



CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES INTERIM COMMITTEE

67th Montana Legislature

SENATE MEMBERS

Chris Friedel
Jen Gross
Theresa Manzella
Mary McNally

HOUSE MEMBERS

Mary Caferro
Jennifer Carlson
Jane Gillette
Dennis Lenz
Ed Stafman
Danny Tenenbaum

COMMITTEE STAFF

Fong Hom - Secretary
Sue O'Connell - Research Analyst
Alexis Sandru - Attorney

MINUTES LOG

HB 39 Working Group

March 2, 2022

Room 455/Zoom, Capitol Building
Helena, Montana

Please note: This document is a Minutes Log and provides annotation of the time elapsed between the beginning of the meeting and the time at which the item was presented or discussed, a motion was made, or a vote was taken. The narrative presented here is provided only as a guide to the audio or video recording of the meeting. The official discussion, motion, or vote is available on the audio or video archive of this meeting. The Legislature does not prepare a transcript of the meeting activities. The time designation may be used to locate the referenced discussion on the audio or video recording of this meeting.

Access to an electronic copy of these minutes and the audio or video recording is provided from the Legislative Branch home page at <https://leg.mt.gov>. From the home page, select the "Committees" drop down menu at the top, then select Administrative or Interim, and the appropriate committee. The written minutes log can be located by expanding the accordion menu for the date of the meeting. Links to the audio/video files can be located by selecting the Video/Audio button on the same page, then the "past/current recordings" button. From there, use the calendar to select the date of the meeting you wish to view/listen to. The written Minutes Log, along with links to the audio and video recordings, is listed by meeting date on the interim committee's web page. Each of the Exhibits is linked and can be viewed by clicking on the Exhibit of interest. All Exhibits are public information and may be printed. Please contact the Legislative Services Division at 406-444-3064 for more information.

MEMBERS PRESENT:

Rep. Dennis Lenz, Chair
Rep. Danny Tenenbaum (*Zoom*)
Judge Fehr (*Zoom*)
Ms. Harwood
Mr. Barnosky
Mr. Smith
Mr. Billteen
Ms. Sullivan
Mr. Furlong
Ms. Bear Don't Walk (*Zoom*)

STAFF PRESENT:

Sue O'Connell, Research Analyst
Fong Hom, Secretary

AGENDA (Attachment 1)

VISITORS' LIST

COMMITTEE ACTION

CALL TO ORDER/ROLL CALL

- 10:04:26 Rep. Lenz called the meeting to order at 10:04 a.m. The committee secretary called roll. **(Attachment 3)**
- 10:09:54 Rep. Lenz gave opening remarks.

FOLLOW UP ITEMS FROM PREVIOUS MEETING

- 10:11:06 Sue O'Connell, Research Analyst, referred the working group to the following documents: Revised Draft Findings **(Exhibit 1)** and Draft Recommendations for Discussion **(Exhibit 2)**.
- 10:12:58 Rep. Lenz commented on the two documents.

Potential Cost of Expanding the Use of PHCs and EPS Hearings

- 10:15:20 Beth McLaughlin, Supreme Court Administrator, presented the estimated costs of a statewide prehearing conference program. **(Exhibit 3)**
- 10:22:43 Brian Smith, Administrator, Office of the State Public Defender, discussed the challenges of assigning counsel to the Emergency Protective Services (EPS) hearings and the costs.

Questions from the Work Group

- 10:27:44 Rep. Lenz asked Ms. McLaughlin about the intent to not put funding for expansion of Prehearing Conferences (PHCs) within the budget.
- 10:29:53 Rep. Lenz asked Ms. McLaughlin about PHCs not being defined in law.
- 10:31:27 Judge Fehr asked Mr. Smith about the lack of public defenders representing parents in child abuse and neglect cases.
- 10:36:31 Rep. Tenenbaum commented on Mr. Smith's testimony.

