

AND THE PENDULUM SWINGS: APPLYING A MODERATE APPROACH TO THE DEFINITION OF CHILD NEGLECT IN TEXAS

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ABSTRACT

In response to the federal district case M.D. v. Abbott, the Texas Legislature has implemented sweeping reform regarding foster care, including changing the definition of neglect through House Bill 567 (H.B. 567) in 2021. H.B. 567 raised the standard for removal due to reasons of neglect by requiring that a child be in “immediate danger” before removal can occur. H.B. 567 also included what is known as an “independent activities” provision, which prevents removal when parents allow their children to engage in independent activities that are appropriate for their development.

Three years after the passing of H.B. 567, child removals in Texas have decreased by nearly 10,000 instances. Given the well-researched effects of long-term neglect and trauma, the primary concern is that many of these children remain in potentially dangerous situations because the standard for removal increased drastically. Instead of increasing the standard in this way, the legislature should have taken a more moderate approach that adequately weighs parental rights and the state’s interest in child protection. There should be consideration of both the traumatic effect of removal and the traumatic effect of remaining in a neglectful home. This can happen by adopting model legislation, which replaces the standard with “substantial risk of immediate danger” and implements increased guidelines for the independent activities provision. Until the state can adopt model legislation, parties can use existing statutes to apply the current definition of neglect.

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I. INTRODUCTION

Child Protective Services (CPS) workers are in the incredibly important and unenviable position of deciding whether to remove children in alleged abuse and neglect cases.¹ When a CPS worker meets with struggling families, many of whom are distrustful of the CPS worker, it puts both the CPS worker and families in very difficult and emotional positions.²

Consider a CPS department that received intakes from the neighbors of a local family of eight (two parents and six children).³ There were allegations of filthy living conditions and concerns for the well-being of the children.⁴ A CPS worker visited the home to meet with the parents and children and to examine the living conditions.⁵ The CPS worker found the family of eight living in an RV, and the inside of the RV was extremely unclean.⁶

The CPS worker, of course, had concerns, but was not sure that there was enough evidence to justify removal of the children.⁷ The Texas Legislature recently raised the standard for child removal, requiring the children to be in “immediate danger” for CPS to remove them for reasons of neglect, and it was not clear to the CPS worker that the children were in immediate danger at that time.⁸ In addition to being undecided about the standard for removal, the CPS worker was also painfully aware of the trauma that removal causes for families.⁹

Instead of attempting removal in this case, the CPS worker offered services to the family in hopes that CPS could provide the support that the

1. See *Learn About DFPS*, TEX. DEP’T OF FAM. & PROTECTIVE SERVS., https://www.dfps.texas.gov/About_DFPS/default.asp (last visited Sep. 23, 2025).

2. See Jill C. Schreiber, Tamara Fuller & Megan S. Pacey, *Engagement in Child Protective Services: Parent Perceptions of Worker Skills*, 35 CHILDREN & YOUTH SERVS. REV. 707, 707–08 (2013).

3. SBG San Antonio Staff, *Bexar County DA’s Office Denied CPS Request to Remove Children 3 Times Before 1 Year-Old Scalded and Shot Up with Meth*, NEWS4SA (last updated Nov. 29, 2023, at 10:30 CST) [hereinafter *Bexar County DA’s Office*], <https://news4sanantonio.com/news/local/cps-requested-removal-of-children-3-time-and-bexar-county-das-office-denied-before-horrific-incident-san-antonio-texas-investigation-deputies-hospital-ambulance-evidence-protection>.

4. Megan Reyna, *Child Advocates Concerned with Current State Law Making It Harder to Remove Children from Homes*, KENS5 (last updated Dec. 4, 2023, at 22:48 CST), <https://www.kens5.com/article/news/local/texas/child-advocates-concerned-texas-law-harder-to-remove-children-from-homes/273-fd2efe14-1d90-4079-b77f-23dbd8551cf2>.

5. See *Bexar County DA’s Office*, *supra* note 3.

6. Mike Stunson, *Parents Gave Baby Meth After She was Badly Burned, Texas Cops Say. ‘Outright Torture’*, FT. WOR. STAR-TELEGRAM (Nov. 7, 2023, at 8:09 CST), <https://www.star-telegram.com/news/state/texas/article281528193.html>.

7. Reyna, *supra* note 4.

8. See *generally id.* (discussing how change of law in 2021 lacks clarity and may have played a role in preventing necessary removals).

9. See *generally* Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1165–69 (2019) (discussing the negative impact on children and parents when children are removed from the home).

family needed to properly care for the children.¹⁰ Unfortunately, the family refused the help offered, and after some time, the family stopped answering phone calls and answering the door during visits.¹¹

More intakes came through about the family from concerned neighbors, followed by more CPS investigations, and CPS eventually decided to pursue removal.¹² CPS gathered evidence, presented in court, and asked for permission to remove the children.¹³

The court ultimately denied the request.¹⁴

CPS continued to investigate and attempted to remove the children again.¹⁵

The court denied the request again.¹⁶

The district attorney in the county received a similar referral to the same family.¹⁷ The district attorney's office conducted an investigation but found that there was insufficient evidence to move forward.¹⁸ The case was dismissed.¹⁹

Several months pass, and the same family appeared in a local news story:

[Couple] accused of burning their one-year-old girl, then injecting her with methamphetamine . . . Documents claim their six children were also found in filthy living conditions. Now, we've learned Family Protective Services tried several times to remove the children from that home, but the Bexar County District Attorney's office denied the request, citing a lack of evidence.²⁰

This was the sad reality for a family in Bexar County, Texas, in November of 2023.²¹ According to news reports, CPS had attempted to request removal of the children, but the district attorney's office denied the request because of insufficient evidence.²² The Bexar County District

10. See Jordan Elder, *Officials Say Four of Six Children Tested Positive for Meth in Bexar County Abuse Case*, NEWS4SA (last updated Dec. 4, 2023, at 17:57 CST), <https://news4sanantonio.com/news/local/officials-say-four-of-six-children-tested-positive-for-meth-in-bexar-county-abuse-case>.

11. See *id.*

12. See *Bexar County DA's Office*, *supra* note 3.

13. See *id.*

14. See *id.*

15. See *id.* (stating that CPS requested to remove the children three times).

16. See *id.*

17. Elder, *supra* note 10.

18. *Id.*

19. *Id.*

20. *Bexar County District Attorney's Office Denied Removal of Children From Abusive Home*, KENS 5 at 00:24–00:30, 01:32–01:45 (last updated Dec. 1, 2023, at 22:06 CST), <https://www.kens5.com/video/news/crime/bexar-county-district-attorneys-office-denied-removal-of-children-from-abusive-home/273-85cfc0cb-d3dc-43a1-aed6-841f31b07a56>.

21. See *id.* (providing an overview of the news story).

22. Elder, *supra* note 10.

Attorney's office expressed concerns that the heightened standard for removal had made it more difficult for the Department of Family and Protective Services (DFPS) to remove children from homes.²³ The CEO of Child Advocates San Antonio, Angie White, when interviewed regarding this case, acknowledged that "the language in House Bill 567 is confusing" and lacks clarity.²⁴

In 2015, Federal District Judge Janis Jack found that the State of Texas was violating the constitutional rights of children in foster care.²⁵ Among many issues, the court focused in on unmanageable CPS caseloads and inadequate regulation of foster care placements as the root causes of these constitutional violations.²⁶ The judge then ordered specific injunctions to address those issues—many of which the Fifth Circuit reversed on appeal—and ultimately ordered the state to implement reform of its foster care system.²⁷

In response to a much-needed case addressing serious concerns with Texas's foster care system, the Texas Legislature implemented sweeping changes.²⁸ However, the Fifth Circuit expressed concern that the district court's injunctions did not adequately address the underlying issues,²⁹ and many child welfare experts were concerned that some of these changes imposed idealistic conditions onto a complicated system that requires a more moderate approach.³⁰ Though the legislative changes were well-intentioned, the changes may not fully account for the complex decisions that DFPS workers make on a daily basis, and there may be serious unintended consequences.³¹

This Comment focuses on 2021 House Bill 567 (H.B. 567). Through the passing of H.B. 567, the legislature sought to clarify the standards for DFPS's justified removals.³² One of the key aspects of H.B. 567 was changing the definition of neglect from exposing a child to "substantial risk" of harm to

23. Reyna, *supra* note 4.

24. *Id.*

25. See *M.D. v. Abbott*, 152 F. Supp. 3d 684, 828 (S.D. Tex. 2015), *aff'd in part, rev'd in part, vacated sub nom.*, *M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 256 (5th Cir. 2018).

