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## Clients Aging Out of Care

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## Clients Aging Out of Care

By Dale Margolin

**Y**outh aging out of foster care face an arduous road. Lawyers for foster youth must help to assure their safe and stable exit from the system and a comfortable transition into the next stage of their lives. Lawyers cannot rely on social service agencies and caseworkers to handle the myriad of issues that youth encounter, and many require court orders or other legal measures.

### Legal/Fiscal Framework

Programs for young people over age 18 are currently funded by The Chafee Foster Care Independent Living Program (Chafee), which provides up to \$140 million to states to assist youth with housing, employment, education, vocational training, sexual and preventive health, money management, and household skills.<sup>1</sup> However, Chafee explicitly mandates that only 30 percent of the

funding can be used to provide shelter to youth, and few states use this money for actual housing. States have some leeway in defining who qualifies for these independent living services, but federal law requires that they be offered to all youth over age 16, no matter their permanency goal. In some states, youth as young as 12 are eligible.<sup>2</sup>

During the 110th congressional

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## Advocacy in School Discipline Proceedings

By Julie Waterstone

**A** few months before he was set to graduate, 17 year-old Robert Jones was facing expulsion from high school for allegedly arranging a sale of marijuana. Academically, he was not a top-caliber student, but certainly not the worst. He had ditched a few periods here and there, but had no prior disciplinary incidents. In the pre-expulsion meeting, the school made it clear to him and his legal guardian that this was a zero tolerance offense for which he would be expelled. But Robert was not expelled.

In fact, this past June, Robert graduated from high school and is planning to attend community college this fall. How did this happen?

Preparation was the key to Robert's successful case outcome. In school expulsion cases, like any other court proceeding, it is important to exercise the full range of trial skills. This begins from the moment you accept the representation, and diligence is required throughout the entire process. So, what is the first step you need to undertake?

### Review the Records

By law, you are entitled to all documents that will be used at the expulsion hearing. Once you accept the case, you should send a letter to the school district requesting these documents, which are commonly referred to as the expulsion packet. Be sure to send a release from your client along with your request.

In addition to the expulsion packet, it is a good idea to get the student's cumulative file from the school that he or she

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## MESSAGE FROM THE CHAIRS

Welcome to the 2009–2010 year with the Children's Rights Litigation Committee! We are very excited about our projects for the upcoming year. As always, please do contact our committee director if you are interested in getting more involved in our work. Two of our cochairs have recently concluded their appointment and I, along with the entire committee, would like to say a big thank-you to them for their hard work: Angela Vigil of Baker & McKenzie who served as a cochair for four years, and Lisa Dewey of DLA Piper who served for the past year. I am grateful for their expertise, hard work, and creativity and look forward to their continued involvement in the committee. I would like to take this opportunity to introduce my two new cochairs. I am looking forward to working with both of them.

Alfreda D. Coward is a partner of Coward & Coward, P.A., a law firm in Fort Lauderdale, Florida. She practices with her sister, Kimberly D. Coward, primarily representing indigent clients in the areas of criminal law and family law. Prior to starting her own practice, she served as an Assistant Public Defender for eight years.

In addition to Coward & Coward, P.A., Ms. Coward currently serves as the cofounder and executive director of One Voice Children's Law Center. One Voice Children's Law Center is a nonprofit organization that represents children that have pending matters in the dependency, delinquency, and/or educational systems.

Ms. Coward is very active in the ABA, having served in numerous leadership positions with the Section of Litigation, the GP, Solo & Small Firm Division, and the Young Lawyers Division. Ms. Coward is also active in her local community where she serves as immediate past president of the T.J. Reddick Bar Association and vice-president of Delta Sigma Theta Sorority, Inc. Amongst others, she also serves as a member of The Florida Bar Juvenile Rules Committee, a member of the School-to-Jail Statewide Initiative, and a member of the Early Learning Coalition.

Lauren Girard Adams is the second incoming chair of the Children's Rights Litigation Committee of the Section of Litigation. Most recently, Ms. Adams was a Clinical Assistant Professor of Law with the Children and Family Justice Center at Northwestern University School of Law, where her teaching focused on juvenile delinquency and school expulsion matters. Ms. Adams also concentrated on juvenile sentencing, including the juvenile death penalty and juvenile life without parole. Prior to teaching at Northwestern, Ms. Adams clerked for the Honorable Ruben Castillo of the U.S. District Court for the Northern District of Illinois. Ms. Adams also was an associate with Baker & McKenzie in Chicago. She received her B.A. cum laude from Skidmore College and her J.D. cum laude from Northwestern University School of Law. ■

Welcome Lauren and Alfreda!

*Shari Shink is the founder and director of the Rocky Mountain Children's Law Center in Denver, Colorado.*

# Dignity in Schools Campaign National Conference

By Ruth Cusick

**O**n June 5 and 6, 2009, 150 advocates, parents, educators, community organizers, and youth from 20 states gathered for the first national Dignity in Schools Campaign conference at Northwestern School of Law in Chicago. The goal of the conference and the ongoing work of the Dignity in Schools Campaign is to reframe the national dialogue on school climate and discipline within a human rights framework, and to affirm that the human right to an education includes full development of the child; protection of human dignity; freedom from discrimination; and right to participation of parents, students, and educators.

This dynamic two-day conference balanced engaging plenary sessions from national experts on such topics as “Promoting Alternatives to Zero-Tolerance” and “School Pushout and Human Rights” with small group breakout sessions during which we contributed information and strategized together about ending school pushout.

A key goal of the conference was to have participants dialogue and give feedback on a draft resolution to end pushout. This resolution covered four major areas regarding pushout: the policies and practices that lead to it; the populations disproportionately affected by it; its consequences; and solutions to combat it. Overreliance on law enforcement to control school discipline and on punitive measures such as suspensions and expulsions were confirmed throughout the sessions as key factors contributing to pushout. Participants worked in small breakout sessions to review and edit the resolution. Those edits were then compiled and reviewed a second time in the breakout sessions, and then final suggestions were discussed, with all

conference participants in a report-back session. This in-depth process ensured that all the stakeholders at the conference had a part in shaping the resolution. The Dignity in Schools Campaign is now working on next steps for national action including finalizing and publishing the National Resolution on Ending School Pushout.

Participants were able to concretely and specifically delve into strategies to combat pushout in community dialogue breakout sessions. In these small sessions, participants discussed reframing school discipline through the human rights framework. Participants then dialogued on specific examples of pushout, identified what human rights were violated in the situation, and articulated how differently those situations would have proceeded if the human rights framework was respected and enforced. Participants developed criteria for effective school practices to address pushout within the human rights framework and from those criteria developed community action plans of best practices. Participants then spent the last community dialogue session making recommendations for multi-stakeholder coalitions at the local and national level.

The plenary session offered participants a chance to hear from and exchange ideas with national experts. Two speakers during the conference focused on the growing use of Positive Behavior Support strategies to transform school discipline. Nancy Franklin, coordinator of behavior support at Los Angeles Unified School District (LAUSD), discussed implementation of LAUSD’s new School-Wide Positive Behavior Support Discipline Policy that uses evidence-based practices to support a shift in the climate of schools.

Ms. Franklin explored four main ideas regarding the policy: schools addressing emotional and social needs of children; the importance of dignity and mutual respect; addressing disparities in discipline; and working with parents. Ms. Franklin’s focus on data monitoring to ensure implementation and the creation of regular school-site data reviews of office discipline referrals, attendance, and achievement because data on suspensions, expulsions, transfers, and dropouts is data that is “too late” was crucial to the goal of ending school pushout. Additionally, John Gardner of the Illinois Positive Behavior Intervention and Supports (PBIS) Network detailed how the mission of their network is to build skills and capacity of PBIS district and school-based leadership teams through training, coaching, and technical assistance.

