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GUARDING THE SCHOOLHOUSE GATE: PROTECTING THE EDUCATIONAL RIGHTS OF CHILDREN IN FOSTER CARE.

by AMY REICHBACH*
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INTRODUCTION

Children in foster care encounter numerous obstacles to educational success. Among these is exclusion from school, the significance of which cannot be overstated. Multiple studies have revealed both anecdotal and statistical links between suspension and failure to graduate.¹ Recognizing that children have protected interests in their education, in 1975 the United States Supreme Court established that students facing even short suspensions from school are entitled to due process.² Children in foster care, however, are rarely in a position to ensure that their due process rights, including the right not to be excluded from school arbitrarily, are protected adequately. Given the devastating consequences of school exclusion, lawyers who represent youth in foster care or their parents must be aware of both their clients' rights and the consequences of school discipline in order to minimize the risk that these children will be excluded from school unnecessarily, unjustly, or illegally. Moreover, it is essential that attorneys be prepared to advocate for their clients' educational rights in order to improve their educational outcomes.

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1. E.g., Ruth B. Ekstrom et al., *Who Drops Out of High School and Why? Findings from a National Study*, 87 TCHRS. C. REC. 356, 360 (1986) (based on a national sample, 31% of those sophomores who had dropped out of school had been suspended or placed on academic probation, whereas only 10% of those sophomores still enrolled had these experiences); Russ Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN, no. 5, Jan. 1999 at 372, 376 (theorizing that suspensions provide at-risk students the free time and opportunity to engage in activity that facilitates dropping out); ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 11 (2000) (liberal use of suspensions intensifies students' conflicts with adults, damaging the relationships that provide support to at-risk youth), <http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school->

I. EDUCATIONAL OUTCOMES FOR CHILDREN IN FOSTER CARE ARE UNACCEPTABLY POOR

It is well documented that positive life outcomes are associated directly with educational success.³ Unfortunately the opposite is also true: educational failure often leads to poor life outcomes, particularly for children in foster care.⁴ According to a National Conference of State Legislatures report, foster children have higher school transfer, absenteeism, tardiness, suspension, and expulsion rates than the general student population.⁵ They are also more likely to have poor grades and academic performance levels, be retained in grade, be placed in more restrictive classrooms, and achieve lower scores on standardized tests.⁶ Not surprisingly, foster children have lower graduation rates than similarly situated peers who were never in foster care;⁷ according to a national study, only 54% of 18- to 24-year-olds who formerly had been in foster care received their high school diplomas, compared with a national graduation average for the general population in that age range of approximately 78%.⁸

This increased risk of educational failure means that children in foster care

discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf.

2. *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

3. See, e.g., PETER LEONE & LOIS WEINBERG, CTR. FOR JUVENILE JUSTICE REFORM, ADDRESSING THE UNMET EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS 5 (2010) (individuals with higher levels of education have indicia of positive life outcomes: lower rates of chronic illness, greater life expectancy, higher incomes, and lower unemployment rates); James Topitzes et al., *Educational Success and Adult Health: Findings from the Chicago Longitudinal Study*, 10 PREVENTION SCI. 175, 177-78 (2009) (finding that those who completed high school were significantly more likely to lead healthy lives as adults and had better outcomes on each of four indicators of adult health: smoking, drug use, depression, and health insurance coverage).

4. See Melissa J. Sullivan et al., *School Change, Academic Progress, and Behavior Problems in a Sample of Foster Youth*, 32 CHILD. & YOUTH SERVS. REV. 164, 164 (2010) ("[R]esearch shows youth leave foster care without an adequate education or life skills needed to emerge as well-functioning adults."); Topitzes et al., *supra* note 3, at 177-78 (finding a correlation between poor academic performance and a higher propensity for smoking, substance abuse, and depression).

5. NAT'L CONFERENCE OF STATE LEGISLATURES, *EDUCATING CHILDREN IN FOSTER CARE: STATE LEGISLATION 2004-2007*, at 1-2, 13 n.12 (2008) (citing multiple studies explaining why foster children have negative educational experiences).

6. *Id.* at 2; see also MASON BURLEY & MINA HALPERN, WASH. STATE INST. FOR PUB. POLICY, *EDUCATIONAL ATTAINMENT OF FOSTER YOUTH: ACHIEVEMENT AND GRADUATION OUTCOMES FOR CHILDREN IN STATE CARE* 5 (2001) (citing a 1990 Oregon survey of 424 foster parents, nearly 40% of whom said that their foster children were performing below grade level).

7. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 5, at 2, 13 n.12 (studies suggest that foster children are less likely to receive a high school diploma than their peers).

8. Ronna J. Cook, *Are We Helping Foster Care Youth Prepare for Their Future?*, 16 CHILD. & YOUTH SERVICES REV. 213, 219 (1994); see also BURLEY & HALPERN, *supra* note 6, at 6 (citing an aggregation of four studies that demonstrated a 58% high school completion rate for youth who were in foster care compared with an 84% rate for the general population); Sullivan et al., *supra* note 4, at 164 ("[O]nly 37% to 55% of youth in care earn a high school diploma or general equivalency diploma before exiting the foster care system." (citations omitted)).

often leave both school and state custody without the appropriate skills and resources to make a successful transition to adulthood. As a result, children in foster care are more likely than their peers to become homeless, incarcerated, or dependent on state services in adulthood.⁹ They are also at increased risk of long-term poverty.¹⁰ For example, in a study following youth for the first two years after they aged out of foster care, researchers characterized 20% of the youth as chronically homeless, with no stable housing throughout that period.¹¹ Recent research on "crossover youth," or youth involved in both the dependency and delinquency systems, estimates that between "nine and twenty-nine percent of dependent children engage in delinquent behavior,"¹² and studies in various regions across the country have found that approximately 30-40% of former foster children become dependent on public assistance almost immediately upon leaving foster care.¹³ The Midwest Evaluation of the Adult Functioning of Former Foster Youth revealed a number of troubling statistics on multiple fronts:

Only half the youths who had turned 18 and 'aged out' of foster care were employed by their mid-20s. Six in 10 men had been convicted of a crime, and three in four women, many of them with children of their own, were receiving some form of public assistance. Only six in 100 had completed even a community college degree.¹⁴

9. DAN LIPS, HERITAGE FOUND., FOSTER CARE CHILDREN NEED BETTER EDUCATIONAL OPPORTUNITIES 1 (2007), <http://s3.amazonaws.com/thf-media/2007/pdf/bg2039.pdf>; see also Cynthia Godsoe, *Caught Between Two Systems: How Exceptional Children in Out-of-Home Care Are Denied Equality in Education*, 19 YALE L. & POL'Y REV. 81, 90-91 (2000) (noting that foster children are at risk for homelessness and long-term poverty); Kevin M. Ryan, *Stemming the Tide of Foster Care Runaways: A Due Process Perspective*, 42 CATH. U. L. REV. 271, 278 (1993) (study of New York City homeless men revealed that many spent time as foster children).

