

# HB 39: JUDICIAL PILOT PROJECTS

## DRAFT RECOMMENDATIONS FOR DISCUSSION

### BACKGROUND AND PURPOSE

House Bill 39 created a working group to review and make recommendations on legislation, funding, or other items needed to successfully put two new practices into place for child abuse and neglect proceedings. The working group was charged with looking at the use of:

- prehearing conferences (PHCs) in select judicial districts that are holding the hearings as part of a pilot project; and
- emergency protective services (EPS) hearings in those districts and in other areas of the state where they've been used following passage of HB 503 in 2021. That bill made EPS hearings an option for any parent who wanted to request them.

EPS hearings are slated to become mandatory across the state on July 1, 2023, as required under HB 90 of the 2021 legislative session.

This briefing paper outlines potential recommendations the working group could present to the Children, Families, Health, and Human Services Interim Committee. ***It's important to note*** that these are draft recommendations, options, and reasons developed by staff based on working group discussions to date.

### POTENTIAL RECOMMENDATIONS

After considering the information received and discussed to date, the working group may want to make recommendations on some or all of the questions below and may want to refine or revise the reasons for any recommendations the group decides to make.

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?
  - a. **Background:** Working group members heard concerns from stakeholders in some judicial districts that a timeframe that works in an urban county with multiple judges may not work as well in multicounty judicial districts that cover large swaths of the state and have only one or two judges.
  - b. **Option 1:** Maintain a uniform timeframe for all judicial districts. Reason: Establishing different timeframes in different jurisdictions may create confusion for parents and others involved in the process and may result in different and unequal protections for children and parents, depending on where they live.

- c. **Option 2:** Recommend different timeframes based on the characteristics of the judicial district: Reason: It may be difficult for judges and others involved in the cases to be ready for a hearing within 5 days in multicounty judicial districts where judges must travel and where county attorney, public defender, and court-appointed special advocate (CASA) resources are limited.
2. Should EPS hearings continue to be held within 5 business days of a child's removal from the home?
  - a. **Background:** Working group members heard that some judicial districts may have trouble meeting the 5-day requirement because of the size of the district, the limited number of judges in a district, and/or the difficulty of bringing all parties together in such a short time period.
  - b. **Option 1:** Continue the 5-day timeframe. Reason: The timeframe does not include the day of removal, weekends, or holidays, so it provides enough time to notify parties, arrange for legal representation, and schedule the hearing.
  - c. **Option 2:** Extend the timeframe. Reason: Extending the time frame would ensure that it could be met in all judicial districts.
  - d. **Option 3:** Vary the time frame according to the characteristics of the judicial district. Reason: In multicounty judicial districts where judges must travel and where county attorney, public defender, and CASA resources are limited, it may be difficult for the various parties involved in the cases to be ready for a hearing within 5 days. Note: This option would be moot if the working group recommends that a uniform timeframe be maintained for all judicial districts.
3. Should the requirement for an EPS hearing apply to cases subject to the Indian Child Welfare Act (ICWA)?
  - a. **Background:** The 2021 legislation regarding EPS hearings exempted ICWA cases because of concerns raised during hearings on HB 90 and HB 503 that the short time period may violate ICWA's requirement for 10-day notice to parents and tribes.
  - b. **Option 1:** Remove the prohibition on the use of EPS hearings in ICWA cases. Reason: The working group heard that:
    - i. EPS hearings are considered an emergency proceeding for the purposes of ICWA and are not subject to the 10-day notice requirement;
    - ii. some courts have found the ICWA exception created by the 2021 Legislature is not valid and have ruled that parents of Indian children can request a 5-day hearing;
    - iii. other courts are denying requests for EPS hearings in cases involving Indian children because of the existing statutory language, leading to unequal treatment of Indian children across the state; and
    - iv. EPS hearings would enhance the protections that ICWA provides to Indian children and parents.
  - c. **Option 2:** Remove the prohibition on the use of EPS hearings in ICWA cases and explicitly state in statute that the hearings are an emergency proceeding for the purposes of ICWA. Reason: Additional language stating that EPS hearings qualify for ICWA's exemption for emergency proceedings would add clarity that the EPS statute doesn't conflict with ICWA requirements.