Several successful strategies to combat school pushout were also discussed during the plenaries. Marco Nunez of Padres Unidos shared a truly inspiring story of a successful community campaign in Denver that achieved a progressive school discipline policy. The Denver Public Schools Discipline Policy now has a tiered approach to discipline that includes assessment to determine whether an administrative/legal, restorative, or skill-based/therapeutic intervention is most appropriate for the student misconduct. Mr. Nunez maintained that the victory of a new discipline policy could not have been achieved without effective community organizing and mobilizing as well as strategic media work. Judge Brian Huff of the Jefferson County Family Court described a collaborative agreement to address disproportionate referrals to the Jefferson County Family Court from the Birmingham City Schools. This collaborative agreement was reached

by bringing together the Birmingham Schools Superintendent, the Birmingham Police Department, Jefferson County Family Court, County Department of Human Resources, probation officers, and the district attorney's office. The agreement outlines that minor school-based offenses will not result in an arrest unless it is the student's third or subsequent offense, and this protocol will reduce court referrals by Birmingham schools by 84 percent. Judge Huff and Mr. Nunez's successes were a few of the many successful strategies highlighted throughout the conference.

Additionally, the conference was greatly enriched by youth participation and performances by Voices from LA, Detroit Streets Speak, Alternative Intervention Models (A.I.M.), and Detroit Summer. Youth participants shared their experiences in schools and

called on all participants to ensure youth participation in advocacy collaborations.

As a young attorney, one of the most exciting things about participating in this conference was the truly thoughtful and challenging conversations that happened

**This conference created a unique space for communication and collaboration to occur.**

because so many different stakeholders were in the room; teachers asked questions that advocates had not confronted; parents described empowering strategies.

Participants disclosed key successes and challenges they confronted in doing work in their own communities, and this conference created a unique space for that communication and collaboration to occur.

To watch videos of keynote and plenary panels, or access conference materials, speaker presentations, and other online resources, please visit the conference page of the Dignity in Schools Campaign website at [www.dignityinschools.org/national-conference](http://www.dignityinschools.org/national-conference).

*Ruth Cusick is a staff attorney and Skadden Fellow at Mental Health Advocacy Services in Los Angeles, California. Her fellowship focuses on legal advocacy for students with mental illnesses who have been inappropriately disciplined and on policy work to combat pushout in Los Angeles schools.*



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# Foreclosure Law and Prevention Assistance for Child Advocates

By Steven Sharpe

**T**he effects of foreclosure can be devastating for children.<sup>1</sup> It can force them to move from a good school, destroy a foster placement, or place unnecessary barriers to reunification. When a foreclosure comes up in a case, advocates should have some basic information about the process and possible solutions to the problem. While child advocates should not provide advice to adults that they are not representing, lawyers can provide information that may assist the adults in keeping their homes, thereby maintaining stability and promoting permanency for the lawyer's child client.

Foreclosure touches all segments of the population. With rising unemployment, home prices in decline, and the widespread sale of abusive subprime mortgage, the foreclosure crisis is not limited to the low-income or elderly population. Because of the complicated nature of the mortgages issued, even sophisticated borrowers got caught in bad deals.<sup>2</sup>

Foreclosure can be avoided in many cases. Unfortunately, people often give up on their homes as soon as they receive collection calls. They believe the situation is hopeless. However, there are legal defenses to foreclosure even if the borrower is behind on the mortgage. In addition, borrowers across the country have access to housing counselors and lawyers who can aid in negotiations with lenders.

If lawyers have an understanding of foreclosure and the services available, they can provide critical assistance. Basic information on civil procedure and the nature of foreclosure in the particular state can either calm the unnecessarily nervous borrower or motivate the borrower who needs to act.

## Foreclosure Process

Borrowers are generally confused about the foreclosure process. This confusion is created, in part, by the lack of a uniform procedure for foreclosure across the country. Because national mortgage servicers operate in all 50 states, they use the term "foreclosure" in an inexact way that does not communicate the particular process that applies in a given jurisdiction.

Although there are several variations in the methods used, the basic difference between states is whether the law requires a full judicial process to institute and complete a foreclosure.<sup>3</sup> In states that require judicial involvement, such as Ohio and Florida, the lender files a lawsuit and borrowers have procedural rights to challenge the lender's remedy.<sup>4</sup> The lender must receive a judgment before it can seek a sheriff's sale of the home. The borrower, therefore, has time to negotiate with the lender and to investigate possible defenses.

Borrowers in states that do not require judicial involvement are subject to an expedited process.<sup>5</sup> Upon alleged default, the lender may bypass the courts and refer the case to an official who will conduct the foreclosure sale.<sup>6</sup> The borrower who wishes to assert that the foreclosure is wrongful must file a lawsuit seeking a preliminary injunction. States such as Arizona, Missouri, and California authorize the use of a non-judicial process. Lenders in non-judicial foreclosure states may use the judicial process, but the non-judicial process provides faster relief.

Child advocates should talk with real estate attorneys and others experienced in foreclosure law to find out the process used in their state. Giving the borrower a basic understanding of the state's foreclosure procedure can cure unnecessary confusion. Borrowers in a judicial

foreclosure state often believe that they have no time to find help and abandon homes they believe will be sold immediately. On the other hand, a borrower in a non-judicial foreclosure state needs to understand the short time frame. In either case, an understanding of the basic rules is critical. National Consumer Law Center publications provide basic guidance on the issue and citations to state foreclosure statutes.<sup>7</sup>

Under any state's procedure, a foreclosure dispute can take a substantial amount of time to resolve with the lender. Unlike landlord-tenant cases that advocates can often solve with a brief phone conversation and payment arrangement with the landlord, mortgage servicers do not respond quickly to even basic requests for information. This complicates even a simple case.

Child advocates should aim to quickly get information about the basic nature of foreclosure and point the borrower toward help. All advocates should know what experienced help is available, including both housing counselors and lawyers. If the advocate does not give this information, the borrower may accept "help" from one of numerous foreclosure scam entities.

## Help Is Available

Nonprofit housing counselors can provide a first line of help for borrowers facing foreclosure. Municipalities, nonprofit housing agencies, community action programs, and other nonprofit agencies employ housing counselors. Counselors cannot and should not provide legal advice or representation unless they are also licensed as an attorney. Instead, they help the borrower work with the lender to reach a solution to the foreclosure. They rely on their experience working with mortgages, their

knowledge of programs available, and their expertise in budgeting and financial literacy to reach the borrower's goal.

The United States Department of Housing and Urban Development (HUD) provides a certification process for housing counselors. An agency seeking HUD certification must operate as a nonprofit, have at least one year of experience in housing counseling, have sufficient resources to implement its housing counseling plan, and meet other HUD requirements. Once the agency is approved, it must continue to satisfy performance requirements to keep its certification. HUD housing counselors are not allowed to charge for foreclosure prevention counseling. These programs commonly do not have income eligibility criteria for their clients.

Because HUD housing counselors provide foreclosure prevention counseling for free and have certification standards, advocates should look for HUD approval when making a referral. While there are reputable agencies who have not obtained HUD certification, there are far too many foreclosure scams. HUD keeps an updated list of certified housing counselors on its website, which makes them relatively easy to find.<sup>8</sup>

Referral to a housing counselor is most appropriate if it happens early in the foreclosure process. Once a foreclosure is started, borrowers should consider retaining an attorney. Throughout the country, lawyers working for nonprofit legal assistance firms, including organizations funded by the Legal Services Corporation, represent borrowers. Although these programs are often limited in whom they can represent, many have expanded their criteria through grants. To provide additional assistance for homeowners, federal, state, and private sources of aid have been developed. For example, the Institute for Foreclosure Legal Assistance (IFLA) has helped fund experienced and dedicated nonprofit agencies that represent borrowers.<sup>9</sup>

Private attorneys also have an important role in protecting borrowers from

predatory lending and mortgage servicing abuses. In fact, they have had a major impact in shaping the legal theories that all advocates use to challenge foreclosure. While there are not enough private attorneys to help all the borrowers who need assistance, a list of specialists is available through the National Association of Consumer Advocates, the principal organization for attorneys battling mortgage foreclosure and predatory lending.<sup>10</sup>

**Bankruptcy cannot  
always prevent  
borrowers from losing  
their homes.**

Many borrowers assume that bankruptcy is the only means of resolving a foreclosure. Bankruptcy is an important tool for consumer lawyers; however, it cannot always prevent borrowers from losing their homes. As a general principle, bankruptcy discharges debts but does not cancel the mortgages or liens that borrowers attach to their property. Borrowers who cannot catch up on payments may still lose their home if they do not reach an agreement with their lenders. A debtor that completes a Chapter 7 bankruptcy will receive a discharge of debts without creating a payment plan (he or she instead gives up any “non-exempt” property). Therefore, unlike a Chapter 13 bankruptcy, a Chapter 7 bankruptcy does not give the debtor an avenue for catching up on his or her back payments. The stay on legal and other proceedings that automatically occurs upon filing a bankruptcy will provide short-term relief by postponing the foreclosure, but it may not stop the foreclosure in the long run.<sup>11</sup>

A Chapter 13 bankruptcy, on the other hand, does provide a forum to permanently resolve the foreclosure through the creation of a payment plan. The

bankruptcy lawyer will help the borrower design a plan to catch up the foreclosure. Some are even willing to litigate predatory lending, mortgage fraud, and other claims through the Chapter 13. This can reduce, or cancel in extreme cases, the balance of the mortgage for the debtor. In addition, a Chapter 13 debtor can permanently remove second mortgages from a home if the first mortgage occupies the entire value of the home.

