

EASY COME, EASY GO: THE PLIGHT OF CHILDREN WHO SPEND LESS THAN THIRTY DAYS IN FOSTER CARE

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INTRODUCTION

Over the course of a few days in April 2008, two child welfare cases were thrust into the public spotlight, receiving expansive media coverage. The first involved a University of Michigan professor, Mike’s Hard Lemonade and a “father-son” trip to a baseball game. The second involved 460 children living at the Yearning for Zion Ranch, a Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS) community located just northeast of Eldorado, Texas. Though on the surface the two cases could not appear to be more different, a common thread related to the removal of children to foster care closely links the incidents.

On April 5, 2008, the Michigan Department of Human Services removed seven-year-old Leo Ratté from his parents’ custody based on a report that his father bought him a Mike’s Hard Lemonade at a Detroit Tigers game.¹ Although the court later described Leo’s father as having made an honest mistake in giving his son an alcoholic beverage, the Department nevertheless filed a petition in juvenile court.² The juvenile court immediately issued an ex parte order removing Leo

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¹ See *Ratté v. Corrigan*, 989 F. Supp. 2d 550, 554-56 (E.D. Mich. 2013).

² *Id.*

from his home and placing him in foster care, which it reaffirmed the next day after conducting a short, perfunctory hearing.³ In both orders, the court found that grounds for immediate removal existed and that the Department had made reasonable efforts to prevent the removal of Leo from his home, even though no such efforts had been made.⁴

On his first night in foster care, Leo slept on a couch at the Department, where he ate a “damp, cold breakfast.”⁵ Then, the Department placed him with foster parents he did not know, despite the fact that his aunt—a licensed foster parent in Wisconsin—drove overnight to Detroit to take temporary custody of Leo.⁶ During this time Leo remained separated from his sister and mother, neither of whom attended the baseball game, and his father was only permitted to see his son under supervision.⁷ Three days later, however, the Department suddenly changed its position and agreed to return Leo home.⁸ Soon thereafter, at the Department’s request, the same court that ordered the removal dismissed the petition and returned Leo to his home.⁹ Five years after the incident, Leo described the ordeal as the worst day of his life.¹⁰

In the days before Leo’s removal, over a thousand miles away, the Texas Department of Family and Protective Services (DFPS) removed 460 children from a FLDS compound after receiving a call from a distressed teenager concerning allegations of physical and sexual abuse.¹¹ During their investigation, DFPS had come to believe the FLDS community had a “pervasive belief system” that groomed the male children to be perpetrators of sexual abuse and the female children to be victims of sexual abuse, thereby placing all children at imminent risk of harm.¹² The district court approved the mass removal of all 468 children, keeping them in foster care.¹³ Like in Michigan, the district court in Texas found that grounds for removal existed and that DFPS made reasonable efforts to eliminate or prevent the need for the children to be removed to foster care.¹⁴

The families in Texas faced an additional hurdle. Since Texas does not provide indigent parents with the right to be represented by lawyers at removal hearings,¹⁵ legal aid and pro bono

³ Order dated Apr. 5, 2008 (on file with author).

⁴ Order dated Apr. 6, 2008 (on file with author).

⁵ Leo Ratté, Short Essay (June 6, 2009) (on file with author).

⁶ See *Ratté*, 989 F. Supp. 2d at 557.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Ratté*, *supra* note 7.

¹¹ See *Texas High Court: Removal of Sect Kids ‘Not Warranted,’* CNN (May 29, 2008, 10:58 PM), <http://www.cnn.com/2008/CRIME/05/29/texas.polygamists/>.

¹² See *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *2 (Tex. App. May 22, 2008).

¹³ *Id.*

¹⁴ *Id.* at *1-4.

¹⁵ See TEX. FAM. CODE ANN. § 262.201 (West 2015); SUPREME COURT OF TEX. CHILDREN’S COMM’N, LEGAL REPRESENTATION STUDY: ASSESSMENT OF APPOINTED REPRESENTATION IN TEXAS CHILD-PROTECTION PROCEEDINGS 20-22 (Jan. 2011), <http://texaschildrenscommission.gov/media/1356/lrs.pdf>.

attorneys scrambled to try to be present at the removal hearings. This scenario was not unforeseen given a study of legal representation that concluded that Texas courts appointed parents' counsel too late in the proceedings,¹⁶ failed to adequately compensate attorneys,¹⁷ and did not ensure that the quality of representation was consistent throughout the state.¹⁸ Far too often, parents in Texas, like those in the FLDS case, navigate the removal process without the help of a lawyer.

Shortly after the district court approved the mass removal, a group of FLDS parents filed a writ of mandamus proceeding to have the district court's temporary orders vacated.¹⁹ In granting the writ, the Texas Court of Appeals found that "[e]vidence that children raised in this particular environment may someday have their physical health and safety threatened *is not* evidence that the danger is imminent enough to warrant the extreme measure of immediate removal."²⁰ The Court of Appeals determined that the trial court had failed to conduct an individualized inquiry as to whether each of the children needed to be removed.²¹ The Court of Appeals also acknowledged that the record did not reflect "any reasonable effort on the part of [DFPS] to ascertain if some measure short of removal and/or separation from parents would have eliminated the risk [DFPS] perceived with respect to any of the children."²²

These two cases sensationalized a constitutional deficit in our child welfare system: the unnecessary removal of children from their parents' custody and their short-term placement in foster care. In each case, the child welfare agency returned the children to their families shortly after their removal. From a legal standpoint, these results signified a victory for the families. However, the children's brief stay in foster care was not benign. An expansive body of research tells us these children likely experienced significant trauma as a result of their removal to foster care, trauma that may haunt them for the rest of their lives. Even more, a firmly established legal framework charges juvenile courts with the critical responsibility of carefully scrutinizing every decision by a child protection agency to involuntarily remove a child from the legal and physical custody of their parents.²³ Yet in these two cases, the courts seemed unwilling to properly test the legality of the removal petitions.

The experiences of the Ratté and FLDS families are not uncommon. Each year, child protection agencies, sanctioned by juvenile courts, remove around twenty-five thousand children from their homes who spend less than thirty days in foster care. The distribution of these data tells us that most of these children spend fewer than two weeks in foster care before being returned to their original caretakers. Compounding their trauma, most of these children are placed in unfamiliar settings with unfamiliar caretakers: group homes, non-relative foster care homes, and emergency shelters.

¹⁶ *Id.* at 20-28.

¹⁷ *Id.* at 32-37.

¹⁸ *Id.* at 39-40.

¹⁹ *See In re Steed*, 2008 WL 2132014, at *1.

²⁰ *Id.* at *3 (emphasis added).

²¹ *Id.*

²² *Id.* at *4.

²³ Although children may be removed from the custody of adults that are not the child's biological or legal parents, we use the generic term "parents" throughout this article to refer to any adult custodian of a child placed in foster care.

This article posits that within this population, there exists a subset of children whose removal, and resulting trauma, should have been prevented by the legal system.²⁴ Within this population, there are children who, like Leo Ratté or the 460 FLDS children, had no business ever spending a day in foster care. Like Leo Ratté or the 460 FLDS children, the cases of these children were not properly vetted by the legal system: neither the courts nor counsel²⁵ challenged the child welfare agency's decision to remove the child from their parents' custody. Yet unlike Leo Ratté or the 460 FLDS children, these children and their families lacked the resources of the University of Michigan or the "scores" of attorneys scrambling to represent them in a high profile case. Unlike Leo Ratté or the 460 FLDS children, their cases did not command the attention of state appellate courts or national media outlets. Rather, these children passed through the juvenile courts on their way to foster care in a rather mundane fashion. The purpose of this article is to examine data and highlight this phenomenon in a way that may assist child welfare professionals in improving both justice and outcomes for children and families, ultimately limiting the number of children who may unnecessarily pass through our nation's foster care system. The belief that children should remain in their homes whenever possible is at the core of the child welfare profession. Our legal system carries the burden of ensuring that belief is upheld each time a removal petition is filed.

This article explores the plight of "short stayers" and argues that juvenile courts are failing to use two tools—the federal reasonable efforts requirement and the early appointment of parents' counsel—to prevent the unnecessary entry of children into foster care. The article also argues that states should give parents and children the right to an expedited appeal of removal decisions to ensure removal standards are properly applied. Finally, this article argues that the federal government must acknowledge the problem of short stayers by utilizing data related to children who may unnecessarily enter foster care in the Child and Family Services Review, the accountability process used to assess state compliance with federal child welfare requirements. But before exploring these issues, the article first describes the trauma children experience when they are separated from their parents and details how federal and state laws are designed to prevent child welfare agencies from unnecessarily inflicting this trauma on children and their families.

I. REMOVING A CHILD FROM A PARENT, EVEN FOR A SHORT PERIOD OF TIME, CAN INFLICT LASTING HARM

Undoubtedly, it sometimes is necessary for a state child welfare agency to remove children from the legal and physical custody of their parents. Courts and legislatures have identified the removal decision as one of the most pivotal points in a child welfare case, given the fundamental

²⁴ It is not the authors' position that every child discharged within thirty days represents an unnecessary removal. Still, as Professor Gupta-Kagan pointed out in a recent article, Arkansas's state child welfare agency freely admitted to the federal government that most short stayers "should have never come into care and should have instead been served in the family home." See Josh Gupta-Kagan, *Towards a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 916 (2014) (citing ARK. DIV. OF CHILD. & FAMILY SERVS., TITLE IV-E WAIVER DEMONSTRATION PROJECT PROPOSAL 14 (2012), http://archive.acf.hhs.gov/programs/cb/programs_fund/ar_waiver_proposal.pdf). From a quality improvement standpoint, children who spend less than thirty days in foster care represent the best proxy—with parsimony in mind—for measuring the extent to which children are unnecessarily removed to foster care.

²⁵ To be fair, counsel may not have had an opportunity to challenge the child welfare agency's decision to remove a child from its client's custody before that decision is made. In most jurisdictions, parent attorneys are appointed after the removal to foster care is effectuated. As discussed later in this article, early appointment of a quality parent attorney can prevent unnecessary removals.

right to family integrity that is implicated. Accordingly, a comprehensive legal framework governs the removal of victims of child abuse and neglect to foster care. As discussed in the next section, the child welfare agency and parents have substantial interests and fundamental rights at stake that must be carefully balanced. Recently, however, a more child-centered narrative has emerged: removing children—even abused and neglected children—from the custody of their parents harms them emotionally, developmentally, and socially. This section explores the nature and extent of those harms.

The consequences of child abuse and neglect are severe.²⁶ The research concerning the short and long-term effects of abuse and neglect on a child’s development certainly weighs in favor of a state’s intervention to protect children. However, when the state intervention goes so far as to remove a child from her parents’ custody, there is more at stake. When this happens, the intervention is not benign.²⁷

When a child is removed from his home, it upsets all aspects of that child’s life. Removal strips the child of his connection to his birth parents, his siblings, his extended family, his friends, and often, his school. It abruptly disrupts his attachment to his primary caregiver and it thrusts the child into a foreign system: foster care. In foster care, children often are placed in unfamiliar placements, with unfamiliar caretakers. The experience of removal and placement in foster care traumatizes children in complex ways.²⁸

Researchers have recognized that removal “lies outside the range of typical childhood experience.”²⁹ The physical separation of a child from their caretaker is often experienced as a significant rejection or loss.³⁰ In examining the discrete experience of a child’s removal and transition into a non-kinship foster care placement, researchers described the “debilitating effects” children experience as a result of not knowing: why they are entering foster care, the purpose of foster care, where they would be living, with whom they would be living, when they will get to see their birth family, and how long their foster care episode will last.³¹ From the children’s perspective, each of these ambiguities evokes responses that threaten their well-being during the physical removal from their parents’ custody and during their placement in non-kinship foster care

²⁶ For a thorough overview of the consequences of child abuse and neglect see INST. OF MED. & NAT’L RESEARCH COUNCIL, *NEW DIRECTIONS IN CHILD ABUSE AND NEGLECT RESEARCH* 111-54 (Anne Peterson et al. eds., 2014).

