TABLE OF CONTENTS

Articles »

What Rights Do Students Have in the Charter School Era?
By Jessica Schneider
Though charter schools are exempt from certain state laws and regulations, charter school students are entitled to the same federal protections as traditional public school students.

A Mobile Legal Office: Meeting Kids Where They Are
By Stacey Violante Cote and Lori Nordstrom
By bringing legal services to homeless youth, they are more likely to know about and get assistance with enforcing their rights.

The Rights of Indian Children: Indian Child Welfare Act Regulations
By Sheldon Spotted Elk
Like the horned toad from Ute legend that helped rescue a boy from harm, child advocates can be a tool in a child's hand.

What Educational Benefit Must a School Provide to a Student with a Disability?
By Jamie Schulte
The Supreme Court is considering whether a merely more than de minimis educational benefit satisfies a school's obligation to provide a free appropriate public education to students with disabilities.

Practice Points »

Ensuring Quality Counsel in Child Welfare Cases for Children, Parents, and the Agency
By Cathy Krebs
The HHS Administration for Children and Families Children's Bureau has issued an information memorandum focused on providing high-quality legal representation for all parties in child welfare court proceedings.

Can the Input of Youth Improve the Justice System?
By Jessalyn Schwartz
Some youths cited lack of food and hot water as reasons for their truancy.
What Rights Do Students Have in the Charter School Era?

By Jessica Schneider – March 30, 2017

The History and Background of Charter Schools and School Choice

“School choice.” It’s a phrase we hear often in today’s education discourse, and the discussion around the nomination for U.S. Secretary of Education has put the issue front and center nationally. As parents and students look for higher performing alternatives to neighborhood schools that often suffer from a lack of resources, charter schools have arisen as one of those alternatives. Charter schools are public schools but are designed to be more innovative and free from constraints. Charters are often referred to as being publicly funded but privately run. Though they do not charge tuition and are open to all students, they can also be thought of as “laboratories” where new and different education policies and practices are tried. Charter schools are given this opportunity for innovation but also held accountable for student learning. They often have a special and unique focus, such as science, technology, engineering, and math; performing arts; or even a legal theme. Some take a structured “no excuses” approach to discipline, trying to prepare students for life beyond high school. Other charter campuses may be alternative schools, or even online schools, or specifically for students who have dropped out of a traditional public school and are trying to recover their credits in order to graduate. This article will cover the legal differences between charter schools and neighborhood public schools as well as the rights of students within charter schools.

Charter schools are a relatively recent phenomenon. In 1991, Minnesota passed the first charter law, and the first charter school opened in 1992. All charter schools operate independently through their charter (contract) between state education officials and community or school leaders. The contract specifies the goals and metrics that must be met in order for the charter school to be in operation. They receive public funding including local, state, and federal tax dollars just like other public schools. According to the National Alliance for Public Charter Schools (NAPCS), there are more than 6,800 charter schools across 43 states and the District of Columbia educating nearly three million children. Charter schools are also unique in that they choose their own management structure and do not have the traditional elected school board that is common to almost all other public schools in the country. The NAPCS reports that 67 percent of all charter schools are independently run, nonprofit, single-site schools; 20 percent are run by nonprofit organizations that run more than one charter school; and just under 13 percent are run by for-profit companies. For-profit charter schools do have to meet financial oversight regulations, just like any company the government would contract with to provide a service. Some networks are quite large. Achievement First operates 32 schools in Connecticut, New York, and Rhode Island. The Noble Network of charter schools
in Chicago operates 16 high schools and serves over 11,000 students in the city. That makes it larger than most school districts in the state of Illinois. After Hurricane Katrina, New Orleans has essentially replaced a traditional public school system with charter schools. As the number of charter schools grows, it is important that advocates know how they operate and what rights students have.

Laws Governing Charter Schools
There is heated debate about whether charter schools are in fact higher performing than traditional public schools and whether they truly intend to educate all students, including students of color, English-language learning (ELL) students, and students with disabilities. But despite the debate, it is true that charters are here to stay and are a continually growing presence in the education landscape. It is important to reiterate that charter schools are public schools and therefore open to all students. They cannot discriminate on the basis of race, religion, disability, or any other protected basis. That means that any student is allowed to attend a charter school and should not be turned away unless it is by lottery for seats due to high demand. It is important to obtain information on the admissions procedure for a charter school in order to understand the process. If charter schools do discriminate in admissions or in treatment of students who are enrolled, a complaint may be filed with the Office for Civil Rights of the U.S. Department of Education. Equitable remedies are available.

Charters, much like other traditional public schools, are governed largely by state law, with some exceptions. What differentiates them is contained in the laws authorizing charter schools that vary from state to state, so it is important to know the charter law in your state. All charter laws should specify a few key points and procedures:

- The law should specify whether there is a cap on the number of charter schools allowed in the state. For example, in Colorado there is no limit to the number of charter schools established, while in Illinois there can only be 120 charters authorized, a maximum of 75 in Chicago and 45 in the rest of the state. It reserves five of the charters in Chicago for dropout recovery schools.
- It should specify what bodies authorize charter schools. Local school boards are often the authorizers of charter schools, but states also can have multiple authorizers such as a state charter commission. There should be a section on the charter application, review, and authorization process for charter schools.
- The law should specify what oversight is required, such as an annual or biannual report or specific data collection to monitor the performance of the charter school. It should also include grounds for renewal, nonrenewal, and revocation.
- The law should specify how the charter schools are exempt from state law and school district regulations, and from which ones. Most of the laws and regulations governing school districts do not apply to charter schools, which is what gives them the freedom to operate in
Children’s Rights Litigation  
Spring 2017, Vol. 19 No. 3

a different way. The exemptions vary widely from state to state and can have implications for labor, civil rights, and teacher certification, just to name a few areas.

You can find a comparison of all state charter laws at www.publiccharters.org.