Chapter 13 has its limits as well. First, the borrower must have a stable and sufficient income to afford a payment plan. Second, the bankruptcy code severely limits a debtor's ability to modify the loan in a Chapter 13 bankruptcy.<sup>12</sup> While a borrower with reasonable loan terms may not need a modification to make the loan affordable, this limitation on changes in loan terms hampers many borrowers who are suffering the effects of subprime mortgages. As an alternative, borrowers with unfavorable loans can reach substantial modifications of subprime loans outside of the bankruptcy context by negotiating with the lender.

Not all people who have already suffered a foreclosure need a bankruptcy. It is true that in many cases a completed foreclosure sale will not cover the full amount of the mortgage debt. This can leave borrowers owing money even after they have already lost their home. However, some states, such as California, have made most such “deficiency judgments” uncollectable by law.<sup>13</sup> Other states have put strict statutes of limitations on collection of deficiency judgments. For example, in Ohio, a lender has two years to begin collection or else its claim is barred.<sup>14</sup> Even in states where these legal protections do not exist, some lenders are slow to collect on deficiency judgments. Bankruptcy is a potential tool for people seeking to avoid foreclosure, but isn't always necessary or advisable.

### **Foreclosure Rescue Scams**

Many for-profit companies guarantee foreclosure relief for a fee. In states where a foreclosure lawsuit is a matter

of public record, companies target these borrowers with direct mail solicitations. Unfortunately, many of these companies provide limited or no relief for borrowers and can leave them in a worse position. Because foreclosure borrowers are often flooded with these advertisements, advocates providing even the most basic information will need to be aware of these scams. While lawyers and government officials are trying to stop scam artists from operating, prevention is still the best means of avoiding a loss.

A common scam involves the payment of an upfront fee to a company who promises to hire a lawyer and obtain a loan modification.<sup>15</sup> The fee may seem affordable and reasonable to the borrower. For example, in Southwest Ohio, it ranges between \$800 and \$1,200. In these scams, the company will contract with a lawyer; however, the lawyer will file a form answer instead of investigating the case. The lawyer will not challenge the entry of a final judgment. In addition, the company may or may not work with the mortgage company.<sup>16</sup>

The United States Department of Treasury has specifically focused on these suspect companies, and is working with the Department of Justice, the Federal Trade Commission, and others to crack down on loan modification scams.<sup>17</sup> Borrowers who are guaranteed success with an upfront fee should be wary of entering into such deals.

Other companies will offer to purchase borrowers homes and then sell or rent it back to them. This option can be attractive for a borrower because it will pay off the mortgage that is about to be foreclosed. However, for a borrower whose home is worth more than the loan, this plan may strip all of his or her equity from the property. Moreover, the contract may have very one-sided terms with expansive rights to evict the borrower. The Office of the Comptroller of the Currency (OCC) has created a warning about foreclosure scams. It states that “[t]he agreement may be very hard to comply with, because it may require,

for instance, high up-front and monthly payments that you may not be able to afford. In fact, the scammers may have no intention of ever selling the home back to you.”<sup>18</sup>

Borrowers need to investigate anyone who they are planning to pay, watch out for up-front fees, and carefully review any contract they sign. As discussed above, borrowers across the country have access to housing counselors and attorneys that can help them negotiate with their lender for free.

**In many foreclosure cases, it is not entirely clear who the “lender” really is.**

### **Defenses to Foreclosure**

Lawyers fighting against foreclosure continue to challenge the common belief that there are no legal arguments against foreclosure. Advocates practicing in other areas must understand that defenses do exist so that they appreciate the need for referring borrowers to experienced lawyers. Many legal services offices routinely handle foreclosures, and it is well worth contacting the appropriate office for assistance. The defenses discussed in the following are a few that a borrower can raise.

#### ***Real Party in Interest***

In many foreclosure cases, it is not entirely clear who the “lender” really is. Modern mortgage loans were often assigned into pools of loans and securitized for investors. The companies who pooled these loans did not sufficiently consider established legal principles and statutes, such as Article 3 of the Uniform Commercial Code, regarding assignments and transfers of ownership of mortgage notes. In addition,

because of the great number of these transactions, mistakes in assignments are sometimes made. Plaintiffs bringing foreclosure cases may not have the ability to establish their rights and ownership of the promissory note under the law. For instance, in Ohio, a federal judge dismissed numerous cases because of the lender’s inability to prove its right to bring the lawsuit.<sup>19</sup>

#### ***Predatory Lending/Substantive Defenses***

The modern mortgage market provided incentives for companies to make questionable loans. The mortgage brokers and other non-bank companies who had the initial contact with the borrower received their money upfront. They were paid based on the size and number of the loans they could originate. To close on deals, they acquired inflated appraisals and doctored loan applications. Wall Street firms had an insatiable appetite for these mortgages, which they would purchase and package as securities. These firms kept money in the system until the market collapsed.

Due to the abusive practices that occurred, borrowers in some cases can raise the fraudulent and predatory activity of the parties that originated or approved their loan in opposition to a foreclosure. Moreover, borrowers may be able to hold any other parties liable who were later assigned the loan if those parties were involved in the origination process. Common law theories include basic tort and contract principles of fraud, unconscionability, and breach of fiduciary duty. Fraud is a useful tool since it fits much of the misrepresentation that occurred in mortgage originations. Moreover, it is a simple concept that judges can understand. Statutory law also provides the means to challenge a foreclosure. Many states have Unfair and Deceptive Practices statutes that guard against abuses in the market. In addition, the federal Truth in Lending Act provides rules for disclosures and strong remedies for violating those rules.

### Mortgage Servicing Abuses

Unfortunately, abuses in the mortgage market can continue past the loan's origination. Banks often no longer keep and service the loans that they make. Instead, the loans are pooled and sold into securities, and borrowers face large servicing companies rather than a neighborhood loan officer. Nonetheless, loan servicers often have clear guidelines that they must follow when handling an account. Servicers of loans insured by HUD's Federal Housing Administration (FHA) must satisfy HUD-promulgated rules for loss mitigation before they can refer the loan to foreclosure. USDA-direct and USDA-insured loans have similar rules. Fannie Mae and Freddie Mac have published extensive servicing guidelines for their loan servicers to follow. Even if the loan does not involve a published guideline, some courts may consider equitable principles to prevent a badly behaving loan servicer from

foreclosing. A servicer who breaks promises, who won't reasonably communicate with a borrower, and who loses documents that a borrower submits for a loan workout cannot have clean hands.

The Real Estate Settlement and Procedures Act (RESPA) provides borrowers with an easy avenue for addressing mistakes in loan servicing. If the borrower has a dispute with the loan servicer, he or she can write a "qualified written request" that explains the basis for the complaint. Under RESPA, the servicer must acknowledge the request within 20 days and respond to the complaint with 60. In addition, RESPA limits the amount of money a servicer can collect each month for taxes and insurance, and the statute requires the servicer to make timely payments out of the account. If the servicer does not follow RESPA, it may face statutory damages and attorney fees.

### Home Affordable Modification Program

The federal government has made several attempts to halt the current foreclosure crisis. Its most comprehensive loan proposal, the Making Home Affordable Program, seeks to increase refinances and loan modifications in order to help more borrowers.<sup>20</sup> Under the plan's Home Affordable Modification Program, mortgage servicers will use 31 percent of the borrowers' gross income as a general standard to modify mortgages. To reach this standard, servicers can reduce interest rates to as low as 2 percent and can forgive a portion of mortgage's principal balance. The value of a borrower's home, the terms of the current mortgage, and other factors will also determine whether a borrower is eligible for a modification. All loans owned by Freddie Mac and Fannie Mae must be considered for this program. In addition, several loan servicers, including Bank of America,

### SAMPLE WRITTEN COMPLAINT

HUD's website (<http://www.hud.gov>) provides a good example of a qualified request that a borrower can use to officially file a written complaint to a lender.