²⁷ See MARK E. COURTNEY ET AL., *CHAPIN HALL AT THE UNIVERSITY OF CHICAGO, MIDWEST EVALUATION OF ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGES 23 AND 24* (2009), available at http://www.chapinhall.org/sites/default/files/Midwest_Study_Age_23_24.pdf; Theo Liebmann, *What’s Missing from Foster Care Reform: The Need for Comprehensive, Realistic, and Compassionate Removal Standards*, 28 *HAMLIN J. PUB. L. & POL’Y* 141, 148 (2006); PETER PECORA ET AL., *ASSESSING THE EFFECTS OF FOSTER CARE: EARLY RESULTS FROM THE CASEY NATIONAL ALUMNI STUDY* (2003), http://www.casey.org/media/AlumniStudy_US_Report_Full.pdf; Robert Racusin et al., *Psychosocial Treatment of Children in Foster Care: A Review*, 41 *CMTY MENTAL HEALTH J.*, no. 2, Apr. 2005, 201-02.

²⁸ See Delilah Bruskas, *Children in Foster Care: A Vulnerable Population at Risk*, *J. CHILD AND ADOLESCENT PSYCHIATRIC NURSING*, May 2008, 70; Catherine R. Lawrence et al., *The Impact of Foster Care on Development*, 18 *DEVELOPMENT AND PSYCHOPATHOLOGY*, Mar. 2006, at 57, 58-59.

²⁹ Lawrence, *supra* note 30, at 58.

³⁰ *Id.*

³¹ See Monique B. Mitchell & Leon Kuczynski, *Does Anyone Know What is Going On? Examining Children’s Lived Experience of the Transition Into Foster Care*, 32 *CHILD. AND YOUTH SERV. REV.* 437, 442-43 (2010).

placements.³²

Other researchers have found that the physical placement into a foster home, as well as any subsequent placement changes, have been shown to negatively impact a child's ability to form healthy attachments.³³ Similarly, researchers found a negative association between the number of unique caregivers for children and positive neuropsychological outcomes related to executive functioning,³⁴ which may limit their capacity for social and emotional functioning, adaptive coping, self-regulation, decision making, developing secure attachments, and maintaining healthy relationships.³⁵ These findings are illustrative of the general research base that documents heightened risk for many poor outcomes among children removed to foster care.

The severity and frequency of these problems are often disproportionate for children removed to foster care when compared to similar children who have remained at home. Examining removal decisions that were "on the margins,"³⁶ Joseph Doyle, an MIT economist, found that children who remained at home had better long-term well-being outcomes than children who were removed and placed in foster care.³⁷ Doyle's research observed higher delinquency rates, higher teen birth rates, and lower earnings among adolescents removed to foster care when compared to similarly situated children who remained at home.³⁸ In a follow-up study, again examining children "on the margins," Doyle concluded that placing children in foster care increased the likelihood that they would become involved with the juvenile justice system and would require emergency healthcare within a year of their CPS reports.³⁹

This research, as summarized by Congress, demonstrates that "there is a profound effect on the child and family once a child is removed from [the] home, even for a short time."⁴⁰ This knowledge imposes a responsibility on the child welfare system to remove children only when absolutely necessary. Our legal framework is built upon that premise, and research on child

³² *Id.*

³³ See Philip A. Fisher et al., *Mitigating HPA Axis Dysregulation Associated with Placement Changes in Foster Care*, 36 *PSYCHONEUROENDOCRINOLOGY* 531, 532 (2011).

³⁴ *Id.*; see also Beth Troutman, *The Effects of Foster Care Placement on Young Children's Mental Health: Risks and Opportunities*, available at <https://www.healthcare.uiowa.edu/icmh/child/documents/Effectsoffostercareplacementonyoungchildren.pdf>.

³⁵ See, e.g., KATHERINE KORTENKAMP & JENNIFER EHRLE, THE URBAN INSTITUTE, THE WELL-BEING OF CHILDREN INVOLVED WITH THE CHILD WELFARE SYSTEM: A NATIONAL OVERVIEW (2002), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/310413-The-Well-Being-of-Children-Involved-with-the-Child-Welfare-System.pdf>.

³⁶ This is a phrase coined by researcher Joseph J. Doyle. The term is used to describe a group of children whose removal to foster care was a close call, occurring whenever there was disagreement among case workers as to whether a particular child's removal was necessary.

³⁷ See Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 *AM. ECON. REV.*, 1583, 1584 (2007).

³⁸ *Id.* at 1607.

³⁹ See Joseph J. Doyle, Jr., *Causal Effects of Foster Care: An Instrumental-Variables Approach*, 35 *CHILD. & YOUTH SERVS. REV.*, 1143, 1149 (2013).

⁴⁰ Administration for Youth and Families, 65 *FED. REG.* 4051, 4052 (Jan. 25, 2000).

development strengthens it. But so long as child welfare agencies remain underfunded, overburdened and susceptible to the same biases that affect anyone, errors in judgment will occur and mistakes will be made.⁴¹ The limited literature on children who spend fewer than thirty days in foster care is focused on improving the decision-making process of child welfare staff in the executive branch.⁴² Training and quality assurance within state agencies certainly could improve the problem. Yet, judges who preside over child welfare cases often are in the best position to provide immediate feedback on removal decisions on a case-by-case basis, through their careful vetting of each removal petition. For this reason, Congress vested its confidence in ensuring children are not unnecessarily removed to foster care in the juvenile and family court judges of the state courts.⁴³

II. FEDERAL AND STATE LAWS REQUIRE COURTS TO CLOSELY MONITOR THE REMOVAL OF CHILDREN FROM THEIR HOMES

To prevent the unnecessary removal of children from their parents, state and federal laws require juvenile courts to closely oversee the removal process. Juvenile courts, like all courts, have an obligation to protect the constitutional rights of parties, which in child welfare cases includes a parent's right to direct the care, custody, and control of her child.⁴⁴ As noted by the Georgia Supreme Court, "There can scarcely be imagined a more fundamental and fiercely guarded right than the right of a natural parent to its offspring."⁴⁵ The Constitution protects the sanctity of the family "precisely because the institution of the family is deeply rooted in this Nation's history and tradition."⁴⁶ This right to family integrity exists to protect reciprocal rights held by both parents and children.⁴⁷ The parent has a fundamental interest in the "companionship, care, custody, and management of his or her children."⁴⁸ Similarly, children have an interest in not being dislocated from the "emotional attachments that derive from the intimacy of daily association" with their parents.⁴⁹

⁴¹ The authors are aware of the extremely difficult decisions that child welfare workers must make, often with limited information, under considerable pressures and operating within strict timeframes.

⁴² See, e.g., Antonio Garcia et al., *Three Models of Collaborative Child Protection: What is Their Influence on Short Stays in Foster Care?*, 19 CHILD & FAM. SOC. WORK 125, 126 (2014) ("The purpose of this paper is to determine whether relying upon CPS workers, law enforcement (LE) officers or both agency providers to respond to allegations of child maltreatment will prevent unnecessary, short-term placements.").

⁴³ See LEONARD EDWARDS, REASONABLE EFFORTS: A JUDICIAL PERSPECTIVE 50 (2014) (ebook).

⁴⁴ See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 533-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

⁴⁵ *Nix v. Dep't of Human Res.*, 225 S.E.2d 306, 307 (Ga. 1976).

⁴⁶ *Michael H. v. Gerald D.*, 491 U.S. 110, 123-24 (1989).

⁴⁷ See *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 854 (1977).

⁴⁸ See *Stanley*, 405 U.S. at 651.

⁴⁹ *Smith*, 431 U.S. at 844.

Because of the weighty interests at stake, each time the State files a petition and seeks an order to remove a child from his home, juvenile courts have a constitutional obligation to prevent the State from overreaching. In this context, time is of the essence. Stressing the importance of judicial oversight during the removal process, Judge Lopez of the Superior Court of Connecticut recognized that the “insecurity and stigma associated with an untimely and unjust removal” was without redress—the court was unable to imagine anyone that could undo the harm to a child and their family that results from an unnecessary removal.⁵⁰ Thus, for juvenile courts to fulfill their constitutional obligation, they must vet removal petitions carefully prior to the physical separation from the child, whenever possible. As the federal government has recognized, when a “child is returned after services have been delivered, *or even immediately*, the State has reunified the family, not prevented a removal.”⁵¹ As such, appellate courts have noted that courts can only sanction the immediate removal of a child from her home when the child faces an imminent risk of harm.⁵²

In addition to the constitutional protections, the juvenile courts also are charged with enforcing a complex regulatory scheme built on state and federal legislative enactments, administrative law, and case law. Generally speaking, the removal process is initiated by the filing of a petition to obtain an *ex parte* order to take physical and legal custody of the child.⁵³ The burden on the state agency is typically a *prima facie* showing that probable cause exists to believe the child is at imminent risk of harm.⁵⁴ In most states, within 72 hours of the removal, the court must hold an emergency hearing or a shelter care hearing, at which point the parents or child can challenge the removal decision.

In addition to state-specific requirements, federal law imposes two requirements, typically codified in state law. Any order authorizing the removal of a child from their parents’ custody, including an *ex parte* order, must be based on the court’s finding that remaining in the home would

⁵⁰ *In re Lindsey P.*, 864 A.2d 888, 899 (Conn. Super. Ct. 2004).

⁵¹ Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020, 4052 (Jan. 25, 2000) (to be codified at 45 C.F.R. pts. 1355, 1356, 1357) (emphasis added).

⁵² *See, e.g., In re Jaelin P.*, No. U06CP06005881A, 2006 WL 3200348 at *6 (Conn. Super. Ct. Oct. 24, 2006) (“Jaelin was and ‘is . . . in immediate physical danger from [her] surroundings, and . . . as a result of said conditions, [her] safety [was and] is endangered and immediate removal from such surroundings [was and] is necessary to ensure [her] safety’”); *In re A.S.*, No. 14-0800, 2015 WL 249196, at *3 (W. Va. Jan. 12, 2015) (caseworker may take child into emergency custody “[i]f a child . . . shall, in the presence of a child protective service worker, be in an emergency situation which constitutes an imminent danger to the physical well-being of the child.”); *Nicholson v. Scopetta*, 820 N.E.2d 840, 853 (N.Y. 2004) (“Thus, emergency removal is appropriate where the danger is so immediate, so urgent that the child’s life or safety will be at risk before an *ex parte* order can be obtained. The standard obviously is a stringent one.”).

⁵³ *See Susan Badeau et al., A Child’s Journey Through the Child Welfare System*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 351-52 (Donald N. Duquette & Ann M. Haralambie eds., 2010). Different states allow different parties to file petitions and remove children on an emergency basis. *Compare, e.g., VA. CODE ANN. § 63.2-1517* (West 2015) (doctor or child-protective services worker may remove children on emergency basis), *and N.H. REV. STAT. ANN. § 169-C:6* (2015) (law enforcement may conduct an emergency removal and agency can petition for removal), *with TENN. CODE ANN. § 37-1-119* (2015) (private parties can petition) *and S.C. CODE ANN. § 63-7-620* (2008) (only law enforcement can conduct an emergency removal). *See also ALA. CODE § 26-14-6* (LexisNexis 2015) (agency, doctors, and law enforcement may conduct an emergency removal.).