26. See 907 F.3d at 256–70 (explaining the findings of the district court).

27. *Id.* at 271.

28. See generally Sneha Dey, *Texas Lawmakers Move to Close Foster Care Hiring Loopholes and Expand Rights of Parents Facing Investigations*, TEX. TRIB. (last updated June 1, 2023, at 18:39 CST), <https://www.texastribune.org/2023/03/02/texas-foster-care-legislature-2023/> (discussing house bills that the legislature passed that impact the Texas foster care system).

29. *Ex rel. Stukenberg*, 907 F.3d at 272.

30. See generally Reyna, *supra* note 4 (reporting on concerns child welfare advocates expressed).

31. See generally *id.* (covering various matters child welfare advocates are concerned about).

32. House Comm. on Juv. Just. & Fam. Issues, Bill Analysis, Tex. H.B. 567, 87th Leg., R.S. (2021) [hereinafter House Bill Analysis].

exposing a child to “immediate danger” of harm.³³ The main goals were to clarify the standards for removal and to ensure consistent application.³⁴

However, immediate danger of harm is not much clearer in application than substantial risk of harm—both are highly discretionary.³⁵ What one CPS investigator considers to be immediate danger could be completely different from another’s interpretation, and the legislation provides little to no guidance on how to interpret this standard.³⁶

To best serve the legislative purpose of improving clarity and preventing the unnecessary removal of children, the Texas Legislature should adopt model statutory definition of neglect that maintains the substantial risk language and includes additional guidelines.³⁷ The legislature correctly implemented additional guidelines for what does not constitute neglect (i.e., the “independent activities” and parental use of marijuana), and those guidelines could further improve by including language that other states have implemented.³⁸ By altering the language and providing a clearer standard for removal, the role of the “gatekeeper” of the foster care system could shift to the judge instead of CPS caseworkers, which would better serve the overall process.³⁹

This Comment discusses the recent legislative changes to the foster care system in Texas, focusing primarily on the effects of H.B. 567’s definitional change of neglect. Part II provides the relevant legislative and case law background on the events leading up to the changes H.B. 567 made.⁴⁰ Part III proposes model legislation to improve the current definition of neglect under Texas Family Code section 261.001(4) and suggests a factors analysis to ensure consistent application.⁴¹ Part III also proposes an alternative approach to interpreting the immediate danger standard under an existing statutory framework.⁴²

33. Tex. H.B. 567, 87th Leg., R.S. (2021).

34. H.J. of Tex., 87th Leg., R.S. 793, 808 (2021) (discussing the goals of the revision, Representative James Frank stated that “part of the problem is the inconsistency in the application”).

35. See TEX. FAM. CODE § 261.001.

36. See *id.*

37. See *infra* Section III.A (proposing model legislation).

38. See *infra* Section III.A.2 (arguing that more guidelines should be in the independent activities provision); see also TEX. FAM. CODE § 262.116(a)(7) (providing examples of behavior that do not indicate neglect).

39. See *infra* Part III (discussing the goal of judicial gatekeeping); see also Melissa Carter, Christopher Church & Vivek Sankaran, *A Quiet Revolution: How Judicial Discipline Essentially Eliminated Foster Care and Nearly Went Unnoticed*, 12 COLUM. J. RACE & L. 496, 497 (2022) (providing an example of a judge who acted as a gatekeeper).

40. See *infra* Part II (discussing the legal background of H.B. 567).

41. See *infra* Sections III.A–B (proposing model legislation to better define neglect in child removals and its application).

42. See *infra* Section III.C (proposing an alternative approach to interpret the immediate danger standard).

II. THE CURRENT STATE OF CHILD REMOVALS IN TEXAS

Partially due to legislative changes in foster care, child removals in the State of Texas have been reduced by nearly half.⁴³ The decision to investigate and remove a child from their home is made by DFPS, which is granted that authority as a state administrative agency through federal legislation.⁴⁴ DFPS must also comply with the Texas Family Code, and DFPS relies heavily on the definitions in the Texas Family Code to make decisions about removals.⁴⁵ The recent changes in foster care seem to be driven, at least in part, by judicial rulings calling for reform.⁴⁶

A. Dramatic Decrease in Child Removals

The Texas foster care system has been under fire for the last ten years and has undergone major reform as a result.⁴⁷ To reduce the rates of unnecessary child removals from their homes and clarify the standards for DFPS removal, the State of Texas passed H.B. 567.⁴⁸ Among many changes to the Texas Family Code, H.B. 567 changed the definition of neglect.⁴⁹ The House Bill also added provisions for what does not constitute neglect, specifically adding an independent activities clause and a clause preventing removals for parental-marijuana use that does not substantially affect the child's development.⁵⁰

Three years later, child removals in Texas have certainly decreased.⁵¹ In 2017, nearly 20,000 children were removed from their homes in the State of Texas.⁵² In 2022, just one year after H.B. 567 took effect, removals decreased to around 9,623.⁵³

43. *CPS Removes 10,000 Fewer Children Per Year Than in 2017*, FAM. FREEDOM PROJECT [hereinafter *CPS Removes Fewer Children*], <https://familyfreedomproject.org/cps-removes-10000-fewer-children/> (last visited Sep. 23, 2025).

44. *1200 Legal Foundation for Child Protective Investigations and Child Protective Services*, TEX. DEP'T OF FAM. & PROTECTIVE SERVS. (June 2021) [hereinafter *Legal Foundation for CPS*], https://www.dfps.texas.gov/handbooks/CPS/Files/CPS_pg_1200.asp?zoom_highlight=social+security+act.

45. *Child Protective Services Handbook, 2110 Definitions of Abuse and Neglect Authority*, TEX. DEP'T OF FAM. AND PROTECTIVE SERVS. (Oct. 2021) [hereinafter *CPS Handbook*], https://www.dfps.texas.gov/handbooks/CPS/Files/CPS_pg_2000.asp#CPS_2110.

46. See *M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 246–47 (5th Cir. 2018) (criticizing state foster care systems and pushing for change). See generally *Santosky v. Kramer*, 455 U.S. 745, 762 (1982) (criticizing the subjectiveness and potential for error in New York neglect proceedings).

47. See generally *CPS Removes Fewer Children*, *supra* note 43 (explaining some of the recently passed major House Bills affecting the Texas foster care system).

48. Tex. H.B. 567, 87th Leg., R.S. (2021).

49. *Id.* (changing the definition of neglect from exposure of a child from “substantial risk of physical or mental harm” to “immediate danger of physical or mental harm”).

50. *Id.*

51. See *CPS Removes Fewer Children*, *supra* note 43.

52. See *id.*

53. See *id.*

Those arguing in favor of H.B. 567 are often of the belief that this significant reduction in removals is not necessarily a problem because removal is a traumatic experience for the child that the state should avoid at all costs.⁵⁴ The traumatic effect of removal has been at the center of the debate over this definition, and it is certainly a valid concern for legislators.⁵⁵

However, legislators must also take into account the traumatic effect of a child being left in a neglectful home.⁵⁶ If a child is living in a home where they are unable to depend on their caregivers for consistent safety and support, that child will likely develop what is known as “complex trauma.”⁵⁷ Complex trauma negatively impacts that child’s ability to form attachments and relationships with others, and often makes it more difficult for children to identify and express emotions appropriately.⁵⁸ Over time, these difficulties can impact a child’s behaviors, reasoning, and learning ability.⁵⁹ Traumatic childhood experiences have even been associated with “chronic illness such as heart disease and cancer, and early death.”⁶⁰ One of the major concerns critics of H.B. 567 voiced was that some of the changes would increase the standard for removal so drastically that “several of the bill’s provisions could result in some children being left in unsafe situations.”⁶¹

Proponents of higher standards for removal argue that the drop in 10,000 removals is not necessarily an issue because it has not resulted in substantially more negative outcomes for children in Texas.⁶² According to one report by DFPS, the number of child fatalities where abuse/neglect was confirmed was 235 in 2019, and the number reduced to 164 in 2023.⁶³ However, this is not an accurate indicator of whether children are experiencing neglect at higher or lower rates because child fatalities would be subject to the same statutory definition of neglect in Texas Family Code section 261.001(4).⁶⁴ In other words, if we are seeing a significant drop in child removals due to the definitional change of neglect, it makes sense that

54. See generally Sankaran, Church & Mitchell, *supra* note 9, at 1161 (examining the negative effects of removing a child from their home).