Attention Customer Service:

Subject: [Your loan number]

[Names on loan documents]

[Property and/or mailing address]

This is a "qualified written request" under Section 6 of the Real Estate Settlement Procedures Act (RESPA).

I am writing because:

- Describe the issue or the question you have and/or what action you believe the lender should take.
- Attach copies of any related written materials.
- Describe any conversations with customer service regarding the issue and to whom you spoke.
- Describe any previous steps you have taken or attempts to resolve the issue.
- List a daytime telephone number in case a customer service representative wishes to contact you.

I understand that under Section 6 of RESPA, you are required to acknowledge my request within 20 business days and must try to resolve the issue within 60 business days.

Sincerely,

[Your name]

CitiMortgage, and Wells Fargo Bank, have signed independent agreements with the Department of Treasury that promise to use this plan.<sup>21</sup>

The Home Affordable Modification Program is a one-size-fits-all approach that will not benefit all borrowers, especially those with large families or high medical expenses. For others, it will provide an excellent means of resolving foreclosure. Because it can provide significant decreases in interest rate and even in principal balance, borrowers facing foreclosure should make sure their servicer has at least considered this option.

### Conclusion

Borrowers can often avoid foreclosure. However, unnecessary foreclosures will continue if borrowers are unaware of the available resources. With basic knowledge of the foreclosure process and an understanding of the available resources, children's advocates can promote and secure stability in their clients' lives.

*Steven Sharpe is a staff attorney at the Legal Aid Society of Southwest Ohio, LLC. He represents children in abuse, neglect, and dependency cases as well as borrowers in foreclosure cases. He would like to thank*

*John Schrider, Debra Rothstein, and Jonathan Ford for their excellent comments.*

### Endnotes

1. Stephanie Armour, Foreclosures' financial strains take toll on kids, USA TODAY (July 9, 2008), available at [http://www.usatoday.com/money/economy/housing/2008-07-08-children-foreclosure-homeless\\_N.htm](http://www.usatoday.com/money/economy/housing/2008-07-08-children-foreclosure-homeless_N.htm)

2. For a very interesting look into the mortgage trouble suffered by a sophisticated *New York Times* writer, see Edmund L. Andrews, *My Personal Credit Crisis*, NEW YORK TIMES MAGAZINE, May 14, 2009, MM46.

3. See Grant S. Nelson and Dale A. Whitman, *Real Estate Transfer, Finance, and Development* 574 (6th ed. 2003). For an in-depth look at foreclosure laws, see National Consumer Law Center, *Foreclosing a Dream: State Laws Deprive Homeowners of Basic Protections* (Feb. 2009).

4. Ohio Rev. Code §§ 2323.07, 2329.06-36, 5301.39; Fla. Stat. Ann. §§ 702.01-.10.

5. See e.g., Ariz. Rev. Stat. § 33-745; Mo. Rev. Stat. §§ 443.290-453.

6. Nelson and Whitman, *Real Estate Transfer* at 603.

7. See note 4 above; see also National Consumer Law Centers, *Foreclosures*, Appx. C (2nd Ed. 2007).

8. See HUD website, HUD Approved Housing Counseling Agencies, available at

<http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm>

9. See Institute for Foreclosure Legal Assistance, available at <http://www.foreclosurelegalassistance.org/index.php>

10. National Association of Consumer Advocates, Find an Attorney, available at <http://members.naca.net/findanattorney/#>

11. 11 U.S.C. § 362; Johnson v. Home State Bank, 501 U.S. 78, 82-83 (1991).

12. 11 U.S.C. § 1322(b).

13. Cal Code Civ Proc § 580d.

14. Ohio Rev. Code § 2329.08.

15. See National Consumer Law Center, National Effort Needed to Protect Homeowners from Mortgage Loan Modification Scams (July 10, 2009).

16. Noelle Knox, *Con Artists Circle over Homeowners on the Edge*, USA TODAY (Nov. 9, 2007).

17. <http://www.ustreas.gov/press/releases/tg83.htm>

18. <http://www.occ.treas.gov/ftp/ADVISORY/2009-1.html>

19. *In re Foreclosure Cases*, 2007 U.S. Dist. LEXIS 84011, 2007 WL 3232430 (N.D. Ohio Oct. 31, 2007.)

20. See United States Department of Treasury, Financial Stability website, available at <http://www.financialstability.gov/roadtostability/homeowner.html>

21. For a list of servicers, see [http://www.financialstability.gov/impact/contracts\\_list.htm](http://www.financialstability.gov/impact/contracts_list.htm)



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## Aging Out

(Continued from page 1)

session (2007–2009), a number of bills were introduced to address the plight of youth aging out of foster care.<sup>3</sup> Significantly, the Fostering Connections to Success and Increasing Adoptions Act was signed into law in October 2008. The act gives states the option, beginning in 2011, of obtaining Title IV-E reimbursement for youth after age 18 who are (1) completing high school or a program leading to an equivalent credential; (2) enrolled in an institution that provides post-secondary or secondary education; (3) participating in a program or an activity designed to promote, or remove barriers to employment; or (4) employed at least 80 hours per month. States have the option of extending these placements until ages 19, 20, or 21. In addition, the College Opportunity and Affordability Act of 2007<sup>4</sup> authorized funding for programs that specifically target and support youth aging out of foster care who are enrolled in post-secondary education. This can include providing temporary housing during breaks in the academic year.

Several other federal laws relate to youth in foster care. The Homeless and Runaway Act provides funding for housing and services for youth under age 21;<sup>5</sup> foster youth who run away from their placements are eligible for these services. Federal housing programs, such as Section 8 and public housing, also have specific provisions for youth aging out of foster care.

### State Law

Each state implements its federal funds differently, with varying levels of service and judicial oversight for youth over age 18. Only Illinois, New York, Vermont, and the District of Columbia maintain full foster care placements for youth over age 18. Despite the differences, the advice in this article applies throughout the country.

### The Service Plan

Under federal law, all foster youth over age 16 must have a written independent living plan.<sup>6</sup> This comprehensive service

## STATE LAW CHART

### Age of Discharge from Foster Care

Maximum cutoff for foster care is 18: FL (1)

Youth may remain in care until age 19: CA, NE, NH, WI, VT, UT (6)

Youth may remain in care until age 20: AK, IA, MI (3)

Youth may remain in care until age 21: AL, AZ, AR, DE, GA, ID, IL, IN, KS, KY, ME, MD, MN, MO, MT, NM, NJ, NV, NY, NC, ND, OH, OK, OR, PA, SC, SD, VA, WA, WV, WY, DC (32)

Youth may remain in care until age 22: MA, TX (2)

Youth may remain in care until age 23: CO, CT (2)

No response HI, LA, MS, RI, TN, PR (6)

Source: Congressional Research Service, "Services for Youth Emancipating from Foster Care," Memorandum to Senator Barbara Boxer at 12 (2007).

plan must be reviewed every six months at a meeting (often called a Service Plan Review or Team Decision Meeting) to which the youth must be invited. The independent living plan should also be reviewed and approved by the judge, who should make any necessary orders. Many states also require that all aspects of the independent living plan (sometimes called a discharge plan) be completed before the youth is allowed to exit care<sup>7</sup> and/or that a youth be placed on a trial discharge, under which he or she can return for services before age 21, prior to final discharge.<sup>8</sup> The independent living/discharge plan must address all of the following issues.

### Housing

No one can function in society without a roof over his or her head. First and foremost, long before the youth is discharged from care, advocates for youth in care must help their clients create a housing plan. No matter what the jurisdiction or level of service provided after age 18, all youth will eventually need a home of their own. Applying for housing programs and preparing for independent living takes months, if not years, of collaboration between youth and their advocates and service providers.

Tens of thousands of youth become

homeless or unstably housed upon discharge or shortly thereafter.<sup>9</sup> Many states explicitly prohibit agencies from discharging youth to homelessness, but the laws can be difficult to enforce once the family/juvenile court loses jurisdiction.<sup>10</sup> Therefore, it is imperative that you obtain orders to prevent homelessness (i.e., for the agency to provide housing assistance or for the housing authority to process an application) while a case is still in court.