⁵⁴ *Id.* at 351. *See, e.g., MICH. COMP. LAWS ANN. § 712A.13a(9)* (West 2012) (Michigan’s removal statute).

be “contrary to the child’s welfare.”⁵⁵ Furthermore, absent certain aggravated circumstances, the court must find that the agency has made reasonable efforts to prevent the child’s removal to foster care.⁵⁶ If a court fails to make either of these findings, the agency cannot receive any federal funds for the entire duration of the child’s stay in foster care, a severe penalty that could cost the State thousands of dollars.⁵⁷

In including these requirements, Congress recognized two things. First, it understood that removal has a “profound effect on the child and family . . . that cannot be undone.”⁵⁸ It also sensed that far too many children needlessly enter foster care and that the “reasonable efforts” requirement would “spare children of the trauma of removal and placement in foster care.”⁵⁹ As observed by Senator Cranston during legislative deliberations, “[f]ar too many children and families have been broken apart when they could have been preserved with a little effort. Foster care ought to be a last resort than the first.”⁶⁰

Second, Congress recognized that courts must oversee the removal process. It understood that courts must make “meticulous and impartial” decisions and monitor the compliance of social service agencies with federal and state laws.⁶¹ This understanding was based on extensive testimony before Congress revealing the need for a “meaningful, aggressive, sensitive, regular review, not a rubberstamp kind of thing, but a judicial review,” in which a judge could ask the “hard questions that too often don’t get asked.”⁶² Congress felt that this judicial oversight was so important that it agreed to only offer federal funding to States in those cases in which a “court of law as an independent decision-maker [had] found that the interests of the child and the duty of the State to protect its children outweighed the interests of family privacy and necessitated removal from parental custody for the child’s welfare.”⁶³ In short, by requiring juvenile courts to certify that the agency had made “reasonable efforts” to prevent the removal and by asking that they find that

⁵⁵ 42 U.S.C. § 672(a)(2)(A)(ii) (2010); *see also* Foster Care Maintenance Payments Program Implementation Requirements, 45 C.F.R. 1356.21(c) (2012); *see generally* Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020 (Jan. 25, 2000) (to be codified at 45 C.F.R. pts. 1355, 1356, 1357).

⁵⁶ 42 U.S.C. § 672(a)(2)(A)(ii) (2010); *see also* 42 U.S.C. §671(a)(15) (2015); Foster Care Maintenance Payments Program Implementation Requirements, 45 C.F.R. 1356.21 (b), (d) (2012); *see generally* Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020 (Jan. 25, 2000) (to be codified at 45 C.F.R. pts. 1355, 1356, 1357).

⁵⁷ Foster Care Maintenance Payments Program Implementation Requirements, 45 C.F.R. § 1356.21(b)(1)(ii) (2012); *cf.* §1356.21(b)(2)(ii) (regarding the failure to make proper reasonable efforts to finalize a permanency plan, which carries only a temporary loss of federal funding until an order containing the proper findings is secured); *see In re Jamie C.*, 889 N.Y.S.2d 437, 446 (Fam. Ct. 2009).

⁵⁸ Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4051, 4052 (Jan. 25, 2000) (to be codified at 45 C.F.R. pts. 1355, 1356, 1357).

⁵⁹ *Nicholson v. Scopetta*, 3 N.Y.3d 357, 379 (2004) (citing Mem. of Children and Families Standing Comm., Bill Jacket, L. 1989, ch. 727, at 7).

⁶⁰ 126 CONG. REC. 14,767 (1980).

⁶¹ *Foster Care, Problems and Issues: Hearing Before the Subcomm. on Select Educ. of the H. Comm. on Educ. & Labor*, 94th Cong. 107-08 (1976).

⁶² *Id.* at 107-08, 110.

⁶³ 125 CONG. REC. 22,682 (1979).

remaining in the home would be “contrary to the welfare of the child,” Congress clearly expressed its desire for courts to play an important role in preventing unnecessary removals.

III. DESPITE THESE REQUIREMENTS, THOUSANDS OF CHILDREN ARE REMOVED FROM THEIR HOMES, ONLY TO REMAIN IN FOSTER CARE FOR THIRTY DAYS OR LESS.

Yet, despite this clear legal framework and the sound research concerning the trauma resulting from removal and placement in foster care, each year, juvenile courts sanction the removals of roughly 25,000 children whose complete foster care episode is thirty days or less.⁶⁴ This section includes an examination of public child welfare administrative data, including an exploration of the rueful reality experienced by short stayers during their brief stays in our states’ foster care systems.

To better understand the prevalence and experience of short stayers, four removal cohorts were constructed using data from the Adoption and Foster Care Analysis and Reporting System (AFCARS), available from the National Data Archive on Child Abuse and Neglect.⁶⁵ AFCARS is a federally mandated data collection system that provides case-specific information on all children covered by the protections of Title IV-B and E of the Social Security Act.⁶⁶ AFCARS contains a Foster Care file, which includes case-specific information on all children who spent time in foster care during the reporting period.⁶⁷ The AFCARS reporting period aligns with the federal fiscal year, extending from October 1 to September 30 of the following year. For purposes of this analysis, four removal cohorts were constructed using the 2010 to 2013 AFCARS Foster Care files. The removal cohorts include all children who were removed during the respective AFCARS reporting period. That is, the 2013 FFY removal cohort would include all children whose removal date was between October 1, 2012 and September 30, 2013.⁶⁸

⁶⁴ The removal cohorts analyzed in this article consist of children whose foster care episode is thirty days or fewer. These children are periodically referred to as “short stayers” in this article and in general. The authors did not choose this terminology or durational limit, but there are a number of reasons for adopting them. First, multiple organizations use the terminology and durational limit. *See, e.g.*, PETER J. PECORA ET AL., CASEY FAMILY PROGRAMS, LEVELS OF RESEARCH EVIDENCE AND BENEFIT-COST DATA FOR TITLE IV-E WAIVER INTERVENTIONS 31, (July 2015), www.casey.org/media/Title-IV_E-Waiver-Interventions-Research-Brief.pdf. Other researchers also use it. *See, e.g.*, Antonio Garcia et al., *Three Models of Collaborative Child Protection: What is their Influence on Short Stays in Foster Care?* 19 CHILD AND FAM. SOCIAL WORK 125. Finally, the federal government has made a distinction regarding children who spend less than 30 days in foster care. *See* 45 C.F.R. § 1355, app. A (2015) (excluding certain data reporting requirements for short stayers).

⁶⁵ Data utilized in this publication were made available by the National Data Archive on Child Abuse and Neglect (NDACAN), Cornell University, Ithaca NY; and have been used with permission. Data from the AFCARS are originally collected by the state’s child welfare agency pursuant to federal reporting requirements. Authors have analyzed data and analyses are on file with them. Neither the collector of the original data, the funder, the Archive, Cornell University, or its agents or employees bear any responsibility for the analyses or interpretations presented here.

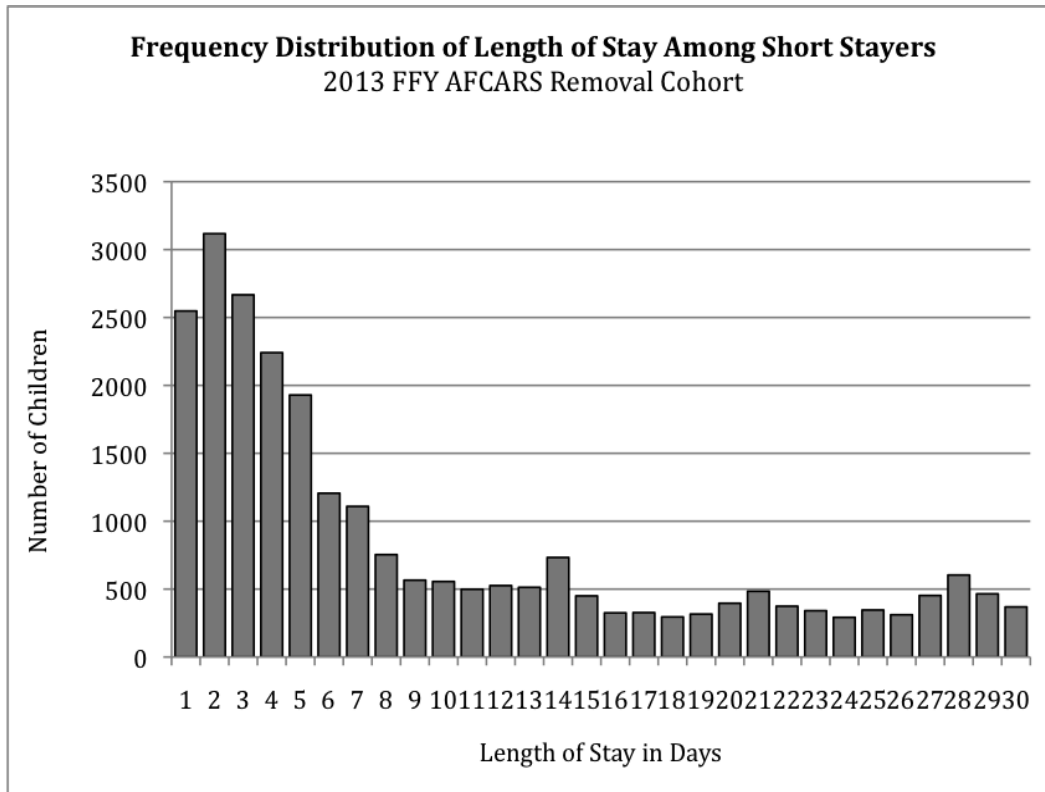
⁶⁶ 42 U.S.C. § 679 (2015); 45 C.F.R. § 1355.40(a) (2015).

⁶⁷ 45 C.F.R. § 1355.40(a)(2) (2015).

⁶⁸ In constructing the cohort, children removed during the month of September during a federal fiscal year were to be censored from the removal cohort. The data were not linked longitudinally for this study, and it would not be possible to determine whether children removed in the month of September were discharged within 30 days of their removal due to the design of the AFCARS annual submissions. The design contemplated censoring such children to close the cohort. However, upon examination of the data, a number of records for children removed in September included discharge dates

During the 2013 federal fiscal year, there were approximately 25,000 short stayers in our foster care system. That is, of the more than 250,000 children removed to foster care between October 1, 2012 and September 30, 2013, nearly 25,000 spent fewer than thirty days in foster care. Figure 1 displays the distribution of short-stayers by length of stay.

Figure 1⁶⁹



Although this article defines short stayers as children whose complete foster care episode is thirty days or fewer, Figure 1 highlights the fact that most short stayers spend considerably less time in foster care. The median length of stay among short stayers was six days, with 75% discharged within two weeks of their removal. These dynamics are relatively stable across the four removal cohorts examined in this paper.

that fell within the next reporting period. Accordingly, the removal cohorts were analyzed without censoring.

⁶⁹ AFCARS, Foster Care File, retrieved from (with permission): National Data Archive on Child Abuse & Neglect, Cornell University, 2013 Federal Fiscal Year; *see supra* note 67.

Figure 2⁷⁰

	2010	2011	2012	2013
Removals	247,846	245,402	248,099	250,335
Short Stayers	29,744	28,344	26,567	25,112
Median Length of Stay	5 Days	5 Days	5 Days	6 Days
75th Percentile	13 Days	14 Days	14 Days	14 Days

During their brief stay in foster care, these children were most likely placed in a non-relative foster care placement, in the home of a relative, or in a congregate facility such as a group home or emergency shelter.⁷¹ Among the 2013 short stayers, these placement types comprised 91% of all short stayers.⁷² Classifying the data in a child-centered manner, only 18% of short stayers in the 2013 removal cohort were placed in a familiar setting—that is, a relative foster care placement. Seventy-three percent were placed in “stranger” foster care placements; this figure includes 53.5% in a non-relative foster care placement, 10.9% in an institutional placement, and 8.9% in a group home. These dynamics are relatively stable across the four removal cohorts.

Figure 3⁷³

	2010	2011	2012	2013
Relative Foster Care Placement	13.9%	15.5%	17.1%	18.2%
Stranger Foster Care Placement	73%	71%	74%	73%

After their brief stay in foster care, most of these children were returned to the very caretakers from whom they were removed. Among the 2013 short stayers, 76% were discharged to the same homes from which they were removed. The remaining short stayers were typically discharged to the custody of a relative.⁷⁴ Again, these data were relatively stable across the four removal cohorts.

⁷⁰ *Supra* note 71, 2010–2013 fiscal years.

