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Children, Families, Health, and Human Services Interim Committee

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**DRAFT** FINAL REPORT TO THE 68<sup>TH</sup> MONTANA LEGISLATURE

*[Text in italics indicates material added since the Committee's initial review of the draft report in June 2022.]*

# CPS STUDIES: HJR 44, HJR 45, AND HB 39

This report is a summary of the work of the Children, Families, Health, and Human Services Interim Committee on three child protective services studies assigned to the Committee during the 2021-2022 interim as outlined in the Committee's work plan and House Joint Resolution 44, House Joint Resolution 45, and House Bill 39. This report highlights key information presented during the interim and the decisions made by the Committee. Members received additional information and public testimony on the study topics. To review that information, including audio minutes and exhibits, visit the Committee's website, [www.leg.mt.gov/cfhhs](http://www.leg.mt.gov/cfhhs), and pages specific to each study:

- [HJR 44 Study](#): Foster Care System
- [HJR 45 Study](#): Child Removal and Family Reunification Triggers
- [HB 39 Study](#): Judicial Pilot Projects



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# CPS STUDIES: HJR 44, HJR 45, AND HB 39

## INTRODUCTION

In the past decade, more than 2,000 children a year have been living in foster care, kinship care, or another out-of-home placement. The high [number of child removals and out-of-home placements](#) has prompted concern on many fronts over the years, resulting in review by [a gubernatorial commission](#) and a [legislative audit](#), a [cross-branch project](#) attempting to analyze child welfare services, formation of groups that strongly advocate for families involved in that system, and multiple studies by interim committees of the Legislature.

As concerns mounted in recent years, the 2019 Legislature passed [two studies](#) that were carried out in the 2019-2020 interim, looking at ways to support families involved in the child protective services (CPS) system and at the effect of increased CPS caseloads on law enforcement and the courts.

Legislative interest continued in the 2021 session, when lawmakers approved review of the following aspects of the CPS system:

- the factors that lead to a child’s removal from the home and the reunification of families after removal occurs (House Joint Resolution 45);
- the family foster care system, where many children who are removed from the home are placed until a permanent placement is determined (HJR 44); and
- the use of two new court procedures designed to improve handling of abuse and neglect cases (House Bill 39).

The HB 39 review actually stemmed from the 2019-2020 interim studies, when the Children, Families, Health, and Human Services Committee (Committee) proposed continued review of judicial pilot projects it had learned about during that interim.

This interim, the Legislative Council assigned all three CPS studies approved in 2021 to the Committee.

## Recommendations

Based on its work over the interim, the Committee approved the following bills for introduction as **Committee bills in the 2023 legislative session:**

- ***LC 161, to implement the recommendations of the HB 39 Working Group, including recommendations to institute prehearing conferences statewide, remove the prohibition on using 5-day hearings in cases subject to the Indian Child Welfare Act, and make other changes related to wider use of those hearings; and***
- ***[Insert information on any additional decisions made in August]***

***\*All bills can be followed in the [legislative bill-tracking system](#) before and during the session using their LC numbers. Actual House or Senate bill numbers will be assigned when the bill is introduced.***

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## HB 39: EVALUATING NEW COURT PROCEDURES

House Bill 39 set a very specific task for the Committee early in the interim: review the preliminary results of two pilot projects being carried out in a few district courts, determine whether the results were promising, and if so, appoint a working group to evaluate potential expansion of the efforts.

