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Removing Barriers--Not Children: How West Virginia Can Prevent Further Harm to Children

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REMOVING BARRIERS—NOT CHILDREN: HOW WEST VIRGINIA CAN PREVENT FURTHER HARM TO CHILDREN

Emily R. Mowry*

ABSTRACT

West Virginia has one of the highest rates of children in foster care—and thus removed from their families—in the United States. Recent scientific and social science research has shown that removing children from their parents’ home is a traumatic event in and of itself, causing further harm to children already experiencing abuse and neglect. Federal legislation in the past ten years requires that states make reasonable efforts to address issues of abuse and neglect prior to removing children from their homes. West Virginia, for many reasons, is not doing so. West Virginia’s state child welfare agency, Department of Health and Human Resources (WVDHHR) is unable to sufficiently staff their offices across the state, leading to crises and an inability to timely investigate referrals to Child Protective Services. The state as a whole lacks access to a number of critical resources that are necessary to preventing removal. The opioid crisis has exacerbated pre-existing poverty and substance abuse problems and caused further need for services in the state. Yet the West Virginia government had a self-proclaimed surplus of $1.308 billion at the end of 2022. This article seeks to propose several programs and services that West Virginia could be funding through that surplus and through various federal grants, including IV-E monies, that would reduce the number of children removed from their homes by providing assistance to parents before the situation rises to the level of imminent danger. This article also suggests ways that West Virginia can mitigate the trauma to children by making greater efforts to place them with relatives and fictive kin in their own communities.

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I. INTRODUCTION

Erin and Lily\(^1\) were both young mothers involved in abuse and neglect cases in West Virginia. Erin was struggling to care for three children alone after ending her relationship with her abusive boyfriend. Erin had a supportive mother who allowed the family to live with her and helped in caring for the children. Erin was able to get involved with a one-on-one parenting and life skills coach who worked with her while the children were still in the home and in her care. Erin successfully completed a 90-day pre-adjudicatory improvement period and made a complete turnaround in her parenting abilities during that time, leading the Court to dismiss the allegations against her and resulting in the reversal of the child abuse substantiation on her record. Erin’s children were never removed from her care and custody because she had the support and encouragement to address her parenting deficiencies.

In contrast, Lily was unhoused, living outside with her infant during an extremely hot summer. Lily had spent years in the abuse and neglect system as a child herself and had suffered unspeakable trauma. Lily, due to the poor choices her trauma and mental illness had caused, did not have any family support system to help her. When Lily went to family for help with the baby, the family member obtained guardianship of the baby and tried to trick Lily into permanently signing away her rights to the child. Lily struggled to maintain safe, appropriate housing; consistent employment; reliable transportation; and mental health treatment. Without her basic needs met, Lily could not focus on participating in services to correct her parenting issues. Instead, Lily’s case moved quickly toward termination of her parental rights to the child who remained out of her care. Lily was told that it was her responsibility to figure out how to meet her basic needs and at the same time comply with numerous improvement period requirements. The child welfare agency did not provide Lily with any substantive assistance in

\(^1\) These names were changed to preserve confidentiality.
meeting her needs and obtaining services because the law states it is a parent’s responsibility to comply with their improvement period terms.\(^2\)

II. BACKGROUND

A. Current Issues

Unfortunately, the dichotomy between Erin and Lily’s outcomes is all too common in a state with high rates of generational poverty\(^3\) and substance abuse disorder. As of April 16, 2023, West Virginia has 6,262 children in foster care under the supervision of the West Virginia Department of Health and Human Resources (“WVDHHR”).\(^4\) None of these children are in the care of their parents. The 2020 census revealed that there are 360,784 children under the age of 18 in West Virginia.\(^5\) In 2020, 1.3% of West Virginia’s children were not in their parents’ care; and that percentage does not include the number of children who were cared for by relatives or fictive kin\(^6\) in guardianships or informal custodial arrangements.\(^7\) That same year, the national average of children in foster care was 0.3%,\(^8\) showing that West Virginia’s child welfare system is facing unprecedented demand. The only other states even close to West Virginia in 2020 were Montana (0.9%) and Alaska (0.8%).\(^9\)

In the past few years, West Virginia has faced nationwide publicity and criticism for its practices surrounding removal of children from their parents and placement of children in out of state facilities.\(^10\) Additionally, West Virginia is

\(^2\) See W. VA. CODE ANN. § 49-4-610(4)(a) (West 2015).


\(^6\) See infra notes 31–33.


\(^8\) Id.

