

Guidance for the Montana State Legislature Children, Families, Health, and Human Services Interim Committee on the Harm of Removal in Child Welfare Cases

There is no dispute that children suffer harm when they are separated from their parents. In the context of the crisis at the Southern Border, the American Academy of Pediatrics issued a scathing statement opposing separating of children from their families, stating “[s]eparating children from their parents contradicts everything we stand for as pediatricians – protecting and promoting children’s health. In fact, highly stressful experiences, like family separation, can cause *irreparable* harm, disrupting a child’s brain architecture and affecting his or her short- and long-term health.”¹ While the harm that might befall a child who is left at home with their parents in most cases is speculative, the harm of removal is certain. This is true even when parents are imperfect. Research shows that children on the margins of removal fare better when left at home than when they are removed.²

Researchers have found that the removal process itself, regardless of what happens next or how quickly a child is returned home, is extremely traumatic. Further, the resulting separation from one’s parents, family, and community causes feelings of grief, loss, and confusion that can result in post-traumatic stress disorder, isolation, substance abuse, and anxiety.

Once in foster care, children face additional harms. Studies show that children are more likely to be abused in foster care than in the general population and have higher rates of physical, behavioral, and mental health conditions than other children even when accounting for poverty. Further, they have worse long-term outcomes than their peers on nearly every metric, from education to health, and are more likely to have juvenile justice system involvement, to develop substance use disorders, to live in poverty, and to be homeless.

Despite this, only a few states require judges to consider these harms when deciding whether to remove a child. Washington, D.C., New York, and, most recently, Iowa, require courts to assess the harm of removal in deciding whether to separate a child from their family. New Mexico and South Carolina include the harm of removal in their reasonable efforts criteria, and Hawaii, Minnesota, Nebraska, and Connecticut have issued policies or agency guidance that emphasize family preservation.

Montana can look to these states as examples of how the harm of removal can be used in judicial determinations and, in so doing, better protect children and their families from the trauma of unnecessary separation.

¹ Press Release, Colleen Kraft, Am. Acad. of Pediatrics, AAP Statement Opposing Separation of Children and Parents at the Border (May 8, 2018) [hereinafter Kraft], <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/StatementOpposingSeparationofChildrenandParents.aspx> [<https://perma.cc/25QX-B2ZA>] (emphasis added).

² Joseph J. Doyle Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1583 (2007)

State	Legal Authority	Language
Washington, D.C.	D.C. Code § 16-2312 (2017); D.C. Code § 16-2319 (2022).	<p>Washington, D.C. statutorily requires courts to assess the harm of removal by determining whether:</p> <p>(A) Reasonable efforts were made to prevent or eliminate the need for removal, or, in the alternative, a determination that the child’s removal from the home is necessary regardless of any services that could be provided to the child or the child’s family; and</p> <p>(B) Continuation of the child in the child’s home would be contrary to the welfare of the child.</p> <p>Further, D.C. requires a pre-disposition report address the following:</p> <p>(2) If the removal of the child from his parent, guardian, or custodian is recommended, the report shall also include:</p> <p>(A) the recommended type of placement;</p> <p>(B) the reasons why the child cannot be protected in his or her home;</p> <p>(C) the likely harm the child will suffer as a result of the separation from his or her parent, guardian, or custodian and recommended steps to be taken to minimize this harm; and</p> <p>(D) the plans for maintaining contact between the parent and child through visitation rights in order to maximize the parent-child relationship consistent with the well-being of the child.</p>
New York	Nicholson v. Scopetta, 820 N.E.2d 840, 852 (N.Y. 2004).	<p>In evaluating New York’s Family Court Act § 1028 concerning temporary child removal, the court in <i>Nicholson v. Scopetta</i> clarified that:</p> <p>The court must do more than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be</p>