**Protections under Federal Law: Homeless Students**

Once a student has decided to attend a charter school, it is important for advocates to know what the student’s rights are. Though charters are exempt from certain state laws and regulations, students are entitled to the same federal protections in charter schools as in traditional public schools. Though it seems obvious, it is not always apparent given the fact that charter schools are often perceived as being different than other public schools. In addition, charter staff and administration may be unaware of federal requirements or suggest they do not apply in the same way. Education of students, parents, and staff can have a big impact in those situations.

If a student is homeless, or more specifically in a temporary living situation, he or she is protected by the [McKinney-Vento Homeless Assistance Act (McKinney-Vento Act)](www.ed.gov). The McKinney-Vento Act applies to local education agencies (LEAs)—i.e., school districts—and the charters authorized by them (or in some cases a charter school is its own LEA). It also applies to state education agencies (SEAs). According to the Department of Education, during the 2013–2014 school year, more than 1.3 million homeless children and youths were enrolled in public schools. Young people of color and lesbian, gay, bisexual, transgender, queer, and questioning (LGBTQ) students are also disproportionately represented in the homeless student population. The McKinney-Vento Act defines homelessness broadly as children and youth who lack a fixed, regular, and adequate nighttime residence. This includes not only students who don’t have a home or need to sleep elsewhere at night but also students who are living together with other friends or family members temporarily. Some states have their own laws that protect homeless students.

Homeless students often face problems with attendance, transportation, regular access to food, enrollment documentation requirements, and a lack of comprehension of these issues by school personnel. Under the McKinney-Vento Act, students are entitled to attend their school of origin even if they are temporarily in a different location because of homelessness, receive transportation to the school of origin (which could be a charter school), and can be entitled to enroll in a school immediately even if not able to produce the required records. Students and parents should also be entitled to an appeal or dispute resolution process if they dispute a decision. Homeless students are also automatically entitled to a free meal under any federal free meal program.

The McKinney-Vento Act also requires the LEA to designate a liaison to be responsible for posting public notices in the school listing the protections for students, ensuring homeless

© 2017 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
students in the school and community are properly identified, making appropriate referrals to outside agencies, and providing parents with opportunities for involvement, among other requirements. If the charter is authorized by an LEA, it is important to find out who the liaison is for that district. There are many other things charter school students and staff should be encouraged to do to support homeless students, including assessing their needs for academic and behavioral supports. Homeless students are entitled to participate in all the programming that other students are entitled to, but school staff should also be able to provide additional supports to address other needs particular to homeless students.

**Protections under Federal Law: Students with Disabilities**

The highly regulated legal area of special education clashes with the legal autonomy of charter schools. Charters should not turn down students with disabilities or “counsel them out” by suggesting that a student would receive better or more appropriate services at a traditional public school. Smaller networks and single-site charter schools operate on a smaller scale, meaning they might not have the resources that a larger school district has, including special education staff. It is important that any advocate be aware that charters have consistently enrolled a lower percentage of students with disabilities. A report by the Government Accountability Office published in 2012 showed that special education students—those with diagnosed disabilities from Down syndrome to attention-deficit disorder—made up 8.2 percent of charter school students during the 2009–2010 school year. While that was up from 7.7 percent the year before, it was below the average at traditional public schools of 11.2 percent in 2009–2010, and 11.3 percent the previous year. There also has been local evidence of charter schools requesting application information that would discourage students with disabilities from applying. In Illinois, the organization Equip for Equality conducted an audit of charter school applications in 2015. It uncovered that some schools ask for inappropriate and sometimes illegal information, such as disability status, Social Security number, and criminal history. Most enrollment forms lacked clear nondiscrimination statements and a clear process that ensures charter schools welcome all students. If charter schools are truly open to all students, they must include students with disabilities.

Two major federal laws that protect students with disabilities are:

- The **Individuals with Disabilities Education Act (IDEA)** that requires schools to serve the needs of students with disabilities and prepare them for further education, employment, and independent living.
- Section 504 of the Rehabilitation Act of 1973, **29 U.S.C. § 794**, that prohibits discrimination based on disability. Section 504 is an antidiscrimination, civil rights statute that requires the needs of students with disabilities to be met as adequately as the needs of nondisabled students. No otherwise qualified individual should, because of a disability, be excluded from participation in or denied the benefits of or subjected to discrimination under any program or activity receiving federal financial assistance, including public schools.
In practice, the application of these laws takes the form of an individualized education program providing services for a disabled student (IEP) and/or a 504 plan. IDEA specifies that a student with a disability must receive a free and appropriate education in the least restrictive environment. It also provides for parents and students to have a voice in this process of evaluating a student and forming the IEP. IDEA covers many different kinds of disabilities that are specifically named in the law, including learning disabilities. A parent can request an evaluation of the student if a disability is suspected, and the school has to provide it. Once a student is found eligible, a team will develop an IEP for the student, which specifically details the services and supports the school will provide to ensure success in school. In addition, the IEP will set out goals for the student. The school can also be responsible for identifying students with disabilities. If the parent disagrees with the services in the IEP or the process, there is a dispute resolution procedure. Often trying to resolve the issue within the district is possible before moving to more formal procedures.

A 504 plan is an accommodation plan. To qualify, the disability must substantially limit the child’s ability to receive an appropriate education as defined by section 504. Unlike in IDEA, there is not a specific list because it would be extremely difficult to exhaustively list all conditions that could qualify. A student may have a chronic condition that is not always obvious, or may have a temporary condition such as a broken arm or leg. Accommodations could include assistance carrying books, a preferred seating assignment, extra time on tests or assignments, assistance with note taking, or a plan for taking medication during the school day. Anyone can refer a student for an evaluation under section 504. Students with an IEP are also entitled to different protections in school discipline proceedings, which are further described below.