\(^9\) Id.

in the midst of a federal lawsuit due to its treatment of children in foster care\(^{11}\) and is seemingly still under supervision by the United States Department of Justice because of violations of federal law in caring for children.\(^{12}\) The opioid epidemic has disproportionately affected West Virginia, resulting in a sharp increase in children coming into foster care or being cared for by relatives.\(^{13}\) And West Virginia continues to struggle with significant, severe generational poverty that compounds family instability and contributes to other factors affecting children’s safety.

Research has shown that removing children from their parents creates another layer of trauma for these children who have already suffered significant emotional harm and that states should make every attempt to avoid removing them when there is any possibility of providing corrective services and maintaining children’s safety while staying in the home.\(^{14}\) West Virginia is creating additional trauma for children by removing them from their parents, especially in situations when there is no other placement available in their own family or community which requires the children to be sent hours away from their home and school.

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\(^{13}\) Suzanne C. Brundage, Adam Fifield & Lee Partridge, The Ripple Effect: National and State Estimates of the U.S. Opioid Epidemic’s Impact on Children, UNITED HOSP. FUND, at 7–8 (Nov. 2019), https://uhfnyc.org/media/filer_public/e6/80/e680760f-d579-46a3-998d-1aa816ab06f6/uhf_ripple_effect_national_and_state_estimates_chartbook.pdf (stating that in 2017 West Virginia had 54 out of 1,000 children affected by the opioid crisis and that this amount was the highest rate in the country, with 22,000 total children affected). Further, in 2017, 12,000 children in West Virginia were living in a home with a parent with opioid use disorder; 4,000 children lost a parent due to death or incarceration; 4,500 children were removed from their home for foster or kinship care; and 1,500 children were suffering from opioid use disorder as an adolescent or had accidentally ingested opioids. Id. at 16.

B. Reasonable Efforts

Both federal and state law require WVDHHR to make reasonable efforts to avoid removing children from their homes, but these “reasonable efforts” are not fully explained or delineated in West Virginia, leading to judicial interpretation of whether such efforts were made on a case-by-case basis. Typically, the reasonable efforts should include offering services that prevent removal of children by identifying the family’s issues and providing services targeted to address those issues. West Virginia law requires WVDHHR to provide “home-based family preservation services” prior to removing a child unless that child is in “imminent danger of serious bodily or serious emotional injury.” WVDHHR can conduct a needs assessment of the family in order to better assess what services might be helpful to prevent the removal of the

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15 See, e.g., 42 U.S.C.A. § 671(a)(15) (West 2018); W. VA. CODE ANN. § 49-2-202 (West 2023). There are certain situations when reasonable efforts are not required; those include specific aggravated circumstances by a parent such as torture, chronic abuse, sexual abuse, abandonment, violent crimes against other individuals in the homes, and prior involuntary termination of parental rights to another child. W. VA. CODE ANN. § 49-4-602(d) (West 2023).

16 Federal guidance from the Children’s Bureau attempts to provide some direction for reasonable efforts: “These services may include family therapy, parenting classes, treatment for substance use, respite care, parent support groups, and home visiting programs. Reasonable efforts also refer to the activities of caseworkers, including safety checks and home visits, that are performed on an ongoing basis to ensure that parents and other family members are participating in needed services and are making progress on case plan goals.” CHILDREN’S BUREAU, REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 2 (Sept. 2019), https://www.childwelfare.gov/pubPDFs/reunify.pdf. More specific services can include “child care, homemaker services, counseling, healthcare services, behavioral health evaluation and treatment, and vocational counseling.” Id.

17 W. VA. CODE ANN. § 49-1-201 (West 2018) (defining “child abuse and neglect services” as those which are “preventing the unnecessary removal of children from their families by identifying family problems and assisting families in resolving problems which could lead to a removal of children and a breakup of the family”).

18 W. VA. CODE ANN. § 49-1-206 (West 2021) (“‘Home-based family preservation services’ means services dispensed by the Department of Health and Human Resources or by another person, association, or group who has contracted with that division to dispense services when those services are intended to stabilize and maintain the natural or surrogate family in order to prevent the placement of children in substitute care. There are two types of home-based family preservation services and they are as follows: (A) Intensive, short-term intervention of four to six weeks; and (B) Home-based, longer-term after care following intensive intervention.”).

19 W. VA. CODE ANN. § 49-2-202 (West 2015); see generally Home-Based Family Preservation Act, W. VA. CODE ANN. §§ 49-2-201 to 49-2-207 (West 2015) (outlining requirements for services provided in the home to prevent removal of children).

20 W. VA. CODE ANN. § 49-1-206 (West 2021) (“‘Needs Assessment’ means an evidence-informed assessment which identifies the needs a child or family has which, if left unaddressed, will likely increase the chance of reoccurring.”).
children. WVDHHR’s efforts in this regard are routinely impacted by the lack of staffing and lack of available services in the community.

