What Happens When Foster Youth Want an Abortion — and What Could Soon Change?

imprintnews.org/foster-care/foster-youth-abortion-sabino/66760

7/28/2022 3:57pm

A leading attorney representing pregnant minors talks to The Imprint about the confidential court hearings that decide whether they can seek abortions without parental consent

By Michael Fitzgerald

Many states have “judicial bypass” laws for pregnant minors who seek an abortion without their parents — a workaround that is no longer available in states that have banned abortion since the Supreme Court overturned Roe v. Wade. Photo via iStock.

Massachusetts family law attorney Jamie Sabino has a unique job: She oversees legal representation of pregnant youth, including those in foster care, when they want to get an abortion without their parents’ permission.

The work has taken on new significance following the U.S. Supreme Court’s June ruling on Dobbs v. Jackson Women’s Health Organization. The seismic decision struck down the constitutional right to an abortion, which has long been guaranteed nationwide for women of

all ages. Sabino says she's now making plans to represent young people traveling to Massachusetts from states with new abortion bans in place.

Minors' access to abortion has always been vulnerable — particularly if they want the procedure done without telling their parents, as mandated by 36 states. In those cases, youth can instead try to convince a judge they are mature enough to make the decision on their own to end a pregnancy, or that it is in their best interest.

But this so-called "judicial bypass" option is gone now in states that have banned abortion since Dobbs**.** Some states where abortion remains legal are also considering laws to end judicial bypass, requiring parental involvement for all minors.

Parental involvement laws have been seen as a compromise between the warring factions on reproductive rights: An acknowledgement that minors may need to seek an abortion on their own, due to parents' conservative views, for example, or sexual abuse they are not emotionally ready to reveal. But in those cases, "judicial bypass" provides some adult supervision of the decision outside of a doctor's office.

Sabino, though, is an ardent abortion rights supporter. She says the courts are the wrong venue for young people seeking an abortion — especially those in foster care. Given the laws in her state since 1981 that require parental notification, she has taken on the role of representing them in these hastily convened mandated hearings.

For the last 40 years, she has led a group of court-appointed attorneys who have come forward to represent thousands of pregnant youth in the Massachusetts court system. She's trained attorneys in 15 other states, served as an expert witness in high-profile legal challenges to parental consent laws and has testified before numerous state legislatures about why the judicial bypass process should be eliminated entirely.

Although summoning the courage to go before a judge to ask permission for an abortion may seem a daunting feat, Sabino described Massachusetts as one of the states that has made the process as streamlined as possible. In 2020, it was also the first state to lower the age for its parental consent requirement to 16.

Data she collects from her rotating group of pro bono attorneys shows that only 17 of more than 25,000 court petitions for an abortion filed by minors since 1981 have been rejected. Of those 17 denials, none of the young mothers were in foster care at the time, and almost all were overturned on appeal within two days.

Young people in many other states likely have worse odds. A 2007 study of three states by the political scientist Helena Silverstein found that courthouses had vast discretion to implement judicial bypass laws, with some judges refusing to hear the petitions, others

“candidly stating” blanket denials, and still others “engaging in practices during hearings that aggressively aim to persuade young women to forgo abortions.” The Washington Post reported similar findings earlier this year.

Jamie Sabino is an attorney who represents pregnant minors, including foster youth, who are seeking an abortion. Photo courtesy of Sabino.

The number of judicial bypass cases in Massachusetts have dropped in recent decades, according to Sabino, along with teen pregnancies nationwide. But the stakes remain particularly high for foster youth, who face higher-than-average rates of pregnancy, and who often arrive at bypass court hearings with the weight of childhood trauma and poverty.

The following has been lightly edited for length and clarity.

What is a “judicial bypass” hearing, and why was it created?

Minors have a constitutional right to abortion that doesn’t come into full bloom until 18, but the Supreme Court said states can only require parental consent if the minor can also *quickly* bypass parents. That’s why it’s a judicial “bypass.”

Some states have “parental notification” and that works the same. Doctors are supposed to notify your parents, but you can go to court and get an order for the doctor not to notify your parents.

Teens have an absolute right of privacy if the court approves it. A couple states require a mental health professional or a doctor to make the judgment. But in most states, it’s just judges. This process only requires one brief court hearing in Massachusetts. Some states will have three-hour hearings. In Alabama, judges have made kids go to “crisis pregnancy centers” first.

How did you get into this line of work?

In 1981, the women’s bar association in Massachusetts put out a call for court-appointed lawyers for minors to come to a training session. I had done no work on abortion. Roe v. Wade came down when I was in college, but I didn’t even notice. I went to this judicial bypass training, and joined the steering committee to organize the attorney panel for these cases.