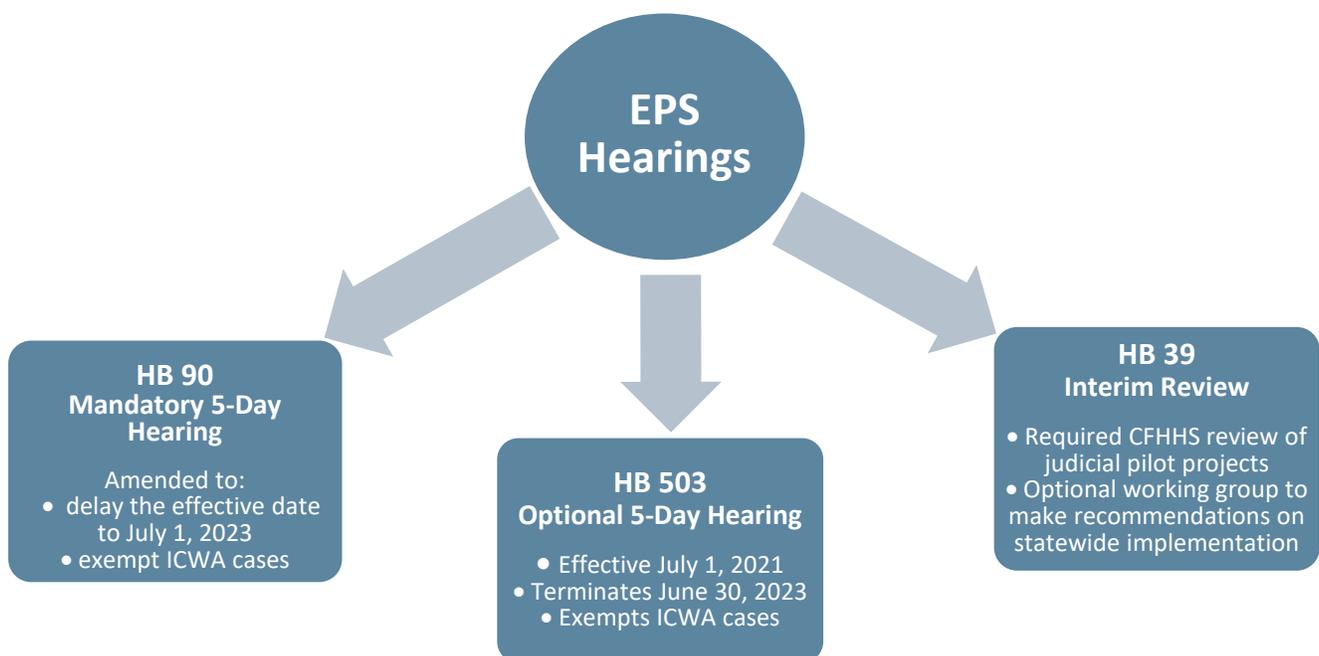
The pilot projects involved:

- prehearing conferences, or PHCs, in which all parties to a child abuse and neglect case attend a facilitated meeting before the first court hearing so they can discuss visitation guidelines, placement options for the child, and treatment needs for the family; and
- early hearings that brought parents into court sooner for consideration of whether removal and out-of-home placement were needed.

The Committee reviewed pilot project data at its September 2021 meeting and agreed to appoint a working group of stakeholders. HB 39 directed that group to:

- determine whether elements of the programs could be replicated elsewhere in the state; and
- make recommendations to the Committee on legislation, funding, or other items needed to expand the pilot projects.

The working group's efforts were affected to some degree by two other bills passed in 2021 relating to a new emergency protective services (EPS) hearing that's held within 5 days of a child's removal from the home. The graphic below illustrates how the three bills interacted.



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House Bill 90 grew out of the CPS study conducted by the Children, Families, Health, and Human Services Interim Committee during the 2019-2020 interim and was co-sponsored by the State Tribal Relations Committee. During that interim, the State Tribal Relations Committee looked at ways to improve communication between the tribes and the state to address the high number of Indian children in the CPS system.

As introduced, HB 90 required all judicial districts to implement EPS hearings in 2021. However, it was amended during the session to delay the effective date to July 1, 2023. Meanwhile, the Legislature also passed HB 503, requiring a court to hold an EPS hearing *only* if requested by a parent. That bill went into effect July 1, 2021, and will terminate on June 30, 2023, when the hearings become mandatory for all cases.

Passage of HB 503 in 2021 gave working group members real-time information on the benefits and challenges of emergency protective services hearings.

Because the optional 5-day hearings were starting to be held as the working group began its review, members heard from numerous stakeholders about which aspects of the hearings were working well and which were not. Those perspectives – expressed by district judges, county attorneys, public defenders, the Child and Family Services Division, court-appointed special advocates, PHC facilitators, and advocates for parents – provided the group with ample food for thought. Members heard not only about the benefits of the EPS hearings and the PHCs, but also about obstacles that people were experiencing in putting the new hearings into practice.