10. Godsoe, *supra* note 9, at 91 ("Former foster youth are also at risk for homelessness and long-term poverty." (citing Ryan, *supra* note 9, at 278)).

11. Patrick J. Fowler et al., *Pathways to and from Homelessness and Associated Psychosocial Outcomes Among Adolescents Leaving the Foster Care System*, 99 AM. J. PUB. HEALTH 1453, 1453 (2009).

12. See LEONE & WEINBERG, *supra* note 3, at 7 (citing Denise Herz et al., *Identifying and Responding to Criminogenic Risk and Mental Health Treatment Needs of Crossover Youth*, in HANDBOOK OF VIOLENCE RISK ASSESSMENT AND TREATMENT: NEW APPROACHES FOR MENTAL HEALTH PROFESSIONALS 495, 496 (Joel T. Andrade ed., 2009)).

13. Godsoe, *supra* note 9, at 91 (citing Jill Sheldon, *50,000 Children Are Waiting: Permanency Planning and Termination of Parental Rights Under the Adoption Assistance and Child Welfare Act of 1980*, 17 B.C. THIRD WORLD L.J. 73, 98-99 (1997)); see also BURLEY & HALPERN, *supra* note 6, at 9 (1994 study "found that four years after leaving care, 51 percent of former foster youth were unemployed, and 40 percent were receiving some form of public assistance").

14. Erik Eckholm, *Study Finds More Woes Following Foster Care*, N.Y. TIMES, Apr. 7, 2010, at A16, available at www.nytimes.com/2010/04/07/us/07foster.html (discussing MARK E. COURTNEY ET AL., CHAPIN HALL CTR. FOR CHILDREN AT UNIV. OF CHI. ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGES 23 AND 24 (2010), http://www.chapinhall.org/sites/default/files/Midwest_Study_Age_23_24.pdf); see also MARK E. COURTNEY ET AL., CHAPIN HALL CTR. FOR CHILDREN AT UNIV. OF CHI., EXECUTIVE SUMMARY, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 21, at 4 (2007), http://www.chapinhall.org/sites/default/files/ChapinHallDocument_1.pdf (reporting that just 2% of the young adults in the study had earned even a two-year degree).

Even while they are still enrolled in school, youth in foster care face numerous obstacles to success. They are often placed at grade levels below those appropriate for their age as a result of assessments demonstrating "poorer cognitive abilities and lower levels of academic performance than their peers."¹⁵ Combined with higher rates of behavioral disorders and absenteeism, lower academic performance contributes to special education referral rates for foster children three times that of children who are not in foster care.¹⁶ As a result, the percentage of children in foster care who are in special education, estimated to be as high as 30-40%, exceeds significantly the percentage of the general student population in special education.¹⁷ Special education is a complex system, difficult to navigate for even the most informed parents with access to financial and other resources. Absent these advantages, youth in foster care may languish without appropriate services because no one knows them well enough to have an accurate picture of their needs, it is unclear whose responsibility it is to ensure that their educational needs are met,¹⁸ and disputes between school districts and state child welfare agencies over funding and cost-shares of private placements may cause significant delays.¹⁹

15. Godsoe, *supra* note 9, at 98.

16. *Id.* at 98-99 (citing Sandra J. Altshuler, *A Reveille for School Social Workers: Children in Foster Care Need Our Help!*, 19 SOC. WORK EDUC. 121, 122 (1997); Robert H. Ayasse, *Addressing the Needs of Foster Children: The Foster Youth Services Program*, 17 SOC. WORK EDUC. 207, 208 (1995)); see BURLEY & HALPERN, *supra* note 6, at 8 (reporting studies showing that 71% of youth in foster care have emotional or behavioral problems and 40% to 60% of youth in foster care have at least one psychiatric disorder; a Washington study reported that 44% of youth in foster care had learning problems, 35% had attention deficit disorder, 16% had mental retardation or developmental delays, and 18% had speech/language problems); Sullivan et al., *supra* note 4, at 164 ("Studies show that foster youth have academic problems including low high school completion rates, grade repetition, lower scores on standardized tests, and they are more likely to be placed in special education than non-foster youth.").

17. See BURLEY & HALPERN, *supra* note 6, at 8, 8 n.26 (citing a survey in Oregon finding that 16% of foster children were in special education, in comparison with 9% of all school children); see also LEONE & WEINBERG, *supra* note 3, at 11 ("Thirty percent of children ages 6 through 11 in the child welfare system showed a need for special education services based on low scores from cognitive and/or behavioral assessment. Studies confirm that children in foster care receive special education services at a much higher rate than students in the general population - between 25 and 52 percent of the populations studied compared to 11.5 percent of the student population as a whole" (citing multiple studies published between 1992 and 2007) (internal citations omitted from text)); CLAIRE VAN WINGERDEN ET AL., CASEY FAMILY PROGRAMS, EDUCATION ISSUE BRIEF: IMPROVING SPECIAL EDUCATION FOR CHILDREN WITH DISABILITIES IN FOSTER CARE 1 (2002) (30-40% of foster children are in special education programs).

18. See Godsoe, *supra* note 9, at 84-85 (suggesting that parental rights are at the center of the special education system and because "enforcement of a child's right to identification and services is premised on parental advocacy," this creates a "statutory structure [that] fails to adequately consider the situation of children without parents willing or legally sanctioned to advocate in their interest."). A related problem faced by youth in foster care is over-identification for special education services, which may also have long-term detrimental effects on a child's prospects for educational success and often "results from teachers and other personnel being more likely to make referrals in the case of foster children because biases against children in out-of-home care as a group, lack of information about an individual child's home situation, and/or lack of understanding about a child's needs and abilities all affect the inherently subjective assessment process." *Id.* at 100.