55. House Rsch. Org., Bill Analysis, Tex. H.B. 567, 87th Leg., R.S. 7 (2021).

56. *Id.* at 8.

57. *Complex Trauma: Effects*, THE NAT’L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/what-is-child-trauma/trauma-types/complex-trauma/effects#:~:text=Abuse%20and%20neglect%20make%20a,children%20with%20complex%20trauma%20histories> (last visited Sep. 23, 2025).

58. *Id.*

59. *Id.*

60. *Id.*

61. House Rsch. Org., Bill Analysis, Tex. H.B. 567, 87th Leg., R.S. (2021).

62. TEX. DEP’T OF FAM. & PROTECTIVE SERVS., FISCAL YEAR 2023 CHILD MALTREATMENT FATALITIES AND NEAR FATALITIES ANNUAL REPORT 1, 7 (2024) [hereinafter CHILD FATALITIES REPORT], https://www.dfps.texas.gov/About_DFPS/Reports_and_Presentations/Office_of_Child_Safety/documents/child-fatality-reports/2024-03-20_Child_Maltreatment_Fatalities_and_Near_Fatalities_Annual_Report.pdf (showing that the number of child fatalities with confirmed abuse/neglect over the years).

63. *Id.* (referring to Table 1).

64. TEX. FAM. CODE § 261.001(4).

we would see a significant drop in child fatalities due to neglect for the same reason⁶⁵—the new bar for neglect is simply higher and more difficult to reach.

The reality is that monitoring child outcomes is complicated, because these issues are impacted by many different legislative policies and societal factors.⁶⁶ For example, Texas experienced an increase in infant mortality rates in 2022,⁶⁷ and experts argue over the root cause. Complicated issues call for moderate solutions so that both sides can be adequately weighed.⁶⁸

The main goal of H.B. 567 was to clarify removal standards for DFPS to prevent inconsistent application and unnecessary removals, but immediate danger is not much clearer in application than substantial risk, as both are highly discretionary.⁶⁹ What one CPS investigator considers immediate danger could be completely different from another's interpretation, and the legislation provides little to no guidance for the new standard.⁷⁰ Very little case law exists to help courts interpret the immediate danger standard in the context of child removals because removals are difficult to overturn via interlocutory appeal through the court system,⁷¹ and there is a process for administrative appeals through DFPS.⁷²

B. The Regulatory Authority of DFPS and Legislative Authority Over DFPS

The Texas DFPS is an administrative agency comprised of smaller branches with specialized roles to protect vulnerable populations.⁷³ As an administrative agency, DFPS must ultimately obtain its power from a body of federal legislation.⁷⁴ The State of Texas similarly receives its legislative authority to structure its child welfare statutes and create its own statutory

65. CHILD FATALITIES REPORT, *supra* note 62, at 7.

66. See Elena Rivera, *More Babies Died in Texas Than Any Other State Last Year, Report Says*, TEX. PUB. RADIO (Nov. 3, 2023, at 12:22 CDT), <https://www.tpr.org/bioscience-medicine/2023-11-03/more-babies-died-in-texas-than-any-other-state-last-year-report-says>.

67. *Id.* (noting that 2,200 babies died in Texas in 2022, causing Texas to have the “highest number of infant deaths in the country” that year).

68. See *infra* Section III.A (proposing a moderate solution).

69. See TEX. FAM. CODE § 261.001(4); see also Reyna, *supra* note 4 (reporting on child welfare advocates' concerns).

70. See TEX. FAM. CODE § 261.001.

71. See Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL'Y REV. 217, 232 (2022) (mentioning the “absence of interlocutory appeals” in foster care law, which “makes it harder for courts to develop the law necessary to provide substantive guidance”).

72. See generally Alexis M. Butler, *Administrative and Judicial Oversight of Child Protective Services: Who Is Regulating the Agency and What Options Do Parents Have?*, 12 TEX. TECH ADMIN. L.J. 133, 134 (2010) (discussing the difficulty of appealing child removals).

73. *Learn About DFPS*, *supra* note 1.

74. *CPS Handbook*, *supra* note 45.

definitions from federal legislation, and the definitions must comply with the general definitions the federal legislature provided.⁷⁵

1. The Federal Legislation & Regulatory Authority that Allows DFPS to Exist

DFPS derives its authority as an administrative agency from the Social Security Act, which provides “federal funding to states with approved state plans for providing child welfare services.”⁷⁶ Because DFPS primarily receives its funding from Titles IV-A, IV-B, and IV-E of the Social Security Act, DFPS is required to comply with all relevant portions of the Social Security Act and the Indian Child Welfare Act of 1978.⁷⁷ The Social Security Act is the source of DFPS authority, because DFPS is the “sole Texas agency that [can] carry out provisions of the Social Security Act.”⁷⁸ DFPS must also comply with the Child Abuse Prevention and Treatment Act (CAPTA).⁷⁹

Child Protective Investigations (CPI) and Child Protective Services (CPS) operate as branches of DFPS.⁸⁰ The primary role of CPI is to investigate reported allegations of child abuse and neglect, and make decisions about whether to close out the investigation, take custody of children living in unsafe conditions, or refer families to CPS for services.⁸¹ If there were findings of abuse or neglect, or if CPI determines that there are not sufficient findings for removal but the family would benefit from services, a referral is made to CPS, which is in charge of providing services to parents and children through Family-Based Safety Services (FBSS) or the placing of the child into foster care.⁸²

CPS receives a high level of deference as far as the ability to make day-to-day decisions about investigations,⁸³ but because it is a branch of DFPS, a federally funded state agency, DFPS controls the procedures and minimum standards.⁸⁴ Under the Texas Administrative Procedures Act, DFPS has the authority to create administrative and procedural rules that CPS must comply with under the Texas Administrative Code.⁸⁵

75. JOANNE LEE & ELIZABETH WEIGENBERG, OPRE REP. NO. 2022-164, HOW DO DEFINITIONS OF CHILD ABUSE AND NEGLECT VARY ACROSS STATES? 1 (Office of Plan., Rsch. & Evaluation 2022), <https://www.scanpoliciesdatabase.com/sites/default/files/2022-08/SCAN-Facts-Definitions-2019.pdf>.

76. *CPS Handbook*, *supra* note 45.

77. *Id.*

78. Butler, *supra* note 72.

79. *CPS Handbook*, *supra* note 45.

80. *Id.*

81. *Id.*

82. *Id.*

83. Butler, *supra* note 72.

84. See TEX. GOV'T CODE § 2001.001; *CPS Handbook*, *supra* note 45.

85. See *CPS Handbook*, *supra* note 45; see also 40 TEX. ADMIN. CODE § 700 (controlling Child Protective Services).

The legislature controls some administrative policies.⁸⁶ Texas Family Code section 261.309, for example, controls the process by which decisions made during the investigation stage are reviewed.⁸⁷ When DFPS makes the decision to remove a child for reasons of abuse and neglect, parents may request an administrative review of the investigation findings (ARIF).⁸⁸ Once the ARIF is completed, parents may request a review of the ARIF, and if parents are still dissatisfied with the outcome, they may appeal to the Office of Consumer Affairs in DFPS.⁸⁹

2. Texas Child Removal Legislation

Texas legislators have the authority to develop their own statutory definitions of abuse and neglect under the Child Abuse Prevention and Treatment Act (CAPTA).⁹⁰ CAPTA provides a broad definition of abuse and neglect:

[A]ny recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation (including sexual abuse as determined under Section 111 [42 U.S.C.A. § 5106g]), or an act or failure to act which presents an imminent risk of serious harm.⁹¹

Within the broader definitions CAPTA provided, states can create their own standards and definitions.⁹²

Texas Family Code section 261.001 provides all relevant definitions for the removal statutes.⁹³ Before 2021, section 261.001(4) defined neglect as “the leaving of a child in a situation where the child would be exposed to a substantial risk of physical or mental harm.”⁹⁴ After the passing of H.B. 567, the same definitions section of the Texas Family Code began to define neglect as “an act or failure to act . . . evidencing the person’s *blatant disregard* for the consequences of the act or failure to act that *results in harm to the child* or that creates an *immediate danger* to the child’s physical health [and] safety.”⁹⁵ Defining neglect is crucial in foster care law because, as

86. See TEX. FAM. CODE § 261.309.

87. *Id.*

88. *Id.* § 261.309(c).