West Virginia has prescribed, according to federal law, specific guidelines detailing when a child can be removed from their parents’ home. Before a petition of abuse and neglect is filed, WVDHHR can remove a child from the home without getting a court order when a CPS worker observes the children “in an emergency situation which constitutes an imminent danger to the physical well-being of the child” or when a CPS worker “has probable cause to believe that the child or children will suffer additional child abuse or neglect or will be removed from the county” before WVDHHR is able to file that petition and obtain an order.21 If WVDHHR does remove a child, the CPS worker has to obtain an emergency custody order “immediately,” but that order is only valid for two judicial days.22 At the end of that period, WVDHHR must either file an abuse or neglect petition or return the child to the parent’s custody.23

At the time of the removal of the children from their parents’ custody, the court must make a finding that “there exists imminent danger to the physical well-being of the child; and there are no reasonably available alternatives to removal of the child, including, but not limited to, the provision of medical, psychiatric, psychological or homemaking services in the child’s present custody.”24 The court is required to hold a hearing “to determine whether or not ‘reasonable efforts’ have been made to stabilize and maintain the family situation before any child may be placed outside the home” with the exception of situations in which the child is in imminent danger at which point the reasonable efforts hearing is held post-removal.25 In the initial order filed upon the court’s receipt of the petition, the court not only appoints counsel and clarifies the children’s custodial situation but also must again make findings “that continuation in the home is contrary to the best interests of the child and why; and whether or not the department made reasonable efforts to preserve the family and prevent the placement or that the emergency situation made those efforts unreasonable or impossible.”26

After a petition of abuse and neglect is filed, the court is required to hold a preliminary hearing within ten days if the children were removed from the parents’ custody.27 At that preliminary hearing, the court’s order must again

21 W. VA. CODE ANN. § 49-4-303 (West 2015).
22 Id.
23 Id.; see also W. VA. CODE ANN. § 49-4-601 (West 2019) (outlining procedure for filing abuse and neglect petition).
24 W. VA. CODE ANN. § 49-4-602 (West 2015).
25 W. VA. CODE ANN. § 49-4-105 (West 2015).
26 W. VA. CODE ANN. § 49-4-602(a)(4) (West 2015). Additionally, “the order may also direct any party or the department to initiate or become involved in services to facilitate reunification of the family.” Id.
27 W. VA. CODE ANN. § 49-4-601(c) (West 2019).
reiterate that continuing placement in the home was not in the child’s best interests, if WVDHHR made reasonable efforts to keep the family together and avoid removal, if WVDHHR complied with the Americans with Disabilities Act if the parents have disabilities, and what efforts WVDHHR needs to make so that the children can return home.\textsuperscript{28} Even if the children were in the parents’ custody at the start of the case, WVDHHR can remove them at any time throughout the case “due to a change in circumstances” but must immediately request a hearing to occur within ten days to make the same findings regarding imminent danger and no reasonably available alternative to removal.\textsuperscript{29}

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C. Kinship Placement

When children are removed from their parents in West Virginia, WVDHHR has to consider the following types of placements\textsuperscript{30}: kinship placement\textsuperscript{31} with a relative\textsuperscript{32} or fictive kin,\textsuperscript{33} traditional foster home,\textsuperscript{34} residential shelter, group homes,\textsuperscript{35} independent living programs,\textsuperscript{36} and residential treatment