19. See *id.* at 106-07 (noting that where both child protection and special education systems are involved, frequently "neither system is prepared to take responsibility for or fully cooperate in fulfilling

The transitory nature of the foster care system contributes to children's vulnerability to school failure. Children in foster care often change schools when they are first removed from their homes, and any subsequent change in placement may result in further school transfers. These disruptions in schooling are common. A study conducted during the 1990s estimated that 42% of children in New York City changed schools within the first thirty days of entering foster care.²⁰ A Washington State study of students found, based on self-reports, that children in foster care had changed schools once during a single school year between ninth and eleventh grade at twice the rate of those not in foster care.²¹ The percentage of foster children who had changed schools twice in one high school year was three times that of their peers.²² Seven percent of eleventh grade foster students in the Washington study reported that they had changed schools at least three times since ninth grade.²³

This mobility is significant, as frequent transfers between schools, and particularly between school districts, disrupt educational progress. Repeated transfers have been correlated with below grade-level academic performance,²⁴ increases in behavioral problems,²⁵ and an estimated loss of as much as six months of educational progress.²⁶ Moreover, a change in school often means a change in curriculum, in addition to the social and emotional impacts of losing what may have been one of few constants in a foster child's life.²⁷ Further, any change in

a child's entire set of needs," and that "interagency disputes, particularly over funding, can stymie progress in a child's ability to access special education and other services").

20. LIPS, *supra* note 9, at 3 (citing VERA INST. OF JUSTICE, FOSTER CHILDREN & EDUCATION: HOW YOU CAN CREATE A POSITIVE EDUCATIONAL EXPERIENCE FOR THE FOSTER CHILD (2004), <http://www.vera.org/download?file=119/Foster%2Bchildren.pdf> (reporting on statistics provided by New York City's child welfare system for the period from 1995 to 1999)).

21. BURLEY & HALPERN, *supra* note 6, at 24.

22. *Id.*

23. *Id.*; see Brandy Miller, Note, *Falling Between the Cracks: Why Foster Children Are Not Receiving Appropriate Special Education Services*, 5 WHITTIER J. CHILD & FAM. ADVOC. 547, 562 (2006) (research has shown that foster children in California attend an average of nine different schools by the time they turn eighteen).

24. See BURLEY & HALPERN, *supra* note 6, at 9 (noting that foster children changing schools are hindered in their academic success).

25. See Sullivan et al., *supra* note 4, at 169 (changing high schools is "a more sensitive predictor of [behavior] problems than change of schools at other levels").

26. See Judy A. Temple & Arthur J. Reynolds, *School Mobility and Achievement: Longitudinal Findings from an Urban Cohort*, 37 J. SCH. PSYCHOL. 355, 373 (1999) (finding that "students who change schools four or more times between kindergarten and the end of seventh grade perform about one year behind their nonmobile peers," but that only six months of that achievement lag could be attributed to the students' moves); see also LEONE & WEINBERG, *supra* note 3, at 15 (describing a study in Oregon and Washington, which found that 65% of foster care alumni had experienced at least seven school changes, and "youth who averaged one less foster care placement per year were nearly twice as likely to finish high school").

27. See MD. PUB. POLICY INST., FOCUS GROUP STUDY: FOSTER CARE FAMILIES, CHILDREN, AND EDUCATION 4 (2006), http://www.mdpolicy.org/docLib/20061130_FosterCareFocusGroupStudy.pdf (moving schools places children either ahead or, most typically, behind their peers and severs the ties children have to an "existing support system" of teachers, other school personnel, and foster parents); Godsoe, *supra* note 9, at 110 (noting that moves can be disruptive to children's relationships and development, counteracting previous academic and social gains).

school requires a new registration. Significant delays in the transfer of student records between schools are common and a child may remain out of school in the meantime if no one is insisting that she be enrolled immediately, as required by law, while awaiting the transfer of records.²⁸ Children in foster care may also miss school to attend court dates, visitation, and other meetings related to their underlying court cases.²⁹ Given all of these challenges, it is not surprising that educational outcomes for children in foster care tend to be poor.

As youth in foster care are experiencing these difficulties, they are also attending schools in a "zero tolerance" climate. A more detailed explanation of zero tolerance and its impact on children is beyond the scope of this Article, but many researchers have documented the increasing use of exclusion from school for minor misbehavior.³⁰ As discussed in Part II, students are not protected adequately from the risk that they will be subjected to this severe consequence. Like other factors correlated with school failure, youth in foster care are particularly vulnerable to unnecessary, unjust, and illegal exclusion from school.

28. See MD. PUB. POLICY INST., *supra* note 27, at 4 ("[F]requent movement also leads to incomplete school records and inconsistency in [foster children's] ability to receive needed services. In some instances, foster care children have blocks of time when they are not able to attend school because they are in the midst of a series of short-term moves."); LEONE & WEINBERG, *supra* note 3, at 18 (noting that reports based on focus group data demonstrate a delay in school enrollment of foster children when they transfer between home placements, too often leading them to be out of school for extended periods of time). This is despite the provisions of the McKinney-Vento Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987) (codified at 42 U.S.C. §§ 11431-11435 (2010)), the primary piece of federal legislation concerning the education of children and youth experiencing homelessness in U.S. public schools. The McKinney-Vento Act was passed in 1987 and reauthorized as amended in January, 2002 as part of the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301 et seq.). Pursuant to the McKinney-Vento Act, "[t]he school selected in accordance with this paragraph shall immediately enroll the homeless child or youth, even if the child or youth is unable to produce records normally required for enrollment, such as previous academic records, medical records, proof of residency, or other documentation." 42 U.S.C. § 11432(g)(3)(C)(i).

