

# Clearinghouse REVIEW

January–February 2012  
Volume 45, Numbers 9–10

Journal of  
Poverty Law  
and Policy

## THE MEDICAID EXPANSION

OF 2014

Screening for Medicaid Eligibility | Health Care Law's Requirements for Nonprofit Hospitals

Medicaid Service Cutbacks | Support for Immigrant Worker Organizing | Foster Youth Respondents in Child Welfare Cases



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# PROTECTION v. PRESENTMENT

## When Youths in Foster Care Become Respondents in Child Welfare Proceedings

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Soraya, a 14-year-old girl living in New York City, was voluntarily placed in foster care by her grandmother shortly after Soraya gave birth to a baby girl.<sup>1</sup> Soraya's grandmother—also her adoptive mother—told caseworkers from the Administration for Children's Services that her granddaughter was uncontrollable and rude.<sup>2</sup> Soraya's grandmother also said, emphasizing her own age (she was in her upper 60s), that she could not care for Soraya and her baby and that she was already caring for Soraya's brothers. About one month after Soraya gave birth to her daughter, the Administration for Children's Services placed her and her baby in a mother-child program run by a foster care agency. Under this arrangement, Soraya, but not her daughter, became a foster child. The mother-child program, together with the Administration for Children's Services, became responsible for planning Soraya's future. In other words, despite being a parent, Soraya was no different from any other child in foster care.

Soraya's status became less clear shortly after her placement in the mother-child program. A hospital reported Soraya's care of her daughter to the New York State Office of Children and Family Services' Statewide Central Register of Child Abuse and Maltreatment.<sup>3</sup> Soraya then became the subject of an Administration for Children's Services investigation and subsequently a respondent in a neglect proceeding in New York County Family Court. The agency first alleged, on the basis primarily of statements made by a nurse at the mother-child program, that Soraya failed to provide adequate supervision and guardianship to her daughter. The second allegation, based on statements by staff at the mother-child program and Soraya's grandmother, was that Soraya suffered from attention deficit hyperactivity disorder and oppositional defiant disorder, that she failed to comply with an appointment for a mental health evaluation, that she failed to follow program staff directives, that she frequently broke curfew and was truant from school, and that, due to her behavior, she had been voluntarily placed in foster care. When Soraya became a respondent in family court, her baby was placed in a nonkinship foster home. Eventually the agency moved the baby to Soraya's grandmother's home while the agency searched for an appropriate foster home for Soraya, who remained at the mother-child program.

<sup>1</sup>All stories here are those of clients of the Center for Family Representation's Young Parents Project; we have changed the clients' names and altered details to protect the clients' confidentiality.

<sup>2</sup>In New York City the local child welfare agency is the Administration for Children's Services.

<sup>3</sup>Hereinafter the New York State Office of Children and Family Services' Statewide Central Register of Child Abuse and Maltreatment will be referred to as the "State Central Register."

The same attorney from the Administration for Children's Services' legal division was assigned to represent the agency in both of its cases regarding Soraya. Thus the same person was arguing for 14-year-old Soraya's best interests and those of her infant daughter and simultaneously trying to prove that Soraya was a neglectful parent. Which aspect of its double role should the agency emphasize? Is there a risk of compromising Soraya's best interests as a subject child and rights as a parent respondent in the course of the agency's efforts to protect her daughter's best interests?

Here we explore the tensions when a respondent is both a parent and a foster child and, consequently, when the local children's services department is both the planning agency for and the presentment agency against a young parent. Specifically we look into the current legal landscape and how it creates conflicts and possible prejudices that do not manifest themselves when a respondent is not in foster care. Further, while we do not propose a solution for these tensions, we do offer some ways in which the child welfare system could treat parenting youths in care with greater fairness and due process.

### I. The Center for Family Representation's Young Parents Project

The Center for Family Representation, founded in 2002, provides free legal representation and social work services to indigent and low-income parents involved with the child welfare system in New York City. Now in the boroughs of

Manhattan and Queens, our interdisciplinary model assigns to each client a team comprising an attorney, a social work staff person, and in some cases a parent advocate, that is, a trained professional who has experienced the child welfare system firsthand and has reunited with her family. While our attorneys provide specialized legal advocacy, our social work and parent advocate staff members help clients get to the root of their problems by assisting them in locating and engaging in stabilizing services such as individual counseling, family therapy, substance abuse treatment, and domestic violence counseling. Through this comprehensive approach, we prevent foster care placement, and when placement cannot be avoided, we strive to shorten children's length of stay in care to minimize the negative consequences of prolonged separation from their families and communities.<sup>4</sup>