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\textsuperscript{28} W. VA. CODE ANN. § 49-4-602(b) (West 2015).
\textsuperscript{29} W. VA. CODE ANN. § 49-4-602(c) (West 2015).
\textsuperscript{30} W. VA. CODE ANN. § 49-1-206 (West 2021) (‘‘Placement’ means any temporary or permanent placement of a child who is in the custody of the state in any foster home, kinship parent home, group home, or other facility or residence.’’).
\textsuperscript{31} W. VA. CODE ANN. § 49-1-206 (West 2021) (‘‘Kinship parent’ means a person with whom the department has placed a child to provide a kinship placement. ‘Kinship placement’ means the placement of the child with a relative of the child, as defined herein, or a placement of a child with a fictive kin, as defined herein.’’).
\textsuperscript{32} W. VA. CODE ANN. § 49-1-206 (West 2021) (‘‘Relative of the child’ means an adult of at least 21 years of age who is related to the child, by blood or marriage, within at least three degrees.’’).
\textsuperscript{33} See W. VA. CODE ANN. § 49-1-206 (West 2021) (‘‘Fictive kin’ means an adult of at least 21 years of age, who is not a relative of the child, as defined herein, but who has an established substantial relationship with the child, including but not limited to, teachers, coaches, ministers, and parents, or family members of the child’s friends.’’).
\textsuperscript{34} W. VA. CODE ANN. § 49-1-206 (West 2021) (‘‘Foster family home’ means a private residence which is used for the care on a residential basis of no more than six children who are unrelated, by blood, marriage, or adoption, to any adult member of the household. ‘Foster parent’ means a person with whom the department has placed a child and who has been certified by the department, a child placing agency, or another agent of the department to provide foster care.’’).
\textsuperscript{35} W. VA. CODE ANN. § 49-1-206 (West 2021) (‘‘Supervised group setting’ means a setting where youth, 16 to 21 years of age, live with staff onsite or are available 24 hours per day and seven days per week. In this setting, staff provide face to face daily contact with youth.’’).
\textsuperscript{36} W. VA. CODE ANN. § 49-1-206 (West 2021) (‘‘Scattered-site living arrangement’ means a living arrangement where youth, 17 to 26 years of age, live in a setting that allows staff to be available as needed, depending on the youth’s level of autonomy. Sites for such living arrangements shall be in community environments to allow the youth full access to services and resources in order to fully develop independent living skills.’’).
West Virginia law has prescribed a tiered preference for placement, with a kinship home with a relative or fictive kin being the most preferred placement for children if at all possible and the least restrictive alternative.\textsuperscript{38} When a child is removed from their home, WV DHHR is required to conduct a “diligent search” to locate “every relative and fictive kin of the child” and must also “provide notice of the child’s need for a placement to relatives and fictive kin who are willing to act as a foster or kinship parent.”\textsuperscript{39} Seven days after removing the children, WV DHHR must provide the court and parties with “a list of all of the relatives and fictive kin of the child known to the department at the time of the filing, whether or not those persons have expressed a willingness to take custody of the child.”\textsuperscript{40}

Unfortunately, WV DHHR struggles to comply with the diligent search provision and often relies on cursory conversations with parents and children who are in the midst of emotional crisis during a removal to provide that information. Often, WV DHHR’s filed “list” contains only the name of one family member who currently has the children, leaving the parties scrambling later if that placement is no longer viable. In many parts of the state, WV DHHR does not even submit a list or demonstrate any efforts to find kinship placements. Even if WV DHHR finds additional kinship and fictive kin, sometimes those individuals live across state lines (in some regions of West Virginia, merely minutes away) which requires WV DHHR to apply to that other state for approval before placing the child in that home,\textsuperscript{41} sometimes requiring children to be placed in traditional foster homes for lengthy periods of time as that process can take several months to complete.

Any of the other parties can file their own lists of relative and fictive kin options for the child within seven days after receiving WV DHHR’s list,\textsuperscript{42} but this option is little used, as many parents at that point in the case are still opposed to their children’s removal and reluctant to help place them. WV DHHR is also required to complete an investigation into all proposed kinship and fictive kin resources and to provide the court and parties with a determination as to whether these resources “are willing and able to act as foster or kinship parents to the child” within 45 days of the original petition being filed.\textsuperscript{43} This follow-up filing

\begin{itemize}
\item \textsuperscript{37} W. VA. CODE ANN. § 49-1-206 (West 2021) (“‘Residential services’ means child care which includes the provision of nighttime shelter and the personal discipline and supervision of a child by guardians, custodians, or other persons or entities on a continuing or temporary basis. It may include care or treatment, or both, for transitioning adults.”).
\item \textsuperscript{38} W. VA. CODE ANN. § 49-4-601a (West 2020).
\item \textsuperscript{39} Id.
\item \textsuperscript{40} W. VA. CODE ANN. § 49-4-601a(2) (2020).
\item \textsuperscript{41} See W. VA. CODE ANN. §§ 49-7-101 et seq. (West 2023) (outlining the process for interstate cooperation through the Interstate Compact on the Placement of Children, or ICPC, procedure).
\item \textsuperscript{42} W. VA. CODE ANN. § 49-4-601a(3) (West 2023).
\item \textsuperscript{43} W. VA. CODE ANN. § 49-4-601a(4) (West 2023).
\end{itemize}
rarely occurs. WVDHHR continues to struggle to follow these requirements to ensure children get priority kinship placements, and their cursory efforts to comply are contrary to the intended effect of placing children with relatives and thereby greatly reducing the disruption to their lives and additional trauma placed on them.

III. LEGISLATIVE FUNDING REMEDIES

At the end of 2022, Governor Jim Justice touted West Virginia’s $1.308 billion surplus in revenue for that entire year. Yet the members of the child welfare community in West Virginia are routinely told that the state has insufficient funding to provide the necessary services to help families and prevent children’s removal.