⁷¹ Other placement types include Trial Home Visit, Pre-Adoptive Home, ILP, Runaway. *See* Definitions of and Instructions for Foster Care Data Elements, 45 C.F.R. § 1355, Appendix A, § II (2015).

⁷² 3,094 short stayers had more than one placement during their foster care episode. This represents 12% of all short stayers. Children with multiple placements were not censored from the analysis. Rather, their final placement type was used. *Supra* note 71.

⁷³ *Supra* note 71, 2010–2013 fiscal years.

⁷⁴ A small percentage of short stayers were discharged to guardianship (2.1% in 2013 FFY) or transferred to another agency (2.7% in 2013 FFY). The remaining short stayers were discharged to adoption (0.3% in 2013 FFY), runaway (0.6% in 2013 FFY), NA (0.5% in 2013 FFY), death (0.2% in 2013 FFY) or emancipation (1.2% in 2013 FFY). *Supra* note 71.

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EASY COME, EASY GO

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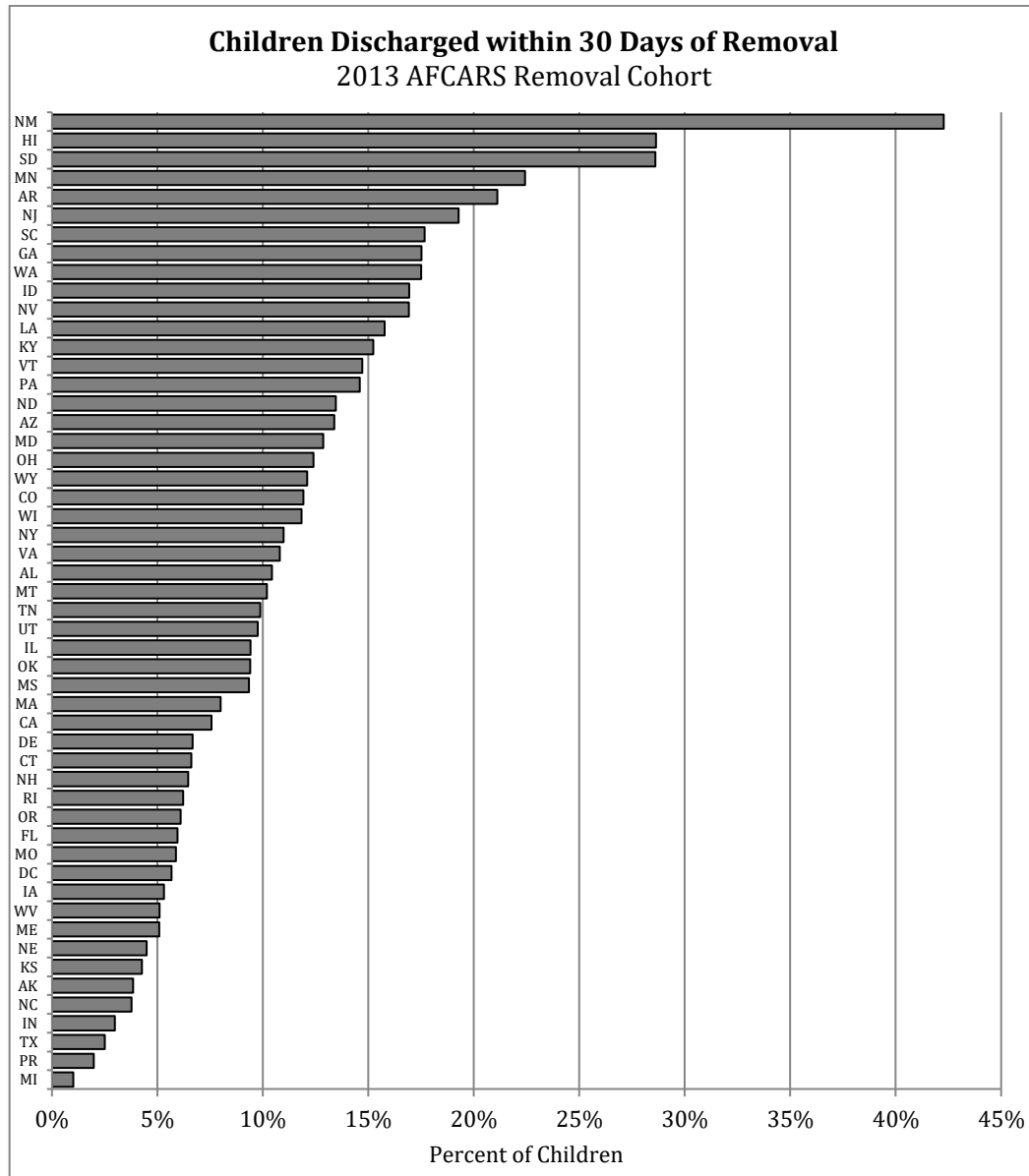
Figure 4⁷⁵

	2010	2011	2012	2013
Reunification	77.4%	77.4%	76.3%	76.2%
Relative	15.3%	15.1%	15.6%	16.2%

In summary, the plight of short stayers is a relatively predictable experience, not unlike that of Leo Ratté or the 460 FLDS children. Following their legal and physical separation from their parents, these children often are placed in an unfamiliar environment—a non-relative foster care placement or a congregate facility—only to be returned to the very caretaker from whom they were initially removed. Although defined as children whose foster care episode lasted fewer than thirty days, most short stayers spend less than two weeks in foster care.

Nationally, the short stayer population comprises approximately 10% of all children removed to foster care. Of course, there is great variance across states, with New Mexico discharging as many as 42% of children within thirty days of their removal and Michigan discharging as few as 1% of children within thirty days of their removal. Figure 5 illustrates this variance across states, with the proportion of short stayers expressed as a percentage of the 2013 removal cohort in each state.

⁷⁵ *Supra* note 71, 2010-2013 fiscal years.

Figure 5⁷⁶

There are important differences in policies and practices that may contribute to the variance in short stayers across states. This section explores those differences through an examination of New Mexico and Georgia data.

⁷⁶ *Supra* note 71.

New Mexico has consistently reported the greatest number of short stayers, with more than four times as many short stayers as the national rate, and roughly one and a half times as many as the next closest state. An examination of New Mexico's statutory scheme governing the removal of children to foster care provides some context as to why this may be.

In New Mexico, the physical removal to foster care is left, in large part, to the discretion of law enforcement.⁷⁷ Although the statute requires law enforcement to coordinate with New Mexico's Children, Youth and Families Department ("CYFD") to conduct a "protective services assessment," there are a number of exceptions to this requirement, including the determination by law enforcement that the child is at "imminent risk of abuse."⁷⁸ Despite this broad delegation—in reality, an almost exclusive delegation of removal authority to law enforcement—the code specifies that whenever law enforcement takes a child into protective custody, CYFD is "not compelled to place the child in an out-of-home placement," and further allows CYFD to "release the child to the child's parent, guardian, or custodian."⁷⁹ This idea is expounded upon in section 32A-4-7 of the New Mexico Statute, which covers a number of situations that either allow or require CYFD to return custody of a child to their parents. First, a CYFD caseworker is required to review the need for placing every child in protective custody.⁸⁰ New Mexico law directs CYFD to release the child from custody "unless custody is appropriate or has been ordered by the court."⁸¹ The statute also requires the child to be returned to their parents' custody unless CYFD files a removal petition within two days of their removal.⁸² Finally, there is a catch-all provision allowing CYFD to reunify the child with their parent "at any time within the two-day period" after the removal "if it is determined by [CYFD] that release is appropriate or if release has been ordered by the court."⁸³

Under this statutory scheme, there is a two-day window in which children may be physically separated from their parents by law enforcement, placed in foster care, and then returned to their parents because the state child welfare agency simply disagreed with law enforcement's decision to remove. During this two-day window, there is no requirement that a judge or attorney ever examine the legality of the removal decision. New Mexico law establishes a framework that enables the executive branch to remove and reunify children within forty-eight hours without ever having to justify that removal in a court of law. This framework is in direct opposition to the system's obligation to avoid unnecessary removals, support family preservation, and promote family and child well-being.⁸⁴ Regrettably, the data support the notion that this 48-hour removal-reunification framework may be driving New Mexico's large short stayer population.

⁷⁷ N.M. STAT. ANN. § 32A-4-6(A) (LexisNexis 2015).

⁷⁸ *Id.* at (A)(1)(a)-(f).

⁷⁹ *Id.* at (C).

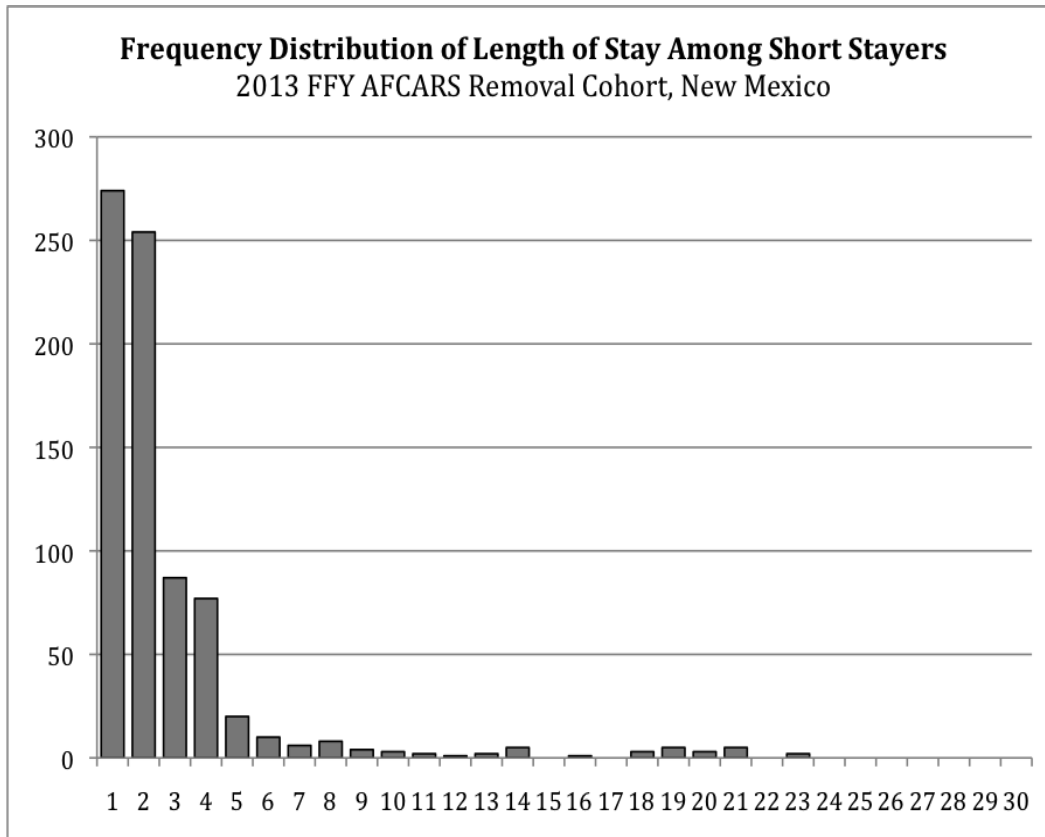
⁸⁰ *Id.* at § 32A-4-7(B).

⁸¹ *Id.*

⁸² *Id.* at (D).

⁸³ *Id.* at (E).

⁸⁴ *See* N.M. STAT. ANN. § 32A-1-3 (LexisNexis 2015).