4. Should legal representation be required for all children during the EPS hearings?
  - a. **Background:** The new statute for EPS hearings (41-3-306, MCA) requires that each child have legal representation for the hearing. For other proceedings, a public defender is required only when a guardian ad litem (GAL) has not been appointed for a child.
  - b. **Option 1:** Keep the requirement for legal representation for each child. *Reason:* The requirement ensures the child's interests are represented.
  - c. **Option 2:** Allow the court to determine if the child needs legal representation. *Reason:* The Office of the State Public Defender (OPD) sometimes has trouble providing enough attorneys to represent all parties in an EPS hearing. In addition, some judges appoint public defenders only when the child is of a certain age or has expressed a preference that a CASA or GAL feels is not in the best interests of the child.
  
5. Should a CASA or GAL be appointed for each child involved in an EPS hearing?
  - a. **Background:** The working group heard that CASA resources in some areas of the state may not allow for a CASA to be available for each EPS hearing.
  - b. **Option 1:** Allow the court to determine whether a CASA should be appointed. *Reason:* CASA representation may not be available or necessary for EPS hearings, which have a different purpose than other court hearings that occur after a child abuse and neglect petition is filed with the court and that require appointment of a CASA or GAL.
  
6. Should the law be changed to explicitly state that a support person is allowed at an EPS hearing?
  - a. **Background:** State law allows a parent or guardian to have a support person present during any in-person meeting with a child protection specialist. Working group members heard that judges in pilot project counties are generally allowing parents to have a support person present at an EPS hearing even though the statutes don't specifically require that.
  - b. **Option 1:** Clarify that parents may have a support person present at EPS hearings. *Reason:* The change would ensure uniformity for all EPS proceedings.
  - c. **Option 2:** Make no changes to current law. *Reason:* Judges have generally interpreted current law to allow the presence of a support person at EPS hearings.
  
7. Should the procedures for notifying public defenders of a child's removal and the need for an EPS hearing be clarified in statute?
  - a. **Background:** Working group members heard that OPD may be able to hire contract attorneys for EPS hearings more easily and provide more effective representation at EPS hearings if more details about the abuse or neglect allegations were available to the office. They also heard that caseworkers and county attorneys may be reluctant to quickly share draft affidavits or petitions because the details may change before the documents are filed.
  - b. **Option 1:** Require the affidavit provided to parents within 2 days of a removal to be provided to OPD at the same time. *Reason:* Public defenders would receive the same information the parents are receiving and would be better prepared to represent the parent and allocate appropriate resources to the case.
  - c. **Option 2:** Require the Department of Public Health and Human Services (DPHHS) caseworker to provide OPD with a copy of the notification form that is provided to parents upon removal of a child. *Reason:* The form provides basic information about the reason the child was removed and would give the office an indication of the extent of resources that may be needed for the case, making it easier to assign staff resources or hire a contract attorney for the case.

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?
  - a. **Background:** Working group members heard that the optional EPS hearings have created some confusion because parents are requesting a hearing before a formal abuse and neglect case has been opened with the court and assigned a case number.
  - b. **Option 1:** Require DPHHS to create a case number for each notification form given to a parent and to provide that number to the clerk of court. *Reason:* Creating a DPHHS-level case number immediately would give all parties a common case number to use before an abuse and neglect petition is filed.
  - c. **Option 2:** Make no changes to current law. *Reason:* Under HB 90, the EPS hearings are scheduled to become mandatory – rather than optional – on July 1, 2023, and courts may want to develop their own processes for tracking the cases at that time.
  
9. Does the statute allowing abuse and neglect hearings to be held by electronic means need to be changed?
  - a. **Background:** Working group members discussed the use of Zoom in recent years and the ways in which it has made participation in abuse and neglect proceedings more accessible for parents and other parties. The EPS hearing statute allows the use of electronic means but courts may choose not to allow that format.
  - b. **Option 1:** Require that EPS hearings be held by electronic means unless the court determines, for good cause shown, that the parties must appear in person. *Reason:* The change would establish a uniform approach across the state and may make it easier for parents and other parties to appear for the hearings.
  - c. **Option 2:** Make no changes to current law. *Reason:* In-person hearings may be more productive, particularly if a judicial district is using a PHC in conjunction with the EPS hearings.
  