A. Family First Act

In 2018, Congress passed the Family First Prevention Services Act which created additional IV-E funding specifically to provide preventative services. The law gave states the opportunities to put together a proposed plan to use the temporary additional funding to focus on preventative services, to provide support for kinship caregivers through Kinship Navigator programs, to reimburse states for placing certain children in residential treatment programs, and to permit states to offer services to youth aging out through the age of 23 (previously, the cutoff was 21).

West Virginia’s proposed plan was approved by the federal government and is supposed to be implemented by 2024. Some of the funding focuses identified by West Virginia in this plan are in-home visitation programs such as Parents as Teachers and Health Families America, Functional Family Therapy

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46 Id.
48 Id. at 15–18. Notably, their proposal appears to continue targeting families who already have open CPS cases. Id.
(FFT), motivational interviewing, trauma-informed delivery of prevention services, child welfare workforce training and support, Children with Serious Emotional Disorders Medicaid Waiver (CSED), managed care for foster and post-adoptive children, improvements to youth services and CPS, and new case management database. It does not appear that WVDHHR has provided an update to that plan. The plan from West Virginia lacked specificity with regards to any of the services intended to be implemented. Most of those services were focused on addressing issues for existing cases, and there was not much mention of implementing services that would prevent the removal of children or prevent cases altogether. Several of the identified issues to be addressed such as worker caseloads and staff training and support have not improved since the drafting of that plan and could be considered quantifiably worse at this time.

B. Legislative & Executive Action

The legislature and governor are well aware of the child welfare crisis in West Virginia and are all too cognizant of the media’s scrutiny on these issues. At the end of 2022, Governor Jim Justice issued an executive order raising the salaries for CPS workers in certain areas of the state with higher costs of living (“locality pay”) to a more competitive wage. In the 2023 session, the West Virginia legislature passed House Bill 2875 which amended W. Va. Code § 49-4-114 and will permit the courts to waive a requirement for a home study before

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49 Id. at 18–22. The plan notes that West Virginia at that time only had one FFT provider; this author is not aware of any additional providers in the state at this time. Id. at 22.

50 Id. at 22 (clarifying that a more detailed plan for this service would be provided in a later modification to the prevention plan).

51 Id.

52 Id. at 23–25.

53 Id. at 26–27.

54 Id. at 27. The managed care program that West Virginia references in this plan has proven to be ineffective at its intended purpose, possibly due to WVDHHR’s lack of communication with them, and there are concerns in the child welfare community that this program will be shut down in the near future.

55 Id. at 28–30.

56 Id. at 32. The referenced database was not implemented until the beginning of 2023 and continues to experience extensive glitches and cause significant delays in all aspects from case plans to subsidy checks for caregivers.


placing children with grandparents.\textsuperscript{59} However, the legislative and executive branches of government could take further steps to focus on preventing the removal of children and requiring WVDHHR to make specific efforts to address issues prior to causing children further trauma through removal.

The provisions of West Virginia law outlining the reasonable efforts to be made prior to removal of children are vague and do not provide sufficient guidance for WVDHHR to follow and for the courts to ensure compliance.\textsuperscript{60} The West Virginia Legislature should review and consider revising these provisions of law to include more specific efforts that must be made by WVDHHR to ensure that children are not removed simply because WVDHHR lacks an appropriate number of staff to address the backlog of referrals to be investigated. This backlog is preventing CPS from having contact with families early enough to provide preventative services.

Likewise, the provision outlining the requirements for diligent searches for relative and fictive kin placements does not contain any details about what efforts WVDHHR actually needs to make to locate those persons.\textsuperscript{61} The West Virginia Legislature should consider requiring WVDHHR to make efforts to find relatives beyond having a single conversation with the parents and children. Additionally, WVDHHR is already unable to follow through on all of the requirements in that provision, so the Legislature should consider including language in the provision that the courts can make a finding of failure to make reasonable efforts to prevent removal of the children or to provide permanency for the children due to a lack of compliance with this provision.

The West Virginia Legislature should consider allocating funds specifically for WVDHHR to contract with full-time family advocates in each county who can be assigned to families with non-violent CPS referrals well before an abuse and neglect petition is even filed (pre-petition) to assist the family with locating services and to maintain regular contact to ensure the safety of the children and prevent their removal. WVDHHR could potentially implement processes in their Centralized Intake process to have the reviewing worker assign service needs cases directly to the family advocate to avoid referrals sitting in a backlog for months with no assistance to resolve the issues.