**Discipline and the School-to-Prison Pipeline**

Even once a student is properly enrolled and has appropriate services, multiple suspensions or an expulsion will not lead to success at a charter school. Keeping a student in school and addressing root causes of disciplinary problems can be critical for the future success of a student. Charter schools have been a large part of the discourse about school discipline and the school-to-prison pipeline, which describes the increasing amount of contact students have to the juvenile justice system because of the discipline practices implemented by schools. It also often reflects the disproportionate effect of discipline and arrests on students of color and disabled students. Zero tolerance policies have made it more likely for students to be suspended, expelled, or even arrested for what may have been previously considered a minor behavior that should be dealt with at school. Bullying issues, including on social media, have also made discipline even more complicated. Discipline is largely governed by state law and individual districts, and unless it involves special education students is not highly regulated. Districts are often given wide discretion to decide what discipline is appropriate within certain boundaries. Because charter schools are autonomous, they are given even more discretion, and
some charter schools are formed around the idea of strict discipline and a highly regulated environment. Some, such as the Noble Network in Chicago, used to fine students for minor disciplinary infractions, though it has since discontinued that practice.

A 2016 study by the Civil Rights Project at UCLA analyzed charter school discipline records across the nation. The study identified 374 charter schools across the country that had suspended 25 percent or more of their entire student body during the course of the 2011–2012 academic year. It also found that more than 500 charter schools suspended black charter students at a rate that was at least 10 percentage points higher than that of white charter students, and 1,093 charter schools suspended students with disabilities at a rate that was at least 10 percentage points higher than that of students without disabilities. It is not true that every charter school is suspending or expelling more students, but it is concerning that charters are using exclusionary discipline at such high rates, especially when a lot of charter schools are serving communities that already face barriers to a quality education.

Procedural due process for discipline is determined by state law and board policy, and it is important to verify what the policies and procedures are for your state, and whether charter schools are exempt from those state laws and regulations. But some protections are the same in every school. Students have a state-created property right to an education, and that right cannot be taken away without due process. The Supreme Court found that students facing suspension should at a minimum be given notice and afforded some kind of hearing. Goss v. Lopez, 419 U.S. 565 (1975). The decision also specified the difference between a short-term suspension and a long-term suspension or an expulsion. Students have a right to a hearing and ideally should be provided notice in writing. But the practice of carrying that out as well as hearing procedures vary by state, so it is important to consult state law and board policies. Students should be given the opportunity to bring an attorney to hearings at their own expense. At a hearing, the student should have the opportunity to present evidence and question witnesses for the school.

There is a movement in some areas to hold charter schools more accountable for discipline practices, because out-of-school suspensions lead to lower academic achievements, higher dropout rates, and pushout into the school-to-prison pipeline as discussed in the UCLA study mentioned above. For example, Illinois recently passed Public Act 099-0456, which states charter schools are no longer exempt from the portion of the Illinois School Code concerning discipline. That means they are subject to the same improved discipline practices in the amended school code, including exhausting appropriate and available interventions before using the most severe forms of exclusionary discipline. Using autonomy to engage in harsh discipline especially threatens the most vulnerable students.

For students with an IEP who face disciplinary actions, it is important to note that there are special protections available under IDEA. For students facing a long-term suspension or
expulsion, there must first be a manifestation determination review (MDR) that determines whether:

- the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or
- the conduct in question was the direct result of the LEA’s failure to implement the IEP.

If either of these circumstances applies, the IEP must be corrected and the student cannot be suspended beyond 10 days or expelled. If they do not apply, the student can be suspended for more than 10 days or expelled, but still needs to be provided with services under the IEP wherever the student is placed. There is an exception for certain situations where there can be an emergency interim placement for 45 days in a situation involving a dangerous weapon or illegal drugs. These are very specific provisions in the statute that apply to all students, even those in charter schools.

The Future of Charter Schools
Despite the debate about charter schools and their effect on public education, it is clear they are an accepted innovation and will likely be a permanent part of the public school system. It is critical that the autonomy given to charter schools be used for innovation and not to curtail student rights. It is very important that students and parents know their rights and school staff be educated on them as well. While charter schools can present good opportunities for a high-quality education for many families, they also can present obstacles or cause confusion around the rights of students and parents. A strong legal advocate can protect those rights and ensure that a charter student has meaningful access to education.

Jessica Schneider is a staff attorney in the Educational Equity Project of the Chicago Lawyers’ Committee for Civil Rights Under Law.
A Mobile Legal Office: Meeting Kids Where They Are
By Stacey Violante Cote and Lori Nordstrom – March 30, 2017

An Invisible Population
Homeless, unaccompanied youth (youth who are homeless and on their own, without parents or guardians) face significant barriers to accessing services and supports. The actual number of homeless youth is unknown at a statewide or national level; homeless youth are an invisible population, because they are often not connected to traditional services for homeless adults, and because the collection of data regarding homeless youth from schools, the child welfare and juvenile justice systems, or other agencies has traditionally been an undercount. National and state efforts to count, and therefore serve, homeless adults have traditionally missed youth. Currently, there is much work at the national and state levels to address this gap and provide better data. See e.g., Conn. Coal. to End Homelessness, Connecticut Counts: 2015 Report on Homelessness in Connecticut; Voices of Youth Count, http://voicesofyouthcount.org/.

Providers and lawyers who work with youth in Connecticut describe existing supports for homeless youth as “woefully insufficient to meet the demands and needs.” Derrick M. Gordon & Bronwyn A. Hunter, Consultation Ctr., Yale Univ. Sch. of Med., Invisible No More: Creating Opportunities for Youth Who Are Homeless 39 (2013). Homeless youth are at increased risk for a host of poor outcomes, including sexual abuse, being lured into prostitution, physical abuse, criminal justice involvement, illness, suicide, mental health problems, and substance abuse. Educational achievement is significantly impacted by homelessness, which is why federal McKinney-Vento laws aim to protect these students.