### Findings and Recommendations: Retain, Refine, and Finance

The working group met four times between October 2021 and March 2022. At their final meeting, members approved a set of [findings and recommendations](#) for the Committee.

Among other things, the findings noted that:

- the quick timeframe for EPS hearings and PHCs encourage a higher level of parent engagement in court proceedings and activities needed for reunification to occur;
- the EPS hearing strengthens the protections provided to Indian children under the Indian Child Welfare Act (ICWA) and does not violate the federal law's timelines for notice to parents and tribes;
- parents may need follow-up contact from their caseworker and/or clearer instructions at the time of removal to make sure they fully understand the purposes and opportunities of the EPS hearing;
- the state public defender system is stretched thin and has not always had attorneys present at EPS hearings; and

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- counties are concerned that PHCs could become an unfunded mandate.

The working group recommended that the Committee:

- introduce legislation to strengthen and clarify the laws relating to PHCs and EPS hearings;
- continue the 5-day timeframe for EPS hearings unless further legal research showed that the timeframe may not meet constitutional standards; and
- hear more information on the question of whether all children should be appointed legal representation for an EPS hearing and then decide whether the current statutory requirement needs to be changed.

*The Committee did not pursue the third recommendation. However, members did consider LC 161 and approved the bill for introduction in the 2023 Legislature. The bill would:*

- *continue the 5-day time frame for EPS hearings;*
- *require all judicial districts to offer prehearing conferences;*
- *remove the prohibition on using EPS hearings in cases subject to the Indian Child Welfare Act;*
- *require the Department of Public Health and Human Services (DPHHS) to share certain information regarding removals with the Office of State Public Defender (OPD) more quickly;*
- *clarify that a support person may be present at EPS hearings and other meetings involving caseworkers, regardless of whether the meeting is held in person or by electronic means; and*
- *appropriate funding to carry out PHCs statewide and shore up OPD resources for child abuse and neglect cases.*

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### HJR 45: REVIEWING REMOVAL AND REUNIFICATION CRITERIA

The decision to remove a child from a home where abuse or neglect is imminent or is actually occurring and to return that child to the home when the danger has passed involves numerous procedures and a balancing of interests and rights. The parties involved must consider both a parent's constitutional right to parent a child and the state's interest – as expressed in Montana law – in protecting children whose safety is at risk because of actions by the people responsible for their care.

Even when the state must step in to protect a child, state law expresses the intent that the protection be provided "whenever possible while preserving the unity and welfare of the family."

HJR 45 asked the Committee to look at the factors that influence a child's removal from the home and that lead to reunification of families after a child has been removed. Those factors come into play as soon as DPHHS receives a report of suspected abuse or neglect.

Decisions regarding removal of a child from the home involve numerous considerations and concerns.

#### Elements of the Process

To lay the groundwork for determining whether changes are needed to the removal or reunification criteria, the Committee first learned about how DPHHS and the courts handle abuse and neglect cases.

#### The Assessment Process

The Committee received [an in-depth overview](#) of the way in which DPHHS reviews reports of suspected child abuse and neglect, investigates allegations of concern, and decides whether removal is warranted.

Each report is evaluated to determine whether it should be investigated and is assigned a priority level based on that evaluation. A Priority One designation indicates a child is believed to be in [immediate danger](#) or at substantial risk of abuse or neglect. For those reports, a caseworker must contact the child within 24 hours of the report. A Priority Two report indicates an impending state of danger of abuse or neglect and must be investigated within 72 hours. A Priority Three report indicates a lower risk of harm and requires a response within 10 days.