ADDITIONAL STAKEHOLDER EXPERIENCES WITH PHCs AND EPS HEARINGS

Office of the State Public Defender

- 10:39:11 Kelli Sather, Deputy Public Defender, Missoula
- 10:47:59 Brigette Menard-Carneal, Public Defender Managing Attorney , Bozeman
- 10:53:03 Nathan Prohaska, Public Defender, Great Falls
- 10:56:16 Emily Lamson, Public Defender, Kalispell

Pre-Hearing Conference Facilitators

- 11:00:09 Gabby Weber, Facilitator, Yellowstone County

- 11:08:56 Lisa Leckie, Facilitator, Lewis and Clark, Silver Bow, Madison, and Beaverhead and Cascade counties
- 11:16:13 Christina Larsen, Flathead County
- 11:19:16 John Guinn, Special Projects Coordinator, Center for Children, Families, and Workforce Development, University of Montana

Work Group Questions and Discussion

- 11:21:29 Rep. Tenenbaum asked Ms. Menard-Carneal about parents choosing not to participate in PHCs. It was noted that Ms. Menard-Carneal had left the meeting.
- 11:21:35 Mr. Prohaska responded.
- 11:23:32 Mr. Furlong asked how reasonable efforts are viewed within the PHCs. Mr. Guinn and Ms. Lamson responded.
- 11:25:38 Mr. Furlong asked Mr. Smith about the standard of practice of when an attorney is supposed to have an initial contact with their client.
- 11:27:29 Mr. Billteen asked Ms. Sather about the pilot project in Missoula County. He also asked about the standing masters in Missoula.
- 11:30:15 Rep. Lenz asked Ms. Leckie to comment on PHCs happening after the initial hearing.
- 11:35:40 Rep. Tenenbaum asked Mr. Smith about the importance for parents' attorneys to meet with the clients as early as possible and whether the Legislature can encourage that practice.
- 11:35:47 Mr. Smith, Ms. Sather, and Ms. Leckie responded.
- 11:41:39 Rep. Lenz commented on Mr. Prohaska's presentation.

UPDATE: EPS HEARINGS IN THE FIFTH JUDICIAL DISTRICT

- 11:43:11 District Judge Luke Berger gave an update on what has happened in the 5th Judicial District relating to PHCs and EPS hearings.

Work Group Questions and Discussion

- 11:52:21 Rep. Lenz asked Judge Berger about his statement that the hearings are never held later than 8 days after removal and whether that involves 8 continuous days or business days..
- 11:55:52 Rep. Lenz asked Judge Berger for his thoughts on why the term "hearings" are so well defined in the judicial community while the term "prehearing conferences" are not.
- 11:59:33 Ms. Harwood asked Judge Berger about the statute requiring an EPS hearing within 5 business days.
- 12:02:58 Rep. Tenenbaum asked Judge Berger about constitutional requirements related to the length of time that can elapse between a child's removal and the initial hearing on the removal.
- 12:05:33 Rep. Tenenbaum asked Ms. O'Connell if that question could be answered about the constitutionality of the delay.

- 12:06:38 Rep. Lenz said that in practice, the removal date doesn't count towards the 5-day limit for an EPS hearing.
- 12:10:40 Mr. Furlong asked Judge Berger about any potential room for his court to hold additional EPS hearings during the week.

LEGAL REPRESENTATION OF CHILDREN IN EPS HEARINGS

- 12:15:31 Karen Kane, Assistant Attorney General, Child Protection Unit, addressed a concern in regard to the interaction between SB 400 and EPS hearings as contemplated. She reviewed Ms. Sandru's memo regarding SB 400 and reviewed a segment of video timestamped beginning at 12:00:29 of the prior working group meeting where Mr. Furlong raised a question about this matter. After reviewing the memo, she agreed with the information in Ms. Sandru's memo.

Work Group Questions and Discussion

- 12:22:15 Mr. Furlong commented that it would be beneficial if statutes clearly stated when decisions must be made in collaboration with the parent.

LUNCH (reconvened at 1:31 p.m.)

REVISIONS TO DRAFT PROPOSED FINDINGS

Overview of Changes

- 13:33:00 Rep. Lenz gave opening remarks and referred the working group to the briefing paper HB 39: Judicial Pilot Projects Revised Draft Findings (**Exhibit 2**)

Revised Draft Findings Discussions

This section reflects the decisions on whether each finding was adopted, revised, or not adopted.

- 13:34:24 **Bullet 1:** Because the EPS hearing held after a child's removal, parents are more likely to engage in court proceedings.
- 13:40:42 **Bullet 2:** Evidence from the state's judicial districts shows that EPS hearings have been more successful in pilot project judicial districts.
- 13:48:39 **Bullet 3:** Although the EPS statute exempts cases subject to the Indian Child Welfare Act (ICWA) from the requirement for an EPS hearing, some courts have concluded that ICWA's exception for emergency proceedings means hearings do not violate federal law's timelines for notice.
- 13:56:59 **Bullet 4:** The combination of prehearing conferences and EPS hearings has often made show cause hearings more productive.
- 14:00:05 **Bullet 5:** PHCs and EPS hearings may reduce the number of contested show cause hearings.
- 14:01:57 **Bullet 6:** Videoconferencing technology has worked well for both PHCs and EPS hearings.
- 14:07:21 **Bullet 7:** Parents may need follow-up contact from their caseworker and/or clearer instructions from DPHHS at the time of removal.

