



INSTITUTE FOR
REFORMING GOVERNMENT

BUILDING BRIGHTER FUTURES:
REFORMING CHILD WELFARE IN WISCONSIN



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The Institute for Reforming Government, along with its partner organization IRG Action Fund, is focused on developing free-market and limited-government reforms, taking action on them, and getting results for Wisconsin. Founded in 2018, IRG has quickly grown into one of the state's largest think tanks, boasting an elite policy team with decades of experience in state and federal government, trade associations, and statewide campaigns. Most importantly, IRG gets results for the conservative movement in Wisconsin.

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Executive Summary

In 1929, Wisconsin enacted the Children’s Code in Chapter 439 of the state statutes. It was the most comprehensive children’s welfare law in the nation at the time. Like in so many things, Wisconsin was ahead of the rest of the country and helped to set a standard for states to follow in establishing a child welfare system. Almost 100 years later, Wisconsin again needs to once again reclaim its title as a national leader. Over the past decade, the state has struggled to keep up with federal benchmarks while still trying to recover from the wide reaching effects of the pandemic. The state has struggled to reach these benchmarks, there are some underlying societal shifts that help to give more context. Although the number of kids going into out-of-home care has decreased in recent years, caretaker drug use as the reason for separation has increased by 121% since 2010. It is now the leading cause for removal of a child from their home, followed by incarceration and alcohol abuse. The state, or government more generally, cannot legislate an end to the societal ills that lead to these situations. The incredible responsibility of being a parent is lost on some and no single act of the government can undo this reality. However, there is more that the state can do to protect children who are entering the system through no fault of their own.

The state is obligated to care for children entering the foster care system by protecting their rights, preventing abuse, and moving them to permanency as quickly as possible. This is a herculean task and an often overlooked and under appreciated core function of government. Although the government cannot control the behavior of these caretakers, there is more that can be done to improve the lives of the children in the system, provide better protection, and give them a greater opportunity for success when they age out.

Right to Self-Directed Counsel

- » Current law allows for children 12 and older to have legal counsel during a CHIPS proceeding, while children younger than 12 are allowed a guardian ad litem. A guardian ad litem serves as an advisor to the court and advocates for what they think is best for the child.

- » Wisconsin should join a growing trend of states that are moving toward guaranteed self-directed counsel for children entering the system at every age. Studies have shown that this model speeds up the path to permanency and creates better outcomes.

Trafficking Prevention

- » Children in the system can be especially vulnerable to the dangers of trafficking and every year there are close to 100 substantiated cases.
- » The state can do more to provide education and implement new technologies to keep children safe.

Reducing Arbitrary Barriers to Permanency

- » When children enter the system, their parents are required to pay the state child support to cover the cost of care for their child. When it is decided that the parent can retake custody of their child, the state can withhold custody if the parent is not current on their payments.
- » This needs to be eliminated as a reason to continue separation. It needlessly extends the timeline to permanency and is detrimental to the children.

Property Rights

- » Roughly 10% of children in out-of-home care are entitled to payments from the Social Security Administration. Currently, most of these funds are absorbed by the state and counties to fund the cost of care.
- » These funds are the personal property of the children in the foster care system by no fault of their own. The money should be placed in escrow for future use by the child. It can assist them when they age out of care and take on the financial obligations of adulthood.

Enforceable Bill of Rights

- » This vulnerable population needs to know what their rights are and know that they are enforceable. Wisconsin needs an enforceable children's bill of rights.

Introduction

The child welfare system exists to protect the rights of children, to prevent abuse and neglect, and when those things have already occurred, to move them into a safe and loving home as quickly as possible. However, it was not always this way. Early American history held a different philosophy that in many ways was contrary to modern thought. In most states there were few if any laws on the books that protected children from abuse. That all changed with the case of Mary Ellen Wilson in 1874.¹ Wilson was the daughter of a widowed mother who, when she could no longer afford to care for her, relinquished custody to a New York orphanage. Mary Ellen was adopted and soon found herself in the care of another widowed mother after the death of her newly adoptive father. She would soon find herself the victim of heinous physical abuse that caught the attention of neighbors. Finally, a motivated investigator from the Department of Public Charity and Corrections, Etta Wheeler, with the help of a willing attorney brought her case before a court with a novel legal argument. The court sentenced the adoptive mother to one year in prison. Mary Ellen would soon find herself under the care of Wheeler's family and go on to start a family of her own. Her case was groundbreaking in that it spawned the creation of legal protections for children and a child welfare system in America.