While homeless youth have a variety of backgrounds and experiences that led to their becoming homeless, they share common barriers to stable housing and educational achievement:

- There is no coordinated service delivery system for homeless youth in many states. While agencies are generally aware of services available for homeless adults or families, schools and community agencies who encounter a homeless youth often have no place to refer them.
- Homeless youth have difficulty navigating the fragmented service system on their own.
- While some services for homeless youth exist, many youth are unaware of the services or do not connect with a service when referred.
- Existing laws can help youth access education and housing-related supports; however, youth are rarely aware of their legal rights.
Because of these gaps, lawyers working with unaccompanied homeless youth need to bring their services to locations where young people spend their time. At a recent conference hosted by the federal Family and Youth Services Bureau and the American Bar Association, lawyers and practitioners gathered to talk about strategies to address these systemic gaps. One of the prominent themes repeated over the course of two days was the need to bring legal services to bear on the issues faced by youth experiencing homelessness. The Center for Children’s Advocacy (CCA), a private nonprofit law firm in Hartford, New Haven, and Bridgeport, Connecticut, does just that through its legal office on wheels—a mobile legal office (MLO).

CCA’s mission is to improve systems’ responses to the needs of poor Connecticut children and youth. CCA advocates for children and youth through a dynamic blend of training, individual representation, and systemic advocacy. Each year, CCA represents more than 750 children and youth and secures substantial systemic reforms that benefit thousands more. CCA attorneys have offices inside health care sites, schools, and community programs; meet with children at child welfare and juvenile justice placements throughout the state; and collaborate with private and public agencies across multiple systems to educate system personnel about the legal rights of children and advance systemic reforms. Because of this, the MLO was a natural extension of CCA’s philosophy of bringing legal services directly to children and youth.

A Law Office on Wheels
The MLO is unique in that it literally brings legal services to youth in the community through a mobile office, one of only a few in the country. CCA received a capital grant to purchase a van that was then customized into a mobile legal office. The MLO has a desk, chairs, and file cabinet (all secured to the van), as well as Wi-Fi capacity to be able to provide legal services on-site at any location. The MLO is staffed with an attorney and an outreach coordinator who bring the van to locations where youth congregate. These sites include youth development organizations, an alternative high school, and the public library, including one branch that has a teen hangout space. The locations, and the dates and times the MLO will be present at the locations, are posted on a teen-friendly website and social media outlets (including Facebook, Instagram, and Snapchat) so that youth who are moving around can access the mobile services. When a youth seeks services from the MLO, the MLO:

- Conducts an assessment of immediate and long-term needs in a legal context.
- Reviews the youth’s educational situation and works with contacts in the school system to help the youth access appropriate educational services to which he or she is legally entitled.
- Identifies services and supports to which the youth is legally entitled, and provides legal representation to help the youth access those services and supports. These can include child welfare services to which the youth can be reintroduced; income supports that can enable the youth to pay for housing or contribute to the housing costs of an adult with whom the youth can live; and housing and income supports for disabled and otherwise eligible youth.
• Identifies factors with a legal component that increase the risk of homelessness, including domestic violence, undocumented status, lack of health insurance, and juvenile justice system involvement, and provides legal representation to address the issues.

CCA began the MLO in 2015 to target unaccompanied (without parents or guardians) youth who are homeless and youth at imminent risk of becoming homeless who are 12–21 years old. Because some groups of youth are disproportionately represented among homeless youth, many of the youth served by the MLO share characteristics with these groups, including LGBT youth, youth with mental illness, young victims of sex trafficking, immigrant youth, youth who have spent time in out-of-home child welfare or juvenile justice placements, and youth with abuse and other trauma histories.

One youth served through the MLO was Tanya. She was 16 years old and pregnant when the violence and threats in her home escalated to the point where she was unsafe. Tanya left and began couch surfing from friend’s house to friend’s house. She heard of the MLO from a community provider who encouraged her to connect with one of the attorneys at a community stop. She had mental health needs that required counseling and special services in school. However, mental health providers would not see her without a parent’s or guardian’s permission, and the absence of a stable address prevented her from attending school regularly. She also didn’t know about her rights to continue attending her school so she didn’t tell anyone about her living situation for fear she would be told she could no longer stay at her school. The child welfare agency was aware of the situation, but remained on the periphery as an observer.

Tanya met with one of the MLO attorneys, who quickly assessed her needs. The attorney then advocated with the child welfare agency for specific supports, educated the mental health provider about the state law allowing minors to receive mental health care without parental consent, and advocated with the school for the services Tanya should have been receiving as a homeless student and a student eligible for special education.

While there are laws on the books to address many of the obstacles faced by youth like Tanya, often youth are not aware of those laws. They do not know that their situation has legal remedies. Because of this, the MLO utilizes its mobility to educate youth and providers about the legal rights of youth experiencing homelessness. By moving to different locations, the MLO can access youth providers at each location and educate them about the legal rights of their clients. This helps to bridge the gap between young people who are fearful of reaching out to adults and a connection to the legal services they need.

Additionally, the MLO developed youth-friendly brochures to provide information about legal rights important to youth experiencing homelessness. These brochures are available to youth through the MLO and at the various partner sites. CCA also developed a dedicated website, Facebook, and Instagram pages, and is utilizing Snapchat to provide teens who are experiencing
homelessness with information about resources and legal rights. The website, [www.speakupteens.org](http://www.speakupteens.org), is also featured prominently on the side of the van. This advertisement serves to raise awareness of the legal rights among youth so that they can also educate their friends and peers.

**Youth Voice**

In planning this enhancement of CCA’s services, staff consulted with youth from a local youth advisory board to create a design for the exterior of the van that would draw in and be welcoming to homeless youth. CCA also worked with youth who were homeless to plan the MLO’s use of social media and the Internet to provide information for homeless youth. The youth advised CCA on terms used, selected the website logo, and provided suggestions about the presentation of the Facebook and website pages. At the suggestion of youth, CCA also created a bilingual (English and Spanish) video, available on the homepage of the website, of youth telling other youth about the help they received from the MLO. The attorneys for the MLO are also featured.