- 14:33:21 **Bullet 8:** In some counties with high abuse and neglect caseloads, will likely create a backlog of other civil cases because, by law, child abuse and neglect cases must be given priority over other cases.
- 14:34:41 **Bullet 9:** The state public defender system is stretched thin for both criminal and civil cases.
- 14:35:48 **Bullet 10:** Confusion exists among the various parties involved in EPS hearings as to the logistics of scheduling and carrying out those hearings and about the purpose of the hearings..
- 14:36:37 **Bullet 11:** Counties are concerned that EPS hearings could become an unfunded mandate.

DRAFT PROPOSED RECOMMENDATIONS

- 14:41:39 Rep. Lenz discussed how the committee will approach this agenda item.

GENERAL PUBLIC COMMENT

- 14:46:13 Denise Johnson, Communication Director, Montana Child Protection Alliance, extended her gratitude for the working group's work on this topic.
- 14:52:23 Josh Butterfly commented on individuals falling through the cracks in the system.

WORK SESSION

Discussion and Action on Recommendations

- 15:03:18 **Recommendation No. 1** Should EPS hearings be held within the same timeframe in every judicial district, regardless of whether the district has multiple counties or multiple judges.
- 15:23:59 Rep. Lenz said that without objection, the working group will move forward with Option 1: maintain a uniform timeframe for all judicial districts.
- 15:24:33 **Recommendation No. 2** Should EPS hearings continue to be held within 5 business days of a child's removal from the home.
Motion: Rep. Tenenbaum moved to change it to 48 hours based on the Hollingsworth court decision and what the surrounding states have done.
Motion withdrawn.
Motion: Continue the 5-day timeframe in the bill draft that is presented to the committee and make a separate recommendation that the committee look at any legal analysis that has been done on whether that timeframe meets constitutional standards.
Discussion: Ms. O'Connell explained the wording of the motion. Ms. Harwood said she would support the second recommendation of the additional review but will object to Option 1 as listed. Ms. Sullivan agreed with Ms. Harwood.
Vote: With objection from Ms. Harwood and Ms. Sullivan, the working group went with Option 1 in Recommendation No. 2.
- 15:40:55 **Recommendation No. 3** Should the requirement for an EPS hearing apply to cases subject to the Indian Child Welfare Act (ICWA).

Discussion: Ms. Bear Don't Walk liked Option 2: Remove the prohibition on use of EPS hearings in ICWA cases. Ms. O'Connell and Ms. Bear Don't Walk with work together to come up with additional language in Option 2.

Motion: The working group asked for a vote on whether it wanted to go with Option 1, Option 2, or nay to both options.

Roll Call Vote: Rep. Tenenbaum, Judge Fehr, Ms. Harwood, Mr. Barnosky, Mr. Smith, Mr. Billteen, Ms. Sullivan, Mr. Furlong, Ms. Bear Don't Walk, and Rep. Lenz voted for Option 2.

15:49:40 **Recommendation No. 4** Should legal representation be required for all children during the EPS hearings.

Discussion: Rep. Lenz discussed leaving No. 4 as is. Ms. O'Connell said that if the working group doesn't take action on this recommendation, the law still has the requirement. Rep. Lenz decided to set No. 4 aside.

16:04:09 **Recommendation No. 5** Should a CASA or GAL be appointed for each child involved in an EPS hearing.

Discussion: Mr. Smith said that as in No. 4, it should indicate an attorney or a GAL, and No. 5 should be CASA. Rep. Lenz decided to set No. 5 aside.

16:05:18 **Recommendation No. 6** Should the law be changed to explicitly state that a support person is allowed at an EPS hearing.

Motion: Mr. Furlong moved that a support person be allowed in a court proceeding in an EPS hearing.

Discussion: Mr. Billteen asked if a support person defined in statute.

Vote: Without objection, Rep. Lenz moved Recommendation No. 6 forward.

