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BILL



ANALYSIS

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Senate Bill 320 (Substitute S-2 as passed by the Senate)
Sponsor: Senator Rick Jones
Committee: Judiciary

(as enacted)

Date Completed: 1-12-12

RATIONALE

Michigan law authorizes a law enforcement officer, without a warrant, to take a child into protective custody if the child's surroundings are endangering his or her health, safety, or welfare. The child must be released to his or her parents unless the officer, or a Child Protective Services (CPS) worker, obtains a court order authorizing placement of the child with a relative, in a foster care home, or in a licensed facility, pending an investigation and hearing. An incident that took place in April 2008 has highlighted apparent shortcomings of the law. In that case, a man had taken his seven-year-old son to a Detroit Tigers game and purchased a bottle of Mike's Hard Lemonade for the boy, not knowing that the beverage contained alcohol. A security guard became aware that a child was drinking alcoholic lemonade and took the boy to the ballpark's medical clinic. He then was transported by ambulance to Detroit Children's Hospital, where a blood test showed no trace of alcohol. The father was questioned by a police officer, CPS was contacted, and a court order evidently was issued for the child's removal and temporary placement. Ultimately, the boy spent two nights in foster care before he was released to the custody of his mother, on the condition that his father move out of the house.

According to a University of Michigan law professor who directs the university's Child Advocacy Law Clinic, Michigan's statute for emergency removal of a child does not meet minimal U.S. constitutional standards, and no other state has a lower threshold. In addition, the statute does not spell out the findings a court must make when ordering

temporary placement. A practical shortcoming is that only a judge, and not a referee, has the authority to issue an order.

In December 2008, the State Court Administrative Office formed a work group to examine these issues. The group included representatives of the Department of Human Services (which employs CPS workers), judges and referees, court administrators, law enforcement personnel, law professors, and representatives of child advocacy groups. The result of this discussion was a recommendation for statutory amendments.

CONTENT

The bill would amend the juvenile code to do the following:

- **Authorize an officer to take a child into protective custody without a court order if the child were at substantial risk of harm or in surroundings that presented an imminent risk of harm.**
- **Require the officer or the Department of Human Services (DHS) immediately to seek a court order for placement of the child pending a preliminary hearing, if he or she were not released immediately.**
- **Allow a judge or referee to issue a written ex parte order, electronically or otherwise, authorizing the DHS to take a child into protective custody and place the child pending a preliminary hearing, if the court made certain findings.**

- **Require a judge or referee to be designated as the contact when a placement order was sought.**
- **List conditions under which a court could order the placement of an abused child in foster care.**

Current Provisions

The juvenile code allows a local police officer, sheriff or deputy sheriff, State Police officer, county agent, or probation officer of any court, without a court order, to take immediate custody of a child under certain circumstances.

The officer or agent is required to attempt to notify the child's parent, guardian, or custodian, and release the child to that person. Unless the child requires immediate detention as provided in the code, the officer must accept the parent's, guardian's, or custodian's promise to bring the child to court at a fixed time. If the child is not released, the child and his or her parents, guardian, or custodian must be brought immediately before the court for a preliminary hearing. Either an order authorizing the filing of a complaint must be entered, or the child must be released.

These provisions apply to a child whose surroundings endanger his or her health, morals, or welfare, a child found violating any law or ordinance, and a child believed to be violating a personal protection order. Under the bill, the current provisions would not apply to a child whose surroundings endanger his or her health, morals, or welfare.

Protective Custody; Placement Order

The bill would allow an officer, without a court order, immediately to take a child into protective custody if there were reasonable cause to believe that the child was at substantial risk of harm or was in surroundings that presented an imminent risk of harm and the child's immediate removal from those surroundings was necessary to protect the child's health or safety. The officer immediately would have to notify the DHS. While awaiting the Department's arrival, the child could not be held in a detention facility.

If the child were not released, the officer or the DHS immediately would have to contact the designated judge or referee to seek a court order for placement of the child pending a preliminary hearing.

A judge or referee would have to be designated as the contact when a placement order was sought for a child in protective custody. In accordance with the bill's provisions for an ex parte order (described below), if the court were closed, the designated judge or referee, upon electronically or otherwise receiving a petition or affidavit of facts, could order placement if the order were immediately communicated in writing, electronically or otherwise, to the appropriate county DHS office and filed with the court the next business day. When a placement order was issued by a designated referee, it would take effect as an interim order pending a preliminary hearing.

(The bill would define "officer" as a local police officer, sheriff or deputy sheriff, State Police officer, or county agent or probation officer of a court of record.)