**Outcomes**

Initial outcomes for the MLO are positive. Over a recent six-month period, 100 percent of the youth referred were screened to determine legal needs, and this screening identified an average of 1.8 cases per youth. On 98 percent of the legal needs, the MLO took an advocacy action. Advocacy actions included referral, consultation, representation in court or administrative proceeding, and other representation outside of court or administrative proceeding. Of the youth served by the MLO, 87 percent gained either the removal of a risk factor that increases risk of homelessness or the removal of a barrier to a protective factor against homelessness; 90 percent, for whom school status information was available, graduated from high school or were enrolled in and attending high school. In comparison, studies of the homeless youth population have found that 75 percent of homeless or runaway youth have dropped out or will drop out of school.

While legal services alone cannot address all of the barriers faced by youth such as Tanya, bringing them to locations where other supports are available helps to ensure their legal rights are adhered to. As a result of the legal services Tanya received from the MLO, the child welfare agency provided her with transportation to medical appointments and helped her locate a stable home with a friend’s parent, the mental health agency began providing counseling, and the school system waived Tanya’s school fees, adjusted her schedule to account for her long trip to school, and provided her with the special education services she needed. Now, Tanya is attending school and her attendance has improved dramatically. She receives regular mental health care to deal with her past traumas, and her mental health has improved.

What we know is that lawyers cannot wait for young people to come and knock on our door. They are often unaware of their rights and do not realize that a lawyer can help. By bringing
legal services to them, and to the people they are connected to, youth are more likely to know about their legal rights and to get assistance in enforcing those rights. As one of our former clients said, “Having a lawyer has helped out and made a huge impact in my life. I was moving from place to place with no stable place to live. . . . [The MLO attorney] helped and fought hard for me to get back into high school. She taught me a few laws and let me know that I should not give up. . . . As a human being we all have rights.” That’s music to any lawyer’s ears.

Stacey Violante Cote is the project director of the Center for Children’s Advocacy’s Teen Legal Advocacy Project in Hartford, Connecticut. Lori Nordstrom is the director of foundation relations at the Center for Children’s Advocacy in Hartford, Connecticut.
The Rights of Indian Children: Indian Child Welfare Act Regulations

By Sheldon Spotted Elk – March 30, 2017

The Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 et seq., is the “gold standard” of child welfare policy for all children. The law charges that children should be safe, raised within their family, and when that is not possible, raised with relatives within an identity-affirming community. These principles are what children’s attorneys and guardians ad litem advocate for all children. Indeed, these are principles that I would want for my own children.

Previously, I represented the best interests of children involved in dependency proceedings for the Ute Indian Tribe of the Uintah and Ouray Reservation in northeastern Utah. I know from growing up in Indian country “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.” 25 U.S.C. § 1901(3). From that knowledge, I worked with determined conviction and involved advocacy for positive outcomes, both in and out of court, for the children I represented.

One particular exhausting day, a tribal elder and mentor took me aside, probably after observing me being overwhelmed and close to burnout because of my inexperience managing a large caseload. The story he shared on that warm spring day has served as paradigm-shifting medicine ever since. The story was the Nuche (Ute) legend about Siats (pronounced se-atch), the cunning monster from the high mountains that would kidnap children from their families. The story was told to me like this:

Long ago, a curious boy was playing near the river against the wishes and warning of his parents. Stalking the boy in the reeds next to the river was Siats, the monster that steals children. As soon as the moment was right, the giant monster sprung out of his hiding place and grabbed the boy and put him in his basket that he carries over his shoulder. Siats, with the boy as his prisoner, commenced the journey to the monster’s home in the high mountains.

Because the journey was much too far for one day, Siats camped with the boy locked inside the basket. All night the boy cried until horned toad, a helper to the Ute, wiggled his way into the basket and asked the little boy why he was crying. The boy said, “I have been taken by Siats. I will never see my family again, hear our beautiful songs in our language, eat our foods, or dance at our Bear Dance, and I will forever be lost.” Horned toad listened with sorrow and cried with the boy in the darkness of the basket.
After some time had passed, horned toad had an idea. Horned toad said to the boy, “Reach down and feel the jagged edges of my prickly head.” After the boy carefully examined the rough edges of the toad in the darkness he responded, “You feel like an arrowhead.” Horned toad then explained the plan to the boy. “In the morning when Siats lifts the basket lid to check on you, pick me up as an arrowhead and throw me into the heart of the monster.”

When Siats awoke from his sleep he did as horned toad predicted and lifted the lid to the basket. The kidnapped child rose courageously with the arrow-headed helper in his hand and killed the beast with a mighty throw. The boy was then able to escape back to his people—the Nuche.

The healing and redemptive medicine of this story is to become like the helper horned toad and be a tool in the hand of a child to help a child and family to safety.

For me, my practice (or ideas as to best interests) changed to the “horned toad” principles of ensuring my child clients had connection to their resilient identities as human beings needing safety, family, relatives, and community connections—after all, Nuche fundamentally means “the people” or the human beings.

Today the term siats is used in a different connotation in the Ute tribal community. The term also refers to child welfare workers, attorneys, and judges who remove children from families. The Ute Tribe is similar to many, if not all, tribal communities where American Indian families experienced the systemic removal of their children through federal policies, churches, boarding schools, child welfare organizations, and foster care bureaucracies in the name of assimilation, or to make life “better” for these children. Biased views and practices persist, and children are “stolen” in that they are removed.