29. Godsoe, *supra* note 9, at 110.

30. E.g., Anna Louie Sussman, *Suspension Trap*, PROGRESSIVE, Apr. 2011, <http://www.progressive.org/sussman0411.html> (discussing rise in suspension rates in New York City and other large American cities during the past decade as a reflection of zero tolerance approaches to discipline); DANIEL J. LOSEN & RUSSELL J. SKIBA, *SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 2* (2010), http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/suspended-education-urban-middle-schools-in-crisis/Suspended-Education_FINAL-2.pdf ("Since the early 1970s, out-of-school suspension rates have escalated dramatically"); ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., *supra* note 1, at 3 (reviewing increasing rates of suspension and expulsion in various communities in several states).

II. PARAMETERS OF SCHOOL DISCIPLINE PROVIDE LITTLE PROTECTION FOR STUDENTS

Despite its recognition in 1954 that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education,"³¹ the United States Supreme Court held in 1973 that there is no fundamental right to education under the federal Constitution.³² This does not mean, however, that schools and school districts are free to deny an education to students on arbitrary grounds. In *Goss v. Lopez*, the Court held that if a student is to be excluded from school because she has committed misconduct, there must be in place "fundamentally fair procedures to determine whether the misconduct has occurred."³³ In so holding, the *Goss* Court established that students have protected property and liberty interests in their education.³⁴ Where any protected interests are at stake, procedural due process minimizes the risk of "substantively unfair or mistaken deprivations of life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests."³⁵ With this principle in mind, the Court held that the Due Process Clause of the United States Constitution applies to all school exclusions, even de minimis suspensions.³⁶

In determining what process is due when a student faces exclusion from school for any length of time, however, the Court provided little concrete guidance, holding only that she "must be given *some* kind of notice and afforded *some* kind of hearing."³⁷ Notice may be oral, informal, and given to the student at the

31. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

32. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). Since the Court's decision in this case, much litigation has focused on state constitutional guarantees of education, with an emphasis on school funding and equitable access to opportunities to learn. See, e.g., *Montoy v. State*, 102 P.3d 1160 (Kan. 2005); *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326 (N.Y. 2003); Daniel S. Greenspahn, A Constitutional Right to Learn: The Uncertain Allure of Making A Federal Case Out of Education, 59 S.C. L. REV. 755, 784 (2008) (Appendix summarizing state constitution education clauses and school finance litigation); Goodwin Liu, Education, Equality, and National Citizenship, 116 YALE L.J. 330, 332 (2006); MICHAEL A. REBELL, *Educational Adequacy, Democracy, and the Courts*, in *ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL* 218, (Timothy Ready et al. eds., 2002). No court has held, however, that the inclusion of an education clause in a state constitution prevents the exclusion of students from school for disciplinary infractions. Cf., e.g., *Doe v. Superintendent of Sch.*, 653 N.E.2d 1088, 1095-96, 1096 n.4 (Mass. 1995) (collecting other state court cases holding that education is not a fundamental right and characterizing its own precedent as recognizing implicitly "that educational opportunities may be lost by students as a result of their actions").

33. *Goss*, 419 U.S. at 574 (citing *Arnett v. Kennedy*, 416 U.S. 134, 164 (Powell, J., concurring), 171 (White, J., concurring and dissenting), 206 (Marshall, J., dissenting) (1974)).

34. *Id.* at 576.

35. *Carey v. Phipus*, 435 U.S. 247, 259-60 (1978) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972)).

36. *Goss*, 419 U.S. at 576.

37. *Id.* at 579. *But see id.* at 582-83 (recognizing that in certain circumstances, where a student poses an ongoing threat of disruption to the academic process or a continuing danger to people or property, she may be removed from school immediately with a "rudimentary hearing" to take place afterward).

commencement of the hearing.³⁸ A parent may be called on the telephone or a letter may be sent home with the student afterward explaining what she is accused of having done. The "hearing" may consist of as little as a description of the school's evidence of misconduct and an opportunity for the student to give her own account of what happened.³⁹ Often, for a student to be readmitted to school following a suspension, a parent or guardian is required to accompany her on the day she returns. Nothing more is required of the school to effectuate the suspension, which then appears on the student's permanent record.

The *Goss* case involved a short suspension; accordingly, the Court limited its holding to suspensions of ten days or less.⁴⁰ It did note, however, that "[l]onger suspensions or expulsions for the remainder of the school terms, or permanently, may require more formal procedures."⁴¹

In the absence of further direction from the Supreme Court, the contours of both the notice and the hearing accompanying exclusion from school vary widely between states, and even within states and school districts. For the most part, states and school districts have heeded the *Goss* Court's warning that elaborate procedures should not be imposed on school administrators seeking to suspend students, lest such requirements hamper the use of a "valuable educational device" necessary to the maintenance of order in schools.⁴² Even where young people may be suspended long-term or expelled permanently and therefore generally receive more than the most rudimentary hearing provided for shorter suspensions, they are not entitled to many of the protections individuals facing deprivation of liberty or property interests might receive in other contexts. For example, in some states a school administrator does not have to provide a student facing exclusion with copies of statements collected from witnesses to the alleged misconduct upon which the administrator may rely in making his decision.⁴³ Nor does a student facing exclusion have the right to call her own witnesses or cross-examine witnesses against her.⁴⁴ Furthermore, although state law may require schools to inform a student that she has the right to be represented by an attorney at a school discipline hearing, it is the student's responsibility to arrange—and pay—for such representation on her own.⁴⁵

38. *Id.* at 582.

39. *Id.* at 581.

40. *Id.* at 584.

41. *Goss*, 419 U.S. at 584.

42. *See id.* (noting that although a student should have the opportunity to share her version of events before a disciplinary decision is made, elaborate disciplinary procedures are not required).

43. *See, e.g.*, JAMES A. RAPP, EDUCATION LAW § 9.09(7)(e) (2011) ("Although a limited right of discovery is ordinarily afforded, failure to provide pre-hearing disclosures will not necessarily invalidate a disciplinary action. This view has been applied with respect to testimony where the accused is able to be present at the hearing, can listen to the statements and witnesses, and there is a full opportunity to ask questions and confront the testimony."). *But cf. Keough v. Tate Cnty. Bd. of Educ.*, 748 F.2d 1077, 1081 (5th Cir. 1984) ("The Keoughs' assertion that before the hearing they should have received a list of witnesses and summary of their testimony is not without some basis. This court indeed has held that usually these safeguards should be afforded to satisfy the fourteenth amendment in cases involving long-term suspensions:").