In working with our clients, we noticed that younger respondents were facing unique challenges and required more individualized advocacy. The Center for Family Representation established the Young Parents Project in 2009 to develop expertise in working with this client population. To be included in the Young Parents Project, parent respondents must be under 22 on the date that their neglect or abuse proceeding or both are filed.<sup>5</sup> Almost all young parents represented by the Center for Family Representation are people of color, and some 88 percent are female.<sup>6</sup> At the time the petitions against them are filed, 22 percent of Young Parents Project clients have been homeless, 41 percent are alleged to have a mental illness, 33 percent are alleged to be vic-

<sup>4</sup>Studies show that long-term foster care placement can lead to increased school dropout and unemployment rates, teen pregnancy, homelessness, drug abuse, incarceration, and mental health diagnoses such as posttraumatic stress disorder and depression (see, e.g., MARK E. COURTNEY ET AL., CHAPIN HALL AT THE UNIVERSITY OF CHICAGO, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGES 23 AND 24 (2010), <http://bit.ly/srlpbq>; Peter J. Pecora et al., Casey Family Programs, Assessing the Effects of Foster Care: Early Results from the Casey National Alumni Study (Oct. 3, 2003), <http://bit.ly/spvzqm>; Richard Wertheimer, *Youth Who "Age Out" of Foster Care: Troubled Lives, Troubling Prospects*, CHILD TRENDS RESEARCH BRIEF (Dec. 2002), <http://bit.ly/uh8Mgv>).

<sup>5</sup>Ages up to and including 21 were chosen because a youth in foster care may consent to remain in care up until her 21st birthday and sometimes beyond her birthday if her foster care agency files for and the Administration for Children's Services grants an extension of placement (see N.Y. COMP. CODES R. & REGS. tit. 18, §§ 422.1(b)(1)(ii), 427.2(c)(1)(ii) (2011)).

<sup>6</sup>People of color account for about 95 percent of all Center for Family Representation clients, and about 80 percent are female. While the Center for Family Representation works with both mothers and fathers, we use female pronouns for our purposes here; all of our Young Parents Project clients who were in foster care at the time of filing are young women; at writing, there are no known congregate facilities in New York City where a young father may live jointly in foster care with his child.

tims of domestic violence, and 46 percent are alleged to have a history of substance abuse. Approximately one-third of Young Parents Project clients have a history of foster care placement, and approximately 18 percent are pregnant and parenting teens in foster care at the time of filing. Of this subset, all clients are female. On this special client population—where foster care status and parenting status overlap—we focus here.

## II. The Legal Landscape for Parenting Youths in Care

Before looking at the particular challenges that parenting youths in care are facing, we need to understand how the legal system regards them in their role as parents.

### A. The Parent

The U.S. Supreme Court has long recognized a parent's liberty interest in raising her child in the manner she sees fit.<sup>7</sup> The Court held in 2000 that the “interest of parents in the care, custody and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court.”<sup>8</sup> However, the interest of parents in the care, custody, and control of their children is not absolute. The New York Family Court Act requires the Administration for Children's Services to investigate suspected acts of child abuse and neglect and endows it with the authority, if deemed appropriate, to prosecute parents under Article 10 of the Act.<sup>9</sup>

When the agency removes a child from the child's parent's care pursuant to such a proceeding and places the child in foster care, the agency takes on a *parens patriae* relationship to the child now in its care.<sup>10</sup> In other words, the agency stands in place of the child's parents and becomes responsible for the child's welfare.<sup>11</sup> In Soraya's case, the agency maintains its *parens patriae* relationship with Soraya and must plan for her well-being even as it pursues a neglect finding against her on the basis of its *parens patriae* relationship with her daughter.

Commentators argue that, in situations where a youth in care, such as Soraya, becomes a parent herself, “[the Administration for Children's Services] should be responsible for harms caused to the children of teens in foster care ... at the very least; [the Administration for Children's Services'] role in the parenting ward's ‘failure’ should be closely examined before any liability can befall the parenting ward.”<sup>12</sup> Most notable and thoughtful is Judge Daniel Turbow of Kings County Family Court's suggestion in his 2003 decision, *In re the Lawrence Children*, that in determining a youth's neglect of her child, child protective courts should consider the factors that would be highlighted in other neglect contexts, that is, “the standard conduct ... of a reasonable child of like age, intelligence and experience under like circumstances.”<sup>13</sup> Judge Turbow writes that this test should like-

<sup>7</sup>*Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (emphasizing “fundamental liberty interest of natural parents in the care, custody and management of their child”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“the history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children”); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925); and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>8</sup>*Troxel v. Granville*, 530 U.S. 57, 65 (2000).