Youth exiting foster care are eligible for an array of housing programs:

- Vouchers & Subsidies

The federal government provides money to states under various statutes to help house youth aging out of foster care. Under the Family Unification Program (FUP), local housing authorities provide housing vouchers to youth aging out.<sup>11</sup> In some localities, for example, New York City, youth are also eligible for priority admission to public housing, where rent is based on income. Some states also offer subsidies to youth when they exit foster care for one-time moving expenses, furniture, and the like. For example, in California, all youth receive a one-time grant of up to \$1,000 for security deposit and move-in expenses; while in New York, youth are eligible to receive up to \$3,600.<sup>12</sup> These

grants are not enough to pay ongoing rent, but they can help youth with ancillary costs as they transition from foster care.

- Supportive Housing

Across the country, supportive housing programs also serve youth aging out of foster care, although more facilities are desperately needed. These programs fall in two categories: congregate programs—youth live together in one building; scattered site programs—youth are placed in apartments (with or without roommates).

In either case, youth almost always must engage in services such as case management, counseling, and life skills training; youth may also have to attend school/vocational training and/or be employed. In some programs, youth must pay a portion of their rent, perhaps not at the beginning but in gradually increasing increments; other programs require housing vouchers, or other subsidies, that the youth will have to obtain to be admitted. Supportive housing programs can be transitional or permanent. Transitional programs are time-limited, usually housing a young person for 18 to 36 months, during which the program is supposed to help the youth stabilize and find a permanent place to live. Some transitional programs allow youth to start living there while they are still in foster care, but this counts against their time limit in the program.

- Transitional Living Programs (TLPs)

Youth under age 21 can use Transitional Living Programs (TLPs) funded by the Federal Homeless and Runaway Act,<sup>13</sup> such as the Covenant House Program. These are time-limited programs, and youth over age 21 will not be admitted for the first time under any circumstance. (Sometimes young people can stay in a TLP after their 21st birthday if they have been living there successfully and have no other place to go.)

- Other Specialized Housing

The U.S. Department of Housing and Urban Development's Section 811 Supportive Housing for Persons with Disabilities funds programs to which youth may also be eligible, if they have a mental disability or seek help for substance abuse.<sup>14</sup> The services in these programs are

not tailored to youth aging out, and most residents will be significantly older—both factors to keep in mind when considering whether a client should apply.

- Homeless Shelters

Unfortunately, many youth will not obtain a voucher or be admitted to a housing program before they age out. Homeless adults can seek shelter in various transitional and supportive housing facilities. The catch to these programs is that you must be deemed “homeless” before you are allowed in.<sup>15</sup> This means that a youth cannot arrange enrollment in a homeless facility before she ages out—she is forced to live in a precarious situation first. It is therefore crucial for an advocate to plan for a youth's transition, to make this “gap” time as short and stable as possible (i.e., by having the youth remain with the foster parent after aging out for the requisite time period; the foster parent can then notarize a statement to the homeless shelter that the youth cannot continue living there).

### Education

Under Chafee, the social service agency is required to provide educational assistance to youth aging out of foster care. This includes helping young people apply for Educational Training Vouchers (ETVs), which were enacted in 2002 as extension of the Chafee legislation.<sup>16</sup> States administer their ETVs differently, but all youth who were in foster care on their 16th birthdays, even if they were later discharged or adopted, are eligible. The vouchers cover tuition, room and board, and other costs associated with secondary education (including vocational training) each year until age 23 (but youth must apply for their first ETV by 21). Unfortunately, thousands of youth who are entitled to the vouchers are not receiving them, and some have lost this opportunity forever, because of misinformation and lack of training of caseworkers.<sup>17</sup> Advocates must step in to facilitate the process. This can be as simple as inviting your client to your office to fill out the brief online application and following up with the caseworker or agency to ensure it is

processed properly.

There are also numerous scholarships targeted to youth in foster care, and thousands more for which the youth may be eligible.<sup>18</sup> Do whatever you can to facilitate the application process—millions of dollars of scholarship money is untapped each year!<sup>19</sup> Foster youth in higher education can be further supported by state programs that provide tutoring, case management, and other services.<sup>20</sup> Moreover, of course, every youth must apply for federal financial aid,<sup>21</sup> making sure to identify as financially independent and a ward of the state (you or the caseworker may have to write a letter or provide documents certifying this).

Lawyers should also be versed in the basics of education and special education law. For example, in many states, youth are entitled to attend regular high school (not a GED or vocational program) until they reach the age of 21 (if they have not graduated before then).<sup>22</sup> This is crucial because caseworkers and schools often encourage foster youth to enroll in alternative schooling when they have moved around a lot or are perceived as ill-suited for regular education. If your client would like a standard high school diploma (and all of the benefits that go with having one), he or she has the right to attend and should receive all the support needed to graduate (including special education services, if he or she qualifies).

An important corollary is that under federal law, young women who are pregnant or parenting cannot be forced out of school.<sup>23</sup> In fact, many high schools offer on-site day care, but even if they do not, pregnant and parenting teens have every right to continue attending their school. Again, school administrators and caseworkers might encourage parenting women to enroll in special schools for pregnant/parenting teens, but these schools are often less rigorous and may not even grant credits towards a standard diploma.

Approximately 40 percent of children in foster care have been deemed eligible for special education, and many more probably qualify.<sup>24</sup> Federal law mandates that all special education students have

Individualized Education Plans (IEPs) that are reviewed at a meeting very six months. A lawyer's attendance may be extremely beneficial because special education services are often delineated in the plan but are not actually being provided to the client.

Of utmost importance for youth aging out is that under federal special education law, by age 14, the IEP must address what instruction will assist the youth to prepare for the transition to adulthood, and by age 16, the IEP must state what transition services the youth needs and specify interagency responsibilities and needed linkages. Again, a lawyer at IEP meetings helps ensure that this independent living planning takes place.

Moreover, under special education law, Chafee, and the Americans with Disabilities Act, youth who are in residential treatment facilities or centers (RTF/RTCs) are entitled to receive all of the same independent living services as other adolescents. Make sure that your clients in congregate care are not missing out on independent living planning and opportunities.

Last, youth advocates must also be mindful of school suspension policies and laws. Youth are entitled to notice and an opportunity to present their side of the story for suspensions of 10 days or fewer and have further procedural safeguards for harsher discipline.<sup>25</sup>

### **Employment**

Under Chafee, states are also required to provide employment assistance to youth. In addition to job readiness, placement, and retention, "training" can also include employment or an internship at the social service agency itself if the youth is interested. Using this flexibility in the language of Chafee to advocate for your client is especially important in this economy when clients may find it extremely difficult to find a regular job.

States also have numerous education/employment programs that are targeted to at-risk youth, according to their federal funding, such as Job Corps, Youth Activities, and Educational Opportunity

Centers (EOCs).<sup>26</sup> Apprenticeship programs, usually administered by the local Department of Labor, can be another wonderful opportunity for clients to gain vocational training and guaranteed employment, and they can attain their GED or high school diploma as part of their participation. Your client's caseworker may not be knowledgeable about these programs, so it is essential to counsel your client and seek in and out of court advocacy for whatever support your client needs.

You may also want to discuss and research opportunities such as Americorp and YouthBuild<sup>27</sup> to name a few.

### **Health Insurance**

Many states have extended Medicaid coverage to youth over age 18, even if they do not offer them other foster care benefits. However, the caseworker must submit paperwork for the benefits to continue, so it may be necessary to follow up and advocate in and/or out of court. When the youth is no longer eligible for foster care Medicaid, he will have to reapply for community Medicaid—making sure he does so and is assisted with this should be a specific part of the discharge plan.

### **Reproductive and Mental Health Care**

A substantial proportion of young people become parents while in foster care, and foster youth are at an increased risk for sexually transmitted diseases.<sup>28</sup> It is essential that you discuss reproductive health with your client. Despite federal and state mandates on agencies to provide sexual health education, you may be the only person to have a frank and confidential discussion with your client about these issues.