This systemic removal was so prevalent that before ICWA’s passage in 1978, Congress found between 25 to 35 percent of all Indian children nationwide were removed from their homes and 90 percent of those children were placed into non-Indian homes. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32–33 (1989). ICWA was enacted to combat this “wholesale removal of Indian children from their homes” and continues today as the policy that “protect[s] the best interests of Indian children” and “to promote the stability and security of Indian tribes and families.” Holyfield, 490 U.S. at 32, 56 n.2. ICWA’s relevance is especially timely now, when the American Indian and Alaskan Natives (AIAN) rate in foster care is 2.4 times the rate of the general population; in at least seven state jurisdictions, the AIAN foster care rate is four times the general population. Alicia Summers, Nat’l Council of Juvenile and Family Court Judges, Disproportionality Rates for Children of Color in Foster Care (Fiscal Year 2014) (2016). Reports are that the AIAN rate is on the rise nationally.
To “promote nationwide uniformity and provide[] clarity to the minimum Federal standards established by [ICWA],” the Department of the Interior through the Bureau of Indian Affairs (BIA) promulgated ICWA regulations (final rule) to “address[] requirements for State courts in ensuring implementation of ICWA in Indian child-welfare proceedings.” Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,778–79 (June 14, 2016). The final rule went into effect on December 12, 2016. The BIA hosted listening sessions in the spring of 2015 and received thousands of public comments, online and in person, three times more than any other rule the BIA has ever published. Suzette Brewer, “Breaking: BIA Publishes Final ICWA Rule,” Indian Country Media Network (June 8, 2016).

“In many instances, the standards in this final rule reflect State interpretations and best practices, as reflected in State court decisions, State laws implementing ICWA, or State guidance documents.” 81 Fed. Reg. at 38,779. Notwithstanding the regulations, a number of states have passed additional ICWA laws to provide more protection to Indian children and families that may address gaps between the federal law and state process and state child welfare agency practices.

“ICWA balances the Federal interest in protecting the integrity of Indian families and the sovereign authority of Indian Tribes with the States’ sovereign interest in child-welfare matters.” 81 Fed. Reg. at 38,789. The balance between the soveregins of our democratic republic—federal, state, and tribal interests— in ICWA may arguably serve as the highest in the principles of federal Indian law. Those principles being: tribal sovereignty, limited state authority over tribes, and the federal trust relationship with tribes. Moreover, ICWA also can be seen as a manifestation of the values of international law in children’s rights and the rights of indigenous peoples.

ICWA is the “horned toad” principle of providing “active efforts” to prevent a child from being removed from his or her natural family, except when there is no alternative to safely keep the child in the home. When a removal does occur, ICWA mandates looking first to relatives and kin for placement, rather than stranger foster care.

The rest of this article will focus on only limited provisions within the ICWA regulations to strengthen the “gold standard” for keeping children with family, with relatives, and in communities.

Children with Families
For all children, a removal from home can create separation from not only parents, but also an extended network of resilient relations. Oftentimes in tribal families there are multiple relations who create a protective attachment for a child. There is no dispute an abusive environment is harmful to child development. However, those children on the edge of being removed may be served as a matter of a child’s right through family preservation efforts rather than child
In recognition of the value of the preference of children being raised with their natural families, ICWA requires that “active efforts” are documented and legal findings are made before any foster care or termination of parental rights “to prevent the breakup of the Indian family.” 25 U.S.C. § 1912(d). The regulations provide 11 new examples of “active efforts” that should be tailored to each unique case in “partnership with the Indian child and the Indian child’s parents, extended family members, Indian custodians, and Tribe.” 25 C.F.R. § 23.2.

While the regulations do not pronounce that “active efforts” are more than “reasonable efforts,” regulations do affirm that “active” is not passive or noninvolved in the case. 81 Fed. Reg. at 38,790–92. The clarification as to “active efforts” makes clear that families are entitled to involved advocacy to support their reunification.

Tribal notice and involvement as early as possible is a mechanism to get “all available hands on deck.” When active efforts have failed or emergency proceedings have been initiated because of immediate threat to the safety of the child, the tribe(s) must receive timely notice to the legal proceedings. The regulations explicitly permit the use of certified mail, rather than exclusively registered mail, and require that notice is sent for separate proceedings (e.g., placement into foster care and termination of parental rights). Tribes’ capacity to intervene and engage in proceedings varies greatly, and some tribes may have protocols to intervene only at specific or critical stages, so notice at each stage is critical.

Children with Relatives

International law provides context for children being raised with their people as a right. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) recognizes that indigenous communities “retain shared responsibilities for the upbringing, training, education and well-being of their children, consistent with the rights of the child.” UNDRIP was endorsed by the United States in 2011, and while the United Nations Convention on the Rights of the Child (UNCRC) was signed in 1995, it has never been ratified by Congress. While not legally controlling, the international legal provisions are recognized as a standard for children’s rights. ICWA is correlative to UNDRIP and UNCRC regarding the children’s provisions and rights of indigenous peoples’ freedom to being raised within a culturally affirming environment.

The rights of an Indian child, under the ICWA regulations, are to have a placement that “(1) [m]ost approximates a family, taking into consideration sibling attachment; (2) [a]llows the Indian child’s special needs (if any) to be met; and (3) [i]s in reasonable proximity to the Indian child’s home, extended family, or siblings.” 25 C.F.R. § 23.131(a). Together with Congress’s goal of the placement of Indian children in homes “which will reflect the unique values of Indian culture,” children should be raised in the fertile soil of an affirming environment.
The “good cause” to deviate from the placement preferences is based on one of the following: request of one or both of the parents after they have reviewed the preferences; request of a child of sufficient age; sibling attachment; extraordinary needs of the Indian child; and the unavailability of a suitable placement after a determination by the court that a diligent search was conducted. 25 C.F.R. § 23.132(c).

An Indian child’s best interests are protected through the placement preferences of ICWA. The principles of family, relatives, and community are “consistent with the guiding principle established by most States for determining the best interests of the child”: preserving family integrity and avoiding removal. 81 Fed. Reg. at 38,797.