IV. COMMUNITY REMEDIES

WVDHHR contracts many of its required services out to various organizations throughout the state, relying on those providers to ensure that families in the communities are receiving the assistance they need to succeed and keep their children safe. Unfortunately, WVDHHR does not regularly evaluate

\textsuperscript{59} H.R. 2875, 86th Leg., 1st Sess. (W. Va. 2023) (amending W. Va. Code § 49-4-114(3) to include permission for the courts to waive home study requirement for grandparents).

\textsuperscript{60} See supra notes 15–29.

\textsuperscript{61} See supra notes 30–43.
the appropriateness of the services those providers are offering, and often WVDHHR workers cannot even accurately describe or explain which providers offer what services.

A. Expectations

Parents going through CPS investigations and abuse and neglect cases are routinely expected to participate in a wide plethora of services, including drug screening multiple times a week; attending substance abuse classes, parenting classes, domestic violence classes, anger management classes, and/or adult life skills classes; participating in multiple evaluations such as psychological evaluations, psychiatric evaluations, and/or addiction severity evaluations; attending individual counseling, substance abuse counseling, and/or couples counseling; complying with supervised visitation schedules at third party providers; and any other terms that the court team believes are necessary and appropriate. Some of these services are provided in the local community, but some of WVDHHR’s required providers are lengthy distances away, requiring parents to travel to comply with the requirements.

Parents are expected to participate in all of the terms placed on them by WVDHHR and/or the courts while also maintaining their employment, housing, transportation, and financial stability. Some parents also have criminal cases that place additional requirements on them that are in addition to what is required of them with regards to their children. Is it any wonder that parents are not able to properly care for their children and meet their children’s needs when such burdens are placed on them?

B. Problems

Many of the above-listed services are not offered to parents until after their children are removed, and much of them occur during the day, jeopardizing parents’ employment and forcing them to choose between meeting their basic needs and complying with requirements. When drug screening is random, parents can get called at any time and be told to report for screening within a short period of time, also disrupting work schedules. The pandemic has shown the world that we have the ability to be flexible and to provide virtual opportunities in many areas we previously required in person participation. Virtual programs can be conducted either through synchronous programming (live) or asynchronous options (posted for later viewing). Many of these services required of parents could be offered in ways that do not interfere with their ability to maintain employment.

Further, most of these programs and providers do not offer childcare for participants, making it even more difficult for parents to retain custody of their children while completing services. Yet how can we expect parents to practice and improve their parenting abilities when they are not given any opportunity to actually care for their children while they are learning new skills?
As the example of Erin and Lily showed, family support and encouragement is critical to parents successfully addressing their issues to appropriately care for their children. However, when WVDHHR removes children and places them with relative caregivers (often grandparents), that action also lessens the parents’ support system by requiring the relatives to prioritize the safety and well-being of the children and making them feel they have to choose the children over the parents.

C. Solutions

1. Parenting Coaches

In some areas of West Virginia, there are one-on-one life coaches who work directly with each parent to help identify and address areas of weakness in their life skills and parenting abilities, often with the children still in the home. These providers seem to have a higher rate of success in keeping families together, especially if they are involved early in the process. Their schedules are more flexible, and they recognize the importance of involving the children in the parents’ learning process. Most of these providers are not contracted with WVDHHR and have to be paid with demand payments as ordered by the courts. West Virginia families would benefit if WVDHHR would consider expanding its contracted providers to include one-on-one providers who can be involved with families prior to petitions being filed and prior to children being removed to help address situations related to poor parenting skills and/or poor life skills.

Few hospitals offer any real parenting courses to help prepare new parents for the realities of caring for children. WVDHHR should partner with the hospitals to offer such classes and ensure that early intervention is done before children are even born.

2. Pre-Petition Counsel

There is currently a nationwide movement by child welfare advocates urging states to consider appointing pre-petition counsel, which is an attorney appointed to represent a parent before a petition is filed.\(^{62}\) Doing so would allow parents to have access to legal advice and be educated on the child welfare system and legal procedures but would also connect them to resources and help them understand the importance of addressing their issues before their children are removed.

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3. Family Resource Centers

West Virginia has begun offering grants for programs called family resource centers. In the areas where those programs exist, parents have access to educational programming, tangible assistance such as food/formula/diapers, and community support. Unfortunately, several locations lack such programs simply because no providers have applied for the grants and no providers are able or willing to offer such services to the community. WVDHHR should more widely promote their grants for family resource centers and make every effort to ensure each county has access to this program.

V. COURT REMEDIES

A. Diversionary Courts

In 2019, West Virginia started offering family treatment courts as a diversionary option to more quickly reunify children with their parents after an abuse and neglect petition is filed. Only 16 out of 55 counties currently offer this program. The family treatment court is designed to allow the parents to go through their improvement periods on a faster timeline than traditional court and provides more consistent accountability and assistance in following through with services. To participate, a parent has to be involved in an active abuse and neglect case, making it likely that their child was already removed from their care. The parent also has to be granted a post-adjudicatory improvement period, usually requiring that they made admissions to the allegations against them, also known as a stipulated adjudication.