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		mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests.
Iowa	Iowa Code Ann. § 232.67 (2020).	<p>In May 2022, the Iowa General Assembly amended I.C.A. § 232.67 to include language that states:</p> <p>The state recognizes removing a child from the child’s family will cause the child harm and that the harm caused by a child's removal must be weighed against the potential harm in allowing a child to remain with the child’s family.</p>
New Mexico	N.M. Stat. Ann. § 32A-4-21 (2022).	<p>Although New Mexico’s removal statute does not explicitly require consideration of the harm of removal, the state does identify it as a specific factor in a reasonable efforts inquiry. A predisposition study must include:</p> <p>(2) a statement of how an intervention plan is designed to achieve placement of the child in the least restrictive setting available, consistent with the best interests and special needs of the child, including a statement of the likely harm the child may suffer as a result of being removed from the parent's home, including emotional harm that may result due to separation from the child's parents, and a statement of how the intervention plan is designed to place the child in close proximity to the parent's home without causing harm to the child due to separation from parents, siblings or any other person who may significantly affect the child's best interest.</p>
South Carolina	S.C. Code Ann. § 63-7-1660 (2017).	<p>When petitioning the family court to remove a child from the custody of the parent, guardian, or other person legally responsible for the child's welfare,</p> <p>(B)(1) The petition shall contain a full description of the reasons why the child cannot be protected</p>

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		<p>adequately in the custody of the parent or guardian, including facts supporting the department's allegation that the child is an abused or neglected child as defined in Section 63-7-20 and that retention of the child in or return of the child to the home would place the child at unreasonable risk of harm affecting the child's life, physical health or safety, or mental well-being and the child cannot reasonably be protected from this harm without being removed, a description of the condition of the child, any previous efforts to work with the parent or guardian, in-home treatment programs which have been offered and proven inadequate, and the attitude of the parent or guardian towards placement of the child in an alternative setting.</p> <p>The petition also shall contain a statement of the harms the child is likely to suffer as a result of removal and a description of the steps that will be taken to minimize the harm to the child that may result upon removal.</p>
Hawaii	Haw. Rev. Stat. § 587A-2 (2021).	<p>Hawaii's Child Protective Act places an emphasis on family unification, stating that:</p> <p>The service plan shall effectuate the child's remaining in the family home, when the family home can be immediately made safe with services, or the child's returning to a safe family home. The service plan shall be carefully formulated with the family in a timely manner. Every reasonable opportunity should be provided to help the child's legal custodian to succeed in remedying the problems that put the child at substantial risk of being harmed in the family home. Each appropriate resource, public and private, family and friend, should be considered and used to maximize the legal custodian's potential for providing a safe family home for the child. Full and careful consideration shall be given to the religious, cultural, and ethnic values of the child's legal custodian when service plans</p>

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		<p>are being discussed and formulated. Where the court has determined, by clear and convincing evidence, that the child cannot be returned to a safe family home, the child shall be permanently placed in a timely manner.</p>
Minnesota	Minn. Stat. Ann. § 260.012 (2021).	<p>(a) Once a child alleged to be in need of protection or services is under the court's jurisdiction, the court shall ensure that reasonable efforts, including culturally appropriate services, by the social services agency are made to prevent placement or to eliminate the need for removal and to reunite the child with the child's family at the earliest possible time, and the court must ensure that the responsible social services agency makes reasonable efforts to finalize an alternative permanent plan for the child as provided in paragraph (e). In determining reasonable efforts to be made with respect to a child and in making those reasonable efforts, the child's best interests, health, and safety must be of paramount concern.</p> <p>(h) When determining whether reasonable efforts have been made, the court shall consider whether services to the child and family were:</p> <ul style="list-style-type: none"> (1) relevant to the safety and protection of the child; (2) adequate to meet the needs of the child and family; (3) culturally appropriate; (4) available and accessible; (5) consistent and timely; and (6) realistic under the circumstances.
Nebraska	Neb. Rev. Stat. 43-532 (2016).	<p>(2) When children and families require assistance from a department, agency, institution, committee, or commission of state government, the health and safety of the child is the paramount</p>

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		<p>concern and reasonable efforts shall be made to provide such assistance in the least intrusive and least restrictive method consistent with the needs of the child and to deliver such assistance as close to the home community of the child or family requiring assistance as possible.</p>
Connecticut	<p>Conn. Gen. Stat. § 17a-101g(b) (2019); Conn. Dep't of Children and Families, 21-2-1, Considered Removal: Child and Family Team Meetings (2019).</p>	<p>As part of its child removal guidelines, the Connecticut Department of Children and Families established that a Considered Removal Child and Family Team Meeting (CR-CFTM) shall be required for all cases in which a child is being considered for immediate removal from his or her home based on the identification of a safety factor.</p> <p>Prior to approving the removal of a child from his or her home, the Program Supervisor shall ensure that a CR-CFTM occurred. A review of the DCF-3035, "Child and Family Team Meeting Agenda" and the outcomes of the CR-CFTM shall be conducted by the Program Supervisor prior to proceeding with removal or other legal intervention in support of removal.</p>