**Children in Communities**

Tribal governments have the rights to make their own laws and be governed by them, including determining membership, domestic relations, and inheritance. An Indian child has a right to culture, tribal citizenship, and identity, and as an extension, a right to community. ICWA is clear that a tribe shall determine an Indian child’s tribal membership.

Under ICWA, when tribal children are domiciled in state land when entering the dependency system, tribes exercise concurrent jurisdiction of state child welfare cases. The tribe, parent, or Indian custodian involved in a child custody proceeding may request the case be transferred to tribal court “in the absence of good cause to the contrary.” 25 U.S.C. § 1911(b). The ICWA regulations do not define “good cause to the contrary” but do provide guidance to what it is not. The court may not consider any of the following factors: whether the case is at an “advanced stage” if notice was not received until the case was at an advanced stage; whether the petition to transfer was made in an earlier proceeding; whether transfer could affect the placement for the child; the child’s cultural connections with the tribe or reservation; and socioeconomic conditions or perceived adequacy of the tribal court. 25 C.F.R. § 23.118.

The tribe I worked for decided to “bring the children home” through a focus on children in their community and ensuring resources to support that work. Many strategies were employed, depending on case specifics. Ensuring the tribal children were closer to home, both in proximity and culturally, was the goal. Some cases achieved the goal through reunification with the natural parents, others by placement within kinship care from stranger foster care. One of the primary practices was the transfer of cases to tribal court when the parents were amenable. In the end we brought all but one child back into tribal custody with an over 75 percent kinship placement rate.

One of the children brought home was “Victor.” When I met Victor, he had been in the foster system for many years, hundreds of miles from his tribal community in a non-Indian home. He had been disconnected from his community so long it had clear effects on his view of himself,
as I heard him say disparaging things about his tribal identity and he choose to self-identify as an different ethnic group altogether. Through great social work and thoughtful court decisions, we began to make contacts with his family in the tribal community. After several short visits and then a trial placement, he wanted to be placed back with his relatives.

Victor became the authentication of the “horned toad” principles, and I witnessed the evidence of the connective resiliency of family, relatives, and community. During one of his visits, I brought Victor to a sweat lodge ceremony in his community. The man running the lodge happened to be a relative he had never met, and Victor’s newfound uncle took a special interest in teaching Victor in detail about the process of the ceremony. That day I sat and sang with them in the darkness of the lodge, the drum beat seemed to reunify Victor back to his land, people, culture, and history. I observed his rebirth and beginning of his journey on the road to healing and life. Horned toad whispers to us, rise up and be courageous when a child is involved.

I agreed to write this article so that you may remember the horned toad and his strategy and planning to defeat Siats to get the boy back to his family, relatives, and community. ICWA can produce successful outcomes, protect the rights of children, and importantly stands as hope, resiliency, and healing for our Indian children and families.

Sheldon Spotted Elk is a director in the Indian Child Welfare Unit at Casey Family Programs in Denver, Colorado.
What Educational Benefit Must a School Provide to a Student with a Disability?

By Jamie Schulte – March 30, 2017

Update: On March 22, 2017, the Supreme Court released a unanimous decision in Endrew F. v. Douglas County District, reversing the Tenth Circuit and remanding the case for further proceedings. The Court rejected the “merely . . . more than de minimis test” that the circuit court applied to determine whether the school district provided a child with a disability a free appropriate public education, as required by the Individuals with Disabilities Education Act. In its place, the Court held that “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Although the decision does not go as far as the petitioners advocated—the Court rejected a “substantially equal” standard—many parent and child advocates consider the decision an important victory for children with disabilities.

Original Article:

On January 11, 2017, the Supreme Court heard arguments in Endrew F. v. Douglas County School District, a case that many believe to be the most significant special education case to reach the Court in over 30 years. The case centers around an important question for educators, advocates, and courts: what educational benefit must a school district confer on a student with a disability in order to provide a free appropriate public education (FAPE), required by the Individuals with Disabilities Education Act (IDEA)? In Board of Education v. Rowley, 458 U.S. 176 (1982), the Court held that the individual education program (IEP) that schools must provide to a student with a disability under IDEA must be “reasonably calculated to enable the child to receive educational benefits.” The question before the Court now is what “educational benefits” means.

Background

The facts of the case involve Endrew, a fifth grade student with autism and attention-deficit/hyperactivity disorder (ADHD), who attended public school from preschool through fourth grade. The school provided Endrew with an IEP that included functional and academic goals. Over time, Endrew began to engage in increasingly problematic behaviors related to his disability. The school did not implement any plan focused on his behavioral or adaptive needs. Meanwhile, his parents asserted that academically Endrew made “little to no progress”; most of his IEP goals were carried over as “continued” from year to year or abandoned even though Endrew had not mastered them. Dissatisfied with the school’s proposed IEP for his fifth grade year, Endrew’s parents placed him in a private school serving children with autism. The private school implemented a behavior intervention plan for Endrew’s individual behavioral needs, and evaluated him for and then provided speech language therapy. Endrew made progress and mastered more advanced goals than those he had failed to master at his previous school.
Endrew’s parents filed a due process complaint under IDEA seeking reimbursement for the private school tuition. The hearing officer ruled in favor of the school district, finding that the school had provided Endrew with a FAPE because he had received “some” educational benefit. Endrew’s parents then filed an IDEA suit in federal court; the district court similarly found for the school district. On appeal, the Tenth Circuit affirmed, using what is often referred to in the litigation as the “more than de minimis” or “merely more than de minimis” test. Essentially, the court found that because the public school provided a more than de minimis educational benefit to Endrew, the district had satisfied its obligation to provide him a FAPE. The Supreme Court granted the parents’ petition for certiorari.