After representing two minors, I said ‘Oh my goodness, the right to control your fertility is one of the most important rights for women.’ I became part of the reproductive justice system at large.

In addition to training lawyers, I track them, collect forms, and have done a couple major research projects, one with University of Massachusetts Boston and one with Planned Parenthood. It’s a side gig, but it’s a big side gig.

Were the Supreme Court, the states, or any of the architects of this bypass process considering the unique circumstances of foster youth?

No, not at all.

For foster care, it put in this twist: Here are kids in state custody because of abuse and neglect by their parents, going to court under a statute that was designed to encourage parent-child communication. Some of these kids wouldn’t even have the option of going to their parents; they don’t know where they are, or talking to them could invite more abuse.

There are also a lot of kids in the child welfare system who are in touch with their parents, or living with parents under agency supervision. Yet the position Massachusetts’ child welfare agency took at first was, we’re a custodian, you’re a parent but you don’t have custody. You don’t have the right to give your child consent to an abortion. We objected to that for many years and finally got it changed. It’s such a hot-button issue.

Youth are vulnerable anyway, but foster youth are some of the most vulnerable people in our society. We need to approach and help and support them with as much compassion as possible — but also empower them in their decision-making, because they’ve had so little power in their lives. To be dictated about this most important issue would be devastating to them, both now and in their long-run development as adults.

Do foster care agencies typically know if a youth in their care seeks an abortion?

I think it must happen, because the kid’s got to get out of school, unless they can get a Saturday appointment. Foster kids tend to be more surveilled — for good reason often, their caseworkers or foster parents are worried about them and want to know where they are.

But I’ve been very surprised at how resourceful these kids are. They get their friends involved. Mary will say ‘yeah, Susie’s over at my house doing homework.’ But Mary’s mother thinks Mary and Susie are somewhere else doing homework. Or they tell me ‘My mother thinks I’m a flake, I’ll just tell her I’m going to work, and if I miss work, she just thinks I’m being flaky.’

They often figure out who is supportive of them in their school system. Sometimes that fails, too, and we have to get involved telling teachers that they cannot tell the parents. They’ll find who can give them a ride. One kid got a ride from another kid who didn’t have a license, but

had a car! Many of them have involved boyfriends, who had money for them. Kids used to have to make calls to Planned Parenthood from a payphone on the side of the road. Now we teach them how to delete their cell phone call history.

What are foster care agencies' typical reaction when they first learn of a pregnancy? What advice do they offer? I assume this has changed over the years, and varies greatly.

Sometimes, caseworkers would give girls a number for Planned Parenthood.

Some refused to do that. That wasn't the policy, but it's what a lot of social workers did. That hasn't been happening for the last 15 to 20 years though. We tried training and explaining, and met with the state child welfare agency's general counsel many times.

It was also different from office to office. Some social workers did drive them to court and come in with them. There's a whole new generation of more educated social workers than there has been in the past. I think their attitude today is, we need to help this kid get the information they need.

They have kids coming to them who are pregnant, who say 'I'm going to have a baby, you have to help me find an apartment.' They don't always want that to happen either. They try to get the kid as much information as possible, but sometimes they think a kid is so troubled they aren't as supportive as they should be for having a baby.

So, I also tell my clients, just because you get consent from court, you can change your mind. But you have the consent if you need it.

How do young people learn about the court process?

It takes a while for a kid to figure out who to call or what to do sometimes, but once they get a Planned Parenthood referral hotline, they learn about what an abortion is and alternatives to abortion. They are asked if there's any adult they want to involve — an aunt, for example, not just parents. That counseling lasts 35 minutes to an hour.

Kids usually learn of this judicial bypass process from their clinic. If they want to proceed with an abortion without parental consent, the clinic usually gives them our number. They can get to court within three to four days, sometimes longer, usually because the kid has a schedule conflict, midterms or a field trip and they can't skip school.

What does the typical judicial bypass hearing look like?

These are in our top-level trial courts, which hear serious criminal felonies and big-dollar civil cases, over $25,000. So when you walk into the clerk's office as a teenager, everyone in that office knows why she was there.

And they don't say anything, but it's palpable — that feeling of 'Here I am, and who are these people? Are they judging me?' Even if the judges are nice.

How do you think judges feel about having to hold these hearings?

They don't usually ever deal with teenagers. They aren't trained in child development. But let me tell you, I think it's better that way. If these kids go in front of a juvenile judge, some of those judges might think they know best, and go into long discussions about your relationship with your parents, or what that situation is.

At the beginning some asked 'Why are we doing this? It doesn't make sense.'

The superior judges only say 'We don't know a lot about teenagers. We're gonna ask you 10 questions and get you in and out.'

They immediately get approval, and walk out of court with the paperwork they need to take to a clinic.