Figure 6⁸⁵

In New Mexico, most short stayers spend only a couple of days in foster care. The median length of stay among short stayers is two days, compared to six days nationally. In New Mexico, 75% of short stayers have been discharged from foster care within three days of their removal, compared to the 75th percentile of fourteen days nationally. In New Mexico, 94% of short stayers were reunified with their original caretakers, compared to 76.2% nationally. Compounding the trauma associated with their removal to foster care, 94% of short stayers in New Mexico were placed in non-relative foster care placements or congregate facilities during their brief stays in foster care,⁸⁶ compared to 73% nationally. Only 5.4% of short stayers in New Mexico were placed with relatives, compared to 16.2% nationally. In short, New Mexico's short stayer population—the largest one in the nation—is a cohort of children who spend 48 hours in unfamiliar environments with unfamiliar caretakers before being returned to their parents. In New Mexico, where state agencies have broad authority to remove and reunify children without legal oversight, CYFD and

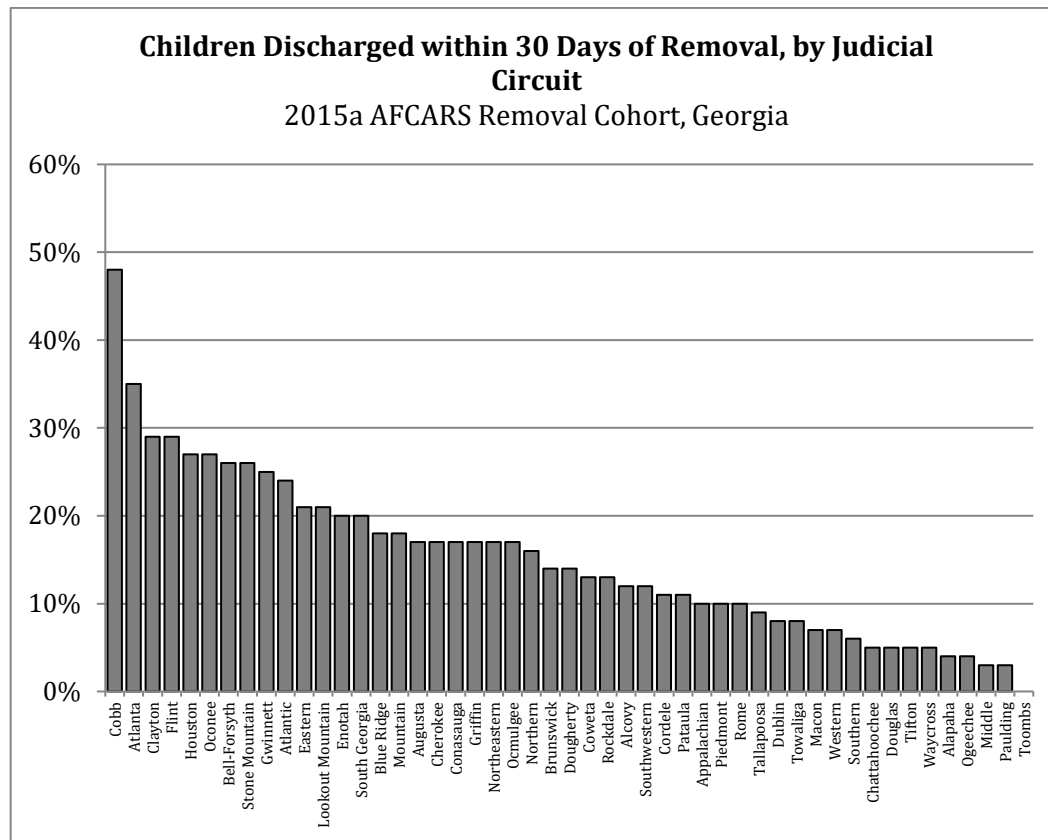
⁸⁵ *Supra* note 71.

⁸⁶ Thirty-two children's records had more than one placement listed in them. For purposes of this analysis, the child's final placement type (before discharge) was used.

law enforcement have no accountability measures in place to assess their practices that may result in the routine, unnecessary removal and placement of children into foster care.

Statutory differences across state lines certainly contribute to the variance in short stayers observed in the AFCARS data. However, there exists just as much variance within states, even under the same statutory scheme. For example, Georgia had the eighth highest percent of short stayers among states during the 2013 FFY, discharging 17.5% of children from foster care within thirty days. Yet the variance observed across judicial circuits in Georgia suggests significant differences among jurisdictions (judicial circuit, county, etc.) operating under a single statutory scheme.⁸⁷

Figure 7⁸⁸

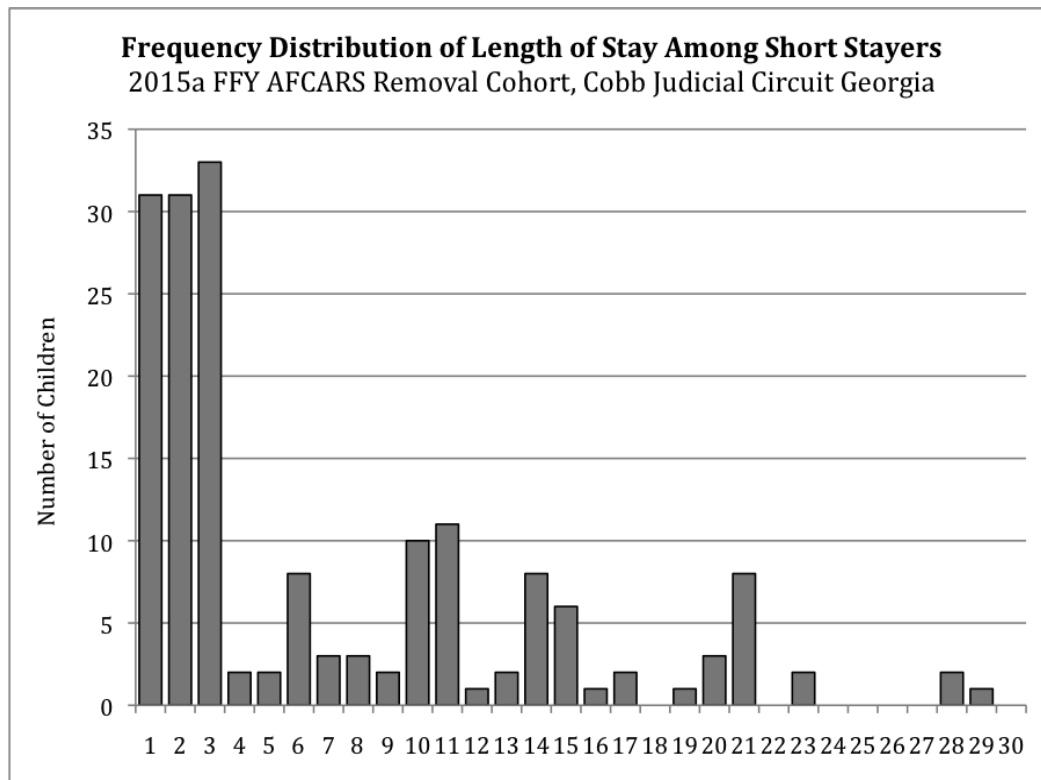


⁸⁷ County level AFCARS data are not always available from the National Data Archive on Child Abuse and Neglect. To conduct an analysis on county level data in Georgia, data were retrieved from Fostering Court Improvement. See GEORGIA CHILD WELFARE MEASURES, www.fosteringcourtimprovement.org/ga (last visited Sept. 7, 2015). Fostering Court Improvement data were analyzed using the same methods. Because more recent data were available through Fostering Court Improvement, this section includes an analysis of the 2015a AFCARS foster care file.

⁸⁸ *Supra* note 71, 2015 fiscal year.

In the Cobb Judicial Circuit, 48% of children removed to foster care were discharged within thirty days of their removal.⁸⁹ There, the median length of stay among short stayers was three days; 75% of short stayers were discharged from foster care within ten days of their removal.

Figure 8⁹⁰



Cobb Judicial Circuit short stayers, similar to those in New Mexico, appear to spend only a matter of days in foster care. Ninety-eight percent—all but five children— were placed in a non-relative foster care placement or an institutional placement during their stay in foster care; 49% were discharged to the custody of a relative, and 46% were reunified with their original caretaker.

The timeliness dynamics of the short stayer population in the Cobb Judicial Circuit align closely with the trends observed in New Mexico, although there is a heavier reliance on discharges to relatives in the Cobb Judicial Circuit. However, it is not a statutory scheme that is influencing the short stayer dynamics in the Cobb Judicial Circuit. In the neighboring Douglas Judicial Circuit,

⁸⁹ See STATISTICS FOR COBB CIRCUIT, REMOVAL TABLES, www.fosteringcourtimprovement.org/ga/JudicialCircuit/Cobb/ (last visited Sept. 7, 2015). These data were current through Mar. 2015.

⁹⁰ *Supra* note 71, 2015 fiscal year.

only 5% of children removed to foster care were discharged within thirty days of their removal.⁹¹ The Douglas and Cobb Judicial Circuit child welfare agencies operate under the same statutory scheme⁹² and utilize the same statewide standards and assessments when determining whether to remove a child to foster care.⁹³ Even more, their removal rates are similar: the Cobb Judicial Circuit average monthly removal rate is two removals for every 10,000 children in the population, compared to 1.9 per 10,000 children in the Douglas Judicial Circuit.⁹⁴ Thus, the variance observed between these two jurisdictions likely is influenced by caseworker and judges' decisions, rather than by the law.

Little is known about what drives front-line workers to remove a victim of child abuse and neglect. While a number of contextual factors have been identified that are known to influence the removal decision, there remains a great deal of unexplained variance in removal decisions across workers.⁹⁵ A number of researchers have examined interrater reliability among case managers' assessments using various instruments and methods.⁹⁶ While risk assessment generally is thought to be improving, it is not uncommon for there to be poor interrater reliability across instruments. That is, case managers using the same risk assessment, reviewing the same hypothetical cases, often arrive at different conclusions.

This provides some context for the variance in removal rates across and within jurisdictions.⁹⁷ This is concerning, of course, given a removal decision's "profound and potentially deleterious impact . . . on the child, the parent, and society."⁹⁸ Juvenile court judges' authority over

⁹¹ See STATISTICS FOR DOUGLAS CIRCUIT, REMOVAL TABLES,

<http://www.fosteringcourtimprovement.org/ga/JudicialCircuit/Douglas/> (last visited Sept. 7, 2015). These data were current through Mar. 2015.

⁹² See O.C.G.A. 15-11-134 (2015) and O.C.G.A. 15-11-133 (2015) (requiring findings for any child removed from their home).

⁹³ See Georgia Child Welfare Policy Manual, Section C, Applicability: "All local county and state level Departments of Family and Children Services (DFCS) shall fulfill the requirements of the aforementioned DHS/DFCS policy," available from Georgia Dept. of Human Services Online Directives Information System, effective Jan. 12, 2016, at <http://odis.dhs.ga.gov/ViewDocument.aspx?docId=3007235&verId=1> (requiring uniformity across counties); see also *id.* at "Court Orders and Placement Authority," available at [http://odis.dhs.state.ga.us/ViewDocument.aspx?](http://odis.dhs.state.ga.us/ViewDocument.aspx?docId=3005989&verId=1)

[docId=3005989&verId=1](http://odis.dhs.state.ga.us/ViewDocument.aspx?docId=3005989&verId=1) (regarding the uniformity requirement as it pertains to removal standards); see also *id.* at "Safety Assessment and Management," available at <http://odis.dhs.ga.gov/ViewDocument.aspx?docId=3007117&verId=1> (regarding the uniformity requirement as it pertains to safety and risk assessments).

⁹⁴ See Fostering Court Improvement, Statistics for Cobb Judicial Circuit, Georgia, Children Removed to Foster Care During Apr. 2014 through Mar. 2015, Average Monthly Removals to Foster Care.

⁹⁵ See J. Christopher Graham et al., *The Decision Making Ecology of Placing a Child into Foster Care: A Structural Equation Model*, 49 CHILD ABUSE & NEGLECT 12, 13 (2015).