89. *Gates v. Tex. Dep’t of Fam. & Protective Servs.*, 252 S.W.3d 90, 93 (Tex. App.—Austin 2008, no pet.).

90. LEE & WEIGENBERG, *supra* note 75.

91. 42 U.S.C.A. § 5101(2) (referencing the statutory notes).

92. See LEE & WEIGENBERG, *supra* note 75.

93. See TEX. FAM. CODE § 261.001.

94. Tex. H.B. 567, 87th Leg., R.S. (2021) (striking out substantial risk and proposing removal of that language from Texas Family Code section 261.001(4)).

95. TEX. FAM. CODE § 261.001(4) (emphasis added).

stated above, CPI intakes, investigations, and removals are controlled by the definition provided in Texas Family Code section 261.001(4).⁹⁶

Texas Family Code chapter 262 provides the legal avenues for a governmental entity like DFPS to obtain possession of a child via temporary orders by a court.⁹⁷ DFPS may take possession of a child before or after obtaining a court order, depending on the circumstances and applicable statute.⁹⁸

Section 262.102 permits a court to issue an order authorizing DFPS to take possession of a child when the following has been satisfied: (1) the child is experiencing an immediate danger to their physical health *or* the child is a victim of neglect or sexual abuse, (2) remaining in the home would not benefit the child's welfare, (3) time and circumstances do not allow for a full adversary hearing, (4) removal of the alleged perpetrator would not adequately protect the child, (5) the child cannot be placed with a family member or other caregiver, and (6) DFPS has made reasonable efforts to prevent removal of the child.⁹⁹ Prior to issuing the court order, DFPS must file a petition supported by an affidavit of an individual swearing to have personal knowledge of the above elements.¹⁰⁰

Section 262.104 of the Texas Family Code allows DFPS to take possession of a child without the backing of a court order, but only under certain conditions.¹⁰¹ DFPS may remove a child if a representative has knowledge that would lead a reasonable person to believe that the child was in a situation presenting an immediate danger to their physical health and safety.¹⁰² Emergency removal may also be justified if a DFPS representative has personal knowledge that would lead a reasonable person to believe that the child was a victim of sexual abuse or trafficking.¹⁰³ If a DFPS representative has another person's information corroborated by personal knowledge that would lead a reasonable person to believe that the child's parent is using a controlled substance and that the use presents an immediate danger to the child's physical health or safety, a child may be removed without a court order.¹⁰⁴

The redefining of neglect in Texas impacted child removal for CPS, because Chapter 261 of the Texas Family Code is the principal governing legislation for the intake and investigation process.¹⁰⁵ This is particularly true for Texas Family Code sections 262.101 and 262.102, which control

96. See *Legal Foundation for CPS*, *supra* note 44.

97. TEX. FAM. CODE § 262.

98. See *id.* §§ 262.101–07.

99. *Id.* § 262.102(a)(1)–(6).

100. *Id.* § 262.101.

101. *Id.* § 262.104(a)(1)–(5).

102. *Id.*

103. *Id.*

104. *Id.*

105. See *CPS Removes Fewer Children*, *supra* note 43.

removals with a court order, because these statutes require DFPS to plead personal knowledge of child neglect to remove for that reason.¹⁰⁶ The definitional change matters because DFPS was already held to the standard of removal for an immediate danger to the child's physical health and safety.¹⁰⁷ Now, to remove for neglect, DFPS is again held to the standard of immediate danger to the child's physical health or safety.¹⁰⁸

3. *The Passing of 2021 House Bill 567*

H.B. 567 was introduced to clarify the removal justification standards for DFPS because there were concerns regarding the trauma experienced by children removed from their homes and placed in the foster care system.¹⁰⁹ The bill was assigned to the Juvenile Justice & Family Issues Committee in March of 2021 to be further discussed and refined.¹¹⁰

Supporters of H.B. 567 were primarily concerned with the unnecessary separation of children from their parents and the resulting trauma.¹¹¹ Removal of a child from their parents is traumatic, regardless of the circumstances surrounding removal.¹¹² Raising the standard of removal for neglect would “help prevent unnecessary removals and allow DFPS to focus on only the most serious cases.”¹¹³

Critics of H.B. 567 praise the legislation for recognizing the traumatic experience of removal.¹¹⁴ However, they also highlight the potential for unintended consequences of such a stark change to the definition of neglect.¹¹⁵ Not only was the standard raised from substantial risk of harm to immediate danger of harm, but the statutory definition also requires the caretaker of the child to have “blatant disregard” for the actions that caused the danger.¹¹⁶ CPS is now in a position to inquire about a parent's mental state before justifiably removing a child.¹¹⁷ Critics pushed for further study on how this definitional change would impact the investigation process before moving forward.¹¹⁸

106. See TEX. FAM. CODE §§ 262.101–02.

107. *Id.* § 262.102.

108. *Id.* § 261.001(4).

109. House Comm. on Juv. Just. & Fam. Issues, Bill Analysis, Tex. H.B. 567, 87th Leg., R.S. (2021).

110. H.J. of Tex., 87th Leg., R.S. 793 (2021).

111. House Rsch. Org., Bill Analysis, Tex. H.B. 567, 87th Leg., R.S. (2021).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* Although the purpose of this Comment is not to analyze the blatant disregard standard, it is worth noting that even when directly asked about defining this term, proponents of the bill did not provide a clear definition. H.J. of Tex., 87th Leg., R.S. 793 (2021) (“[I]t is a challenge sometimes of seeing how CPS defines things. And frankly, the way it gets defined and implemented across the state is often very inconsistent.”).

117. House Rsch. Org., Bill Analysis, Tex. H.B. 567, 87th Leg., R.S. (2021).

118. *Id.*

Despite the push for further reflection on the potential consequences of this change, the bill survived the House and Senate.¹¹⁹ H.B. 567 was filed without the Governor's signature on May 15, 2021, and it became effective on September 1, 2021.¹²⁰

As far as the impact on child removals in Texas, H.B. 567 is relevant because of CPS's ability to remove a child after obtaining a court order under Texas Family Code section 262.101.¹²¹ Currently, the statute allows removal after obtaining court permission for reasons of immediate danger, neglect, and sexual abuse.¹²² With the definitional change brought on by H.B. 567, the statute now essentially reads that CPS can only remove with a court order in instances of immediate danger to the child, immediate danger to the child, and sexual abuse.¹²³ If the legislature planned to raise the bar this way, what is the point of having neglect as a reason for removal under this statute?¹²⁴

C. Changes Driven by the Court System

Foster care standards are generally driven through statutory reform with little case law at the appellate level (due to the difficulty of successfully appealing child removals).¹²⁵ The American court system, however, has still been a driving force for foster care reform.¹²⁶ The United States Supreme Court has criticized the discretionary nature of child welfare legislation in New York, particularly regarding the termination of parental rights.¹²⁷ Recent Texas-specific reform has been pushed through primarily due to *M.D. v. Abbott*.¹²⁸

1. United States Supreme Court: *Santosky v. Kramer*

Courts have long been seeking to find the appropriate balance between the constitutional rights of parents and the governmental interest of child protection.¹²⁹ In the 1982 case *Santosky v. Kramer*, the Supreme Court

119. *HB 567 History*, TEX. LEG. ONLINE, <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=HB567> (last visited Sep. 23, 2025).

120. *Id.*

121. TEX. FAM. CODE § 262.101.

122. *Id.*

123. *See id.*; *see also* Tex. H.B. 567, 87th Leg., R.S. (2021).

124. *See* TEX. FAM. CODE § 262.101.

125. *See supra* Section II.A. (mentioning the lack of appellate case law due to difficulty of appealing child removals).

126. *See generally* *Santosky v. Kramer*, 455 U.S. 745, 762 (1982) (describing the court's significant role in parental rights hearings, likening such hearings to criminal trials); *M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 246–47 (5th Cir. 2018) (criticizing state foster care systems and pushing for change).