44. *See, e.g.*, *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 921 (6th Cir. 1988) (concluding that a school district did not violate an expelled student's procedural due process rights by denying his

These limited protections do not insulate children adequately from the risk that they will be disciplined for misconduct that they did not commit or the risk that they will be disciplined severely through permanent expulsion—which in some states means that no other public school must accept that child, ever⁴⁶—when a less punitive consequence would be sufficient to address the misbehavior. As discussed in Part III, these risks are magnified for young people whose lives are marked by “[h]igh mobility, precarious living conditions, and deep poverty.”⁴⁷ For children in foster care, these obstacles may “combine to present significant educational, health, and emotional difficulties,”⁴⁸ which they do not leave behind when they enter the schoolhouse gate. Unfortunately these very same issues that may impede school success also increase the likelihood that children in foster care will be excluded from school unnecessarily and possibly without due process.

III. CHILDREN IN FOSTER CARE ARE UNABLE TO PROTECT THEMSELVES FROM UNNECESSARY, UNJUST, OR ILLEGAL EXCLUSION FROM SCHOOL

Studies have demonstrated that children in foster care are suspended and expelled at higher rates than their peers.⁴⁹ This may be due to the potentially overwhelming educational and mental health needs of youth who have experienced significant trauma, or to teachers’ and administrators’ negative biases, prejudices, or insensitivity arising “out of a lack of knowledge about the experiences and development of children in out-of-home care.”⁵⁰ For many of the reasons discussed in Part I above, including high mobility and a lag in the transfer of records, children in foster care often have unaddressed special needs. When their schools do not have adequate information about them and consequently fail to provide necessary

request to cross-examine the witnesses against him).

45. See, e.g., *Texarkana Indep. Sch. Dist. v. Lewis*, 470 S.W.2d 727, 735 (Tex. Civ. App. 1971) (“[T]he student has the right to be represented by counsel of his own choice at his own expense.”).

46. See, e.g., MASS. GEN. LAWS ch. 71, § 37H(e) (“When a student is expelled under the provisions of this section, no school or school district within the commonwealth shall be required to admit such student or to provide educational services to said student.”); MICH. COMP. LAWS § 380.1311(3) (“Except if a school district operates or participates cooperatively in an alternative education program appropriate for individuals expelled pursuant to this section and section 1311(2) and in its discretion admits the individual to that program, and except for a strict discipline academy . . . , an individual permanently expelled pursuant to this section is expelled from all public schools in this state and the officials of a school district shall not allow the individual to enroll in the school district unless the individual has been reinstated under subsection (5)”).

47. CATHERINE Y. KIM ET AL., *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* 47 (2010).

48. *Id.*

49. See NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 5, at 2, 13 n.12 (citing multiple studies); see also LEONE & WEINBERG, *supra* note 3, at 10 (discussing and citing multiple studies published between 1992 and 2005 demonstrating that “children who have been abused or neglected and children who are placed in foster care generally have lower scores on standardized tests, poorer school grades, and more behavior problems and suspensions from school than comparison groups”); Sullivan et al., *supra* note 4, at 169 (two-thirds of students in study cohort of foster children said they had been suspended from school).

50. Godsoe, *supra* note 9, at 113.

academic and other support services, children may engage in disruptive behaviors and be subjected repeatedly to "short-sighted remedies" such as suspension and expulsion.⁵¹ The inability of foster children to challenge their suspensions or expulsions effectively may also play a role in their overrepresentation among students excluded from school.

Although children have the nebulous right to "some kind of notice" and "some kind of hearing" before suspension or expulsion from school, the meaningful exercise of this right is not self-executing.⁵² In order to fully "respond, explain, and defend,"⁵³ a student must be able to challenge evidence against her and advance an effective argument regarding the appropriate consequences for her actions. Given that a hearing constitutes an administrative burden and schools likely view it as in their best interest to avoid getting bogged down in procedures that the *Goss* Court characterized as potentially "overwhelm[ing] administrative facilities,"⁵⁴ school officials have an incentive to simplify their obligations and even to shortcut procedural protections where they can. Children whose parents are familiar with school handbooks and sources of state and federal law prohibiting arbitrary exclusion from school are in a better position than their peers to hold schools accountable, challenging suspensions that occur without hearings and marshalling evidence in their favor. They are also more likely to be able to obtain legal assistance.

Most foster children have a significant number of adults in their lives, including biological parents, foster parents or group home staff, social workers, investigators, guardians *ad litem*, and lawyers. All of these adults have different roles to which they bring varying degrees of knowledge and a range of beliefs about school discipline. In part due to a lack of clarity on the part of schools and between these adults as to who holds which of a foster child's educational rights, youth in foster care encounter obstacles to effective advocacy in connection with exclusion from school throughout the process.⁵⁵

Not surprisingly, the challenges begin with the issue of notice. The purpose of notice, particularly in the context of a long-term suspension or expulsion, is to enable the student and her parent or guardian to prepare for the hearing where she will attempt to prevent the exclusion.⁵⁶ It is not clear even to whom notice is sent

51. Susan F. Cole & M. Geron Gadd, *Uncovering the Roots of School Violence*, 34 NEW ENG. L. REV. 601, 601-02 (2000); see LEONE & WEINBERG, *supra* note 3, at 17 ("When the transfer of student records is delayed, administrators and teachers often do not know how to serve highly mobile students. Consequently, these students may remain out of school for extended periods of time or, if in school, they may be placed in inappropriate programs and classes." (citation omitted)).

52. *Goss*, 419 U.S. at 579.

53. *Gorman v. Univ. of R.I.*, 837 F.2d 7, 13 (1st Cir. 1988).

54. *Goss*, 419 U.S. at 583.

55. Each of these adults—biological and foster parents, case workers and lawyers—has a primary responsibility to the child other than ensuring that she is not excluded from school unnecessarily or without due process. As a result, it is entirely possible that none of the many adults in her life is available to protect a foster child's rights as to school discipline. See Miller, *supra* note 23, at 552-53 (2006) (discussing findings of the 2002 Vera Institute Report and observing that foster children are often overlooked in assessment for special education programs and in the education system generally).