10. Should the language from HB 499 of 2021 regarding reasonable efforts, or a reference to that requirement, be added to the EPS statutes?
  - a. **Background:** Working group members were asked to consider whether the EPS statute should reference the reasonable efforts requirements of 41-3-423.
  - b. **Option 1:** Add a reference to 41-3-423 to the EPS hearing statute. *Reason:* The addition would make it clear that the reasonable efforts requirements of 41-3-423 apply to EPS hearings.
  - c. **Option 2:** Make no changes to current law. *Reason:* The law currently requires DPHHS to make reasonable efforts to prevent the need for removing a child from the home, and the EPS hearing statute applies only after a removal has occurred.
  
11. Should parents be allowed to waive an EPS hearing?
  - a. **Background:** Working group members heard that PHCs sometimes result in agreement among the parties on the most appropriate placement, visitation, and treatment options to be pursued. Under current law, the show cause hearing required for abuse and neglect cases may be waived if the parties stipulate to the waiver.
  - b. **Option 1:** Allow waiver of an EPS hearing if the parties stipulate to waiving the hearing. *Reason:* An EPS hearing may not be needed if the parties come to agreement on key issues during a PHC.
  - c. **Option 2:** Make no changes to the current law. *Reason:* The EPS hearing serves a different purpose than the show cause hearing and should not be waived.

12. Should PHCs be required in all judicial districts?
- a. **Background:** Working group members heard that prehearing conferences have led to higher parent engagement in court proceedings and treatment options and have made show cause hearings and other proceedings more productive.
  - b. **Option 1:** Require PHCs in all judicial districts. *Reason:* Initial data on PHCs shows they are resulting in higher parent engagement and quicker reunification of families.
  - c. **Option 2:** Make no changes to current law. *Reason:* Each judicial district should decide whether PHCs are necessary and if so, in what manner they should be carried out in that district.
13. Should the Legislature appropriate funding to offset the costs of more widespread use of PHCs and EPS hearings?
- a. **Background:** The PHC pilot project has been funded with federal funds. Working group members heard that additional funds from that federal source will not be available to expand the use of PHCs statewide. Members also heard concerns about costs associated with scheduling and coordinating EPS hearings and the need to increase funding for the OPD in order to ensure that public defenders are available for the hearing. Stakeholders have expressed concerns that PHCs and EPS hearings will become unfunded mandates for local governments.
  - b. **Option 1:** Include an appropriation to cover the anticipated costs of additional PHC facilitators, case management tools, and data collection and analysis regarding PHCs and EPS hearings. *Reason:* Existing resources will not cover the costs.
  - c. **Option 2:** Include an appropriation to fund additional public defenders or increase public defender pay to improve the availability of public defenders for EPS hearings. *Reason:* Existing resources will not cover the costs.
  - d. **Option 3:** Include an appropriation to cover the costs of coordinators to schedule prehearing PHCs and EPS hearings for a county or judicial district. *Reason:* This would be a new responsibility for most courts and county attorney offices, and they may not have the ability to absorb the costs.

## EFFECTIVE DATES

With some exceptions, bills passed during a legislative session generally become effective on October 1 of the year in which the bill was passed unless the bill provides for all or parts of the bill to go into effect on a different date.

Appropriations generally are effective on July 1 of the year of passage, unless the appropriation is delayed for some reason.

Because HB 90 established a July 1, 2023, effective date for the mandatory use of EPS hearings, any work group recommendations affecting EPS hearings generally should be made effective on July 1, 2023. However, working group members may want to identify changes they believe should go into effect earlier in order to improve or streamline the procedures for the EPS hearings that are currently held only upon a parent's request. Any provisions needing an earlier effective date could be made effective on passage and approval of the legislation.