Since its inception, the child welfare system has undergone many changes and reforms that have ultimately led to the system(s) that we have today. The Mary Ellen Wilson case prompted the founding of a private organization, the New York Society for the Prevention of Cruelty to Children, which is still in operation today.² In time, the federal and state governments would begin to take on responsibility for abused and neglected children. In 1912, the federal government created the Children's Bureau.³ With the passage of the Social Security Act of 1935, the federal government increased its role in and provided funding for child welfare programs in the states.⁴ At this point, Wisconsin had already begun to take on the issue at a state government level. In 1929, Wisconsin enacted the Children's Code into law and created the Department of Public Welfare ten years later.⁵ This was a root agency from which we get the Department of Children and Families today.

After 150 years of child welfare agencies operating in this country, little has changed in how we fundamentally operate these programs. The core principles of any child welfare system is to prevent abuse and neglect, protect children who are or have been abused, and when a child cannot safely stay with their biological parents any longer, to move the child to a permanent placement in a good home as soon as possible. However, there are ways to improve the system, to push for better outcomes, and improve the lives of these vulnerable children. The government cannot predict and prevent child abuse in all cases, but when a child finds themselves in these types of situations from no fault of their own, the system needs to be capable of ensuring a brighter future for these children. When a child enters

¹ Markel, Howard, Ph.D. Case Shined First Light on Abuse of Children. New York Times. 14 December 2009. <https://www.nytimes.com/2009/12/15/health/15abus.html>

² New York Society for the Prevention of Cruelty to Children. About the NYSPCC. <https://nyspcc.org/about-nyspcc/>

³ Department of Health and Human Services. About. <https://www.acf.hhs.gov/cb/about>

⁴ Child Welfare League of America. Timeline of Major Child Welfare Legislation. <https://www.cwla.org/wp-content/uploads/2014/05/TimelineOfMajorChildWelfareLegislation.pdf>

⁵ Wisconsin Legislative Reference Bureau. Blue Book, 2011-2012. Page 385.

the system they should have a vigorous advocate for their rights, be reunited with biological parents when appropriate in spite of any financial obligations, given every opportunity for a thriving future, and kept safe while in out-of-home care.



Focus On Children

Outside of protecting children from abuse and neglect, the child welfare system is responsible for getting children who have already suffered these maltreatments to a permanent and safe setting as soon as possible. However, that doesn't always happen in the current system. Between July of 2023 and June 2024, just 34.1% of children entering the system were able to be moved into a permanency through reunification, adoption, or moving in with relatives in under 12 months.⁶ This is below the goal of 40.5% set by the federal Children's Bureau. Although Wisconsin hit their target metrics in the 12-24 months and 24 months plus metrics, they are just barely above the minimum targets set by the federal government. The wide range of factors that go into why abuse and neglect happens and how it is remedied leaves us with no fingers to point, but rather, solutions to find.

The number of cases that require a child to be put into out-of-home care (OHC) has declined in recent years, but a recent spike in specific categories of causation paint a more detailed picture for what these children are seeing in their home. At the end of 2018, 7,826 Wisconsin children were in an OHC placement, the most recent figure at the end of 2023 showed 6,142, a 21.5% decrease.⁷ However, since 2010 we have seen a 121% increase in the number of cases caused by caretaker drug abuse.⁸ It was the leading cause for removal of a child from their home, followed by caretaker incarceration, alcohol abuse, and inadequate housing in that order with the remainder being for reasons outside of these main groupings.

There is little the state can do to head off these systemic issues in society that lead to situations where it becomes necessary to remove a child from their home. Issues of drug and alcohol abuse have a long history and the state cannot, nor does it have the ability to, ensure that every parent is avoiding these pitfalls and providing a stable and loving home for their children. However, when natural supports do not exist within a family to deal with these issues, the state must step in to ensure that children are given every opportunity to have a safe home, supportive care, and brighter future beyond their current situation. However, there are reforms we can make to the current system in Wisconsin that will ensure that children move through the system as expeditiously as possible, keep them safe in the intervening time, and better prepare them for the world when they don't have their natural family to fall back on.