56. Even for very short suspensions where a more formal hearing will never occur, notice is essential as it facilitates the identification of patterns of behavior and discipline, possible violations of

for a child in foster care. Schools appear to notify the child's social worker in many instances. The social worker, however, is not suited to stand in the place of a parent. She is working within a "best-interests" model;⁵⁷ an ethical obligation that informs the position she takes on behalf of her client. She cannot at the same time be expected to advocate zealously for a student's return to school in all circumstances: she may perceive a conflict between challenging a school in a specific case and her need to maintain a collaborative relationship with the school for the sake of other clients on her caseload; she may believe that suspension is in a child's best interests because it will teach her a lesson; she may want to challenge the exclusion but not know how to defend a student in a school discipline hearing; she may not even be aware of what is happening.⁵⁸ In recognition of these types of conflicts, federal, and sometimes state, law prohibits social workers from signing special education students' individualized education plans.⁵⁹ If a student is in a foster home, the foster parent may be notified instead, but depending on the longevity and the quality of relationship between the child and the foster parent, the latter may not be in a position to advocate effectively for the child.⁶⁰ For a student in group or transitional care, finding an individual to stand in the place of a parent may be even more difficult. In the absence of further direction, the school may believe it has met its obligation to notify a parent or guardian when its actions actually fall short.

Though a discussion of the panoply of rights possessed by children with special needs facing school discipline is beyond the scope of this Article, it is important to note their existence given the high rates of children in foster care who are also in special education.⁶¹ Complicated procedural protections exist to ensure

the student's rights by the school, and potential avenues to minimize instances of exclusion.

57. See NAT'L ASS'N OF SOCIAL WORKERS, CODE OF ETHICS § 1.01 (2008), available at <http://www.socialworkers.org/pubs/code/code.asp> ("Social workers' primary responsibility is to promote the wellbeing of clients. In general, clients' interests are primary. However, social workers' responsibility to the larger society or specific legal obligations may on limited occasions supersede the loyalty owed clients, and clients should be so advised.")

58. See BURLEY & HALPERN, *supra* note 6, at 10 ("In most states, the educational needs of foster children are not consistently tracked by caseworkers.")

59. See Individuals with Disabilities Act (IDEA), 20 U.S.C. § 1415(b)(2)(A) (2006) (prohibiting employees of state agencies involved in the education or care of a child from acting as an education surrogate for a ward of the state). It has been recognized in other contexts that social workers may experience ethical conflicts if placed in a position in which they must decide whether to advocate zealously for a child client or do what they believe is in that client's best interests. See, e.g., 110 MASS. REGS. CODE § 4:34(1)(a) (2011) (providing that where a child in the custody of the Department of Children and Families is a suspect in a criminal investigation, the Department cannot consent to having the child interviewed by police, but instead must petition a court for the appointment of a guardian *ad litem*).

60. See Godsoe, *supra* note 9, at 108 ("Although child welfare workers are required by law to provide foster parents or group homes with the health and education records of the children in their care, they do not always do so, and foster parents or other caregivers are left inadequately informed to properly advocate for children."); Miller, *supra* note 23, at 556 (discussing Vera Institute study finding that foster parents "expressed little insight as to any special problems of children at school due to their foster care status").

61. See Godsoe, *supra* note 9, at 98-99 (citing several studies, including one finding that 41% of foster children have been held back at least one grade level); see also BURLEY & HALPERN, *supra* note

that children with special needs are not excluded from school for behaviors that are a manifestation of their disability.⁶² Without someone in a position to ensure that a school has conducted itself in accord with federal and state mandates, a child may be excluded from school illegally.⁶³ Moreover, because children in foster care are so transitory, they may have unidentified special educational needs that both prevent them from succeeding in school and increase their risk of suspension or expulsion.⁶⁴

IV. ADVOCATE! STEPS THAT LAWYERS FOR CHILDREN AND PARENTS MAY TAKE TO PROTECT THEIR CLIENTS' EDUCATIONAL RIGHTS

In light of the devastating impact of suspension and expulsion on children's prospects for educational success, in combination with the likelihood that children in foster care will experience exclusion from school, lawyers in child welfare cases must educate themselves about this issue and be prepared to address it. They may do so both proactively and retroactively in individual cases. Lawyers for children and parents should also consider becoming involved in systemic reform efforts to improve school climate and minimize the use of out-of-school suspension for

6, at 8 and studies cited (including one study documenting that 16% of foster children were in special education programs, compared to only 9% of all school children).

62. See 20 U.S.C. § 1415(k)(1)(E) (requiring officials to review a student's file within ten days to determine whether conduct violations that result in a changed educational placement have a direct and substantial relationship to the student's disability or are a direct result of the school's failure to implement the student's Individualized Education Plan).

63. See ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT OF HARVARD UNIV., *supra* note 1, at 9 (noting that the IDEA "provides extensive procedural protections for children with disabilities to ensure that under appropriate circumstances the impact of their disabilities are considered in meting out punishment, but in many circumstances, school officials are clearly ignoring the law").

64. See, e.g., Cole & Gadd, *supra* note 51, at 601-02 (recognizing that few schools have the ability to treat a child dealing with trauma before the effects of that trauma affect in-school behavior); MD. PUB. POLICY INST., *supra* note 27, at 4 ("There is no consistency in the programs being offered across school districts."). Under the IDEA, state and local educational agencies must ensure that the rights of children are protected by determining the need for, and assigning, a surrogate parent whenever: no parent (as newly defined at 34 § C.F.R. 300.30) can be identified; the public agency, after reasonable efforts, cannot locate a parent; the child is a ward of the State under the laws of that State; or the child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11434a(6)), 20 U.S.C. § 1415(b)(2)(A) (2005), 34 C.F.R. §§ 300.519(a)-(b) (2006). The surrogate parent program entrusts educational decision-making to a third party, who is generally a volunteer. This requirement, necessary to ensure that the rights of children with disabilities are protected, further complicates an already complex process for children in foster care and may cause additional delays as the surrogate parent is requested and appointed, then gathers and reviews records and interviews interested parties. Because surrogate parents are appointed only for students who are covered by the IDEA, those children whose special educational needs are not yet identified do not benefit from this program. Moreover, the existence of a surrogate parent does not resolve open questions regarding school discipline. See Miller, *supra* note 23, at 552-61 (explaining that even when a child in foster care has an identified disability, it may not be clear who is primarily responsible for helping her navigate school disciplinary issues or ensuring that her Individualized Education Plan provides all necessary services and that each school she attends maintains compliance with federal and state mandates regarding special education).

minor misconduct.