Depending on the results of the caseworker's investigation, a child may:

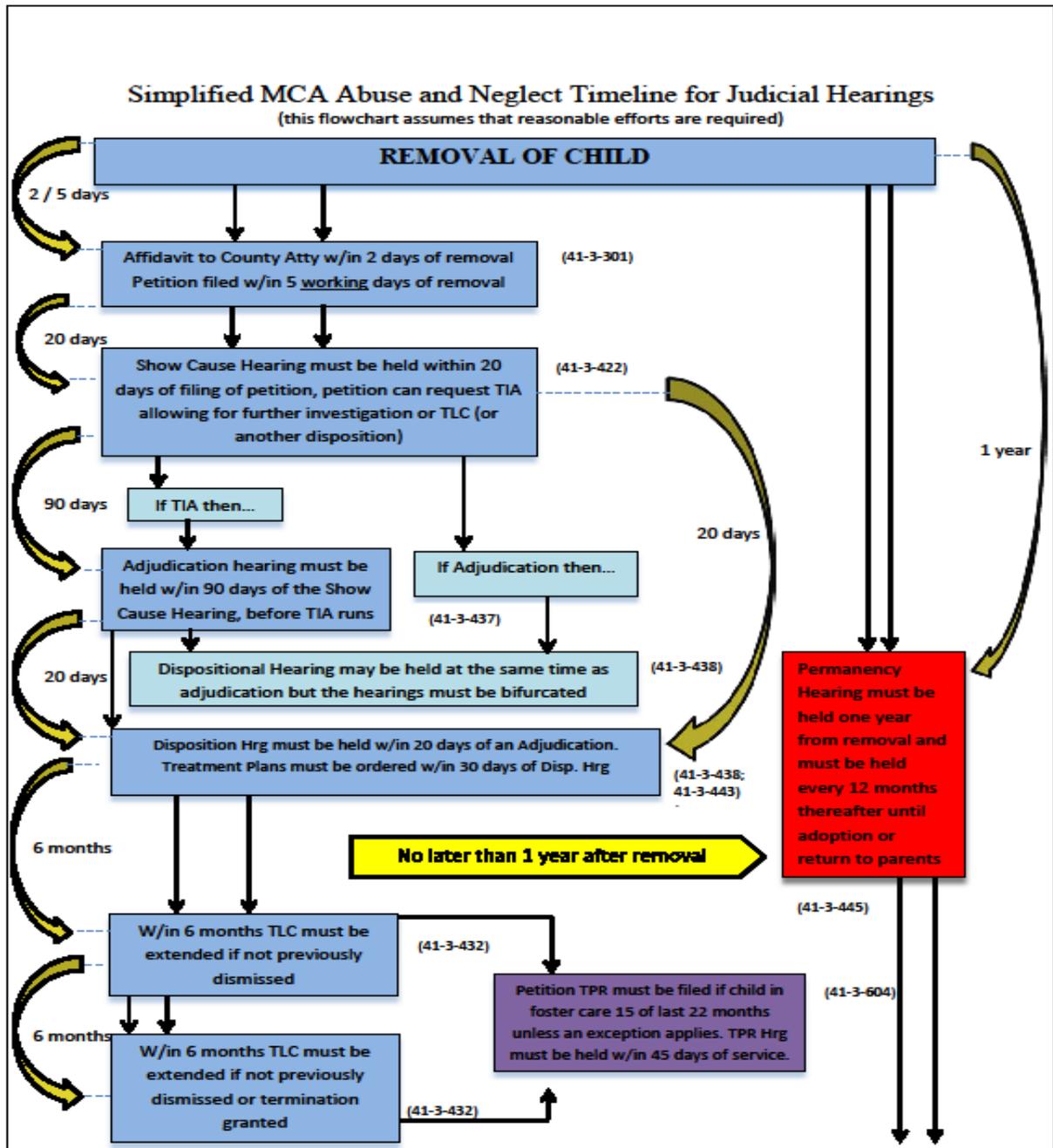
- be removed if immediate danger is believed to exist; or
- remain in the home if the caseworker and family can develop a plan that ensures the child's safety.

The state may also file an abuse or neglect petition in court seeking further authority for the department to investigate. If the child is removed, the petition could seek continued out-of-home placement for the child.

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## The Judicial Process

The removal of a child sets off a series of events in the judicial system to determine whether removal should continue, whether the family needs services and what services are needed, and whether the family is able to be safely reunified or whether the child needs to be placed in a different long-term living situation. The graphic below illustrates the steps and timelines in that process.