127. *Santosky*, 455 U.S. at 762.

128. *Ex rel. Stukenberg*, 907 F.3d at 246–47.

129. *See generally* *Santosky*, 455 U.S. at 769 (1982) (discussing a standard of proof that “strikes a fair balance between the rights of the natural parents and the State’s legitimate concerns”).

examined the statutory standard of proof for permanent neglect proceedings in New York.¹³⁰ After assessing the factors for appropriate due process laid out in *Mathews v. Eldridge*, the Court held that in proceedings to terminate parental rights, the Fourteenth Amendment Due Process Clause requires states to be held to, at minimum, the clear and convincing standard.¹³¹

Over the course of its analysis, the Court criticized the nature of permanent neglect proceedings generally, recognizing that the process “employ[s] imprecise substantive standards that leave determinations unusually open to the subjective values of the judge.”¹³² The Court also found that termination proceedings “are often vulnerable to judgments based on cultural or class bias.”¹³³ Highly discretionary standards, coupled with the imbalance of state power versus parental resources, can create a high risk for erroneous termination of parental rights.¹³⁴ By raising the standard of proof for state entities, the Court sought to prevent unnecessary terminations of parental rights and emphasize the importance of the decision for the factfinder.¹³⁵

By raising the standard, the Supreme Court sought to balance the sanctity of parental rights alongside protecting children.¹³⁶ And it would not be the only time that the court system pushed for major reform.¹³⁷

2. Texas: *M.D. v. Abbott*

In 2015, children living in Texas’s foster care system brought a class action lawsuit against the State of Texas in *M.D. v. Abbott*.¹³⁸ The class of children filed a claim under 42 U.S.C. § 1983, alleging that the state had violated their Fourteenth Amendment due process rights by placing them in a system that exposed them to “serious risk of abuse, neglect, and harm to their physical and psychological well-being.”¹³⁹ After a bench trial, Judge Jack of the Court for the Southern District of Texas found DFPS violated the substantive due process rights of children in foster care, primarily in regards to “[caseworkers’] caseloads, monitoring and oversight, placement array, and foster group homes.”¹⁴⁰

130. *Id.* at 748.

131. *Id.*

132. *Id.* at 762.

133. *Id.* at 763.

134. *See id.* at 763–64.

135. *Id.* at 764.

136. *Id.*

137. *See generally* *M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 243 (5th Cir. 2018) (analyzing a class action against the State of Texas alleging that the state’s maintenance of its foster care system exposed minor children to abuse).

138. *Id.*

139. *Id.*

140. *Id.* at 246.

Judge Jack then ordered the State of Texas to implement policies and procedures to address the constitutional violations.¹⁴¹ Court-appointed special masters made recommendations, then the court appointed a special monitor to oversee DFPS's changes.¹⁴²

The Fifth Circuit reversed the district court's decision in part, reasoning that "[m]any of the injunction provisions fail to address the specific problems giving rise to the constitutional violation."¹⁴³ For example, the Fifth Circuit discussed the district court's injunction of CPS implementing a cap on their caseloads,¹⁴⁴ and while this would be the solution in an ideal world, it simply would cause more problems than it would fix given the "staffing crisis" in DFPS.¹⁴⁵ Capping caseloads would cause destabilization of the cases already in place.¹⁴⁶ Instead of allowing the district court's injunction to remain in place, the Fifth Circuit recognized the complexity of the issue and suggested a more moderate approach: DFPS should establish standards for the assignment of caseloads, and they should especially consider the "complexity of the cases and the experience of the caseworker."¹⁴⁷ This is just one example of the Fifth Circuit taking the district court's injunctions and providing more context and flexibility while still addressing the underlying issues and need for change.¹⁴⁸

The Texas Legislature enacted many changes in response to the outcome of *M.D. v. Abbott*, and many of these changes were necessary.¹⁴⁹ House Bill 7 (H.B. 7), passed in 2017, for example, expanded the rights of access for child guardian *ad litem*s, implemented additional duties for child attorney *ad litem*s, and placed limitations on a court's ability to order termination of parental rights.¹⁵⁰

Lawmakers, as previously discussed, also implemented H.B. 567 in 2021 in response to *M.D. v. Abbott*.¹⁵¹ As a result of H.B. 567 and other changes, 10,000 fewer children were removed in 2022 than in 2017.¹⁵² This Comment does not argue that all 10,000 of those children should have been removed from their homes; the individual situations of each child are unknown. However, given the outcomes associated with the long-term effects of experiencing neglect, the legislature should take a more middle-of-the-road approach to ensure protection of the 10,000 children that

141. *Id.* at 246–47.

142. *Id.*

143. *Id.* at 272.

144. *Id.* at 274.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 274–87, 279 (striking ninety-two injunctions as improper because many of them fail to "address the discrete issues underlying the violation").

149. *See id.* at 271 (discussing the need for reform).

150. Tex. H.B. 7, 85th Leg., R.S. (2017).

151. *See* Tex. H.B. 567, 85th Leg., R.S. (2021).

152. *See CPS Removes Fewer Children, supra* note 43.

likely would have been removed had the legislation stayed the same.¹⁵³ At the very least, the legislature should have heeded the demands for more research on the potential effect of this definitional change, which was called for by those critical of H.B. 567.¹⁵⁴

III. TEXAS SHOULD ADOPT MODEL LEGISLATION TO BETTER DEFINE NEGLECT IN CHILD REMOVALS

The legislature was correct in the implementation of additional guidelines for what does not constitute neglect (i.e., provisions addressing “independent activities” and parental use of marijuana).¹⁵⁵ But raising the neglect standard from substantial risk of harm to immediate danger of harm, when viewed in the context of existing case law interpretations of certain legal terms of art, puts CPS in a position of having to intervene only in cases of “dire emergency,” which may be too high of a bar to adequately protect children in Texas.¹⁵⁶

This is especially true when the change is considered in the full context of the new definition, which requires the person caring for the child to have “blatant disregard” for the consequences of their actions.¹⁵⁷ In addition to the high standard, there is little case law helping guide the application of this definition in a child removal context, as many of the cases touching on the definition of immediate danger are dealing primarily with other issues.¹⁵⁸

The Texas foster care system would be better served by a more moderate and incremental approach that would involve adopting a definition of neglect that adequately balances fundamental parental rights and governmental interests involving child protection.¹⁵⁹ The “independent activities” provision can also be expanded to improve clarity, because more guidelines can help make the desired application clearer.¹⁶⁰ If adopted, the model legislation can be interpreted using a factor analysis that is tailored to the standard that is provided.¹⁶¹ Until model legislation can be adopted, CPS workers should use

153. *See id.*

154. House Rsch. Org., Bill Analysis, Tex. H.B. 567, 87th Leg., R.S. (2021).

155. *See* TEX. FAM. CODE §§ 261.001(4)(B), 262.116.

156. *In re Kubankin*, 257 S.W.3d 852, 859–60 (Tex. App.—Waco 2008, no pet.) (defining a “dire emergency” as a “serious immediate question concerning the welfare of the child”) (emphasis removed).

157. TEX. FAM. CODE § 261.001(4).

158. *See, e.g.,* *Whitworth v. Whitworth*, 222 S.W.3d 616, 619–22 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (dealing with a post-divorce custody dispute); *see also Kubankin*, 257 S.W.3d at 854–55 (dealing with modification of child custody orders after final divorce).

159. *See generally* GREG BERMAN & AUBREY FOX, *GRADUAL: THE CASE FOR INCREMENTAL CHANGE IN A RADICAL AGE 71–93* (2023) (discussing how legislative incrementalism has improved the federal Social Security system and crime rates in New York).

160. *See infra* Section III.A.2 (altering the independent activities provision).

161. *See infra* Section III.B (laying out a factors analysis).