What's it like for the minors' seeking abortion permission?

The court officers try their best to take the kids through a back elevator to the judge's office.

At least a couple times foster kids would say 'Am I gonna see anyone I know at the court?' And I'd have to reassure them 'It's not the juvenile court, where you went into CPS, it's a different court — but you still could run into someone you know.'

They were much more fearful of being outed to the public. A lot of them haven't told their social worker, they found us on their own.

The hearings are 5 to 10 minutes. The records are sealed. The minor's name only appears on one piece of paper which is put in a sealed envelope in the impounded papers. We have her sign the complaint "Mary Moe," so they ask 'why would I sign that, it's not my name?' We say 'just sign it.'

The kids are definitely anxious. We had one girl who had miscarriage while she was leaving the courthouse.

How do judges behave in these hearings?

Judges generally speak in sympathetic tones. Most of them are very nice, though they aren't quite apologetic. And it's things like 'Are you in school? Do you have plans for the future? Did you talk to anybody making this decision? Are you aware of the risks of the procedures?'

They are supposed to conclude the minor is mature enough to give consent to the procedure. They decide how they want to evaluate that. Some judges say 'I can't imagine I would say this child is not mature enough to give consent, but is mature enough to parent.'

For a lot of judges, it's 'she's mature when she walks in the door. She's acknowledged she's pregnant, she's gotten to court, she's coming to tell some black robed stranger the most intimate details of her life.'

In Massachusetts at least, I think it's even easier for foster youth. There are judges who seem to be thinking: 'Oh my god, how can I tell this kid it's wrong not telling their parents when she's in foster care? How can I say she's wrong for wanting an abortion when she's trying to dig herself out of this?'

So how does the judicial bypass process usually go for foster youth in Massachusetts?

Girls in state custody who have to go to court, it's often more difficult. They don't have a support system, they aren't in their own neighborhood, they're not living with an older sister who will go with them to court. And for them, the court holds trauma. Court is what took them away from their parents.

For some of them, court is no big deal. But for many, court represents a very traumatic part of their lives, and that makes it very difficult.

It's too bad there isn't an advocacy group on this just for foster youth. There isn't anything different legally in how it happens for foster and non-foster youth. But the emotional content is really different for foster youth, for the things they've experienced.

What are the typical circumstances that make a pregnant foster youth not want to tell their parents they are seeking an abortion?

Research I did in 2000 with the University of Massachusetts Professor J. Shoshanna Ehrlich involved data for why youth don't tell their parents, among those who called Planned Parenthood. Shohsanna interviewed 26 kids, and several of them were involved with the child welfare system.

A couple were afraid of their parents, or were not in touch with them. Some said they wanted to reunite with their parents, 'but if I tell my mother, I might not be able to go back.' Because they wanted to reunite, they didn't want to be told by their angry parents to stay in the state Department of Children and Families custody.

What does this process look like in other states, especially those that have greater restrictions on abortion?

Alabama was one state where judges were requiring teens to go to a crisis pregnancy center, to hear the anti-choice side. In some of the states, like Tennessee or Missouri, there were problems getting lawyers to take the cases. They were turning clients away.

Minnesota had supportive judges in Duluth and Minneapolis, but virtually everywhere else the judges were refusing to hear these cases, so kids were traveling three to four hours. The courts set it up so they could hear the cases at 8 a.m., so the kid could go right to the clinic nearby.

But how do you explain to your mother why you leave your house at 5 a.m? A lot of them lie and say they are doing a sleepover at my friend Susie's house.

In southern states, like Louisiana, judicial bypass is often denied. A lot of kids in Ohio have been denied petitions. In Texas, if you lived in Austin you were good to go — before SB8 and the Dobbs ruling.

Do any judges seem less sympathetic due to anti-abortion beliefs?

A handful, about 10% of judges, refused to hear these cases at all at first. That isn't an issue now, we have a lot of judges. But there are some states where youth will have to travel two to three hours to find a judge. And that's weird. You don't usually have judges refuse a subject matter. You don't become a judge if some areas of the law are off limits.

Some of them are a little stiff and formal. One said to me, 'I'm formal because I want her to know I'm a judge and I'm approving her authority to do this.'

I said 'Yeah that kind of comes across like you're a jerk, though.'

One judge was horrible: 'Well, if you can't keep your knees together you have to take the jackpot consequences.'

We brought some judicial complaints against some judges, and they were informally resolved, so those judges just stopped hearing the cases. But by and large the judges have been respectful, they ask appropriate questions, they kept the hearings to a minimum. And yet, it's still traumatic for these young women.

Update 8/3/22: This story has been updated to specify the number of states that have required parental involvement for minors seeking an abortion.

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