<sup>9</sup>See, e.g., N.Y. FAM. CT. ACT § 1011 (2011) (“This article is designed to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being. It is designed to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met”); N.Y. FAM. CT. ACT § 1034 (2011).

<sup>10</sup>See, e.g., *In re the Lawrence Children*, 768 N.Y.S.2d 83, 88 (N.Y. Fam. Ct. Kings Cnty. 2003) (citing *Palmer v. Cuomo*, 503 N.Y.S.2d 20 (1st Dep't 1986)).

<sup>11</sup>Rebecca Bonagura, *Redefining the Baseline: Reasonable Efforts, Family Preservation, and Parenting Foster Children in New York*, 18 COLUMBIA JOURNAL OF GENDER AND LAW 175, 186 (2008).

<sup>12</sup>*Id.* at 188–89 (“The state foster care system already uses the *parens patriae* doctrine to strictly limit or restrict a parenting ward's decisions.... Given this high level of control exerted by the state over the mother's choices, it defies logic that state agencies subsequently place all of the responsibility on the mother for ‘neglect’ of the child, particularly in cases when the neglect arises largely out of the conditions or setting of the mother's foster care placement”).

<sup>13</sup>*In re the Lawrence Children*, 768 N.Y.S.2d at 92 (citations and italics omitted).

wise be applied to a minor parent's conduct, and, when evaluating that young parent's care of her child, family courts should consider that the youth "has different capabilities and fewer options than an adult. [S]he simply cannot be expected to provide the same level of care to a child, in every respect, as an adult. [S]he cannot be penalized for not acting like an adult."<sup>14</sup>

### B. Filing a Neglect or Abuse Petition Against a Parenting Youth in Care

Courts have occasionally recognized that youths in care are different from other parent respondents and should be treated differently on a legal level. However, courts have clearly held that social services departments may pursue child neglect and abuse findings as well as terminations of parental rights against minor parents who are in foster care, thereby obviating the need for the appointment of a special prosecutor or different presentment agency.<sup>15</sup> In *In re Ta Fon Edward J.B.* the respondent, a mother who was herself in the care of the Administration for Children's Services, argued that the termination petitions against her should be dismissed because, by proceeding on them, the agency was in violation of "its constitutional, statutory, and fiduciary

obligations to act in her best interests."<sup>16</sup> The Appellate Division of New York's Second Department rejected this line of argument and concluded that the agency is not precluded from seeking to terminate the rights of a parent in foster care.<sup>17</sup> The court wrote, "Nothing in the Family Court Act or the Social Services Law lessens, increases, or otherwise changes the responsibilities of either [the Administration for Children's Services] or its contract agencies when faced with caring for the offspring of a foster child."<sup>18</sup> This sentiment echoed the New York Court of Appeals' 1995 decision, *In re Tyriek W.*, in which it explicitly stated that the supervising agency for a young parent in care could take whatever remedial steps, "including filing a petition under Article 10 of the Family Court Act," might be necessary regarding her children.<sup>19</sup>

Even in a decision as sympathetic to parenting youth as *In re Lawrence*, and even while acknowledging the "surface plausibility" of respondents' argument that there was a "conflict of interest" in the Administration for Children's Services' dual position of being a protective and planning agency as well as the presentment agency in a neglect matter, the court did not go so far as to say that a "special

<sup>14</sup>*Id.* (citations omitted). See also Bonagura, *supra* note 11, at 203–4 (citations omitted). Cf. *In the Matter of J.G.B., Minor Child*, 628 S.E.2d 450, 456–57 (N.C. Ct. App. 2006) (in context of termination of parental rights hearing where respondent parent is "an unemancipated minor, herself in the custody of [the Department of Social Services], the trial court must make specific findings of the parent's 'ability, or capacity to acquire the ability, to overcome factors which resulted in the child being placed in foster care'" (citing *In re Matherly*, 562 S.E.2d 15 (N.C. Ct. App. 2002)). Cf. also Bonagura, *supra*, at 226–27 (discussion of California legislation from 2004–2005 that deals solely with teen parents in foster care and how their needs must be met).