In most states and under a patchwork of federal law, adolescents age 14 and older have the right to confidentiality in their reproductive health care,<sup>29</sup> including contraception,<sup>30</sup> termination of pregnancy<sup>31</sup> and testing/treatment for sexually transmitted diseases.<sup>32</sup> Furthermore, Medicaid has a confidentiality clause that applies to minors.<sup>33</sup> If your client's agency has a religious

affiliation that precludes it from discussing family planning or providing such services in its health clinic, the youth must be referred elsewhere.<sup>34</sup>

Mental health is also a crucial topic to broach with your client. Most foster youth feel exposed by the system, and justly so. They are often reluctant to seek mental health treatment for fear of lack of privacy. However, many states have statutes explicitly protecting minors' confidentiality in mental health treatment,<sup>35</sup> and ethical obligations on professionals reinforce this. Furthermore, you should advocate for your client to receive psychological services outside of the agency if she desires.

For further information on adolescent access to confidential health services, contact Advocates for Youth, (202) 419-3420, <http://www.advocatesforyouth.org/>.

### **Public Benefits**

Many youth will need to receive public benefits, aside from health insurance, after discharge. The catch-22 with temporary cash assistance (Temporary Assistance for Needy Families—TANF) is that youth are not eligible while in care, but once they get out, benefits can take 30 days or more to kick in. One way to address this gap, which has been successful in some localities, is to write a letter to the TANF office, indicating the date of the youth's discharge and requesting that they process the application so benefits commence by then. In the states where the family/juvenile court has jurisdiction over the TANF office, you could also obtain a court order to this effect; otherwise, consider an order for the caseworker to at least accompany the youth to the TANF office to make sure that things go smoothly.

All youth should also apply for food stamps, as the eligibility is generally less stringent, and they may even be able to receive them still in care (especially if they have children).

Parenting youth should also be eligible for subsidized child care programs, which they can often apply for at the same time as cash assistance. Your client should be aware

that she may have to seek child support or produce information about the baby's father (or mother) to receive these benefits. All parenting teenagers in foster care can and should also be receiving food under the Women, Infants, and Children (WIC) program, and they are eligible for WIC before (and after) leaving the system.

### Immigration Status

Perhaps the single most important background question you can ask your client when you first receive a case is whether he was born in the United States. If he was not, and you fail to discover this or follow up, he will exit the foster care system undocumented and will forever lose the ability to obtain legal permanent resident status (unless he has another avenue for obtaining status, which is unlikely). Youth in foster care can receive legal permanent resident status (Special Immigrant Juvenile Status—SIJS) if a family/juvenile judges signs an order declaring that the child is a court dependent; parental reunification is not possible due to abuse, neglect, or abandonment; it is not in the child's best interest to be returned to the home country; and the child has proceeded or should proceed to long-term foster care, adoption, or guardianship.<sup>36</sup>

While it cannot be stressed enough that this the paperwork must be submitted as soon as possible to United States Citizenship and Immigration Services (USCIS), youth can apply after age 18 as long as they have been declared dependent and are still receiving some kind of service from the agency. The agency must submit a youth's agreement to continue in service or write a letter of verification,<sup>37</sup> and submit all of the paperwork in time for the youth to have an interview before his or her 21st birthday.

Although anecdotally some youth have been interviewed successfully after they turn 21, the official policy is that they must still be "dependent" at the time of interview. In any event, no young person can ever submit anything after 21, so do not delay!

### Identity Theft

Youth in foster care are extremely susceptible to identity theft. Their social security numbers are readily available and are invariably stolen by foster parents or relatives, to open credit card accounts, make tax claims, and obtain other benefits.

**Youth in foster care are extremely susceptible to identity theft.**

There are several steps that must be taken to prevent and/or ameliorate this situation, and some states have codified them into the law.<sup>38</sup>

First, to prevent theft, you or the caseworker should conduct a credit check as soon as possible before the youth turns 18, so any issues can be resolved by discharge. For minors, you will need to write a registered letter to each of the credit bureaus. The letters should include the child's full name, social security number, and parent's name and address (if rights have not been terminated). The letter should ask that a search for a credit file be done of the child's social security number, since often the name will be different. Additionally, you should include a copy of the child's birth certificate, guardianship/court papers indicating that the child is a ward of the state, and a copy of the child's social security card. The credit bureaus will want to make sure you are the correct person before releasing information. If you are told, "There is no file," the youth probably has nothing to worry about, but make sure to obtain a letter stating that a file does not exist. Ideally, you/caseworker should check again every year until independence. If no credit file exists, but you/youth are

highly suspicious of his caretakers, contact a government/nonprofit credit assistance organization (see [http://www.ojp.usdoj.gov/ovc/help/it.htm#nat\\_org](http://www.ojp.usdoj.gov/ovc/help/it.htm#nat_org)), who can take measures to ensure that a credit file is not fraudulently created in the future.

### Other Legal Issues

Be sure to ask your client if he or she has been arrested and/or convicted of anything in juvenile or criminal court. You should attempt to do whatever is possible to ameliorate your client's record, such as having his or her juvenile records expunged or sealed (some states require a court order for this) or asking the probation department to

### RECOURSE

If a credit file exists and/or a youth's identity has clearly been stolen (i.e., he or she has a collection agency looking for him; is unable to open some kind of account; sees a telephone/cable bill with his or her information on it; etc.), the youth should immediately contact a government/nonprofit credit assistance organization. They will walk the youth through these essential steps to clear his or her record:

- A fraud alert must be placed on the youth's account by the three major credit reporting agencies (Equifax Credit Information Services, Tel: (800) 525-6285; Trans Union Fraud Victim Assistance, Tel: (800) 680-7289; Experian Consumer Fraud Assistance Tel: (888) 397-3742.
- All accounts in the youth's name must be closed.
- The youth must register a complaint with the Federal Trade Commission (FTC). The youth should be prepared to fill out affidavits of forgeries for banks, credit grantors, and recipients of stolen checks, Tel: (877) 438-4338.
- The youth must contact the Social Security Office, Tel: (800) 269-0271.

write a letter certifying the youth's satisfactory completion of sentence. Otherwise, these records, even ones that you think are sealed will come back to haunt the young person when he or she applies for jobs.

It is absolutely imperative that your client leave foster care with all documents—birth certificate, social security card, driver's license/non-driver ID, Medicaid card (even if expiring), etc. Agencies and foster parents often lose these documents or realize on the eve of discharge that they only have copies of them. Ask early and do whatever is necessary to obtain new ones (it varies

**The key to all of these issues—housing, employment, education, health care, benefits, immigration, credit, and documents—is time.**

by locality). The driver's license/non-driver ID is crucial—in many states, youth need their caseworkers to accompany them to the Department of Motor Vehicles to vouch for their identity. Once they leave care, they may have an extremely difficult time providing the requisite identification. If your client wants to learn to drive, you should also advocate, using Chafee, for the agency to fund lessons; driving is necessary in many localities for achieving independence and obtaining a job/education.

Finally, in some states, youth have a right access a copy of their entire foster care record before or upon discharge.<sup>39</sup> If you client so desires, make sure to request/obtain a court order, as the agency will

likely be reluctant to release them. The young person is also entitled to a copy of his or her health and education records<sup>40</sup> under federal law, and should absolutely retrieve all documents relating to immunizations and medical/dental treatment, as well as his or her entire school file.

The key to all of these issues—housing, employment, education, health care, benefits, immigration, credit, and documents—is time. Never underestimate how long it will take to process applications, and do not be afraid to go to court to get orders, while you still can.

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## Endnotes

1. 42 U.S.C. § 677(h). States must match the federal contribution with 20 percent from state authorized funds.

2. Government Accountability Office. *Foster Youth: HHS Actions Could Improve Coordination of Services and Monitoring of States' Independent Living Programs*, 15, available at <http://www.gao.gov/new.items/d0525.pdf>

3. Fernandes, Adrienne. *CRS Report for Congress: Youth Transitioning from Foster Care: Background, Federal Programs and Issues for Congress*. Washington, DC: Congressional Research Service, updated September 5, 2008, 43–60, available at [www.nrcys.ou.edu/yd/pdf/RL34499\\_youth%20transitioning.pdf](http://www.nrcys.ou.edu/yd/pdf/RL34499_youth%20transitioning.pdf)

4. H.R. 4137.

5. 42 U.S.C. § 11432.

6. 42 U.S.C. § 675(1)(D).