Attorneys who represent children in foster care or their parents should work with foster parents, social workers, service providers, and schools to ensure effective communication regarding school issues. Early in her representation, the child's lawyer should contact all parties and request in writing that she be informed of any academic and behavioral issues that arise at school. This way, everyone is on notice that the lawyer would like to be involved. The lawyer for the parent of a child in foster care may also contact the school on her client's behalf to inform the school that the parent wishes to be apprised of ongoing issues with his child and remain involved in her education. Lawyers for children and parents in child welfare cases should familiarize themselves with special education law as well as school discipline policies within their clients' communities. Although *Goss v. Lopez* establishes the floor as to students' rights in the school discipline context, policies vary by state and by school district.⁶⁵ To protect their clients' rights, lawyers must be aware of any additional due process protections available through state law and school or district policy and practice. Should a child client receive a suspension or expulsion from school, her attorney should consider representing her in any associated hearings and appeals.⁶⁶ Additionally, special education and school discipline training and other resources may be offered by various legal services organizations within the state. Child welfare lawyers should forge relationships with these organizations, which are often available to accept referrals or to support lawyers' efforts to keep their clients in school. Attorneys for children in foster care may also seek opportunities to educate school administrators about the realities of their clients' lives and the impact of school discipline on the future prospects of this vulnerable population. They may do this either in individual cases or by partnering with advocacy organizations to offer local trainings.

It is important that lawyers review the school records of each child client to become aware of any educational challenges the client may be experiencing and to learn to differentiate between difficulties due to transitions and difficulties potentially related to a disability. When newly appointed to any case, attorneys should find out where the child has most recently attended school and send a records request to the school administrator. If the child presently receives, or has ever received, special education services, the lawyer should send a separate request to the district's director of special education. Special education departments often maintain their records in a central administration office; sending requests to both departments increases the likelihood that the lawyer will receive the child's complete school file. Lawyers for children should also speak with their child clients about their school experiences, as school records alone will not paint the full

65. See, e.g., Brent E. Troyan, Note, *The Silent Treatment: Perpetual In-School Suspension and the Education Rights of Students*, 81 TEX. L. REV. 1637, 1640 (2003) ("Because available punishments for recalcitrant schoolchildren are determined at the state level by statute, actual discipline practices vary by jurisdiction.").

66. By maintaining contact with her clients' schools, a lawyer for children can also position herself to advocate for the substantive components of her clients' education. For example, she can ensure that the school provides work for each day a student is out of school due to suspension and advocate for alternative disciplinary measures that are less detrimental to her clients' opportunities to learn.

picture. If a review of the records leads to concern about a possible disability, lawyers should consider working with other members of the child's team to request a special education evaluation.⁶⁷ Additionally, attorneys may have authority under their state regulations to request an evaluation themselves.⁶⁸ In any event, lawyers involved in the child welfare system must educate themselves about special education, the processes by which children are identified and individualized education plans are developed, and the existence of special protections against suspension and expulsion, in order to advocate effectively for their clients.⁶⁹

Lawyers for children in foster care should also familiarize themselves with the McKinney-Vento Homeless Assistance Act, which requires school districts to allow homeless youth to continue attending their school of origin unless the family wishes otherwise, in which case the youth should be enrolled in the new district without delay.⁷⁰ Thus, if a homeless child transfers to a new district, she must be enrolled immediately, even if this requires the school to enroll her without immunization records or records from her previous school.⁷¹ If the student chooses to remain at her school of origin, transportation must be provided.⁷² The Act defines homeless children and youth as "individuals who lack a fixed, regular, and adequate nighttime residence," a definition that often encompasses children in foster care.⁷³ This includes those children and youth who:

are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional

67. See 20 U.S.C. § 1414(a)(1)(B) (2006) (allowing "either a parent of a child, or a State educational agency, other State agency, or local educational agency [to] initiate a request for an initial evaluation to determine if the child is a child with a disability").

68. See, e.g., 603 MASS. REGS. CODE § 28.04(1) (explaining that in Massachusetts, for example, "any person in a caregiving or professional position concerned with the student's development" may request an evaluation.) Unless she is bound by a "best interests" model of representation, before requesting such an evaluation the child's lawyer should ensure that such a request is consistent with her client's position, whether it is based on the child's expressed wishes, substituted judgment, or some other model approved by the jurisdiction in which she practices.

69. To the extent their clients seek to have their children returned to their care, parents' attorneys should assist their clients in developing skills to protect their children's educational rights. Unless prohibited by the court or their service plans, ongoing participation by non-custodial parents in their children's lives, including their schools, is likely to be viewed favorably by the court determining whether their children will be returned to them. See AM. BAR ASSOC. CTR. FOR CHILDREN AND THE LAW, ET AL., ISSUE BRIEF: FOSTER CARE & EDUCATION: SCHOOL STABILITY UNDER FOSTERING CONNECTIONS: MAKING BEST INTEREST DECISIONS 4 (2011), available at http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/education/best_interest_final.authcheckdam.pdf ("Engaging parents in a child's education decision-making is an important way to foster the child-parent bond that will ultimately support reunification.").

70. 42 U.S.C. § 11432(g).

71. *Id.* at § 11432(g)(3)(C)(i) (directing any school "selected in accordance with this paragraph [to] immediately enroll the homeless child or youth, even if the child or youth is unable to produce records normally required for enrollment, such as previous academic records, medical records, proof of residency, or other documentation").

72. *Id.* at § 11432(e)(3)(E)(i)(III).

73. *Id.* at § 11434a(2)(A).

shelters; are abandoned in hospitals; or are awaiting foster care placement.⁷⁴

The Act's broad definition of homelessness makes it possible for many children in state custody to maintain some degree of educational stability during a time of flux in their familial lives.