Michigan has implemented a diversionary program called “baby court” which focuses on families with children under the age of four who are either at risk of having the children removed or have had their children placed in foster care.

67 W. Va. Code § 62-15B-2(a) (West 2023). Of note is that those individuals who are adjudicated based on one of the aggravated circumstances (with the exception of prior involuntary termination), which do not require reasonable efforts to reunify the family, are not eligible for this program. Id.
The program focuses on providing the family with mental health resources, early childhood intervention services, and parenting assistance. West Virginia should consider implementing additional family treatment courts and explore the concept of “baby courts” to help provide diversionary options to families to either prevent removal of their children or assist in more efficient reunification with appropriate supports in place. West Virginia should evaluate whether the Family First funding can be used for those programs and should also investigate the grants such as the one recently granted to Michigan for the diversionary court program.

B. Findings & Disposition

1. Reasonable Efforts

When the courts ratify the removal of children, they must make specific findings regarding reasonable efforts made to prevent removal. However, the required language, beyond asking for information on why continuation in the home was not possible, does not necessitate making case-specific findings regarding what WVDHHR’s efforts were and how they were reasonable. Further, evidence is rarely presented regarding what steps WVDHHR took to offer these services. Courts can require WVDHHR to present specific evidence and details of the efforts that were made to prevent the removal of the children rather than making generic findings. Such requirements would put more pressure on WVDHHR to make actual, demonstrable efforts to offer services that correct the conditions before removing the children.

Some areas of West Virginia have significant backlogs of CPS referrals still awaiting investigation which often results in situations rising to the level of imminent danger by the time CPS gets involved since no services are provided to the family to correct the issues that led to the referral during that backlog period. In making reasonable efforts findings, the courts should be inquiring when CPS was first notified of issues with each family and should factor that information into deciding whether appropriate actions were undertaken to prevent removal of the children.

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69 Id.

70 See supra notes 15–29.

71 West Virginia judges do take into consideration WVDHHR’s significant staffing issues in making determinations about reasonable efforts made to achieve permanency for children later on in abuse and neglect cases and have denied WVDHHR IV-E findings on that basis. Making similar evaluations with regards to reasonable efforts to prevent removal would be appropriate and analogous.
2. Alternative Disposition

Child welfare advocates nationwide are making a push for states to consider “kinship guardianship” as an alternative to permanently terminating parental rights.72 “Guardianship creates a legal relationship between a child and caregiver that is intended to be permanent and self-sustaining and can provide a permanent family for the child without the necessity of terminating parental rights.”73 Importantly, using this alternative permanency plan will allow the child to keep their relationship with their biological family while being cared for by an appropriate person who is able to meet their needs.74 Another critical aspect of guardianship versus termination of parental rights is that children would still have their inheritance rights with regards to their biological parents and families, a right that children lose when parental rights are terminated.75 States can use IV-E funding to offer subsidies to permanent guardians and can use the Family First additional funding to staff a Kinship Navigator to assist in locating services for the guardian, child, and family.76

In West Virginia cases, courts can consider granting a “Disposition 5” which permits the courts to place children in permanent legal guardianships with relatives or foster families without terminating the biological parents’ rights.77 Doing so would allow parents who can show a material change in circumstances to later come back to court and present evidence of that change and request that the court consider returning the children to their custody and terminating the guardianship.78 This type of disposition is actually a less restrictive alternative to terminating parental rights.79 Initially, when parental rights are terminated, parents do have the ability to come back into court and request a modification of

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73 Id. at 1.
74 Id. at 2.
75 Id. at 4.
76 Id. at 4–6.
77 See W. VA. CODE ANN. § 49-4-604(c)(5) (West 2023) (“Upon a finding that the abusing parent or battered parent or parents are presently unwilling or unable to provide adequately for the child’s needs, commit the child temporarily to the care, custody, and control of the department, a licensed private child welfare agency, or suitable person who may be appointed guardian by the court.”).
78 See W. VA. CODE ANN. § 49-4-606 (West 2023) (outlining procedures to modify dispositional orders).
79 W. VA. CODE ANN. § 49-4-604(c) (West 2023) (“The court shall give precedence to dispositions in the following sequence:” dismissal, referral for services and dismissal, reunification with WVDHHR supervision, terms of supervision, temporary commitment of custody, and termination of parental rights.).
their disposition. However, once an adoption occurs, the option to modify no longer exists, and the child is lost to them, barring exceptional circumstances.