Texas Family Code section 262.107 to interpret the immediate danger standard.¹⁶²

Clear legislative guidelines and expectations can allow for more consistent application of the standard in our court system, preventing the role of “gatekeeping” in foster care from falling on CPS workers and instead shifting that role to judges.¹⁶³

A. Proposed Model Legislation

The State of Texas should adopt a model statutory definition of neglect to promote a balance of parental rights and child protection and prevent overwhelming change to the foster care system.¹⁶⁴ Incremental legislative change can often be more effective than radical change,¹⁶⁵ and adopting the model statute would provide a more incremental change than H.B. 567.¹⁶⁶ The model statute below is formatted as a bill being proposed to the legislature would be presented.¹⁶⁷ The model statute would alter Texas Family Code section 261.001(4) in the following ways:

- (4) “Neglect” means an act or failure to act by a person responsible for a child’s care, custody, or welfare evidencing the person’s blatant disregard for the consequences of the act or failure to act that results in harm to the child or that creates ~~[an immediate danger]~~ a substantial risk of immediate harm to the child’s physical health or safety and:
- (A) includes:
 - (i) The leaving of a child in a situation where the child would be exposed to ~~[an immediate danger]~~ a substantial risk of immediate physical or mental harm, without arranging for necessary care for the child, and the demonstration of an intent not to return by a parent, guardian, or managing or possessory conservator of the child . . .
 - (B) does not include . . .
 - (i) allowing the child to engage in independent activities that are appropriate and typical for the child’s level of maturity, physical condition, developmental abilities, or culture, including:

162. See *infra* Section III.C (arguing that Texas Family Code section 262.107 can be used to interpret and apply the immediate danger standard).

163. See generally Carter, Church & Sankaran, *supra* note 39 (discussing how one judge significantly reduced the number of child removals in New Orleans by strictly interpreting statutes and holding CPS to their burden of proof).

164. See BERMAN & FOX, *supra* note 159, at 71–113 (discussing how various systems have been improved through incrementalism).

165. See *id.*

166. See Tex. H.B. 567, 87th Leg., R.S. (2021).

167. E.g., Tex. H.B. 567, 87th Leg., R.S. (2021) (demonstrating how a proposed bill is formatted).

- (a) traveling to and from school, including by walking, running, or bicycling;
- (b) traveling to and from nearby commercial or recreational facilities;
- (c) engaging in outdoor play;
- (d) remaining unattended in a home that a reasonable and prudent parent, guardian, or legal custodian would consider safe for the child; or
- (e) engaging in a similar independent activity.¹⁶⁸

I. “Substantial Risk of Immediate Physical or Mental Harm”

H.B. 567’s definitional change for neglect from substantial risk to immediate danger did not improve the clarity or consistency in application of the neglect standard, as both definitions are highly discretionary.¹⁶⁹ And “immediate danger” is a high bar.¹⁷⁰ Changing the definition of neglect in this way is significant, because the majority of child maltreatment victims in Texas are reported to have been victims of neglect.¹⁷¹

The Texas Family Code’s previous definition of neglect has been criticized for being “so incredibly broad.”¹⁷² The core criticism is that parenting inherently involves the balancing of risks, and including “risk” in the definition of neglect leaves open the possibility of state intervention when the child is inevitably exposed to some form of risk.¹⁷³ Proponents of the immediate danger standard argue that this language grants a higher level of parenting discretion and accounts for cultural differences that affect parenting decisions.¹⁷⁴

It may be true that broad language in the statute will allow child welfare professionals to consider more factors.¹⁷⁵ However, one of the key criticisms of foster care generally is the highly discretionary nature of the standards for

168. See TEX. FAM. CODE § 261.001(4) (brackets indicating proposed omissions and underlined portions indicating proposed additions).

169. See Reyna, *supra* note 4 (discussing concerns that the new standard lacks clarity).

170. See *In re Kubankin*, 257 S.W.3d 852, 859–60 (Tex. App.—Waco 2008, no pet.) (explaining that in cases of compelled return of a child via writ of habeas corpus, the court may not order return of the child if there is a serious immediate question concerning the welfare of the child, which appellate courts have defined as “an imminent danger . . . or, stated another way, a dire emergency”).

171. Texas – *Child Welfare Outcomes Report*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://cwoutcomes.acf.hhs.gov/cwodatasite/byState/texas/> (noting that as of 2022, 83.3% of child maltreatment victims experienced neglect).

172. David Pimentel, *Legislating Childhood Independence*, 50 PEPP. L. REV. 285, 310, 330–31 (2023).

173. See *id.*

174. See *id.* at 310–13.

175. See *id.* at 338.

child removal and termination of parent-child relationships.¹⁷⁶ In the statement of legislative intent for H.B. 567, Representative James Frank acknowledged this concern, explaining that “part of the problem is the inconsistency [of removal standards] in the application.”¹⁷⁷

Another concern is that statutory definitions of neglect often “mirror the definition of poverty.”¹⁷⁸ As pointed out by the American Bar Association (ABA), to fully understand removals for neglect, it is necessary to recognize the difference between “poverty as a cause of child maltreatment and poverty as child maltreatment.”¹⁷⁹ Although not the focus of this Comment, it is worth noting that only half of states have included poverty as an exception for what does not constitute neglect,¹⁸⁰ and Texas is not one of them.¹⁸¹

If the legislative purpose was to clarify standards and ultimately prevent CPS investigators from making unnecessary emergency child removals, the logical solution would be to provide as many guidelines as possible to outline what legislators do not consider a necessary removal.¹⁸² Raising the standard for neglect without providing necessary guidelines likely created more confusion regarding the actual interpretation.¹⁸³

The immediate danger standard also puts CPS workers in the position of post-harm intervention instead of prevention of imminent harm.¹⁸⁴ Replacing the immediate danger standard with “substantial risk of immediate harm” allows CPS to consider the range of parenting discretion factors that come with the immediate danger standard without having to wait until actual harm occurs before intervening.¹⁸⁵

2. Independent Activities Provision

A similar level of parenting discretion could be granted through the independent activities provision that was already added, allowing legislators

176. See *Santosky v. Kramer*, 455 U.S. 745, 762 (1982) (“Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge.”).

177. H.J. of Tex., 87th Leg., R.S. 793, 808 (2021) (statement of legislative intent by Rep. Frank).

178. Pimentel, *supra* note 172, at 341–42.

179. Maren Dale, *Addressing the Underlying Issue of Poverty in Child-Neglect Cases*, ABA (Apr. 10, 2014), <https://www.americanbar.org/groups/litigation/resources/newsletters/childrens-rights/addressing-underlying-issue-poverty-child-neglect-cases/>.

180. *Id.*

181. See TEX. FAM. CODE § 261.001(4)(B).

182. See generally Gupta-Kagan, *supra* note 71, at 219–33 (calling for more guidance in foster care law).

183. See Reyna, *supra* note 4 (quoting one child advocate criticizing the new definition for its lack of clarity).

184. See TEX. FAM. CODE § 261.001(4).

185. Cf. *In re Kubankin*, 257 S.W.3d 852, 859–60 (Tex. App.—Waco 2008, no pet.) (requiring proof of a dire emergency to show “a serious and immediate question concerning the children’s welfare”); see *infra* Section III.B (discussing the factors that courts and CPS workers should consider under a “substantial risk of immediate harm” standard).

to clarify a broad definition without requiring a dire emergency for CPS to intervene.¹⁸⁶ Also, the model statute accounts for cultural differences by maintaining language that allows children to engage in activities that are “appropriate and typical for the child’s . . . culture.”¹⁸⁷

Some professionals are hesitant to provide too much detail in the statutory framework out of fear that this puts the parent in the position of asking permission from the state when it comes to decisions about raising their children.¹⁸⁸ While this concern is valid, it does not change the fact that inherently vague statutory language with little to no guidance within the statute, or in case law, will necessarily lead to discretionary application.¹⁸⁹ More legislative guidelines will ensure a more consistent and narrow application of the statute,¹⁹⁰ and avoiding vague legislation will help protect vulnerable groups.¹⁹¹

Several states have proposed or implemented statutory provisions allowing children to engage in independent activities, but some have chosen to be more detailed than others.¹⁹² Utah and Oklahoma provide examples of what independent activities may be included.¹⁹³ Utah’s child welfare system has been praised as one of the best in the nation, and Utah is well-known for low rates of entry into the foster care system, prioritization of permanency for children, and emphasis on reducing time spent in foster care.¹⁹⁴ According to one study from the Annie E. Casey Foundation, Utah is currently ranked third in the nation for overall child well-being.¹⁹⁵

Texas, alternatively, is one of the only states that does not list examples of accepted independent activities.¹⁹⁶ The proposed model statute pulls from some of the more detailed statutes while leaving intact the majority of the language H.B. 567 implemented.¹⁹⁷

186. See generally *Kubankin*, 257 S.W.3d at 860–61 (finding that a “serious immediate question concerning the welfare of [a] child” requires proof of a dire emergency).