7. *E.g.*, N.Y. Fam. Ct. Act § 1089 (d) (2)(9)(viii)(C); see also *Legal Rights of Teens in Out-of-Home Care*. San Francisco: Youth Law Center, September 2003, 26 (describing California practice); Pokempner, Jennifer & Lourdes Rosado, *Dependent Youth Aging Out of Foster Care: A Guide for Judges*. Philadelphia: Juvenile Law Center, 2003, 3 (describing Pennsylvania practice).

8. *E.g.*, Va. Code Ann. § 63.2-905.1; N.Y. Comp. Codes R. & Regs. tit. 18, § 430.12 (f)(4)(a).

9. Fifty-four percent of recently aged-out

youth are homeless or unstably housed (Kushel, Margot B., et al., *Homeless and Health Care Access After Emancipation*, ARCHIVES OF PEDIATRICS & ADOLESCENT MEDICINE 10, 2007, 986, 987).

10. *E.g.*, N.Y. Comp. Codes R. & Regs. tit. 18, § 430.12(f)(3)(i)(c).

11. <http://www.hud.gov/progdsc/famuni8.cfm>

12. Congressional Research Service. "Services for Youth Emancipating from Foster Care," Memorandum to Senator Barbara Boxer, 2007, 5; N.Y. Comp. Codes R. & Regs. tit. 18, § 430.9(f)(1)(i)(b).

13. 42 U.S.C. § 11432.

14. <http://www.hud.gov/offices/hsg/mfh/progdsc/disab811.cfm>; see, e.g., programs: Iowa City Housing Information, [www.jeonet.com/city/planning/jchi/iid.htm](http://www.jeonet.com/city/planning/jchi/iid.htm); New York State Campaign for Mental Health Housing, [www.campaign4housing.org/members.html](http://www.campaign4housing.org/members.html).

15. See, [http://www.tacinc.org/HH/Program\\_Policy/SHP.htm](http://www.tacinc.org/HH/Program_Policy/SHP.htm), describing the requirements for admission to the Supportive Housing Program under the McKinney/Vento Homeless Assistance Act (Pub. L. 100-77).

16. P.L. 107-133.

17. In a study of nine states, only 56 percent of youth pursuing secondary education received a voucher in 2007. *CRS Report for Congress*, 23.

18. See, e.g., <http://orphan.org/index.php?id=30> or <http://www.collegescholarships.org/scholarships/foster.htm>

19. The National Center for Education Statistics reports there are 750,000 scholarships earmarked for qualified students, totaling \$1.2 billion, but millions go unspent because students fail to apply, available at [http://money.cnn.com/2002/06/11/pf/college/q\\_scholarship/index.htm](http://money.cnn.com/2002/06/11/pf/college/q_scholarship/index.htm)

20. *E.g.*, The Great Expectations program in Virginia, available at <http://www.vccs.edu/Foundation/GreatExpectations/tabid/615/Default.aspx>

21. <http://www.fafsa.ed.gov/>

22. *E.g.*, NY CLS Educ. § 3202(1).

23. Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq) prohibits sex discrimination in schools that receive federal funds. Regulations explicitly forbid certain forms of differential treatment of pregnant and parenting teens, including expelling pregnant students from school, excluding them from classes or extracurricular activities, and harassing or stigmatizing unmarried teenage mothers. The

regulations also require schools to grant medical leave to pregnant students whose doctors deem it necessary and to reinstate such students at the end of their leaves.

24. Ventrell, Marvin & Duquette Donald, Eds. *CHILD WELFARE LAW AND PRACTICE*, 282 (2005).

25. See J. Rapp, Education Law § 9.05 (1996) for a full discussion of school disciplinary law.

26. See <http://www.jobcorps.gov/home.aspx>; [http://www.doleta.gov/youth\\_services/](http://www.doleta.gov/youth_services/); <http://www.ed.gov/programs/trioeoc/index.html>

27. See <http://www.americorps.gov/>; <http://www.youthbuild.org/>

28. Mark E. Courtney, et al. *Executive Summary: Midwest Evaluation of the Adult Functioning of Former Foster Youth*. Chicago: Chapin Hall Center for Children, Dec. 2007, 9–10.

29. Adolescent Access to Confidential Health Services, available at <http://www.advocatesforyouth.org/>; *Carey v. Population Services International*, 431 U.S. 678 (1977).

30. *Carey*, 431 U.S. 678 (1977).

31. *Ohio v. Akin Center for Reproductive Health*, 497 U.S. 502, 510–11, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990); *Wicklund, et al. v. Salvangi*, 93 F.3d 567, 572 (9th Cir. 1996).

32. E.g., CO. REV. STAT. §25-1-801(d) (1995); ILL. ANN. STAT. ch. 40, para. 2201-1; N.H. REV. STAT. ANN. §141-C:18 (1995); NY. PUB. HEALTH LAW §§2504, 2305, 2306 (McKinney 1995).

33. 45 C.F.R. §5b.6.

34. See, e.g., in *New York*, the court ordered settlement in *Wilder v. Bernstein* WL 355413 (S.D.N.Y. Jul. 1, 1998).

35. E.g., ME. REV. STAT. ANN., tit. 19 §§902, 905 (1995).

36. Immigration Act of 1990, Pub L. 101-649, §153; 8 U.S.C. § 1101 (a)(27).

37. For assistance with immigration, see, e.g., <http://immigrantchildren.org/SIJS/>; The Children's Project, available at <http://www.ayuda.com>

38. See, e.g., California Assembly Bill 2985, which requires county welfare departments to request credit checks for foster youth who are 16 or older and provide referrals to credit counseling organizations if the credit check discloses any negative information.

39. E.g., N.Y. Comp. Codes R. & Regs. tit. 18, § 428.8.

40. The Health Insurance and Portability Act (HIPAA) PL. 104–91; The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) grants youth over age 18 the right to inspect and copy their education records; see also 42 U.S.C. § 675, requiring foster care case plans to contain health and education records.



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## School Discipline

(Continued from page 1)

was attending. You should send a letter to the school, requesting these documents. Again, be sure to include a release along with your request.

If the police interviewed your client, you should get a copy of the police report if possible. The school district or the local police station will be in the best position to provide the report to you.

Once you have received these documents, you should review them all carefully. With regards to the expulsion packet, pay particular attention to the witness statements. Look out for any inconsistent statements. What is the date on the witness statements? Does it appear that any of these statements were written by someone other than a student? For example, did an adult write the statement? And examine the notice of the expulsion hearing. Does the school district clearly set out the charges against the student?

Also, carefully examine the student's cumulative education records. You should look to see whether the student has any prior disciplinary history. Look at the student's grades. Was there a change in grades at any point? Was there a pattern of behavior that led to this incident? If there were prior behavior incidents, try to ascertain the school's response. Did the school ever evaluate the student for special education? Was the student made eligible? Why or why not?

The documents can provide a lot of useful information for you to use at the expulsion hearing. In Robert's case, the documents illustrated that Robert had been receiving good grades. But as school demands increased, his grades dropped. Around the time that there was a change in his grades, there was actually a letter in his file from his guardian requesting that he be evaluated for special education. Yet, nothing happened as a result of that letter.

After you review the documents, the next step is to meet with your client.

### Interviewing the Client

You should first discuss your client's version of the incident. Ask your client what he or she told school administrators or police officers about the incident. Be sure to find out whether your client

**One important issue you may wish to raise at the hearing is the investigation conducted by the school. Be sure to ask your client whether the school administrator met with him or her prior to recommending expulsion.**

made a written statement.

If it is not clear from the school records, find out whether the student is receiving special education services or accommodations under Section 504. If the student is supposed to receive these services, try to find out whether he or she was actually receiving the services to which he or she was entitled. Did the school hold a manifestation determination IEP? If you are not familiar with special education, you should consult with an attorney who has expertise in this area because students with disabilities are entitled to special protections.

One important issue that you may wish to raise at the hearing is the investigation conducted by the school. Discuss this thoroughly with your client. You

want to know who was present during the incident. Go back through the expulsion packet to check whether there is a statement from everyone who witnessed the incident. If a witness statement was not included, you want to know why. At the hearing, you will want to find out whether that student was questioned. If so, where is that student's statement?