<sup>15</sup>Eve Stotland and Cynthia Godsoe, *The Legal Status of Pregnant and Parenting Youth in Foster Care*, 17 UNIVERSITY OF FLORIDA JOURNAL OF LAW AND PUBLIC POLICY 1, 43–45 (2006) (in none of four states surveyed—California, Florida, Illinois, and New York—were authors able to find decision in which court held that "special prosecutor" needed to be appointed so that same child protective agency in charge of youth in foster care was not bringing child welfare proceeding against that youth as parent). New York is not the only state where the planning or protective agency is the same as the presentment agency in child welfare proceedings against parenting youth in foster care; the same is true in at least fourteen other states and the District of Columbia (see *Matter of Baby Girl D.S.*, 600 A.2d 71, 71–90 (D.C. 1991); *R.F. v. State Department of Human Resources*, 740 So. 2d 1093, 1093–96 (Ala. Civ. App. 1999); *Lashonda M. v. Arizona Department of Economic Security*, 107 P.3d 923, 923–30 (Ariz. Ct. App. 2005); *Matter of Angelina B.*, No. H14CP06008823A, 2011 Conn. Super. LEXIS 1128 (Conn. Super. Ct. May 16, 2011); *In re M.M.*, 733 N.E.2d 6, 6–14 (Ind. Ct. App. 2000); *Commonwealth, Cabinet for Health and Family Services v. T.N.H.*, 302 S.W.3d 658, 658–65 (Ky. 2010); *In re Lee*, No. 283038, 2008 Mich. App. LEXIS 2060 (Mich. Ct. App. Oct. 16, 2008); *Matter of C.B.Y.*, 936 So. 2d 974, 974–83 (Miss. Ct. App. 2006); *Matter of J.G.B.*, 628 S.E.2d 450, 450–57 (N.C. Ct. App. 2006); *In the Matter of A.H. Child, and Concerning K.H. Mother*, 421 N.W.2d 71, 71–76 (S.D. 1988); *In the Interest of M.D.L.E.*, No. 09-05-514 (CV), 2007 Tex. App. LEXIS 1738 (Tex. Ct. App. March 8, 2007); *L.G. v. Amherst County Department of Social Services*, 581 S.E.2d 886, 886–90 (Va. Ct. App. 2003); *Matter of R.L.F.*, 1997 Wash. App. Lexis 1236 (Wash. Ct. App. Aug. 1, 1997); *In re Termination of Parental Rights to Christopher M.*, 707 N.W.2d 581 (Wis. Ct. App. 2005).

<sup>16</sup>*In re Ta Fon Edward J.B.*, 6 A.D.3d 611, 611–12 (N.Y. App. Div. 2004).

<sup>17</sup>*Id.* (citations omitted).

<sup>18</sup>*Id.*

<sup>19</sup>*In re Tyriek W.*, 652 N.E.2d 168, 171 (N.Y. 1995).

prosecutor” or other presentment agency should be appointed in lieu of the Administration for Children’s Services.<sup>20</sup> Rather, the court rejected the argument made by the respondents that, in cases such as theirs, the Administration for Children’s Services attorneys have a “conflict of interest” as defined under the Code of Professional Responsibility.<sup>21</sup> The court found also worth noting that, “while [the Administration for Children’s Services] has an obligation to minor parents in its care, there is no suggestion that [the Administration for Children’s Services’] counsel has an attorney-client relationship with those parents which would somehow be compromised by that counsel’s continued participation in these proceedings.”<sup>22</sup>

### C. The Lasting Impact of a Finding of Neglect

Despite finding that the Administration for Children’s Services, in its role as presentment agency, does not have a standard conflict-of-interest relationship with a parent who is in foster care, the *In re Lawrence* court did note that a “finding of neglect is not as benign as Children’s Services would suggest.”<sup>23</sup> Indeed, findings of neglect or abuse have a “significant deleterious impact” upon any parent.<sup>24</sup> In New York a finding will result in the parent’s name being on file with the State Central Register until the youngest child named in the initial report is 28.<sup>25</sup> Once the finding is made, a parent is un-

able to obtain expungement of the report, which is accessible to potential employers, especially those in the field of child care or education.<sup>26</sup> Such a finding creates a stigma for any parent, and it can be especially prohibitive for youths in care trying to find employment.<sup>27</sup> Take Soraya for example; her daughter was barely 2 months old and Soraya only 14 years old when the Administration for Children’s Services filed a neglect case against her. A finding of neglect could mean that Soraya is precluded from working as a teacher, a school safety officer or bus driver, a licensed child care provider, a pediatric nurse, or a host of other positions until she is 42. For Soraya, the future already looks limited.

### III. The Conflicts and Challenges of Foster Children Who Are Also Parents

Certainly child welfare agencies may bring neglect and abuse allegations and even termination of parental rights proceedings against young parents who are foster children themselves. However, to discount the significant impact that a young parent’s status and experience as a foster child play in a case against her as a respondent would be naïve.