Source: Karen Kane, Supervising Attorney, Child Protection Unit, Montana Department of Justice

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At each step of the judicial process, the court must consider the evidence and make decisions related to removal, treatment, and reunification, along with other matters related to the case. [Those steps](#) and [the legal standards of proof required](#) in each instance are generally outlined in state law.

### Final Disposition of Case

The goal of all abuse and neglect cases is to provide permanency for the child. Permanency can be achieved through:

- reunification with the parent or parents, if the conditions established for return of the child are met and the court believes the child will be safe in the home;
- adoption, which can occur only after parental rights have been terminated;
- guardianship, which can occur without termination of parental rights; or
- exit from the foster care system because of the child's age.

### Supporting Children and Parents

*Committee members explored other ideas related to supporting parents and children who become involved in the child welfare system. They heard about the importance of removing children only when the danger of allowing them to remain in the home outweighs the trauma that could be caused by removal.*

*Speakers discussed the physical and emotional effects of removal on children. They also noted that research shows children who have been placed in foster care have worse outcomes in terms of education, employment, homelessness, mental health, and involvement in the criminal justice system. The Committee also learned about laws in other states that:*

- *require judges to consider the harm of removal when making decisions on whether a child needs to be placed outside of the home; and*
- *allow parents to request a jury trial when a case has proceeded to the point where the state is seeking to terminate parental rights.*

### Recommendations

Throughout the interim, Committee members sought to better understand the factors that trigger removal of children and to reconcile the state's current processes with:

- the right of parents to make decisions regarding their child's care, custody and control;
- federal court rulings in cases from other states; and
- Montana Supreme Court rulings involving state cases.

*During their May meeting, members reviewed information about a [Hawaii U.S. District Court ruling](#) and a [4<sup>th</sup> U.S. Circuit Court of Appeals ruling](#) related to the speed of judicial review of removals, as well as a [9<sup>th</sup>](#)*

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*U.S. Circuit Court of Appeals ruling on warrantless removals of a child from the home. They also heard about two Montana Supreme Court cases – a 1994 ruling and a 2015 ruling – in which the court decided against dismissing cases based on the state's failure to meet statutory timeframes for hearings. In those cases, the court ruled that the delays did not substantively affect the due process rights of the parents and that the lower courts correctly found that returning the children because of the procedural delays was not in the best interests of the children involved.*

*At its final three meetings, the Committee worked on a bill draft to change areas of Montana's abuse and neglect statutes to more closely conform with provisions in the federal court rulings. The bill draft:*

- requires a caseworker to obtain a warrant before removing a child from the home in all cases except those where the child may suffer serious bodily injury or sexual abuse before a warrant can be obtained;*
- requires law enforcement to assist with removals in which a warrant is not obtained;*
- requires an emergency protective services hearing to be held within 72 hours of a child's removal from the home;*
- requires a child abuse and neglect petition to be filed within 72 hours of the child's removal;*
- requires that all children be represented by an attorney at any court proceeding in their case;*  
*and*
- changes the criteria for dismissal of a child abuse and neglect case.*

*[Insert final action and LC number after the August meeting]*

### Reconciling the Differences in the EPS Hearing Timeframes

The bill draft developed from the HB 39 Working Group recommendations and the bill from the HJR 45 study will go to the Legislature proposing two different time frames for the EPS hearing. LC 161 does not change the 5-day timeframe in current law, while HJR 45-1v3 would shorten the time period to 72 hours.

The Committee decided to advance the bills with different timeframes after determining that a conflict does not exist between the two bills. Although both bills propose changes to the same section of law (41-3-306, MCA) only one bill – HJR 45-1v3 – proposes a change to the timeframe in that section of law. LC 161 makes a different change to 41-3-306; it removes the prohibition on using EPS hearings in cases subject to the Indian Child Welfare Act (ICWA).

Many bills approved by the Legislature amend the same sections of law. But unless they amend the same provision of a statute in different ways, they don't actually conflict. Therefore, no conflict exists between LC 161 and HJR 45-1v3. If both bills pass, the Legislature will have expressed its intent to reduce the 5-day EPS hearing timeframe to 72 hours while also allowing EPS hearings in ICWA cases.