187. See TEX. FAM. CODE § 261.001(4)(B)(ii).

188. See Pimentel, *supra* note 172, at 331.

189. See Ilya Shapiro, *Vague Laws Defy the Rule of Law*, CATO INST. (Dec. 17, 2009, at 22:07 CST), <https://www.cato.org/blog/vague-laws-defy-rule-law>.

190. See generally *id.* (discussing the danger of arbitrary enforcement of vague laws).

191. See Fenja Schick-Malone, *Letting the Kids Run Wild: Free-Range Parenting and the (De)regulation of Child Protective Services*, 81 WASH. & LEE L. REV. 387, 426 (2024).

192. Compare UTAH CODE ANN. § 80-1-102(58)(b)(iv) (West 2025) and COLO. REV. STAT. ANN. § 19-1-103(100)(b) (West 2025) (providing a list of acceptable independent activities), with TEX. FAM. CODE § 261.001(4) (stating only the provision and no additional guidelines).

193. See UTAH CODE ANN. § 80-1-02 (West 2025); OKLA. STAT. tit. 10A, § 1-1-105 (2025).

194. See Naomi Riley & Sarah Font, *Utah Is Leading the Way in Caring for Foster Children*, AM. ENTER. INST. (Mar. 23, 2023), <https://www.aei.org/op-eds/utah-is-leading-the-way-in-caring-for-foster-children/>.

195. ANNIE E. CASEY FOUND., 2024 KIDS COUNT DATA BOOK: STATE TRENDS IN CHILD WELL-BEING (2024), <https://assets.aecf.org/m/resourcedoc/aecf-2024kidscountdatabook-2024.pdf>.

196. See TEX. FAM. CODE § 261.001(4)(B)(ii).

197. See UTAH CODE ANN. § 80-1-102(b) (West 2025); COLO. REV. STAT. ANN. § 19-1-103(100)(b)(IV) (West 2025).

B. Texas Courts Should Use Precedent to Interpret the Model Legislation's Neglect Definition and Apply the Standard Using a Factor Analysis

If used alongside prior case law interpretation of “substantial risk” and a tailored factor analysis, the court system could interpret the new language consistently (and use case law precedent to back up their decisions).¹⁹⁸ Factor analyses are used throughout the Texas Family Code and case law regarding family issues.¹⁹⁹ Factor tests allow practitioners to apply a range of considerations before making their decisions, which is why they are preferred for family law cases that require particularly careful consideration.²⁰⁰

Maintaining the substantial risk language would allow current judges (and CPS workers) to rely on prior case law for interpretation.²⁰¹ One appellate court in Texas has used *Black's Law Dictionary* to fashion together an interpretation of substantial risk of immediate harm.²⁰² The court found that substantial risk “denotes one that is ‘actually existing; real; not seeming or imaginary; . . . solid; true; veritable.’”²⁰³ Immediate harm was found to mean “harm resulting ‘[n]ext in line or relation; directly connected; not secondary or remote’ from the ‘situation.’”²⁰⁴ In short, substantial risk of immediate harm can be interpreted to mean “an actual, real risk of harm as a direct, temporally proximate result” of the action in question.²⁰⁵

To better apply the standard, courts can incorporate a factor analysis to determine whether the risk of harm is real and immediate.²⁰⁶ Many factors can be pulled from existing statutes and case law.²⁰⁷

Texas Family Code section 262.107 controls when CPS takes possession of a child without a court order in emergency situations and provides the standard that courts must adhere to when deciding whether to return the child to the home.²⁰⁸ This statute does not technically apply to removals for neglect for several reasons.²⁰⁹

198. See *Tex. Dep't of Fam. & Protective Servs. v. Barlow*, No. 03-05-00469-CV, 2007 Tex. App. LEXIS 5087, at *11 (Tex. App.—Austin June 28, 2007, pet. denied) (providing a legal definition of “substantial risk of immediate harm”).

199. See TEX. FAM. CODE §§ 262.107, 263.307; *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976).

200. See John Dewar, *The Normal Chaos of Family Law*, 61 MOD. L. REV. 467, 470–71 (1998) (discussing the importance of using “presumptions, factors, standards, guidelines and principles to rules” to balance various interests “in pursuit of an optimal outcome”).

201. See *Barlow*, 2007 Tex. App. LEXIS 5087, at *11 (examining the legal definition of “substantial risk of immediate harm”).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. See TEX. FAM. CODE § 263.307 (laying out the factors that courts must consider when determining best interest of the child).

207. See *id.* §§ 262.107, 263.307; *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976).

208. TEX. FAM. CODE § 262.107.

209. See *id.*

First, removals without a court order can only occur when there is immediate danger to the child.²¹⁰ Neglect is not listed as a reason for removal without a court order.²¹¹ Removals for reasons of neglect can only occur with a court order.²¹²

Second, even if it was argued that the statute applies because the current definition of neglect now includes “immediate danger,” under the model statutory definition above, neglect would be defined as substantial risk to immediate harm instead of immediate danger; therefore, the statute would not apply to the model statute’s definition of neglect.²¹³ However, some considerations found under section 262.107 could be incorporated into a factor analysis for foster-care judges making determinations about neglect removals.²¹⁴

Texas Family Code section 263.307 lays out factors that are used to analyze whether “the child’s parents are willing and able to provide the child with a safe environment,”²¹⁵ and they are often used to decide whether to terminate parental rights.²¹⁶ The Texas Supreme Court has also laid out a similar list of factors for consideration of the child’s best interest in the context of terminating parental rights.²¹⁷ Some of these factors can also be used to determine whether a child is experiencing real and immediate risk.²¹⁸

The below list of factors is a combination of various standards from existing statutes and Texas Supreme Court precedent.²¹⁹ Texas foster care judges should use the following factors to determine whether there is a substantial risk of immediate harm (i.e., whether the risk of harm to a child is both real and immediate) for the purposes of child removals due to neglect:

210. *Id.* § 262.104.

211. *Id.*

212. *Id.* § 262.101.

213. See House Bill Analysis, *supra* note 32 (explaining key aspects of H.B. 567).

214. See generally TEX. FAM. CODE § 262.107 (showing that courts must consider, among many factors, evidence showing immediate danger to the child, controlled-substance use in the home, the making of methamphetamine in the home, and whether removal of the alleged perpetrator from the home would adequately protect the child).

215. *Id.* § 263.307(b).

216. See *In re N.M.S.*, No. 04-23-00152-CV, 2023 Tex. App. LEXIS 4809, at *5–10 (Tex. App.—San Antonio July 5, 2023, no pet.) (showing application of factors like child’s age and vulnerabilities, frequency of harm to the child, and history of abuse in the family).

217. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976).

218. See generally TEX. FAM. CODE § 263.307 (listing factors in determining best interest of the child); *Holley*, 544 S.W.2d at 371–72 (listing factors that could be helpful for determining whether danger to a child exists).

219. See sources cited *supra* note 218 (providing factors that the Texas Family Code provides, as well as factors that the Texas Supreme Court created).

- (1) the child's age and physical and mental vulnerabilities;²²⁰
- (2) the magnitude, frequency, and circumstances of harm to the child;²²¹
- (3) whether the child has been the victim of repeated harm after the initial report and intervention by the department . . . ;²²²
- (4) whether there is history of abusive or assaultive conduct by the child's family or others who have access to the child's home;²²³
- (5) "whether the child's household includes a person who has: abused or neglected another child in a manner that caused serious injury to or the death of the child; or sexually abused another child";²²⁴
- (6) "whether the child would not be adequately protected in the child's home with an order for the removal of the alleged perpetrator under Section 262.1015 or 262.1016 or a protective order under Title 4;"²²⁵
- (7) And "the programs available to assist the parents or guardians of the child and reasonable efforts made by the removing governmental entity to implement assistance programs to prevent removal of the child from the home."²²⁶

These factors apply under the model statute's definition involving "substantial risk of immediate harm" because they combine some statutorily implemented factors that focus on parental rights with others that focus on child protection and the best interest of the child.²²⁷ Implementing this analysis alongside the model legislation would allow the legislature to incrementally raise the standard for removals due to neglect without leaving the court system with no guidance on how to interpret the new standard.²²⁸

C. In the Alternative, Texas Family Code Section 262.107 Should Be Used to Interpret the Current "Immediate Danger" Standard

As an alternative to adopting the proposed model legislation, Texas Family Code section 262.107 should be used to interpret the immediate danger standard.²²⁹ The current definition of neglect affects removals with a court order under section 262.102 because neglect is listed as a reason for

220. TEX. FAM. CODE § 263.307(b)(1).

221. *Id.* § 263.307(b)(3).