⁶ Wisconsin Department of Children and Families. Child Welfare Key Performance Indicators Dashboard. 7/1/23 through 6/30/24, Legal Permanency <12 months. <https://dcf.wisconsin.gov/cw/all>

⁷ Wisconsin Department of Children and Families. 2020-2024 Children and Families Plan Final Report. Pg.10. <https://dcf.wisconsin.gov/files/cqi-cfsr/pdf/plans/cfsp25.pdf>

⁸ Wisconsin Department of Children and Families. 2020-2024 Children and Families Plan Final Report. Pg.11. <https://dcf.wisconsin.gov/files/cqi-cfsr/pdf/plans/cfsp25.pdf>

Right To Client-Directed Counsel

When a child enters the child welfare system, it usually comes by way of a child in need of protection or services (CHIPS) proceeding. It begins with a report being made by a family member, a teacher, a caregiver, or anyone who may have contact with the child to child protective services (CPS). If CPS substantiates the claim, they can take the child into custody and file a CHIPS petition with the court. This starts a process which is for all intent and purpose, a court case. These cases lead to one of three main outcomes, dismissal, counseling for any of the involved parties, or possible removal of the child from their home into OHC.⁹ This can be as confusing for the child as it is the parents.

Current law allows for the court to appoint attorneys for the parents and children 12 and older. Children under the age of 12 may have a guardian ad litem appointed. This confusing process and lack of guaranteed legal representation has led to inefficient and poor outcomes. As mentioned above, the path to permanency in Wisconsin is underperforming federal metrics or barely keeping pace. As of August 2024, roughly 32% of children in OHC have been there for 25 or more months.¹⁰ That means these children have not been in a permanent home setting for over two years. If the goal is getting children to permanency as fast as possible, then Wisconsin has a lot of room for improvement.

Client-direct counsel for children in a CHIPS proceeding is one way to solve this. As mentioned earlier, children ages 12 and older can be appointed counsel, but children younger than 12 are usually given guardian ad litem. A guardian ad litem appointed by the court represents what they see as the best interests of the child in the CHIPS proceeding. They do not act as an attorney representing the child. Therefore they do not advocate on behalf of what the child wants, rather they advocate what they think is best for the child.

Children going through the traumatic process of possibly being separated from their parents should have the absolute right to client-directed counsel, regardless of age or the court's discretion. The right to client-directed counsel ensures that the best interests of the child are represented by an attorney of law who is bound by the highest ethical standards. This becomes even more clear when balanced with the fact that the Supreme Court of the United States decided in Gault that children in delinquency proceedings have a constitutional right to due process, thereby guaranteeing them the right to counsel.¹¹ Children who are in the juvenile justice system are accused of a crime, whereas children entering the child welfare system are often victims of abuse and neglect. If we guarantee the right to counsel to protect the liberty interest of children accused of criminal activity, it's all the more important that we give children who are victims the same right.

This prescriptive policy is not just backed by sentiment or a philosophical stance, data shows

⁹ Wisconsin Legislative Fiscal Bureau. Informational Paper #53 Child Welfare Services in Wisconsin. January 2023, https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0053_child_welfare_services_in_wisconsin_informational_paper_53.pdf

¹⁰ Wisconsin Department of Children and Families. Out-of-Home Care Dashboard. Accessed August 14, 2024. <https://dcf.wisconsin.gov/dashboard/ohc>

¹¹ Ceresi, F.J.. In Re: Gault: A Constitutional Celebration. Children's Legal Rights Journal Volume: 8 Issue: 3 Summer 1987 Pg: 11-15. <https://www.ojp.gov/ncjrs/virtual-library/abstracts/re-gault-constitutional-celebration#:~:text=The%20requirements%20of%20due%20process,representation%20of%20counsel%20or%20right>

that client-directed counsel leads to better outcomes for these vulnerable children. A study conducted in the state of Washington showed that children with access to counsel had a 45% higher rate of reunification, a 30% reduction placement changes, and a 65% reduction in unnecessary school moves.¹² A second study showed that children with counsel move to permanency or reunification at higher rates than children without counsel.¹³ The data is clear, if we want to move children to permanency sooner and improve the outcomes of the child welfare system, we should give children the right to client-directed counsel.

Protecting The Most Vulnerable

In 2021, there were 83 substantiated cases of child sex trafficking in Wisconsin, slightly lower than the 113 cases in 2020.¹⁴ Due to issues in the implementation of the 2015 law that mandated the collection of this data, the Department of Children and Families has acknowledged that this data “represents underreporting of cases”.¹⁵ The issue becomes even more stark when you zoom out to a wider map and focus on the number of kids that go missing each year. In 2022, the National Center for Missing and Exploited Children (NCMEC) had over 22,000 cases of children missing from the care of the child welfare system reported to the organization.¹⁶ According to NCMEC, the majority of those running away were between the ages of 14 and 17. Living outside the confines of a safe and stable home provided to them by their biological parents, these teenagers are some of the most vulnerable in society. When the state is not able to place them into the permanent setting, it becomes even more important that they are given the awareness they need to stay safe.