Ex Parte Order

The bill would allow a judge or referee, upon electronically or otherwise receiving a petition or affidavit of facts, to issue a written ex parte order, electronically or otherwise, authorizing the DHS immediately to take a child into protective custody and place the child pending a preliminary hearing, if the court found all of the following:

- There was reasonable cause to believe that the child was at substantial risk of harm or was in surroundings that presented an imminent risk of harm, and the child's immediate removal from those surroundings was necessary to protect the child's health and safety.
- The circumstances warranted issuing an ex parte order pending the preliminary hearing.
- Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.
- No remedy other than protective custody was reasonably available to protect the child.

-- Continuing to reside in the home was contrary to the child's welfare.

The ex parte order would have to be supported by written findings of fact.

(An "ex parte" order is an order issued without notice to or appearance of the opposing party.)

Foster Care Placement of Abused Child

The juvenile code establishes procedures that apply when a child is under the jurisdiction of the family court due to alleged abuse or neglect. The court may release the child to the custody of either parent or to his or her guardian or custodian under conditions necessary for the child's physical health and mental well-being. The court also may order a parent, guardian, custodian, nonparent adult, or other person living in the child's home to leave the home and not return if the court finds probable cause to believe that that person committed the abuse.

The bill also would authorize the court to order placement of the child in foster care if the court found all of the following:

- Custody of the child presented a substantial risk of harm to the child's life, physical health, or mental well-being.
- No provision of service or other arrangement except removal of the child was reasonably available to safeguard the child adequately from that risk.
- Continuing the child's residence in the home was contrary to the child's welfare.
- Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.
- Conditions of child custody away from the parent were adequate to safeguard the child's health and welfare.

MCL 712A.10 et al.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The case involving the boy who drank Mike's Hard Lemonade probably is unique, but many families are affected by flaws in Michigan's child protective services system. The system is said to be both overinclusive and underinclusive, removing children who should remain with their parents while neglecting to protect others from harm. Although it is not possible to legislate against poor decision-making and overzealous workers, amending the law could help prevent incidents in which children are inappropriately taken into protective custody and placed in temporary foster care. In turn, this could free up law enforcement officers, court personnel, and CPS workers to pursue cases in which abuse and neglect actually exist.

At a minimum, the bill would bring Michigan's threshold for emergency removal up to the constitutional standard set by various U.S. Courts of Appeals. This standard requires the existence of exigent circumstances, which means, in this context, that the child is in imminent danger or is immediately threatened with harm, leaving no time for the police to get a court order. Although the U.S. Court of Appeals for the Sixth Circuit, which includes Michigan, evidently has not addressed the issue, the U.S. District Court for the Western District of Michigan did so in a 2004 case (*O'Donnell v Brown, et al.*, Case No. 5:02-CV-143). The Court held that a child may be removed either pursuant to a written court order or under exigent circumstances.

The bill would codify the exigent circumstances standard for removal without a court order, by requiring reasonable cause to believe that a child was at substantial risk of harm or in surroundings that presented an imminent risk of harm, and that immediate removal was necessary to protect the child's health and safety. The bill also would incorporate this standard among the criteria a court would have to use when placing the child pending a preliminary hearing.

In addition, the bill would streamline the process by allowing either a judge or a referee to issue an order authorizing protective custody and temporary placement. Currently, only a judge has this power, which can lead to unnecessary

delays and complications without contributing to sound decision-making. On the other hand, in practice, referees in some counties apparently are contacted and authorize emergency removal when a judge is not available. Under the bill, it would be clear that they had the authority to do so, and a referee's interim order would be effective pending a preliminary hearing.

Response: In the interest of children's safety, it is important that officers and caseworkers continue to have the ability to remove and temporarily place children without a written order in hand. The bill would authorize a judge or referee to issue a "written ex parte order, electronically or otherwise". Assuming that a text message would satisfy this requirement, then the process would not be delayed.

Supporting Argument

The bill lists conditions that a court would have to find when ordering out-of-home placement of an abused or neglected child after a preliminary hearing. Among other things, the court would have to find that custody with a parent would present a substantial risk of harm to the child's life, physical health, or mental well-being, and no arrangement other than removal was reasonably available to safeguard the child. The juvenile code previously included similar language but it was removed, evidently due to a drafting error, when the code was amended in 1997.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill would clarify existing law enforcement policy regarding the threshold for the emergency removal of a child from his or her parents' custody. The change would address unusual circumstances in which a child might be unnecessarily placed in an emergency foster care facility until a court hearing takes place. The State does not expect to realize any savings, but some savings could be possible due to the placement of children in the family home or other relative's home rather than in emergency foster care, which the State pays for in part.

The local governments are not expected to realize any savings due to the policy changes, but some minimal savings could be

possible in certain cases. The counties must share equally the costs of foster care placements with the State if a child is not eligible for Federal funding.

Fiscal Analyst: Frances Carley

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.