222. *Id.* § 263.307(b)(4).

223. *Id.* § 262.307(b)(7).

224. *Id.* § 262.107(b)(1)–(2).

225. *Id.* § 262.107(a)(3).

226. *Holley v. Adams*, 544 S.W.2d 367, 372 (Tex. 1976).

227. *See* sources cited *supra* note 218 (providing a combination of best interest of the child factors directly taken from the Code and the Texas Supreme Court).

228. *See supra* Section III.A (proposing model legislation and discussing the need for guidance).

229. *See* TEX. FAM. CODE § 262.107.

justifying removal with a court order.²³⁰ Section 262.107, on the other hand, provides the standard for removing a child in an emergency situation without a court order under section 262.104.²³¹

Several grounds for removal without a court order require “immediate danger to the physical health or safety of the child.”²³² After an emergency removal, an initial hearing is held to determine whether the removal was justified.²³³ Courts make these determinations using the standard laid out in section 262.107.²³⁴

Although section 262.107 does not provide a clear definition of “immediate danger,” it does list circumstances that provide enough evidence to satisfy a court regarding emergency removal of a child.²³⁵ These circumstances can be used to interpret the language that appears in the statutory definition of neglect, which now includes an immediate danger standard.²³⁶

While this solution will not resolve every uncertainty arising under the new definition of neglect, using section 262.107 will at least clarify the immediate danger language.²³⁷ There is no current statutory framework specifically tailored to interpreting neglect, so until one is provided or model legislation is adopted, section 262.107 would be the best option for interpreting immediate danger in the context of child removals.²³⁸ The primary goal is to establish clear statutory guidelines, which would ensure more consistent application by CPS workers and judges.²³⁹

D. Clear Statutory Frameworks and Judicial Gatekeeping

Regardless of the statutory language, firsthand interpretation will always fall to CPS investigators and caseworkers because they are the first to apply the definitions.²⁴⁰ As a result, they are often considered the gatekeepers of foster care removals compared to juvenile court judges.²⁴¹ However, the

230. *See id.* § 262.102.

231. *See id.* §§ 262.107, 262.104.

232. *Id.* § 262.104(a).

233. *See id.* § 262.107.

234. *Id.*

235. *See id.*

236. *See id.* § 261.001(4).

237. *See id.* §§ 261.001(4), 262.107.

238. *See id.* § 262.107.

239. *See infra* Section III.D (pushing for clear statutory frameworks to allow judges to apply the statutes consistently).

240. H.J. of Tex., 87th Leg., R.S. 793, 808 (2021) (noting that CPS is the first to “define” statutory child removal terms).

241. *See* Carter, Church & Sankaran, *supra* note 39, at 497 (discussing the child welfare community’s tendency to “de-emphasize the role of the judge as an impartial gatekeeper”).

Texas foster care system would be better served if judges, instead of CPS investigators, were treated as the gatekeepers.²⁴²

By providing judges with clear statutory definitions, case law precedent, and factors to analyze, judges will be empowered to strictly interpret child removal statutes and back up their interpretations.²⁴³ In doing so, when CPS attempts to remove a child with a court order for reasons of neglect under Texas Family Code section 262.104, the court system may interpret the statutes clearly and prevent unnecessary removals.²⁴⁴

This is exactly what happened in New Orleans after one judge, Judge Gray, made the decision to strictly interpret the removal statutes in her state and hold CPS to its burden of proof and evidentiary rules.²⁴⁵ Regarding evidentiary rules, for example, during one hearing, a case manager was testifying and “clearly struggling to remember certain details that the department attorney wanted in the record.”²⁴⁶ To refresh his memory, the case manager began to review his notes, but Judge Gray interrupted him, reminding the courtroom that witnesses are “not allowed to reference notes or other materials without the court’s express permission.”²⁴⁷ Judge Gray asked probative and clarifying questions, both of testifying witnesses and child welfare professionals in the room.²⁴⁸

Texas judges can take a similar approach, but the legislature must provide them with the proper legislative tools.²⁴⁹ Providing Texas courts with clear definitions and necessary guidelines will not only allow CPS to apply the standards more effectively, but will also allow Texas judges to gatekeep foster care entry more consistently.²⁵⁰

IV. CONCLUSION

To address constitutional violations by the State of Texas against children in foster care, Congress implemented sweeping reform through the passing of many bills over a short time.²⁵¹ While many of these changes proved necessary, there are concerns that these changes have been too idealistic to address the underlying issues.²⁵² The Fifth Circuit acted on

242. *Id.*

243. *See id.* at 496.

244. *See* TEX. FAM. CODE § 262.104.

245. Carter, Church & Sankaran, *supra* note 39, at 507.

246. *Id.* (citing Video Recording: 1000-CC, held by Orleans Parish Juvenile Court (Feb. 21, 2017)).

247. *Id.* at 507–08 (citing Video Recording: 1000-CC, held by Orleans Parish Juvenile Court (Feb. 21, 2017)).

248. *Id.* at 505 (stating that Judge Gray asks numerous questions of the witnesses).

249. *See supra* Sections III.A–B (providing legislative guidelines).

250. *See* Carter, Church & Sankaran, *supra* note 39, at 507.

251. *See supra* Part II (explaining the recent legislative changes).

252. *See supra* Section II.B.3 (discussing concerns expressed before and after the bill passed).

similar concerns when striking many of the injunctions ordered by the district judge in *M.D. v. Abbott*.²⁵³

To adequately weigh parental rights, the state's interest in child protection, the traumatic effect of removal, and the traumatic effect of leaving a child in a dangerous situation, the state must take a more moderate approach when defining neglect.²⁵⁴ The legislature must also be willing to provide more guidelines for CPS to follow to ensure clear expectations.²⁵⁵

Implementing the model legislation this Comment proposes will not resolve every issue in the foster care world; that would be unrealistic for a complex and continually changing system.²⁵⁶ However, implementing the model legislation would provide a clearer framework for CPS and other child welfare advocates.²⁵⁷ By changing the standard to "substantial risk of immediate danger," the standard for removal increases (as the legislature intended), and CPS and foster care judges can rely on precedent case law to help define the terms.²⁵⁸ A factor analysis comprised of existing statutes and case law can be used to guide application of the statute.²⁵⁹ The model legislation would also provide more guidelines for what falls into the "independent activities" category while still accounting for cultural and developmental differences.²⁶⁰

In the meantime, CPS and foster care judges should use Texas Family Code section 262.107 to interpret "immediate danger."²⁶¹ Although the statute was not tailored specifically for child removals due to neglect, the overlapping language would provide necessary guidance for child welfare professionals.²⁶²

Overall, implementing the model legislation this Comment proposes will provide more guidance to CPS and foster care judges than currently exists, and more guidance will ensure more consistent application of these statutory frameworks.²⁶³

253. See *M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 256–70 (5th Cir. 2018).

254. See *supra* Part III (proposing a more moderate solution for child removals).

255. See *supra* Part III (providing model legislation).

256. See *supra* Part III (discussing the strengths of proposed model legislation and the remaining potential improvements).

257. See TEX. FAM. CODE § 261.001(4).

258. See *supra* Section III.A (showing case law precedent that courts can rely on for interpretation and application).

259. See *supra* Section III.B (providing a factor analysis CPS workers can use to apply the model legislation).

260. See *supra* Section III.A.2 (discussing additions to the independent activities provision).

261. See *supra* Section III.C (arguing that Texas Family Code section 262.107 should be used to interpret the current standard until the state can adopt model legislation).

262. See *supra* Section III.C (showing the overlapping language between the definition of neglect and Texas Family Code section 262.107).

263. See *supra* Part III (arguing that the model legislation and accompanying factor test will provide more clarity and guidance).