

Youth, Rights & Justice

ATTORNEYS AT LAW

Oregon House of Representatives
Committee on Judiciary
Testimony in Support of HB 2849
April 3, 2019

Chair Williamson, Vice-Chair Gorsek, Vice-Chair Sprenger and Representatives of the Committee, Youth, Rights & Justice (YRJ) would like to thank you for the opportunity to testify in support of HB 2849 and the -2, -3, -4, and -6 amendments.

Founded in 1975, Youth, Rights & Justice is a non-profit law firm located in Portland, Oregon, that provides client-centered legal representation for children, youth, and parents in the child welfare and juvenile justice systems. Youth, Rights & Justice also represents children, youth, and parents in delinquency and dependency cases heard by the Oregon Court of Appeals and Oregon Supreme Court, in addition to staffing an educational advocacy program. It is our mission to improve the lives of vulnerable children and families in the courts, legislature, schools and community.

History of HB 2849

HB 2849 is the product of considerable work by stakeholders during both the 2018 legislative short session and in an interim work group established by this committee. The concepts in the bill were originally part of HB 4009 (2018), which dealt with both entry into foster care (emergency removal of children from their parents with and without a court order) and exit from foster care in some instances with the reinstatement of parental rights. The latter part of HB 4009 was enacted in 2018 and a work group was established to deal with emergency removal and protective custody orders. As YRJ testified before this committee on February 14, 2018,

This bill's focus is on the importance of family. As originally written it modified two important points in Oregon's child welfare process—children's entry into foster care through removal by the Department of Human Services or law enforcement, and the ability of children to exit foster care by reuniting with parents whose rights have been terminated, when reunification is in the best interests of the child.

Although the amendments to the bill remove section 1 of the original HB 4009 draft, which modified the Oregon standard for the removal of a child from the care of her parents, that issue remains of critical importance to Oregon children and families. Currently, the Oregon removal standard is out of step with what the Fourth and Fourteenth Amendments of the United States Constitution require.

At Youth, Rights and Justice we see all too often how the current standard for removal without a court order, along with the current statutory barriers to obtaining a protective custody order, leave Oregon families vulnerable to inappropriate state intrusion, disrupted attachment and unnecessary trauma.

During the interim, the work group met on multiple occasions. Members included Representative Sanchez and Senator Gelsler. Representatives (sometimes multiple representatives) from the following agencies and groups were also part of the work during the interim: the Oregon Judicial Department (OJD), the Department of Justice (DOJ), the Department of Human Services (DHS), CASA, the Oregon District Attorneys Association, Tribes, Oregon Criminal Defense Lawyers Association, Youth Rights & Justice, Disability Rights Oregon, law enforcement officials (including local police and sheriffs), juvenile judges, academics, child abuse assessment centers and other community partners.

The Importance of HB 2849

Constitutionality of Family Separation

The United States Supreme Court has repeatedly found that parents have a constitutional right to the care and custody of their children. Inherent in this right is a child's "reciprocal" right to be raised by his or her parent—a right sometimes referred to as a right to family unity or family integrity. Before the government can disrupt the parent-children relationship it must provide parents and children with due process to ensure that their fundamental rights under the Fourteenth Amendment are protected. Children and parents also have a right protected by the Fourth Amendment to be free from unreasonable search and seizure without a warrant.

The current statute governing removal of children without a court order authorizes government actors to take a child into protective custody when "the child's condition or surroundings reasonably appear to be such as to jeopardize the child's welfare." This standard is inconsistent with modern practice and unacceptable under case law from both the Oregon Court of Appeals and the Ninth Circuit Court of Appeals. *Nathan v. Dept. of Human Services*, 288 Or. App. 554 (2017); *Kirkpatrick v. Cty. of Washoe*, 843 F.3d 784 (9th Cir. 2016); *Rogers v. County of San Joaquin*, 487 F3d 1288 (9th Cir 2007); *Demaree v. Pederson*, 887 F.3d 870 (9th Cir. 2018) (requiring imminent risk of serious harm to justify a removal of children without a court order).

Consistent with standards articulated in the case law, HB 2849 removes the old language and substitutes a standard prohibiting removal without a court order unless "there is reasonable cause to believe that there is an imminent threat of severe harm to the child." Reasonable cause is defined as both a subjective and objective reasonable belief "given all of the circumstances and based on articulable facts." Severe harm is defined as: "life threatening damage or significant or acute injury to a person's physical, sexual or psychological functioning."

Reducing Disproportionality

According to DHS data, American Indian/Alaska Native children are overrepresented in foster care at a rate 3.25 times that of the general population and for African American/Black children that rate is 1.7.ⁱ A process for neutral judicial review, prior to removal decisions, provides independent oversight of removals before they happen.

Reducing Harm from Unnecessary Removal

The harm of removal cannot be undone by a return to parent shortly after the removal; removal “upsets all aspects of a child’s life.”ⁱⁱ The physical separation from the child’s primary caretaker is viewed as a rejection or loss, which is exacerbated by the fact that children often don’t know why they are entering foster care or how long it will be before they see their parent(s).ⁱⁱⁱ Furthermore, due to shortages of foster homes, often children are separated from siblings. Foster care, even for a brief time, is not a benign intervention.

Modernizing Process for Obtaining a Protective Custody Order

The bill amends the language governing application for a protective custody court order, modernizing the practice and making it much easier for DHS and law enforcement to obtain the orders when required. These provisions were the product of much discussion and drafting by those members of the group most affected: DHS, DOJ and OJD.

Conclusion

The current bill was the product of a lengthy process involving stakeholders from all parts of the child welfare and juvenile court dependency practice. The agreed-upon language in HB 2849, (including the modifications in the -2, -3, -4, and -6 amendments) substantially limits removals without a court order, but does not prevent DHS or law enforcement from keeping children safe. YRJ supports passage of HB 2849 with the -2, -3, -4, and -6 amendments.

ⁱ Department of Human Services, Office of Reporting, Research, Analytics and Implementation, *2017 Child Welfare Data Book* 15 (2018), at <https://www.oregon.gov/DHS/ABOUTDHS/LegislativeInformation/2017-Child-Welfare-Data-Book.pdf>

ⁱⁱ Sankaran, Vivek, co-author. “Easy Come, Easy Go: The Plight of Children Who Spend Less Than 30 Days in Foster Care.” *C. Church, U. Pa. J. L. & Soc. Change* 19, no. 3 (2016): 207, 211, available at <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2850&context=articles>.

ⁱⁱⁱ *Id.*