It is increasingly important that children, especially those in the child welfare system, are educated on the dangers of human trafficking. This can be done with mandatory education of youth in the child welfare system. Assembly Bill 977 during the 2023-2024 legislative session would have done just that, but through the public school system.¹⁷ What is vitally important though is that the child welfare agency overseeing the child’s case be mandated to educate these children on the dangers of human trafficking at an age appropriate level. This can be done at any point in the process. Child welfare agencies cannot always prevent a child from running away, but they can educate them on the clear and present dangers in society.

The use of existing and emerging technologies can also aid in the effort to find these missing children. Currently, a child welfare agency in Wisconsin will take a picture of a child entering the system within 30 days and renew that photo every 6 months. To enhance this approach, the child should be issued a state identification card with their most current photo on it. Other efforts could be given to implementing the use of facial and fingerprint recognition technology. These improvements will give CPS and law enforcement new tools to use in their efforts to find and identify missing children.

¹² Washington State Center for Court Research. Evaluation of the Washington State Dependent Child Legal Representation Program. 2021. <https://www.courts.wa.gov/subsite/wscctr/docs/DCLR%20Report%202021.pdf>

¹³ Zinn, A. E. & Slowriver, J. Expediting Permanency: Legal Representation for Foster Children in Palm Beach County. Chicago: Chapin Hall Center for Children at the University of Chicago. 2008. <https://www.issuelab.org/resources/1070/1070.pdf>

¹⁴ Wisconsin Department of Children and Families. Reports of Child Sex Trafficking Allegations & Substantiations to Child Protective Services. 2023. <https://dcf.wisconsin.gov/files/publications/pdf/5607.pdf>

¹⁵ Wisconsin Department of Children and Families. Reports of Child Sex Trafficking Allegations & Substantiations to Child Protective Services. 2023. Pg. 3. <https://dcf.wisconsin.gov/files/publications/pdf/5607.pdf>

¹⁶ National Center for Missing and Exploited Children. Analysis of Children Missing from Care Reported to the NCMEC, 2013-2022. <https://www.missingkids.org/content/dam/missingkids/pdfs/analysis-of-children-missing-from-care-reported-to-ncmec-2013-2022.pdf>

¹⁷ 2023 Assembly Bill 977. <https://docs.legis.wisconsin.gov/2023/proposals/ab977>

ENDING UNNECESSARY SEPARATION

Wisconsin is one of 12 states that will maintain a termination of parental rights based on a family's inability to pay back funds used to support their child in foster care, even if they have fulfilled all other obligations.¹⁸ This can result in parents completing the necessary steps to reunify with their children (e.g. drug counseling, parenting courses, attaining employment), only to have their children withheld from them because they cannot afford the hundreds of dollars a month the state or county is requiring them to pay. This policy directly cuts against one of the primary goals of the child welfare system; to maintain or reunify families.

Alone, inability to pay child support payments to the state should not be a reason to delay reunification with biological parents. In cases where the parent of a child has done everything required of them to reunify with their child, separation should not be allowed to continue because of inability to pay the state child support. In fact, the federal Department of Health and Human Services came out with guidance, advising states to stop this practice.¹⁹ The guidance points to a study out of Wisconsin that shows how requiring otherwise qualified parents remain current on their state child support payments lengthens a child's stay in the child welfare program unnecessarily.²⁰ Removing this requirement will help to speed up the reunification and lead to better outcomes for children and parents alike.

KEEPING PERSONAL PROPERTY

About 10% of children that enter the foster care system in the US are entitled to Social Security benefits with typical payments totaling \$700 a month and as of 2021, Wisconsin is one of 49 states that intercept these payments and funnel them into state coffers.²¹ However, there are more states moving toward benefit conservation, allowing children to keep these funds for use when they leave the system. In many cases, the children are not alerted that these payments are being taken by the state. This money could be a lifeline to foster children reaching adulthood, when they are on their own without the benefit of a natural family safety net.

When a child enters the child welfare system, that state assumes the responsibility for the basic provisions of care for the child. This includes food, clothing, shelter, education, and much more. In a way, they step into the role of parent when the child is separated from their birth parent or guardian. The funds that belong to the child are not for the state to offset the cost of its responsibility, they are the property of the child.