Another important issue may be the process that was followed by the school. You need to be familiar with the due process protections provided by your state. In California, for example, a student is afforded the opportunity to present his or her side of the story at a pre-expulsion meeting with the parent(s) present. Be sure to ask your client whether the school administrator met with him or her prior to recommending expulsion. Was your client able to speak at the pre-expulsion meeting? Sometimes school administrators will tell the student why they are being recommended for expulsion, but will not give the student a meaningful opportunity to participate.

You should also ask your client for any other witnesses that could be helpful to the case. Find out whether your client knows if the witnesses would be willing to testify on his or her behalf and, if so, how to contact those witnesses.

Although you have the student's school records, be sure to discuss your client's past history directly with him or her. You will want to find out whether this student had any prior involvement with law enforcement. You want to know whether this student has ever been in trouble at school before. If so, how did the school handle that incident? Did the school try to help the student improve behavior in any way? This information may be useful if your state has a requirement that, for certain types of offenses (usually those that are not considered zero tolerance), the school district must show that they have tried to correct the behavior, but were unable to do so, and

thus, expulsion would be the only option.

You will also want to find out what positive things can be said about your client. Does your client volunteer anywhere, do community service, or mentor other students? Is your client actively involved with a religious organization? If possible, you should try to get letters of support for the student. Or better yet, bring a character witness to the hearing to testify about the student. It can be helpful to ask the student to prepare a statement about why he or she wants to go back to school and his or her goals.

Now begins the task of putting everything together for the hearing.

### **The Format of the Hearing**

Before going to the hearing, try to find out what the format is going to be like. Every jurisdiction will have different rules governing who will hear the matter. In many jurisdictions, expulsion hearings are heard by an administrative panel. The hearing may also be heard by the school board or an appointed hearing officer. The panel may be comprised of administrators from schools within the district, but under no circumstance should the panel include anyone from the school attempting to expel your client.

Regardless of who presides over the hearing, the proceeding must be taped. In the event that you need to appeal your case, a transcript of the proceeding will be critical.

The level of formality will vary from jurisdiction to jurisdiction. Some school districts may follow a formal structure where the hearing is conducted like an actual trial, where you will make an opening statement, present your case through witness testimony, have the opportunity to cross-examine the school district's witnesses, and make a closing statement. Other school districts may conduct the hearing more like a meeting where the parties are simply discussing what occurred.

Whether the hearing is formal or informal, you should be prepared to

address some key issues such as procedural violations, problems with the investigation, inconsistent witness statements, and evidentiary issues.

### **Procedural Violations**

To be able to adequately address whether any procedural violations occurred, you need to be intimately familiar with

**The hearing panel may be comprised of administrators from schools within the district, but under no circumstances should the panel include anyone from the school attempting to expel your client.**

the procedural protections afforded to students through your state's education code. Depending on the laws in your state, some potential procedural violations may include whether the district conducted a pre-expulsion meeting with your client; whether your client had an opportunity to tell his or her side of the story before being recommended for expulsion; whether the student's parent was present during the pre-expulsion meeting; whether your client was promised anything in exchange for his or her statement; or whether the notice recommending expulsion adequately set forth the charges against your client.

If there were any procedural violations, you need to raise them at the

hearing. You can do this in the following ways: in your opening statement, through a direct examination of your client, through a direct examination of your client's parent, and through your cross-examination of the school administrator. If there were any procedural violations, you should argue that the expulsion is not valid and that your client must return to his or her school immediately.

If your client receives special education services or should receive such services, it is best to raise that with the school district prior to the expulsion hearing. If the school failed to identify your client as someone in need of services or failed to provide the appropriate services, the expulsion hearing should not go forward. If you try to raise these issues at the hearing, the panel may not know what to do with the information, or could tell you that those issues are separate and apart from the expulsion hearing. If you have raised this issue with the school district and they have ignored you, raise it at the expulsion hearing to preserve the record. But plan to file for due process against the district or, if you are not comfortable doing this on your own, find counsel who practices in special education and ask for assistance. This is critical for the success of your client.

### **Attacking the School's Investigation**

Another key issue to address at the hearing will be whether the school failed to appropriately investigate the incident. Schools can fail to interview key witnesses that could help your client. Or a school will only interview those witnesses that have reason to point the finger at someone else (perhaps that witness actually did something that he or she should not have done). The school may interview a witness but fail to obtain the statement. Another possible scenario is that the school interviewed a witness and got a statement, but now that witness's statement disappeared. An effective way to deal with these issues is

through your cross-examination of the school administrator who conducted the investigation. It may be that there is no good explanation for the school's failure to conduct an adequate investigation. This provides a reason to argue that expulsion would be improper and the student should be allowed to return to school.

You may also find that there are witness statements that are not consistent with one another. This can be tricky to deal with because the school district does not always bring every student witness to the hearing (sometimes they may not even bring any student witnesses to testify). In either case, you should argue that the district's failure to bring these necessary witnesses is a good reason not to expel your client. The school's failure to bring necessary witnesses denies your client due process as he or she will not have the opportunity to cross-examine the testimony against him or her. If your client is expelled, this is a ground on which you can appeal.

You may also find that a school administrator testifies that a witness implicated your client, but that witness's statement does not even mention your client. You want to be sure to bring out any inadequacies in the school's investigation of the incident through your cross-examination of the school administrator.

### Evidentiary Concerns

Before you go to the hearing, you need to know the evidentiary standard that applies in your jurisdiction. In California, a school district may expel if there is substantial and direct evidence; hearsay evidence is allowed, but cannot be the sole basis for a decision to expel. As stated previously, school districts often do not bring student witnesses to the expulsion hearings. So, if the school district is only relying on a witness statement, or a school administrator testifying about what a student witness said, you would have strong hearsay objections. Be prepared to argue that

the school district needs to bring the witnesses to the hearing to allow your client the opportunity to cross-examine the evidence. If the student witness will not testify, the school district should be prepared to show that testifying would expose that student to an unreasonable risk of psychological or physical harm. In the absence of harm that can be proven at the hearing, the student witness should be there. Failure to bring that person results in a deprivation of due process for your client and is yet another ground for an appeal.

### Objections

In some jurisdictions, technical rules of evidence do not apply. The panel will often remind you that you do not need to make objections because the rules of evidence do not apply and there is no one to rule on the objections. Remember though, you are creating a record. If you need to appeal your case, you want to be sure that your objections are noted. You do not want to find yourself in a situation where you have appealed the case and opposing counsel argues that you are barred from raising an issue because you did not object the first time around.

### The Hearing

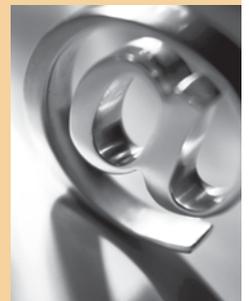
This is your chance to put it all together. If you have followed the steps outlined previously, you should end up with a successful result.

In Robert's case, we were able to show that Robert did not understand how providing someone with a phone number could be considered arranging drugs. Robert honestly believed that he did not do anything wrong. We also had a powerful character witness that testified about Robert's strength of character, dedication to helping others, and desire to do right. We brought letters of support from agencies for which Robert volunteered. Due to our diligent preparation, the district found Robert deserved a second chance. He was not expelled and is now on a path to a successful future.

*This article was based in part on Tips for Representing a Student in an Expulsion Hearing in the Legal Services for Children Suspension-Expulsion Manual. Julie Waterstone is a clinical professor and the director of the Children's Rights Clinic at Southwestern Law School. She can be reached at [jwaterstone@swlaw.edu](mailto:jwaterstone@swlaw.edu).*

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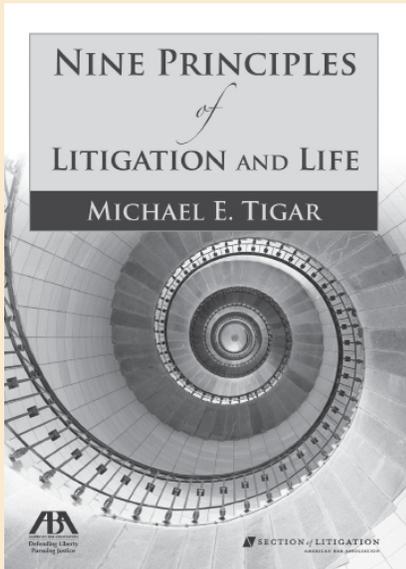


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