Tamara had been in foster care since she was 4 years old and had been placed in multiple homes, in some of which she suffered physical and sexual abuse. At 19

<sup>20</sup>*In re the Lawrence Children*, 768 N.Y.S.2d at 85–88.

<sup>21</sup>*Id.* at 87 (case law cited by respondents was inapplicable in that it all involved more traditional conflict-of-interest scenarios wherein attorney at issue was simultaneously representing separate parties who had actual or potential adverse interests). Cf. Sarah Katz, *When the Child Is a Parent: Effective Advocacy for Teen Parents in the Child Welfare System*, 79 *TEMPLE LAW REVIEW* 535, 552 (Summer 2006) (whether there is conflict of interest for attorney for youth in foster care to represent her also on her case as parent).

<sup>22</sup>*In re the Lawrence Children*, 768 N.Y.S.2d at 87.

<sup>23</sup>*Id.* at 88.

<sup>24</sup>*Id.* at 90.

<sup>25</sup>See N.Y. FAM. CT. ACT § 1051(f)(iii) (2011).

<sup>26</sup>*Id.* The stigma of having a neglect finding can be lasting and can have a profoundly negative impact on employment for Center for Family Representation clients given that their average level of education and job training often leave limited avenues of employment open to them, such as child and home health care.

<sup>27</sup>With respect to the long-lasting impact of findings of neglect and abuse, Judge Daniel Turbow in *In re Lawrence* also raised the idea of applying a different standard to cases involving younger parents and notes that “the records of many serious crimes committed by a minor may be sealed or expunged” (*In re the Lawrence Children*, 768 N.Y.S.2d at 90 (citations omitted)). In this context, he concluded that the lasting consequences of a neglect finding for a minor parent “can only be considered exceptionally harsh, notwithstanding [the Administration for Children’s Services’] characterization of Article 10 proceedings as ‘remedial, rather than punitive’” (*id.*).

she became pregnant, and the foster care agency responsible for her care placed her in a maternity residence. While there, she had disagreements with other residents and sometimes left without permission for days at a time to stay with family members. On one occasion, a psychologist came to the residence to evaluate Tamara. Not feeling well that day, Tamara was not fully cooperative with the psychologist. Nonetheless, the psychologist wrote up a report and presented the evaluation as a current assessment, although the psychologist based the report primarily on Tamara's history of diagnoses dating back as long as five years.

After Tamara gave birth to a baby boy, she stayed with him every night in the hospital; she learned how to breastfeed and care for him during the first week of his life. Three days after the baby's birth, a social worker from the maternity residence called in a report against Tamara to the State Central Register, and, several days later, the Administration for Children's Services filed a neglect petition against Tamara. The allegations were not based on the actual care she had given her son but rather on her own history of placement in foster care. The first allegation of "neglect" against Tamara only described her status as a child in foster care.<sup>28</sup> The second allegation stated that Tamara suffered from a mental illness, exhibited volatile behavior, and would "awol" (go missing from care). The agency also claimed that she engaged in verbal and physical altercations with staff members and peers at the maternity residence, did not comply with medical or mental health appointments, had at least twelve prior psychiatric hospitalizations, had been diagnosed as having at least two mental health disorders and exhibiting symptoms of narcissistic and borderline personality disorder, and required support and supervision because her behavior was not conducive to raising

a child. The hospital where Tamara had stayed with her son for the first week of his life articulated no concerns about her ability to parent.

### A. Enhanced Scrutiny of Youths in Care

Parenting youths in foster care are among the most vulnerable respondents in neglect and abuse proceedings. Not only are they in foster care, but also, as parents and expectant parents, they are subject to a heightened level of scrutiny by virtue of living in a highly structured environment staffed with mandated reporters.<sup>29</sup>

Our youth-in-care clients almost always face allegations by foster parents or staff members in congregate care settings, such as mother-child placements or maternity residences. Some common allegations against young mothers in foster care are being missing from care—or "awoling"—either with or without the subject child and either prior to or during pregnancy; missing curfew either with or without the subject child and either prior to or during pregnancy; taking the child to homes or locations not cleared and approved by the agency; failing to follow directives or suggestions on the care of the subject child from an agency staff member or a foster parent; failing to attend school, a General Educational Development program, or job training; behaving in a difficult-to-control manner in a congregate care facility or a foster home; and not complying with recommended therapeutic treatment or medication management or both for a mental health diagnosis such as bipolar disorder, attention deficit hyperactivity disorder, oppositional defiant disorder, or posttraumatic stress disorder.