In 2023, Wisconsin received \$3.9 million through Social Security Administration payments made to 577 children in the state's child welfare system. 79%, or \$3.1 million was used to offset the cost of care for these children. This does not cover the full cost of care for these

¹⁸ Shapiro, Joseph. In some states, an unpaid foster care bill could mean parents lose their kids forever. National Public Radio. 19 January 2023. <https://www.npr.org/2023/01/19/1148829974/foster-care-parental-rights-child-support>

¹⁹ Letter from Department of Health and Human Services, Administration for Children and Families, July 29, 2022. Aysha E. Schomburg, Associate Administrator, CB. Tanguler Gray, Commissioner, OCSE. https://www.acf.hhs.gov/sites/default/files/documents/cb/letter_regarding_assignment_rights_child_support_for_children_foster_care.pdf

²⁰ Cancian, M., Cook, S., Seki, M., & Witmer, L. Making parents pay: The unintended consequences of charging parents for foster care. Children and Youth Services Review. (2016) <https://www.sciencedirect.com/science/article/pii/S0190740916303425>

²¹ Hager, Eli & Shapiro, Joseph. Meet Malerie, Tristen, Katrina, Alex, Ethan, Mateo. The Marshall Project. 17 May 2021. <https://www.themarshallproject.org/2021/04/22/foster-care-agencies-take-thousands-of-dollars-owed-to-kids-most-children-have-no-idea>

children which was estimated to cost more than \$22 million.²² However, these funds are the property of children, who through no fault of their own, have found themselves within the child welfare system. The principle here is clear, this is the child's property and should not be taken by the state or county regardless of the cost of care.

The data further shows that these funds could be put to good use by children who have the greatest potential of aging out of care. 42% of these children were age 15 or older. When these children age out of the child welfare system, they are no longer the responsibility of the state and face the daunting transition to adulthood without the natural support of biological parents like many of their peers. They may seek higher education or employment, but in either scenario they will need housing, transportation, and the basic necessities of adult life. If these funds are set aside for them, it may help them put a deposit down on an apartment, down payment on a car, or even help pay for college. This is a simple way to give them every opportunity for success in life.

CHILDREN'S BILL OF RIGHTS

The seemingly obvious, but overarching philosophy that started the child welfare system in America is that children have rights like any other member of society. The gradual progression of the development of the child welfare system has been to in way guarantee the children's rights are not violated. However, there is no cohesive set of rights set aside in statute or organized in an easily defined way. That is why some states are moving toward a new trend of creating a "bill of rights" for children who enter the foster care system. However, these rights have no meaning unless they are enforceable.

In 2009, Arizona passed into law a set list of rights for children in foster care.²³ (Oddly enough, Wisconsin had a children's bill of rights passed as part of the 2009-2011 state biennial budget. Unfortunately, that provision was vetoed by then Governor Jim Doyle.²⁴) However, rights had no use due to the fact that they were not enforceable. Without the enforceability of the rights, the children in the system were no better off than they were prior to the passage of the bill. Then, in 2023, legislators amended the statutes to make the rights enforceable.

Some may argue that this would put too much pressure on an already strained court system, raising concerns that an extensive list of rights will only serve to increase delays. Fortunately, in Arizona they found a way to alleviate this concern by indicating that children seeking relief could only do so in the context of their existing dependency case.

Currently, DCF publishes a handbook for children entering OHC, in which there is a list of enumerated rights.²⁵ However, the states that have enacted a bill of rights generally have a more extensive and all-encompassing list of rights. Generally, most states follow a similar listing of rights that largely focus on the child's health, safety, education, social and familial connections, and decision making authority where appropriate. As a model example, Arizona's enforceable children's bill of rights can be used as a model in Wisconsin.²⁶

²² Wisconsin Department of Children and Families. IRG Data Request. March 2023.

²³ Center for the Rights of Abused Children. Enforcing the Rights of Children in Foster Care. February 29, 2024. <https://www.thecenterforchildren.org/assets/Blog-Files/Enforcement-of-Foster-Youth-Bill-of-Rights.pdf?vid=3>

²⁴ 2009 Wisconsin Act 28. Section 1051n, pg 217. <https://docs.legis.wisconsin.gov/2009/related/acts/28.pdf#page=217>

²⁵ Department of Children and Families. A Guide for Youth in Out-of-Home Placements in Wisconsin. March 2024. <https://dcf.wisconsin.gov/files/publications/pdf/405.pdf>

²⁶ Arizona Statute. 8-529. <https://www.azleg.gov/ars/8/00529.htm>



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