## HJR 44: FOSTER CARE SYSTEM

[House Joint Resolution 44](#) requested an interim study of Montana’s foster care system. The Children, Families, Health and Human Services Interim Committee began this study in March 2022.

Montana’s foster care system is primarily funded by [Title IV-E of the Social Security Act](#), which provided \$33 million in FY 2021. Title IV-E funds cover about 65% of eligible foster care costs for nontribal children and 83% of the costs for eligible tribal children who are being served by state social services. Other sources of funding include Title IV-B of the Social Security Act and the Child Abuse Prevention and Treatment Act (CAPTA).

To become a licensed foster care provider, foster parents must be 18 years of age and meet a short list of basic requirements, including good physical and mental health. Prospective foster parents undergo a fingerprint background check and submit paperwork, including personal health and financial statements and immunization records for household children under the age of 12. After the department determines they are eligible for licensure, foster parents complete 18 hours of training, a family assessment, and a home assessment. It is rare that a prospective foster parent “fails” at the home assessment stage – instead, the department helps families meet home safety and health requirements.

### Voices from the Field: Foster Parents Speak Out

At its May 2022 meeting, the Committee heard from foster parents about the difficulties that foster parents can face, including challenges that make it difficult to remain as foster parents. One speaker asserted that she does not feel there are barriers to licensure itself, as the thorough departmental requirements are there to ensure the welfare of children. Another speaker was concerned about the time it takes to become licensed – he said it took he and his wife over a year to become licensed, receiving little communication in between each step. He also voiced concerns about the security of questionnaire answers used for the family assessment.

The speakers noted that there is not ongoing training or support from the department for most foster families. Foster care reimbursements do not cover all of a child’s costs, which is a barrier for many middle-income and low-income foster families. Montana’s decrease in childcare availability is a challenge for foster parents, especially those who take emergency placements.

Retention data for Montana’s foster families is not available. However, increased support – including training for foster parents, counseling for foster youth, and additional compensation – are associated with improved retention rates in other states.

HJR 44 Meeting Materials

[Key Federal Funding Sources](#) (staff briefing paper)

[Becoming a Foster Parent](#) (staff briefing paper)

[Foster Parent Retention](#) (background information from the National Conference of State Legislatures)

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## APPENDIX A:

### HB 39 WORKING GROUP MEMBERS

House Bill 39 required the Children, Families, Health, and Human Services Interim Committee to create a working group of at least 10 people if Committee members believed the results of two judicial pilot projects for child abuse and neglect cases held promise. The Committee approved creation of the working group on September 22, 2021.

HB 39 specified the makeup of the working group to ensure representation of the various parties involved in child abuse and neglect proceedings and to include at least two members from rural areas of the state. The Committee's presiding officer, Representative Ed Stafman, appointed the following working group members based on nominations from agencies or associations involved with the entities required by HB 39 to be represented on the working group.

Member	Entity Represented	City/Town	Rural
Rep. Dennis Lenz Presiding Officer	Children, Families, Health, and Human Services Interim Committee	Billings	
Rep. Danny Tenenbaum Vice Presiding Officer	Children, Families, Health, and Human Services Interim Committee	Missoula	
Jessica Fehr	District Judge	Billings	
Kelsie Harwood	County Attorneys	Chinook	x
Eric Barnosky	Department of Public Health and Human Services	Helena	
Brian Smith	Office of State Public Defender	Helena	
Tom Billteen	Court Improvement Program	Helena	
Kiersta Sullivan	Court-Appointed Special Advocates	Conrad	x
Matt Furlong	Public Member	Helena	
Eldena Bear Don't Walk	ICWA Experience	Billings	

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## APPENDIX B: CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES INTERIM COMMITTEE MEMBERS

Before the close of each legislative session, the House and Senate leadership appoint lawmakers to interim committees. Members of the Children, Families, Health, and Human Services Interim Committee serve one 20-month term. Members who are re-elected to the Legislature, subject to overall term limits and if appointed, may serve again on an interim committee. This information is included in order to comply with 2-15-155, MCA.

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