The allegations against Soraya were partly based on her actual care of her daughter and on her placement in a congregate care setting. The nurse at the mother-child program not only faulted Soraya's

<sup>28</sup>A petition against a foster youth typically contains a separate allegation establishing her status as a foster child. The assumption, of course, is that this foster care status—and what it implies about the quality of parenting the youth herself received—has created or at least significantly contributed to a risk of neglect to the subject child.

<sup>29</sup>See, e.g., Bonagura, *supra* note 11, at 198–200. See also N.Y. Soc. SERV. LAW § 413 (McKinney 2011) (defining mandated reporters as those persons or officials who are required to report when they suspect or have reasonable cause to suspect that child has been abused or maltreated and including among those persons or officials physicians, nurses, social workers, licensed mental health counselors, school workers, day care workers, residential care employees, and any child care or foster care workers).

care of her daughter and her failure to accept advice about that care but also told the Administration for Children's Services that Soraya left the program without permission and that she consistently broke curfew. The allegations indicated that Soraya suffered from attention deficit hyperactivity disorder, and, although they did not state when or from whom she received that diagnosis or how they were related to her care of her daughter, they did state that she had not cooperated with a scheduled mental health evaluation. In contrast to some of the allegations against Soraya, the allegations against Tamara were all speculative; the supposed risks to Tamara's son were all related to mental health diagnoses and alleged behavior that occurred before she gave birth.

Although the allegations against Soraya and Tamara can be distinguished in terms of timing, that is, whether they allege neglect from before or after the birth of the child, they share the element of being based on placement in foster care. Unlike other respondents, whose actions and behavior are generally not being observed, Soraya and Tamara were being watched and held to very particular rules in congregate care facilities. This heightened level of scrutiny can easily lead to a "mutual mistrust" between agencies and the young women in their care and undermine the efficacy of the agencies' planning efforts with their charges.<sup>30</sup> Often the same agency personnel who initiated the report of suspected neglect or abuse—and who may eventually testify against the young respondent—must also continue to work with the young mother on her underlying foster care case.

## B. Planning for the Return of a Child

After a neglect petition is filed against a young parent in foster care, a new foster care worker is assigned to develop a service plan outlining what the young parent must do to reunify with her child. These plans are created at periodic conferences, which are held with the young parent and foster care workers to discuss the young person as a foster child and as a parent.

These conferences have two distinct purposes: (1) ensuring that the young person has access to and completes the services she needs as a foster child; and (2) developing a service plan and monitoring her progress toward solving alleged safety problems that brought her baby into foster care. However, her service plan as a subject child is commonly transferred to her case as a respondent parent with little or no changes to reflect the young parent's distinct needs in these different roles. Although there is overlap between the needs of a young person as a foster child and as a parent, failing to separate the two can disadvantage the young parent and create barriers to family reunification.

Maya, a 15-year-old mother who was living in a maternity residence when she gave birth to her son, had a pattern of missing school. Before she gave birth, attending school consistently became a goal of the service plan she developed with her foster care caseworker. This was appropriate for her as a youth in foster care, but when it became part of her service plan as a respondent parent, and subsequently a dispositional order entered by her New York County Family Court judge, she was put in a position that few older parents face. Maya had to attend school in order to have her child returned to her care, despite school attendance having no direct impact on her child's safety.

For older respondents who are adjudicated neglectful, the dispositional order contains only services, such as obtaining treatment for a chemical dependency, participating in domestic violence counseling, or maintaining a mental health treatment regimen, that directly affect their ability to care safely for their children. While attending school may have a positive long-term effect on Maya's ability to provide for her family, when it becomes a requirement of having her child in her care she is held to a different standard from other parents against whom the same allegations are made but who are not in foster care. For some young

<sup>30</sup>Bonagura, *supra* note 11, at 208 (mistrust is "especially dangerous when the mother is dependent upon the agency that expects and anticipates her failure" and that "implication is a perpetual cycle of removal that most severely affects and discriminates against poor single women and minorities").



mothers who are already disadvantaged by their placement in foster care, this is a failure to correlate fairly their service plan with safe parenting and presents potentially unnecessary barriers to reunification with their children.