⁹⁶ John P. Nasuti & Peter J. Pecora, *Risk Assessment Scales in Child Protection: A Test of the Internal Consistency and Interrater Reliability of One Statewide System*, 29 SOC. WORK RES. & ABSTRACTS 28 (1993); PETER H. ROSSI, JOHN R. SCHUERMAN & STEPHEN BUDDE, CHAPIN HALL CTR. FOR CHILDREN AT THE UNIV. OF CHI., UNDERSTANDING CHILD MALTREATMENT DECISIONS AND THOSE WHO MAKE THEM (1996).

⁹⁷ The judge may also be contributing to the variance, given the court's role in overseeing the removal process.

⁹⁸ Bilhah Arad-Davidzon & Rami Benbenishty, *The Role of Workers' Attitudes and Parent and Child Wishes in Child Protection Workers' Assessments and Recommendation Regarding Removal and Reunification*, 30 CHILD. &

removals is designed to counteract the negative effects of erroneous removal decisions. Of course, once a child has been removed, the court cannot undo the harm that has occurred to that child or their family. However, by thoroughly vetting every removal petition and litigating reasonable efforts determinations at every removal proceeding, the court provides consistent feedback to agency staff regarding the parameters of their removal authority.

Short stayers can suffer significant trauma as a result of removal from their families and their placement into foster care, and such trauma may be compounded when they are placed in unfamiliar settings. Most short stayers spend less than two weeks in foster care before being returned to their parents.⁹⁹ Many more are placed permanently with relatives.¹⁰⁰ The data beg the questions: did these children need to enter foster care at all? What imminent risk of harm was mitigated during their brief stay in foster care that could not have been mitigated absent their removal? Was the question of reasonable efforts to prevent removal fully vetted in order to prevent these children from entering foster care? Why are courts sanctioning the immediate removal of children who then remain in foster care for such a short period of time? Most importantly, can the harms inflicted by unnecessary removal to foster care be avoided?

Juvenile courts could address this problem and reduce the number of children unnecessarily traumatized by their removal to foster care through improved utilization of two tools: 1) the federal “reasonable efforts” requirement and 2) the early appointment of counsel for parents. Additionally, states could ensure compliance with state and federal removal laws by giving parents and children a right to an expedited appeal of removal decisions. These factors are discussed below.

IV. COURTS HAVE FAILED TO CONSISTENTLY ENFORCE THE REASONABLE EFFORTS REQUIREMENTS

Through the passage of the Adoption Assistance and Child Welfare Act of 1980, Congress required juvenile courts to find that state child welfare agencies made reasonable efforts to prevent the need to remove children on a case-by-case basis.¹⁰¹ By doing so, Congress gave courts a robust role in overseeing the removal process, in order to address concerns that far too many children were being unnecessarily placed in foster care. In situations where courts refused to make a reasonable efforts finding, Congress decided to penalize child welfare agencies by withholding federal funds to pay for costs associated with the child’s stay in foster care.¹⁰²

During the legislative debates prior to the adoption of the reasonable efforts requirement, legislators questioned whether courts would be willing to use the reasonable efforts finding—and the possibility of depriving agencies of federal funding—to prevent agencies from unnecessarily placing children in foster care. Congress understood that courts might be concerned about funding for children and thus would do everything within their power to enable the child to receive all available monies. Thus, Congress confronted the legitimate concern of a “misuse of the court process simply in order to obtain Federal assistance.”¹⁰³

YOUTH SERVS. REV. 107, 108 (2008).

⁹⁹ *Supra* note 71.

¹⁰⁰ *Id.*

¹⁰¹ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272.

¹⁰² *Id.* at § 471(a)(15).

¹⁰³ 125 CONG. REC. 22,686 (1979).

But legislators quickly dismissed those concerns:

The committee is aware of allegations that the judicial determination requirement can become a mere *pro forma* exercise in paper shuffling to obtain Federal funding. While this could occur in some instances, the committee is unwilling to accept as a general proposition that the judiciaries of the States would so lightly treat a responsibility placed upon them by Federal statute for the protection of children.¹⁰⁴

Instead, Congress assumed that courts would use “meticulous and impartial decision-making procedures” to prevent overreaching by state agencies.¹⁰⁵

But over the past thirty-five years, evidence suggests that Congress wrongly assumed that juvenile courts would not make findings simply to maximize federal funding for child welfare agencies. A survey of over 1200 juvenile court judges found that only 44 judges—less than 4%—had ever made a no reasonable efforts finding.¹⁰⁶ Similarly, a state study found that 90.4% of judges stated that they either rarely or never made a no reasonable efforts finding.¹⁰⁷ Moreover, 40.5% of judges reported making reasonable efforts findings even when they believed the agency had not made reasonable efforts.¹⁰⁸ When asked why such findings would be made in the absence of supporting evidence, judges reported that insufficient information and funding concerns were primary factors.¹⁰⁹ A similar report concluded that the federal system of funding “creates a disincentive for judges and referees [to make] negative reasonable efforts determinations.”¹¹⁰ Mirroring these findings, authors of a New York report concluded that the reasonable efforts issue was “very rarely addressed” and that judges admit they often routinely approve requests to remove children even when they do not believe the agency has made an adequate case.¹¹¹

These statistics accord with the observations made by many commentators and attorneys working within the system. In many child welfare hearings, reasonable efforts requirements simply are not enforced, or even mentioned, as none of the stakeholders have an interest in jeopardizing

¹⁰⁴ S. REP. NO. 96-336, at 16 (1979).

¹⁰⁵ Mark Hardin, *Ten years later: Implementation of P.L. 96-272 by the Courts*, in THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980 (PUBLIC LAW 96-272): TEN YEARS LATER 51, 52 (North American Council on Adoptable Children, 1990).

¹⁰⁶ Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 237 (1989).

¹⁰⁷ CUTLER INSTITUTE FOR CHILD AND FAMILY POLICY, MUSKIE SCHOOL OF PUBLIC SERVICE, MICHIGAN COURT IMPROVEMENT PROGRAM REASSESSMENT 105 (Aug. 2005), http://muskie.usm.maine.edu/Publications/cf/MI_CourtImprovementProgramReassessment.pdf.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ A.B.A. CENTER ON CHILDREN AND THE LAW, MICHIGAN COURT IMPROVEMENT PROGRAM ASSESSMENT OF PROBATE COURTS’ HANDLING OF CHILD ABUSE AND NEGLECT CASES 93-94 (Kathi L. Grasso ed., 1997), <http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/cipaba.pdf>.

¹¹¹ SPECIAL CHILD WELFARE ADVISORY PANEL, ADVISORY REPORT ON FRONT LINE AND SUPERVISORY PRACTICE 47-48 (Annie E. Casey Foundation, Mar. 9, 2000).

federal funding.¹¹² Instead, as noted by retired Judge Len Edwards, “most judges approve of what the agency has done with little or no thought about it.”¹¹³ To simplify the process, decision makers have developed standard court reports and orders that include preprinted findings that the agency has made reasonable efforts that are sufficient to satisfy federal auditors.¹¹⁴ Frequently, efforts include activities like interviews, investigations, and drug screens—steps that are far more investigative in nature than authentic efforts to prevent kids from being removed.¹¹⁵ As one scholar concluded, the pre-preprinted orders were enough “to keep federal dollars flowing into the jurisdiction, but it surely did not live up to the spirit of the [Adoption Assistance and Child Welfare Act].”¹¹⁶

Courts, however, have done far more than enter pre-drafted reasonable efforts orders to satisfy federal auditors. They have actively collaborated with child welfare agencies to persuade the federal government to maximize funding for child welfare agencies.¹¹⁷ For example, in Kansas, a juvenile court judge was a member of the team assisting the child welfare agency to prepare for an upcoming federal audit; when the state failed an initial audit, court staff conducted trainings to address the failure and were present during the subsequent audit to help resolve any issues.¹¹⁸

Similarly, in Iowa, the child welfare agency and the courts developed a memorandum of understanding in which the agency promised to inform courts of “the language and timing of judicial findings necessary for” federal funding, and to collaborate with the judicial branch to

¹¹² See David J. Herring, *The Adoption and Safe Families Act—Hope and its Subversion*, 34 FAM. L. Q. 329, 335 (2000) (observing that “the reasonable efforts requirement was not vigorously enforced, or even mentioned, in many case review hearings” and that “[n]one of these actors had an interest in jeopardizing federal foster care funds.”). See also MARK HARDIN ET AL., A SECOND COURT THAT WORKS: JUDICIAL IMPLEMENTATION OF PERMANENCY PLANNING REFORMS 87 (A.B.A Ctr. on Children and the Law 1995) (“Judges express concern that negative findings would be punishing to the county financially.”).

¹¹³ EDWARDS, *supra* note 45, at 13. See also Hardin, *supra* note 107, at 53. (“In many places, good progress has been made in terms of superficial compliance with the Act, i.e., making sure that court orders recite the necessary language to comply with federal law. However, too often language does not reflect a meaningful judicial deliberation.”).

¹¹⁴ See Herring, *supra* note 114; Mark Hardin, *Ten years later: Implementation of P.L. 96-272 by the Courts*, in THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980: TEN YEARS LATER, 54 (North American Council on Adoptable Children, 1990) (“In some states, courts and agencies have taken a cynical approach, seeking to assure receipt of federal funds without the court taking a meaningful look at reasonable efforts – including pre-printing the findings on orders.”).

¹¹⁵ Although the federal government has not defined the phrase “reasonable efforts”, it has provided a list of suggested services that exemplify the types of efforts child welfare agencies should be making. These include homemaker’s services, day care, crisis counseling, individual and family counseling, emergency shelters, emergency financial assistance, and temporary child care. 45 C.F.R. § 1357.15 (2010).

¹¹⁶ Herring, *supra* note 114.

¹¹⁷ See Cecilia Fiermonte & Nancy Sidote Salyers, *Improving Outcomes Together: Court and Child Welfare Collaboration*, CHILD AND FAMILY RESEARCH CTR., FOSTERING RESULTS, SCHOOL OF SOCIAL WORK, U. OF ILL. (containing many quotes from juvenile court judges about the importance of collaboration between courts and child welfare agencies).

¹¹⁸ See National Child Welfare Resource Center on Legal and Judicial Issues, A Service of the Children’s Bureau, <http://apps.americanbar.org/child/rcjji/cfsr>.

develop solutions to ensure that court orders were meeting federal requirements.¹¹⁹ In turn, the courts promised to minimize audit risk related to court orders and judicial proceedings.¹²⁰

Finally, in Georgia, after the agency determined that thirty court orders did not comply with federal requirements, a juvenile court judge under contract with Georgia's Court Improvement Program met with each judge to discuss the court orders identified by the agency to ensure that future orders would make the correct findings.¹²¹ These are but a few examples of a national trend in which judges and agency officials "collaborate" to ensure that the "right" findings are made. Unsurprisingly, when agencies successfully receive federal funding, courts have publicly applauded their efforts. After the Michigan Department of Human Services won an appeal of a federal audit, the Chief Justice of the Michigan Supreme Court declared that the win demonstrated "a fine example of how the judicial branch has supported DHS [the child welfare agency], not only in this appeal process, but also in child welfare work in general."¹²²

The desire for juvenile courts to work with agencies to maximize funding for children in foster care is understandable. Foster care systems are underfunded. Necessary services are unavailable. As a result, caseworkers rarely have the tools they need to effectively work with families. No one can argue over whether an infusion of resources into the foster care system is critical to helping children and their families.

But in acting on this desire, juvenile courts have failed to apply an important statutory provision that forces agencies to only remove children after they have attempted to work with their families. The scheme requires judges to issue orders that may ultimately deny agencies federal funding when they fail to provide reasonable efforts prior to removing a child. When a court issues such an order, "it sends a message to child protection and social workers that they should not repeat that action or that they should do more than they did in the case before the court."¹²³ This scheme, however, only works if judges remain disinterested in the effects of denying federal funding to these agencies, a role Congress intentionally asked judges to assume. In refusing to play this role, judges have failed to utilize an important tool to reduce the number of short stayers in foster care. In abdicating their responsibility to carefully scrutinize removal petitions for reasonable efforts, courts have become complicit in the system's failure to prevent unnecessary removals, thereby compounding the trauma a child experiences.