An additional tool available to lawyers for children in foster care is the Fostering Connections to Success and Increasing Adoptions Act of 2008.⁷⁵ The Act requires that state child welfare agencies coordinate with schools to ensure that foster children remain in their schools of origin unless this is not in the child's best interest.⁷⁶ Unlike the McKinney-Vento Act, no funding is attached to this provision, but the statute does, at a minimum, constitute a policy preference in favor of educational continuity for children in foster care.⁷⁷ As a result, children's lawyers may use the Act to advocate against school transfers and insist that school stability be a factor in the placement decisions of child welfare professionals.⁷⁸

Lawyers who represent children in foster care or their parents should also increase their own awareness of school discipline policies, including those that exist in their clients' communities and those that have been successful in reducing school exclusion elsewhere and could be adopted in their schools. Fortunately, after many years spent excluding students without increasing school safety or improving school climate, many school districts are realizing that zero tolerance school discipline policies do not work.⁷⁹ Consequently, school and district level administrators are now considering alternatives to school discipline, including school-wide Positive Behavioral Interventions and Supports (PBIS).⁸⁰ PBIS has

74. *Id.* at § 11434a(2)(B).

75. Pub. L. No. 110-351, 122 Stat. 3949 (2008) (codified as amended in scattered sections of 42 U.S.C.).

76. 42 U.S.C. § 675(1)(G)(ii)(II) (2008).

77. It is possible that the Fostering Connections to Success and Increasing Adoptions Act constitutes more than a policy preference. For a state to be eligible for federal payments for foster care and adoption assistance, it must comply with certain requirements, including "the development of a case plan for each child receiving foster care maintenance payments under the State plan." 42 U.S.C. § 671(a)(16) (internal citations omitted). As defined in 42 U.S.C. § 675(1)(G)(i) and § 204(a)(1)(B), case plans are required to include a "plan for ensuring the educational stability of the child while in foster care." Moreover, some states have enacted legislation or policy guidances to permit children in foster care to remain in their schools of origin. See 2011 VA. LAWS CH. 154 (S.B. 1038) (amending VA. CODE ANN. §§ 16.1-281 and 22.1-3.4, and adding § 63.2-900.3); N.J. STAT. ANN. §30:4C-26b(f) (West 2010); see also AM. BAR ASSOC. CTR. FOR CHILDREN AND THE LAW, ET AL., *supra* note 69, at 3, 6, 7 (describing laws and guidances enacted in New Jersey, Pennsylvania, Connecticut and Virginia).

78. 42 U.S.C. § 675(1)(G)(i) (directing that child welfare agency plans for educational stability include "assurances that each placement of the child in foster care takes into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement").

79. See Donna St. George, *More Schools Rethinking Zero-Tolerance Discipline Stand*, WASH. POST, June 1, 2011, http://www.washingtonpost.com/local/education/more-schools-are-rethinking-zero-tolerance/2011/05/26/AGSIKMH_story.html.

80. Office of Special Education Programs Technical Assistance Center on Positive Behavioral Interventions & Supports, available at http://www.pbis.org/school/what_is_swpbs.aspx (last visited Nov. 21, 2011).

been described by the Office of Special Education Programs as a "decision making framework that guides selection, integration, and implementation of the best evidence-based academic and behavioral practices for improving important academic and behavior outcomes for all students."⁸¹ Schools and districts implementing PBIS have reported that these strategies show promise. In North Carolina, for example, in the 2009-2010 school year, schools adopting positive behavioral intervention and support approaches experienced a 15% lower suspension rate than the state average.⁸² In a recent study of an urban middle school in the Midwest that implemented school-wide positive behavioral support, office discipline referrals were decreased by 20% over a two-year period and short-term out-of-school suspensions were reduced by 57%.⁸³ Although they may not encounter school or district campaigns to reduce the use of suspensions and expulsions on a daily basis, lawyers and other practitioners involved with the child welfare system should support policy initiatives and school-wide approaches such as PBIS as alternatives to school exclusion.⁸⁴

CONCLUSION

Children in foster care encounter numerous obstacles to educational success, including overrepresentation among students excluded from school. Given the devastating consequences of suspension and expulsion, it is essential that attorneys who represent children in foster care or their parents are aware of their rights in the school discipline context. By holding schools accountable and advocating zealously for their clients' educational rights, lawyers can work to minimize the risk that these children will be excluded from school unnecessarily, unjustly, or illegally. Constant vigilance is required to ensure that children in foster care remain inside the schoolhouse gate.

81. *Id.*

82. N.C. POSITIVE BEHAVIOR INTERVENTION AND SUPPORT INITIATIVE, 09-10 EVALUATION REPORT 5 (2011), available at <http://www.ncpublicschools.org/docs/positivebehavior/data/evaluation/pbs-cval-report.pdf>.

83. Jared S. Warren et al., *School-wide Positive Behavior Support: Addressing Behavior Problems that Impede Student Learning*, 18 EDUC. PSYCHOL. REV. 187, 193 (2006). During this same time period, "in-school conferences with students (discussing with student his/her problem behavior) decreased by 17%, time-outs (student required to sit in the office for a period of time) decreased by 23%, [and] in-school suspensions (student works on assignments in supervised workroom) decreased by 5%." *Id.*

84. Advocates may want to explore alternatives that, like PBIS, penalize substantive learning opportunities to a lesser extent than complete exclusion. These may include alternative schools or alternative programs within schools. Though a full discussion of alternative schools is beyond the scope of this Article, it is important to note that viable alternative programs, like all schools, must provide students with access to high quality education. See Press Release, Center for Law and Education, American Bar Association Calls for Action on Right to High-Quality Education (Aug. 6, 2009), available at <http://www.cleweb.org/sites/default/files/ABACLEpr.pdf> (summarizing three recommendations on the right to high-quality education adopted by the American Bar Association in August 2009 and emphasizing that, *inter alia*: (1) all schools should provide the core elements of a high-quality educational program to all children; (2) policies should be adopted to "reduce the removal of students from instruction as a result of disciplinary exclusion," and (3) to the extent youth are removed from their substantive educational environments, they must be able to "resume their education in a high-quality, age-appropriate program that enables them to graduate and prepare for higher education").