### C. Mental Health Diagnoses and Access to Confidential Records

As with Tamara, serious mental health diagnoses, prior psychiatric hospitalizations, and a failure to cooperate with medication management may trail young mothers in foster care regardless of whether the diagnoses remain accurate and regardless of how close in time they are to the actual birth of their children. For example, Megan, like Tamara, had been in foster care since the age of 4. The Administration for Children's Services filed a neglect petition against Megan when her twins were 12 days old and Megan herself was 19 years old. The allegations were almost exclusively based on Megan's mental health and how it would affect her care of the twins.<sup>31</sup> Some of the allegations about Megan's mental health described events that were proximate in time to when the petition was filed. Those allegations detailed the mental health professionals' opinions that were formulated within four months of the date the petition was filed and indicated that Megan had been psychiatrically hospitalized several times in the year leading up to filing. But the allegations also stated that Megan had a diagnostic history of major depressive disorder, recurrent posttraumatic stress disorder, and attention deficit hyperactivity disorder, and that, for "the past ten years, [she] also has a history of noncompliance of medication regimen, refusal to attend therapy, and being awol." In other words, the Administration for Children's Services chose to allege that, even at about 9 years old, Megan did not "cooperate" with mental health treatment.<sup>32</sup>

Once the Administration for Children's Services filed a petition against Megan,

the same attorney was assigned to both her underlying youth-in-care case and the new neglect proceeding. Because of Megan's foster care status, the attorney had access to Megan's mental health information that the attorney would not likely have had if Megan were not in care. Not only did the attorney have access to evaluations and information dating from Megan's pregnancy when she was placed in a maternity residence, but also the attorney could refer to mental health diagnoses and a related lack of treatment compliance dating back to Megan's preteen years. While this may technically be considered legal, it certainly does not treat a parent in foster care fairly or like other respondents. Administration for Children's Services petitions against respondents who are not in foster care commonly contain allegations related to mental health diagnoses, and while some of those allegations may describe time periods before the birth of the subject children, those allegations do not commonly discuss diagnoses and lack of compliance going back to teen and even preteen years. Only because of the not-so-secret window that the agency has into the recent or sometimes distant past of young respondents in care is it able to have such allegations in its petitions.

Megan's case does, however, exemplify when past evaluations were obtained in a manner that comported with New York State's Mental Hygiene Law.<sup>33</sup> The Administration for Children's Services attorney assigned to the case filed motions with the family court; the motions asked that Megan's mental health records from various institutions be ordered produced. The Center for Family Representation was given an opportunity to oppose the motions. Unfortunately this level of due process can be—perhaps unintentionally—bypassed when mental health evaluations and treatment records are a part of the underlying foster care records themselves and reflect work an agency has done with a young person as part of its obliga-

<sup>31</sup>Predictably the second allegation stated that Megan was a subject child in a pending termination of parental rights proceeding.

<sup>32</sup>What the petition did not state is that the child welfare system had effectively been Megan's parent during this alleged ten-year period of noncompliance.

<sup>33</sup>See N.Y. MENTAL HYG. LAW § 33.13(c)(1) (McKinney 2011) (records about individual "may not be released ... except ... pursuant to an order of a court ... requiring disclosure upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality").

tion to advance the youth's best interests. Foster care agencies frequently work with consulting psychiatrists or psychologists who come to the foster care agencies or congregate care facilities to evaluate foster youths. The evaluations then become part of the foster care agencies' records about a particular young person in their care. If a foster care agency social worker is the one who is providing a youth with weekly counseling, the content of the social worker's counseling sessions as well as engagement and compliance is detailed in the case records that foster care agency workers routinely keep. In these instances, the case records are likely to be considered part of the business record of the foster care agency and will survive any argument challenging their admissibility, particularly where the attorney obtains certified and delegated foster care records containing the information on the evaluation and counseling sessions. In such an instance, without ever engaging in motion practice and dealing with protections set forth in New York's Mental Hygiene Law, the Administration for Children's Services may be able to introduce the mental health records of a parenting youth in care into evidence easily at the neglect or abuse proceeding against the youth.

#### D. Dual Roles of the Players

In a neglect and abuse case against a youth in foster care, the Administration for Children's Services, like other child welfare departments around the country, is in an awkward position. The agency is presenting a case against the youth as a parent while simultaneously planning for her and protecting her best interests as a subject child whose parents were either found neglectful or abusive or who was voluntarily placed in foster care by a parent or other custodian. That this is technically legal does not mitigate the sensation of conflict that permeates such cases.<sup>34</sup>

Because the Administration for Children's Services is tasked with a dual role of protection and presentment, a neglect case is often based on a young person's long history in foster care. The agency's attor-

ney thus has access to records that would otherwise require a client's consent or a court's order to obtain. For Tamara, this meant that allegations were based on her history in foster care rather than her actual care or lack of care for her child. As one former agency attorney explained to us, the attorney sometimes felt conflicted in cases where a youth in care had been given a mental health diagnosis as a teen or pre-teen. Most agency attorneys are not trained to balance simultaneous representation of both the protective agency and presentment agency, and the attorney felt that she was unable to separate background information from that which should form the basis for a neglect or abuse allegation.