V. STATES HAVE FAILED TO APPOINT COUNSEL FOR PARENTS EITHER PRIOR TO OR IMMEDIATELY AFTER CHILDREN'S REMOVAL

In addition to failing to enforce the reasonable efforts requirements, states also have underutilized a second tool that can prevent children from unnecessarily entering foster care—the appointment of quality counsel to parents at the outset of a child welfare case. Lawyers representing

¹¹⁹ Memorandum of Understanding, Iowa Department of Human Services-Judicial Branch Cooperation 7 (Nov. 2005).

¹²⁰ *Id.*

¹²¹ See Title IV-E Reimbursement Project, Judicial Council of Georgia Committee on Justice for Children, <http://cj4c.georgiacourts.gov/content/title-iv-e-reimbursement-project>.

¹²² Press Release, DHS Prevails in Federal Audit Appeal (Jan. 24, 2011), http://www.michigan.gov/dhs/0,1607,7-124-5455_7199_8380_-250173--,00.html.

¹²³ See EDWARDS, *supra* note 45, at 28.

parents play a crucial role in helping judges enforce all laws, including the reasonable efforts requirement, and help to keep children safely at home. Parents' attorneys do this by investigating the facts of a case, presenting information to courts and child welfare agencies, locating services for families, and identifying alternatives to removal that will safely keep a child in her home with her family.¹²⁴

Studies across the country have demonstrated that strong parent representation prevents children from being removed.¹²⁵ For example, more than 50% of children of clients of the Center for Family Representation ("CFR"),¹²⁶ a multidisciplinary legal office in New York City, avoid foster-care placement altogether.¹²⁷ Similarly, the Detroit Center for Family Advocacy, which provides legal and social work advocacy to families, prevented all of the 110 children it served during a three-year pilot period from entering foster care.¹²⁸ At this juncture, few can dispute that early appointment of quality parent representation can help keep children safe in their homes.

Yet, across the country, states have failed to appoint counsel for parents either prior to or immediately after a child's removal. This failure manifests itself in different ways. For example, in Mississippi, no statute exists affording parents the right to counsel, thus allowing courts to completely deny parents the right to a lawyer throughout an entire child welfare case, even prior to the termination of their parental rights. Appellate courts in Mississippi have upheld termination of parental rights decisions even where the parents had no legal representation at any point during their cases.¹²⁹

In other jurisdictions, while parents may receive the assistance of a lawyer at some later stage of a child welfare case, they are not entitled to one at the first removal hearing, which typically occurs between twenty-four and seventy-two hours after the removal. For example, in Texas, parents are only appointed counsel at the full adversary hearing, which occurs fourteen days after the child has been removed.¹³⁰ In Delaware, a court's decision whether to appoint counsel is purely discretionary, based on "the degree to which the loss of parental rights are at stake; the risk of an erroneous deprivation of those rights through the dependency proceedings; and the interest of DSCYF as to the ultimate resolution."¹³¹ Similar practices exist in Minnesota, Wisconsin, Indiana, Missouri and Hawaii.¹³² In these jurisdictions, courts have vast discretion, on a case-by-case basis, to determine whether parents should be appointed counsel.

¹²⁴ For a more detailed review of the role of parents' attorneys in child welfare cases, see Vivek Sankaran, *Representing Parents in Child Welfare Cases*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 579 (Donald N. Duquette & Ann M. Haralambie eds., 2010).

¹²⁵ See Elizabeth Thornton & Betsy Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*, 46 FAM. L.Q. 139, 148 (2012).

¹²⁶ More information about the Center for Family Representation is available at <http://www.cfrny.org>.

¹²⁷ See Center for Family Representation, *Our Results*, available at <http://www.cfrny.org/about-us/our-results>.

¹²⁸ See Thornton & Gwin, *supra* note 127, at 145.

¹²⁹ See *K.D.G.L.B.P. v. Hinds County Dep't of Human Servs.*, 771 So. 2d 907, 909 (Miss. 2000).

¹³⁰ See TEX. FAM. CODE ANN. § 262.201 (West 2015).

¹³¹ See DEL. FAM. CT. R. 206.

¹³² Vivek Sankaran, *A National Survey on a Parent's Right to Counsel in Termination of Parental Rights*

Even in states in which parents' right to counsel appears to be strong, problems with early appointment exist. For example, in Michigan, although indigent parents are entitled to counsel at their first court appearance, hearings can be continued—for up to two weeks—to allow courts the opportunity to locate attorneys willing to take such appointments.¹³³ But while a court can continue the hearing to find a lawyer, it still can order the removal of a child from her home during that time.¹³⁴ So in practice, many parents still lose their children to foster care without ever having a lawyer advocate on their behalf. And in Washington, D.C., while courts appoint counsel for children up to seventy-two hours prior to the first court hearing—presumably to allow the attorney to work with others to try to resolve issues, including the need for an out of home placement for the child—courts still refuse to appoint lawyers to represent parents until the day of the actual hearing. This system denies the parents' lawyers the chance to adequately prepare for the hearing and have a meaningful impact on the outcome.¹³⁵

The lack of uniformity regarding when parents are appointed counsel is striking. But even when courts appoint attorneys for parents, they have failed to ensure the legal representation is adequate.¹³⁶ Consequently, parents' lawyers are underpaid, overworked and inadequately trained.¹³⁷ They carry high caseloads. They lack access to experts from other disciplines, like social workers, investigators, and parent partners. Rather than spending their time engaging with their clients or advocating for them at important agency meetings, they too often must move from hearing to hearing, simply helping to process a case from one stage to the next.

National child advocacy groups have lamented the inadequacy of parents' counsel for many years. For example, a 2005 report by the American Bar Association described parent representation in one state as falling “disturbingly short of standards of practice.”¹³⁸ Yet systems

and Dependency Cases, U. OF MICH. <http://youthrightsjustice.org/Documents/SurveyParentRighttoCounsel.pdf>.

¹³³ See Mich. Ct. R. 3.965(B)(11) (allowing adjournment for “other good cause shown.”).

¹³⁴ *Id.*

¹³⁵ See D.C. CODE § 16-2312 (2011).

¹³⁶ For an overview of the ways in which states are inadequately providing parent representation, see Vivek S. Sankaran, *No Harm, No Foul? Why Harmless Error Analysis Should Not Be Used To Review Wrongful Denials Of Counsel To Parents In Child Welfare Cases.* 63 S.C. L. REV. 13, 28-35 (2011).

¹³⁷ See, e.g., MINN. JUDICIAL BRANCH, REPORT OF CHILDREN'S JUSTICE INITIATIVE PARENT LEGAL REPRESENTATION WORKGROUP TO MINNESOTA JUDICIAL COUNCIL 2, (Nov. 17, 2008), <http://www.leg.state.mn.us/docs/2009/other/090151.pdf> (noting that “[t]here is no statewide funding and no standards of practice for attorneys representing parents.”); Astra Outley, *Representation for Children and Parents in Dependency Proceedings* 8 (2004), http://islandia.law.yale.edu/representingchildren/rcw/jurisdictions/am_n/usa/united_states/us_pew_report.pdf, archived at <https://perma.cc/94PN-358F> (noting that almost three-fourths of court-improvement specialists believed that attorneys for parents were not adequately compensated); Opinion, *Giving Overmatched Parents a Chance*, N.Y. TIMES, June 17, 1996, at A14 (observing that “parents are generally stuck with harried court-appointed lawyers who are juggling many cases, and who often show up unprepared and late for hearings.”); APP. DIV. FIRST DEP'T COMM. ON REPRESENTATION OF THE POOR, CRISIS IN THE LEGAL REPRESENTATION OF THE POOR (2001), available at http://www.courts.state.ny.us/press/old_keep/

http://www.courts.state.ny.us/press/old_keep/lad-rep-poor.shtml (writing that “[a]s a result of shamefully low rates of compensation of assigned counsel, lack of resources, support and respect, inadequate funding of institutional providers, combined with ever-increasing caseloads, New York's poor are too often not being afforded the ‘meaningful and effective’ representation to which they are entitled”).

¹³⁸ CUTLER INSTITUTE FOR CHILD AND FAMILY POLICY, MUSKIE SCHOOL OF PUBLIC SERVICE & A.B.A.,

have largely failed to respond to this outcry. While significant reforms have occurred in some jurisdictions to strengthen legal representation in criminal matters, parent representation has received scant attention.

The federal government has also minimized the importance of early and strong parent representation. In other areas of the child welfare system, the federal government has taken steps to ensure uniform practices across the states. For example, in order to receive federal funding to support their child welfare systems, states must comply with a litany of mandates, including requirements that children receive the assistance of a guardian ad litem,¹³⁹ that children are afforded the opportunity to provide input about their permanency,¹⁴⁰ and that courts' hearings must occur within specific time frames.¹⁴¹

But the federal government has remained noticeably silent about the need for quality and early parent representation. Tellingly, federal funds can still flow to states that completely deny parents the assistance of a lawyer. Moreover, while the federal government has spent millions of dollars studying the quality of child representation,¹⁴² it has done little to support parent representation. By remaining blind to this issue, it has perpetuated an inadequate system in which children needlessly enter foster care, contrary to the intent of federal child welfare legislation and foundational constitutional principles protecting the integrity of families. Unless both courts and legislatures recognize the importance of early appointment of quality parent attorneys, children will only continue to unnecessarily enter foster care.

VI. STATES SHOULD AFFORD PARENTS AND CHILDREN THE RIGHT TO AN EXPEDITED APPEAL OF REMOVAL DECISIONS

States certainly must take steps to enforce state and federal removal standards and to appoint counsel for parents at removal hearings. But an additional problem exists in that most states have failed to create a process to hold juvenile courts accountable for their decisions at removal hearings. States could address this gap by allowing parents and children to immediately appeal decisions placing children in foster care. In states without this system, the body of law defining the legality of removal decisions remains undeveloped. Thus, juvenile courts remain free to disregard state and federal laws with very few repercussions. States must work to change this.

MICHIGAN COURT IMPROVEMENT PROGRAM REASSESSMENT 155 (Aug. 2005), <http://muskie.usm.maine.edu>

[/Publications/cf/MI_CourtImprovementProgramReassessment.pdf](#). The report further noted that parents reported that "their attorneys do not return phone calls or provide parents with their phone numbers, do not explain what is going on in their cases, do not give parents a chance to tell their side of the story at court hearings, and make deals without consulting with them. Parents describe talking to their attorneys for only a few minutes before their hearings."

¹³⁹ 42 U.S.C. § 5106a(b)(2)(B)(xiii).

¹⁴⁰ 42 U.S.C. § 675a(a)(2)(A).

¹⁴¹ 42 U.S.C. § 675(5)(B)-(C).

¹⁴² In Oct. 2009, the federal government awarded the University of Michigan Law School a six-year, six million dollar grant to study the representation of children. See NATIONAL QUALITY IMPROVEMENT CENTER ON THE REPRESENTATION OF CHILDREN IN THE CHILD WELFARE SYSTEM, <http://www.improvechildrep.org/Overview.aspx> (last visited Feb. 12, 2016).

In a number of states, parents and children do not have a right to appeal removal decisions.¹⁴³ Rather, in these jurisdictions, they must file an application or petition with their appellate court requesting permission to appeal. In those cases, the appellate court will only address the merits of the case after they have granted a request for an appeal or an extraordinary writ. This process can take months, if not longer, unless additional motions are filed to expedite the matter. By the time the appellate court renders a decision on the removal decision—if it even chooses to do so—the issues raised in the appeal would likely be moot due to the passage of time and intervening events.

Others, like New York, Massachusetts, and Pennsylvania, provide parties with a right to challenge removal decisions.¹⁴⁴ Statutes in these states contain some expedited procedures that govern these appeals. But even in these jurisdictions, the resolution of a removal appeal could take months.

