition or requesting a time extension.

B.M., 2021 CO 39 (briefed above):

- Juvenile court did not violate father's due process rights or statutory right to counsel when it declined to appoint him a third attorney.

People in Interest of K.S.-E, 2021 COA 93

- 5th amendment privilege against self-incrimination
- Review of contempt order against RPC seeking to advise parent on this right.
- Contempt order vacated:
 - 5th amendment right encompasses contemporaneous advice and counsel entitled to advise mother.
 - Risk of irreparable harm was sufficient to excuse noncompliance

33



34

JUVENILE JUSTICE

**People in Interest of N.D.O.,
2021 COA 100**
Juvenile can be held accountable for crime of violence under complicity theory.

**People in Interest of B.H.,
2021 COA 86**
Prejudgment interest on restitution for property damage begins on date victim incurs replacement/repair costs.

35

HB21-1064
*Update Processes
Juvenile Sex Offender
Registry*
effective 6/24/2021

- Implements various recommendations from the legislative oversight committee concerning the treatment of persons with mental health disorders in the criminal and juvenile justice systems regarding juveniles who have committed sex offenses.
- Clarifies requirements that a juvenile moving from a state where the duty to register was terminated by court order is not required to register in Colorado.
- Expands judicial discretion regarding registration and notice requirements regarding the duty to register
- Provides for clean-up of the registry for those no longer under a duty to register
- And much more

36



40

HB21-1309

CRIMINAL TRIAL
CONTINUANCES
COVID-19 PANDEMIC
(C.R.S. 18-1-405 &
16-4-107.5)

41

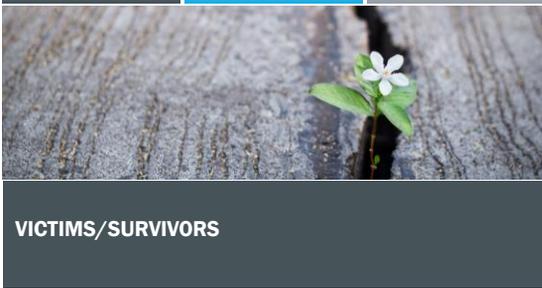
**PEOPLE IN
INTEREST OF R.J.B.,
2021 COA 4**

Court did not abuse discretion in holding termination hearing via Webex.

Mother's due process and equal protection rights were not violated by denial of continuance until hearing could be held in person.

Less drastic alternatives determination upheld.

42



43

<p>SB21-088 Child Abuse Sexual Accountability Act</p> <ul style="list-style-type: none"> Creates a civil cause of action for a minor who is a victim of sexual misconduct against the organization that operates or manages the youth program if the sexual misconduct occurred while the victim was participating in the program if the organization knew or should have known of a risk of sexual misconduct. Claims brought when the misconduct occurred after January 1, 2022 have no statute of limitations When the misconduct occurred between January 1, 1960 and January 1, 2022 the claim must be brought before January 1, 2025. Effective Jan. 1, 2022 	<p>SB21-280 Concerning Bias Motivated Crimes - "Kiana Arrellano's Law"</p> <ul style="list-style-type: none"> Harassment becomes a class 1 misdemeanor (from a class 3) if the offender commits harassment because of that person's actual or perceived race, color, religion, ancestry, national origin, and physical or mental disability. Effective 6/28/21 <p>HB21-1069 Enforcement of Sexual Exploitation of a Child</p> <ul style="list-style-type: none"> Updates language to reflect evolving technology and makes sexual exploitation of a child an extraordinary risk crime. Effective 9/6/21
---	---

44

<p>HB21-1060 <i>U VISA CERTIFICATION REQUIREMENTS</i></p>	<ul style="list-style-type: none"> Visa path for victims of certain crimes Bill clarifies requirements and establishes timeframes to achieve consistent application state-wide Effective 5/10/21
--	---

45



46

HB21-1059
Online Student Protections “Isaiah’s Law”

- Prevents education providers from:
 - prohibiting a student’s parent from being in the same room except when person is continually disruptive
 - Requiring video if the student’s technology doesn’t allow for such use of a camera
 - Suspend or expel a student based on the presence of an item within the student’s physical environment while participating in online instruction or based on the student’s behavior (with some exceptions).
 - If a student was suspended or expelled on or after March 23, 2020 in violation of this section then it must be revoked and expunged from the students record.
 - Effective 5/28/2021

47

OTHER EDUCATION RELATED BILLS

- SB21-106:** Concerning Successful High School Transitions – opens the high school innovative learning pilot program to other schools, either independently or through a district. Creates the 4th year Innovation Pilot Program (effective 7/7/21).
- SB21-119:** Increasing Access to High-Quality Credentials – deals with the career development success program which provides financial incentives to school districts to encourage programs like we discussed above. Expands apprenticeship programs to those outside of construction services. Requires collaboration of various departments to identify each year the top 10 industry-recognized credentials that may be awarded to high school students and aligned state academic standards (effective 6/30/21).
- SB21-117:** Foster Care Student Services Coordination – amends provisions concerning students in OOH placement and mandates cooperation between the schools and county. Streamlines transportation billing practices and allows regional plans (effective 4/26/21).

48



49

SB21-278
Reimbursement For
OOH Placement
Services

- Changed some of the language in the FFPSA sections of Title 19 to allow ARD the full 60 days for the initial hearing for youth in DYS.
- Sets rules for negotiating reimbursing rates and doesn't allow negotiation below the set minimum.

50

SB21-269
Licensing Of
Respite Child Care
Centers

- Adds a licensing type to allow facilities to add programming to serve kids in foster or kinship care that need respite (for age 5-21).
- This would be recreational, peer interaction, skill development, and trauma-informed care, but not treatment.
- Effective 9/6/21

51



52