A court order entering a Disposition 5 needs to include specific language: (1) “that continuation in the home is contrary to the best interests of the child”; (2) if WVDHHR “made reasonable efforts, with the child’s health and safety being the paramount concern, to preserve the family . . . and to prevent or eliminate the need for removing the child . . . and to make it possible for the child to safely return home”; (3) if WVDHHR complied with the Americans with Disabilities Act requirements; (4) what efforts WVDHHR did make (or if an emergency made efforts impossible); and (5) “specific circumstances of the situation which made those efforts unreasonable if services were not offered by the department.”

If the child is to remain in WVDHHR custody for purposes of a permanency plan, the order must also state if the child is going to be placed in a legal guardianship, placed with a relative, or placed in “another planned permanent living arrangement” (APPLA). The latter permanency plan is only available if a child is 16 years old and there is “a compelling reason for determining that it would not be in the best interests of the child” to be in a legal guardianship or with a relative.

In West Virginia, a subsidized guardianship does not require parental rights to be terminated but does require that the children “have a physical or mental disability,” “are emotionally disturbed,” “are older children,” “are part of a sibling group,” or “are a member of a racial or ethnic minority.” These subsidies continue as long as the child is in that guardianship until the child turns 18 (unless they have a “special need” or are in school or employed at which time the subsidy would end at age 21). WVDHHR’s policy manual advises that

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80 W. VA. CODE ANN. § 49-4-606 (West 2023). The motion to modify a disposition has to be presented by the guardian ad litem for the child, the child’s current guardian, or WVDHHR. W. VA. CODE ANN. § 49-4-606(a) (West 2023). The court has to find that the parent demonstrated a material change of circumstances and that changing the placement and custodial situation is in the child’s best interests. Id.; see also In re S.W., 236 W. Va. 309, 779 S.E.2d 577 (2015). A parent whose rights to the child were terminated (either voluntarily or involuntarily) does not have standing to request modification of a dispositional order. See In re Cesar L., 221 W. Va. 249, 654 S.E.2d 373 (2007).
81 See W. VA. CODE ANN. §§ 49-4-606(a), (c) (West 2023) (prohibiting modification of dispositional orders after a child is adopted).
82 See W. VA. CODE ANN. § 49-4-606(b) (West 2023). If an adoptive placement falls through, either through the child’s removal or the adoptive parent’s relinquishment, the court has to hold a permanency review hearing for the child which could open the options back up to include restoration of parental rights. Id.
83 W. VA. CODE ANN. § 49-4-604(c)(5) (West 2023).
84 W. VA. CODE ANN. § 49-4-604(c)(5)(E) (West 2023).
85 W. VA. CODE ANN. § 49-4-604(c)(5)(E) (West 2023).
86 W. VA. CODE ANN. § 49-4-112(a) (West 2023).
87 W. VA. CODE ANN. § 49-4-112(e) (West 2023).
subsidized guardianships should only be explored for non-relative caregivers if the child is over 12 years old unless the parties decided such a permanency plan is in the child’s best interests.88

West Virginia courts should consider using legal guardianship as an alternative to termination of parental rights, especially with children who are teenagers and do not want their parents’ rights terminated. A Disposition 5 would be a less restrictive alternative and would allow children to maintain familial connections that a termination of parental rights would sever.

VI. CONCLUSION

The crisis in West Virginia’s child welfare system is resulting in children suffering additional harm, not only by the backlog in investigating referrals but by the lack of services offered that leads to children being removed from their homes and their parents’ care. While West Virginia’s leadership continues to boast of surpluses in the state budget, West Virginia’s children and their families are struggling, and the child welfare system is overburdened and underfunded. West Virginia should reevaluate where money is being allocated and focus on funding existing preventative services as well as explore adding new services to intervene and assist at-risk families before situations rise to the level of imminent danger and require the removal of children. The West Virginia Legislature can explore updating the language of reasonable efforts and diligent search provisions to hold WVDHHR to greater accountability and can consider requiring WVDHHR to provide family advocates who can connect at-risk families to resources early on. WVDHHR can consider contracting with a wider range of service providers including one-on-one service providers, providing families with pre-petition legal counsel, better supporting and advertising family resource centers, and implementing better organizational and staffing policies that keep their positions filled and their caseloads manageable. The courts should consider exploring additional treatment court options for families in West Virginia, making more robust reasonable efforts and diligent search findings, and using legal guardianships as an alternative to termination of parental rights and familial connections. Children in West Virginia are already exposed to so many adverse childhood experiences throughout their young lives. The child welfare system needs to make better efforts to intervene early with preventative services and help families by removing barriers—not children.