The District of Columbia and New Mexico provide good models of how an effective process could work. In D.C., children have the right to appeal removal decisions.¹⁴⁵ Children's attorneys must file the appeals within two days of the decisions, but need not file briefs.¹⁴⁶ Then, the Court of Appeals must hear argument on the appeal on the third day and render its decision the day after argument.¹⁴⁷ The Court of Appeals is not required to issue a written opinion.¹⁴⁸ The primary flaw of D.C.'s expedited process is that it is limited to appeals filed by children.¹⁴⁹

In New Mexico, all parties have the right to appeal a removal decision.¹⁵⁰ Parties must initiate the appeal within five days of the order.¹⁵¹ Then, within ten days, the Court of Appeals must either affirm the decision based on the Appellant's pleading and the record or order the other parties to file a response within ten days.¹⁵² No later than thirty days after the initiation of the appeal, the Court of Appeals must render a final decision.¹⁵³

The systems created in D.C. and New Mexico provide examples of how to balance a child's sense of urgency with the need to review important decisions made by trial courts. At a minimum, states must ensure that juvenile courts remain accountable for important decisions they make, which can be accomplished by creating a robust appellate process.

¹⁴³ See, e.g., *In re McCarrick/Lamoreaux*, 861 N.W.2d 303 (Mich. Ct. App. 2014) (holding no right to appeal initial removal decision); *In re C.K.*, 591 A.2d 57, 60 (Vt. 1991) ("It is crucial that the CHINS determination proceed unhindered by appeals challenging an infinite variety of procedural and substantive questions that may arise along the way."); N.C. GEN. STAT. § 7B-1001 (2015) (not including appeal of initial removal order on list of permissible appeals); TEX. FAM. CODE ANN. § 105.001(e) (West 2003) (excluding temporary orders of removal from interlocutory appeal).

¹⁴⁴ N.Y. FAM. CT. ACT § 1112 (McKinney 2006); MASS. ANN. LAWS ch. 119, § 27 (LexisNexis 2015); PA. R.A.P. 102.

¹⁴⁵ D.C. CODE § 16-2328(a) (2001).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See *In re S.J.*, 632 A.2d 112 (D.C. 1993).

¹⁵⁰ N.M.S.A. 32A-1-17(a).

¹⁵¹ N.M. Rules of App. Procedure, Rule 12-206A(C).

¹⁵² N.M. Rules of App. Procedure, Rule 12-206A(F)(1).

¹⁵³ N.M. Rules of App. Procedure, Rule 12-206(A)(F)(2).

VII. THE FEDERAL GOVERNMENT SHOULD INCLUDE MEASURES RELATED TO “SHORT STAYERS” IN THE CHILD AND FAMILY SERVICES REVIEW

Finally, the federal government must play a larger role in addressing the problems of short-stayers in foster care. The Children’s Bureau, which is housed within the Department of Health and Human Services, carries a significant influence in directing states to focus on certain practice areas. To promote positive outcomes for children and families receiving federally funded child welfare services, the Children’s Bureau monitors the provision of state child welfare services through several activities. To ensure children do not unnecessarily enter foster care—a core congressional mandate—the Children’s Bureau should monitor the number of short stayers in our nation’s foster care system. Unfortunately, rather than monitor data related to short stayers, the Children’s Bureau has elected to censor them from their monitoring efforts.

In 1994, Congress amended the Social Security Act to require the Children’s Bureau to review and evaluate state child welfare systems to: (1) ensure conformity with federal child welfare requirements; (2) determine what is actually happening to children and families as they are engaged in child welfare services; and (3) assist states in helping children and families achieve positive outcomes.¹⁵⁴ The Children’s Bureau developed the Child and Family Services Review (CFSR) to carry out this congressional mandate and assess outcomes in the domains of safety, permanency and well-being.¹⁵⁵ The CFSR is a five-part process, the main components of which are a statewide assessment and an onsite review.¹⁵⁶ For the statewide assessment, the Children’s Bureau analyzes AFCARS and NCANDS data to compare certain state outcome measures against national standards, which are set by the Children’s Bureau.¹⁵⁷ The CFSR, although not without its flaws, remains one of the most important innovations in child welfare. In many states, the CFSR was the catalyst for child welfare agencies’ first attempt to measure their practices against their mission of protecting children and strengthening families.

The CFSR represents a critically important opportunity for the federal government to provide feedback to the states and influence their practices. The CFSR is a time-intensive process, involving a diverse group of stakeholders and comprehensive review of a state child welfare system.¹⁵⁸ Since the original congressional mandate, two rounds of CFSRs have been completed.¹⁵⁹ After each round, the Children’s Bureau made substantial changes to the process based on the advice of expert panels and extensive public commentary.¹⁶⁰ A third round is currently underway.¹⁶¹ Although the measures have changed over time, they generally have measured the recurrence of

¹⁵⁴ Social Security Act Amendments of 1994, Pub. L. No. 103-432, 108 Stat. 4398 (1994); 42 U.S.C. §1320a-2a (2007).

¹⁵⁵ Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020, 4023 (Jan. 25, 2000) (to be codified at 45 C.F.R. pts. 1355, 1356, 1357).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See, e.g.,* Statewide Data Indicators and National Standards for Child and Family Services Reviews, 79 Fed. Reg. 22604, 22605 (Apr. 23, 2014) (to be codified at 45 C.F.R. pt. 1355).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

maltreatment for children, timeliness of permanency, and placement stability.¹⁶² The relevant permanency measure currently in place is:

Of all children who enter foster care during a twelve-month period, what percent are discharged to permanency within twelve months of entering care?¹⁶³

The justification for this measure is that “the indicator provides a focus on the child welfare agency’s responsibility to reunify or place children in safe and permanent homes as soon as possible after removal.”¹⁶⁴ *As soon as possible*.

Certainly, the Children’s Bureau recognizes that there is such a situation in which a reunification is achieved too fast: in other words, where removing the child from the home was unnecessary. This concept can be explained by revisiting the New Mexico data explored above. The short stayers in New Mexico are reunified very soon after their removal—most within two days of their removal. If the measure above were computed by including all children removed during the reporting period, the Children’s Bureau would be incentivizing the unnecessary removal and short-term placement of children in foster care. The more short stayers a state has, the higher its percentage of children discharged within twelve months of entering care.

Of course, the federal government’s priority of achieving permanency “as soon as possible” is tethered to the congressional mandate of avoiding unnecessary removals to foster care. This presumably is the basis for a regulation that has long been a part of the CFSR. The timeliness of permanency indicators has consistently excluded children whose complete foster care episode was less than eight days.¹⁶⁵ A foster care episode of less than eight days, the argument goes, is too fast. A state’s performance on timeliness of permanency measures in the CFSR should not improve on the basis of reunifying children within eight days of their removal. The relevant CFSR 3 permanency measures include this exclusion, as have the historical measures.¹⁶⁶

Interestingly, the original proposed rule required that children be in foster care for at least thirty days.¹⁶⁷ However, the proposed rule was modified after learning there was more public support for an eight-day exclusionary rule, and the Children’s Bureau took the position there was little difference in measuring at eight days compared to thirty days.¹⁶⁸ The Children’s Bureau stated

¹⁶² *Id.*

¹⁶³ *Id.* at 22607.

¹⁶⁴ *Id.* at 22708.

¹⁶⁵ *See* Statewide Data Indicators and National Standards for Child and Family Services Reviews, 79 Fed. Reg. 61244 (Permanency Performance Area 1), 61245 (Permanency Performance Area 4), 61246 (Permanency Performance Area 4) (Oct. 10, 2014) (to be codified at 45 C.F.R. pt. 1355).

¹⁶⁶ Statewide Data Indicators and National Standards for Child and Family Services Reviews, 79 Fed. Reg. 22604, 22606 (Apr. 23, 2014) (to be codified at 45 C.F.R. pt. 1355).

¹⁶⁷ *See* The Data Measures, Data Composites, and National Standards to Be Used in the Child and Family Services Review, 71 Fed. Reg. 32969, 32975 (June 7, 2006).

¹⁶⁸ *Id.*; Our data reveal the same: short-stayers timeliness dynamics are front-loaded. Although defined as children who spend less than thirty days in care, most exit within two weeks of their removal.

purpose for including this rule was “to address variation in State practices and policies concerning the placement of children in very short term foster care.”¹⁶⁹

It is important to not incentivize a policy or practice in utilizing “very short term foster care,” and an exclusion of children whose foster care episode is less than eight days accomplishes that as it relates to measuring timeliness to permanency. However, it misses the mark as it relates to preventing unnecessary removals, a core congressional mandate. As previously discussed, state “practices and policies concerning the placement of children in very short term foster care” raise serious justice issues for families and well-being issues for children. Further, these issues undermine the oft repeated priority of keeping children in their homes whenever possible, avoiding the unnecessary placement of children in foster care. Exclusion of children whose foster care episode is less than eight days from the CFSR measures is treating the symptoms, not the cause, of the problem. Aware that there is variation in “State practices and policies concerning the placement of children in *very* short term foster care” (emphasis added), the Children’s Bureau should measure the extent of such practices and policies, provide feedback to states on the related legal and health problems related to those practices and policies, and ultimately disincentivize them. As a starting point, the Children’s Bureau could include a measure in the CFSR of the percentage of children who are discharged within thirty days of their removal.

Of course, inclusion of any such measure concerning short-stayers in the CFSR as it currently stands would likewise have unintended consequences. The authors of this paper join a number of other researchers in calling on the Children’s Bureau to reform the relationship between the federal and state governments in using child welfare administrative data to drive program improvement. Rather than utilizing a limited number of outcome measures to determine “substantial conformity,” the focus of the CFSR should be “to better understand *why* states are achieving particular . . . outcomes.”¹⁷⁰ The 2013 AFCARS file reveals 25,112 children who spent less than thirty days in foster care. It would be irresponsible to penalize states on the basis of those data alone. However, it is equally irresponsible to exclude them from the federal monitoring. Preventing the unnecessary removal of children to foster care is a cornerstone of nearly every child welfare-related legislative effort from Congress. Analyzing data related to short stayers is critical to informing our understanding of how states are promoting the congressional mandate of preventing unnecessary removals.

VIII. CONCLUSION: PRIMUM NON NOCERE

In Epidemics, Book I of the Hippocratic School, students of medicine were cautioned: “Practice two things in your dealings with disease: either help or do not harm the patient.” In modern times, said more succinctly, medical students simply pledge to “First, do no harm.” *Primum non nocere*. Although not technically part of the Hippocratic Oath, this is among the most recognizable phrases concerning a physician’s promise to abide by a number of ethical standards. Consumers of healthcare join doctors in confronting this ethical dilemma every day. An oncologist may consider the pros and cons of chemotherapy with a cancer patient, but they would never prescribe chemotherapy unless there was some chance of benefit. Of course, the idea that a doctor must

¹⁶⁹ *Id.*

¹⁷⁰ Mark E. Courtney et al., *Unintended Consequences of the Push for Accountability: The Case of National Child Welfare Performance Standards*, 26 CHILD. & YOUTH SERV. REV. 1141, 1152 (2004).

consider the possible harm that a particular intervention might cause is an ethical issue that extends beyond the practice of medicine. The maxim applies in child welfare just the same.

Removing a child from their parents' custody is an extreme measure, one that carries well-known benefits and risks. While removal to foster care can ensure the safety of some children, there are obvious risks of harm when they are legally and physically separated from their parents. Children suffer developmentally, emotionally, and socially when they are removed from their parents' custody and placed in unfamiliar environments, with unfamiliar caretakers. Accordingly, our child welfare framework involves legal safeguards to ensure that children are not unnecessarily removed from their parents' custody.

But data reveal that too many children still may be unnecessarily subjected to this intervention. Forcibly removed from their parents' care and placed in unfamiliar environments, these children and their families are subject to trauma under the color of state law. The legal system, with the help of the Children's Bureau, must take steps to address this problem. The solution is quite simple: "*primum non nocere*."