Argument: Competing Standards in a “Blizzard of Words”
In their brief to the Supreme Court, Endrew and his parents argued that a merely more than de minimis benefit is inadequate and contrary to Congress’s intention in IDEA, particularly as amended in 1997 and 2004. The proper standard is “substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society,” which they asserted can be gleaned directly from IDEA. The federal government filed an amicus brief in support of Endrew’s parents, but proposed a different standard: students with a disability must be afforded “an opportunity to make significant educational progress.” The government rooted its argument in IDEA and in the Supreme Court’s interpretation in Rowley that the law requires schools to provide “meaningful” access to an education.

The school district argued that Rowley instead reveals that IDEA does not provide a true substantive standard, and is principally about procedural protections. It claimed that the Court should not be crafting a more specific substantive standard because doing so would violate the Spending Clause: states get federal education funds by agreeing to provide students with disabilities a FAPE, and changing what that means would be an unfair burden on the states. The district further argued that the more than de minimis standard is working, and is essentially the same as “some benefit” required by Rowley.

At oral argument, the justices seemed at times exasperated by the many different suggested formulations—which Justice Alito referred to as a “blizzard of words” facing the court—and raised questions about what any of them really mean. Justice Breyer noted that the Court lacks expertise in education and needs to rely on those who do, including the U.S. Department of Education. But amidst the uncertainty, the justices consistently questioned the merely more than de minimis standard advocated by the school district and used by the Tenth Circuit and other circuit courts. As Justice Ginsburg pointed out, this wording does not come from IDEA or Rowley. Several justices pushed the district’s attorney on whether the merely more than de minimis standard truly comports with the holding in Rowley, and how such a standard could both have “bite,” as the district’s attorney claimed, but still require only a nontrivial benefit to students with disabilities.
But the justices also raised a number of challenges for Endrew’s parents and the government. Several, particularly Justice Kennedy, expressed concern about costs to already cash-strapped school districts that could be required to provide a heightened level of services to students with disabilities. The parents’ attorney tried to alleviate this worry, emphasizing that most students’ needs can be met by teachers and specialists already on staff, and that Congress made clear in IDEA that cost cannot prevent servicing students with more serious needs who require more than the local public school can provide. A number of the justices questioned how the proposed “substantially equal” standard would work for students whose disabilities would prohibit them from ever achieving grade-level standards. The parents’ attorney suggested that the answer lies in “alternative achievement standards,” drawn from the text of IDEA. But the justices seemed possibly more satisfied with how such students could fit within the government’s articulation, focused on significant educational progress “in the light of the child’s circumstances.”

In sum, it is not clear what standard, if any, the Supreme Court is likely to endorse. The justices’ remarks at argument may suggest disapproval of the merely more than de minimis standard, giving hope to parent and child advocates that the Court may reject it. But the justices also seemed concerned with capturing the right “nuance” among the many suggested formulations, particularly in light of anticipated future litigation. The Court’s decision is expected to be published by this summer.

Jamie Schulte is a Skadden Fellow and attorney with LAF in Chicago, Illinois.
PRACTICE POINTS

Ensuring Quality Counsel in Child Welfare Cases for Children, Parents, and the Agency

By Cathy Krebs – March 14, 2017

The HHS Administration for Children and Families Children’s Bureau has issued an information memorandum focused on providing high-quality legal representation for all parties in child welfare court proceedings. The memorandum emphasizes that quality representation is essential to a well-functioning child welfare system given the gravity of the decisions made by the court. It discusses relevant research, outlines best practices, and identifies strategies to ensure quality representation.

The memorandum notes that there is a consensus in the field that children and parents require legal representation in child welfare cases and discusses how agency attorneys provide important oversight and ensure that the agency presents evidence of its diligence in making reasonable efforts to reunite families. In fact, quality representation of all three parties provides needed accountability of the system. The memorandum also discusses standards, caseloads, ethics and other issues related to quality representation.

Cathy Krebs is the committee manager for the ABA Section of Litigation’s Children’s Rights Litigation Committee in Washington, D.C. She is also the newsletter editor for the committee.
Can the Input of Youth Improve the Justice System?
By Jessalyn Schwartz – February 17, 2017

The Pittsburgh Foundation has completed an eight-month research effort to determine how to better serve youth involved in the juvenile justice system. Surveying 53 youths with formerly or currently active cases in the court system, the study found that the failure of adults to ask questions about why the youth acted out and to give the young person a say in their consequences, was one of the biggest problems leading to mass detention of young people. Some youths discussed their reasons for truancy, such as a lack of food, clean clothing, hot water, or other necessities. Others cited violence in the home or other extenuating circumstances as why they committed an offense.

"The Qualitative Study of Youth in the Juvenile Justice System," as the report is titled, aims to review and reduce inequities in the juvenile justice system and serve as a tool to obtain grant funds and strong community partnerships to assist youth in Pittsburgh. Data from 2015 shows that of the 3300 young people referred to juvenile probation, a little less than 1000 ended up in secure detention, with another 770 in home detention. ¾ of that population was being disciplined for nonviolent crimes, such as truancy, failure to pay fees, or drug-related offenses. The numbers also show that an overwhelming percentage of youth in detention are African-American, while Black youth make up only 20% of the community population.

The study recommends giving youth a greater voice in developing reforms, diversion programs, and policy related to juvenile justice, improving school discipline and reasons for court or probation referrals, paying more attention to at risk youth, such as females of color, and changing the way court fees and restitution amounts are set. Youth must be heard in the process of their punishment, as there is a finding that having a voice ensures better compliance. Overall, the study highlighted that access to a consistent, caring, and honest adult was the most meaningful factor in achieving positive outcomes for youth in the juvenile justice system.

Jessalyn Schwartz is an attorney in Boston focusing on child welfare and mental health law.
The views expressed herein are those of the author(s) and do not necessarily reflect the positions or policies of the American Bar Association, the Section of Litigation, this committee, or the employer(s) of the author(s).

ABA Section of Litigation Children’s Rights Litigation Committee

http://www.americanbar.org/content/aba/publications/litigation-committees/childrens-rights