16:07:54 **Recommendation No. 7** Should the procedures for notifying public defenders of a child's removal and the need for an EPS hearing be clarified in statute.

Discussion: Mr. Smith supports both options.

Motion: It was moved to combine Option 1 with Option 2, to provide the Office of State Public Defender with the notification form and with the affidavit at the same time it is provided to the parents.

Vote: Recommendation No. 7 passed with Judge Fehr objecting.

16:26:51 **Recommendation No. 8** Should the procedure for notifying the clerk of court of a child's removal and the need for an EPS hearing be clarified in statute.

Discussion: Rep. Tenenbaum supported Option 1. Mr. Smith and Ms. Harwood have concerns on how Option 1 would work. Mr. Billteen supported Option 2.

Vote: Without objection, Recommendation No. 8 will move forward with Option 2, no change to the law.

16:32:26 **Recommendation No. 9** Does the statute allowing abuse and neglect hearings to be held by electronic means need to be changed.

Discussion: Judge Fehr said that having remote hearings should be an option.

Motion: Mr. Smith moved to amend Option 1 to say, if requested by the party, the EPS hearing be held electronically.

Discussion on Motion: Mr. Furlong asked if Option 1 would cover a parent's request to have their hearing in person.

Vote: Without objection, Recommendation No. 9 will move forward with Option 2, no change to the law.

16:40:39 **Recommendation No. 10** Should the language from HB 499 (2021) regarding reasonable efforts, or a reference to that requirement, be added to the EPS statutes.

Discussion: Mr. Furlong is in favor of Option 1. Ms. Bear Don't Walk would hate to diminish ICWA by establishing a reasonable effort baseline as opposed to an active effort baseline for not removing children.

Motion: Mr. Furlong moved to utilize Option 2 and make no changes to current law.

Vote: Without objection, Recommendation No. 10 will move forward utilizing Option 2, no changes to the law.

16:47:21 **Recommendation No. 11** Should parents be allowed to waive an EPS hearing.

Discussion: Mr. Furlong disagreed with Option 2. Ms. Harwood supports position that a parent should be able to waive a hearing if they don't think it's in theirs or the child's best interest. Mr. Smith said people would support no change in the law.

Motion: Rep. Tenenbaum would leave Recommendation No. 11 as is.

Vote: Without objection, Recommendation No. 11 is left as is.

16:54:38 **Recommendation No. 12** Should PHCs be required in all judicial districts.

Discussion: Mr. Billteen asked if the PHCs would be made available for all judicial districts but not mandated if parents don't want to participate. Rep. Lenz would require the option of PHCs in all judicial districts.

Motion: Require the option of PHCs in all judicial districts.

Vote: Without objection, Recommendation No. 12 moves forward with Option 1.

16:57:18 **Recommendation No. 13** Should the Legislature appropriate funding to offset the costs of more widespread use of PHCs and EPS hearings.

Discussion: Mr. Smith said everyone supports Option 1. Is there a way to make Option 2 to consider encouraging paying contract attorneys. Mr. Furlong would like to consider all three options. Ms. O'Connell discussed what she would put in the bill draft.

Motion: Mr. Furlong moved to put No. 13 as a recommendation but leave the line items open.

Vote: Without objection, Recommendation No. 13 will move forward.

17:07:16 **On Recommendation No. 4 and Recommendation No. 5**, Rep. Lenz said that there needs to be a definition for prehearing conferences and maybe for posthearing conferences.

Discussion: Ms. Harwood said that if not able to define it, just using those requirements of what is discussed at those conferences because they are open to interpretation but having those specific items in which are discussed, that could help define it. Mr. Furlong said that we define prehearing conferences within the scope of our pilot project. Rep. Lenz asked if they should move it forward or set it aside and leave it as is.

Motion on No. 4: Mr. Smith moved for Option 3, no change in the law on Recommendation No. 4.

Vote: Without objection, Recommendation No. 4 will move forward with no change to the law.

Motion on No. 5: Mr. Smith moved for Option 2, no change to the law in Recommendation No. 5.

Vote: Without objection, Recommendation No. 5 will move forward with Option 2, no change to the law.

Discussion and Action on Findings

17:18:32 Rep. Lenz summarized the discussion on the findings. The working group will see the draft bill that goes before the committee.

17:19:28 Rep. Lenz said he appreciates the good work done by the HB 39 Working Group.

ADJOURNMENT

17:21:19 Rep. Lenz adjourned the meeting at 5:21 p.m.