The Administration for Children's Services attorney who drafted the petition against Tamara was also eventually given the job of representing the agency on Tamara's placement case. Simultaneously the attorney had to present to the court the agency's efforts to help Tamara become a self-sufficient adult and evidence against Tamara as a respondent. The attorney argued for Tamara's son to be removed from her care; this created a risk that Tamara would be moved from the mother-child home where she was living, thus losing stable housing. In making this decision, the agency put the best interests of Tamara's son above Tamara's best interests.

The Administration for Children's Services is not the only player with a dual role in proceedings against young parents in care; the same judge who is presiding over the youth-in-care case often presides over the neglect proceeding. For the family court system, this may be the most efficient and holistic means by which to handle these concurrent cases.<sup>35</sup> However, the judge may have access to a young parent's mental health records, drug tests, medical history, or school records that would have otherwise been unavailable to the court without traditional motion practice. The judge may also know detailed information regarding a young parent's past behavior such as truancy, curfew violation, leaving place-

<sup>34</sup>See II.B Filing a Neglect or Abuse Petition Against a Parenting Youth in Care, in main text.

<sup>35</sup>See Stotland & Godsoe, *supra* note 15, at 29–30 for a brief discussion of the movement toward unified family courts.

ment, juvenile offenses, and questionable compliance with services or mental health treatment even if such behavior occurred before the youth was a parent or even pregnant.<sup>36</sup> As other authors on this subject have pointed out, “this information, which would be otherwise irrelevant or inadmissible, has the potential to prejudice the judge against the teen. Ironically, the more the teen herself suffered at the hands of the adults responsible for her care ... the more dubious the judge may be with regards to her own ability to parent.”<sup>37</sup> The judge’s access to information from the young parent’s youth-in-care case may result, as in Maya’s case, in services that are more appropriate to the youth-in-care case being incorporated into orders made in the neglect proceeding against the youth as a parent.

#### IV. Recommendations

New York case law and national practice do not acknowledge a conflict in the Administration for Children’s Services presenting cases against youths in care for neglecting their children. However, the current system gives the presentment agency an unfair advantage in cases involving this especially vulnerable subset of respondents. This advantage often results in a failure to uphold the due process rights of parents who are in foster care.<sup>38</sup>

While we believe that the ideal way to handle this situation would be through the creation of a separate presentment agency or division of the Administration for Children’s Services to bring cases against young parents who are themselves in foster care, we understand that governmental budgetary restraints make such a creation unrealistic. What we propose, in the alternative, is that child welfare agencies such as the Administration for Children’s Services do not assign the same attorney to both a youth’s planning case and her neglect case.

We do not suggest that this proposal is the most efficient solution. However, we believe that it strikes a necessary balance between economic realities and maintaining a level of fairness in proceedings against young parents. It also allows the presentment attorneys to be in a less conflicted position as each attorney would approach the case by viewing the youth in care through a single lens—either as a foster child or as a parent—rather than constantly undertaking what can be a nearly impossible balancing act.

Even if there are different attorneys representing the same social services agency, the attorney presenting the case against the youth in care as a parent should be required to comply with proper legal requirements, such as mental hygiene laws, in order to access the youth in care’s records, particularly mental health records. While this could necessitate additional motion practice, the burden would be outweighed by the benefit of continued due process for the young parent. And, while this may, of course, mean that a proverbial “wall” has to be erected within a single legal unit, a young parent in care will be treated more like other respondents by the agency, minimizing what is now a fairly open back and forth of records and information related to the young parent’s foster care case.

Parenting youth in foster care and the child welfare system that is responsible for protecting and planning for parenting youths and their children face myriad challenges. By exploring these challenges we hope to start a conversation that will prompt greater attention to the struggles inherent in these cases.

#### **Authors’ Acknowledgments**

*We wish to thank Jenna DiCostanzo, law student at St. John’s University; Annie Stup, associate, Center for Family Representation Development and Communications; and a former Administration for Children’s Services attorney, who asked to remain anonymous.*

<sup>36</sup>See *id.* at 28–29.

<sup>37</sup>*Id.* In our experience a family court judge’s prior knowledge of and history with the parent of a newly minted young respondent can, fairly or not and consciously or not, create an almost immediate negative impression of the young respondent despite a lack of overlap in allegations and surrounding circumstances.

<sup>38</sup>Bonagura, *supra* note 11, at 231 (“When the state fails to provide the care and resources needed by minor wards to be adequate parents, and especially when the parent is illegally separated from her children, the minor’s constitutional parenting rights become virtually meaningless. The minor parent may not have an adequate starting point for taking care of herself, let alone her children”).



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