



January 25, 2021

To: Chairman Klemin and Members of the House Judiciary Committee

Re: Testimony of the National Coalition for a Civil Right to Counsel (NCCRC) Supporting House Bill No. 1035

Hearing: January 26, 2021, 9:00am

Chairman Klemin and Members of the Judiciary Committee:

Thank you for the opportunity to submit testimony supporting House Bill No. 1035, which would ensure that children in need of protection or services have a right to appointed counsel. This legislation is imperative, as it ensures that the legal rights of children – who are the very subjects of such proceedings - are enforced.

Our coalition, the National Coalition for a Civil Right to Counsel (NCCRC) seeks to advance the recognition of a right to counsel in civil cases involving fundamental interests and basic human needs, such as child custody. We are comprised of over 500 participants and partners from 41 states. The NCCRC worked closely with the American Bar Association on its 2006 Resolution (which passed the ABA House of Delegates on a unanimous vote) that urges federal, state and territorial governments to recognize a right to counsel in basic human needs civil cases such as child custody.

In 2017, the U.S. Department of Health and Human Services' Administration for Children and Families, Children's Bureau determined that there was "widespread agreement" that children need legal representation in child welfare proceedings. The American Bar Association's Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings echoes this position as well and calls for a right to be established for children in such cases. At present, 32 states across the country guarantee the right to counsel for all children in child abuse, neglect, and dependency proceedings, while another two states guarantee counsel for all children over a certain age and another five states guarantee counsel for children in certain circumstances. North Dakota is one of the few states not to provide such a guarantee; instead, a child's right to counsel only arises for a child who is either not represented by the child's parent or guardian or where the child's interests conflict with those of the parent.

Though H.B. 1035 covers several different types of proceedings, each is within the purview of the Juvenile Court Act – meaning that each proceeding is both legally complex and fraught with emotion. These cases inherently concern deeply traumatic, private, and familial issues for the children at their center. Short and long-term decisions are made about where and with whom a child can reside, how often they can see a sibling, parent or other important family member, who they can generally interact with and in what setting, what services they have to participate in, etc. Child welfare proceedings have serious, lasting effects on the relationships and well-being of the very children the child welfare system is meant to help. It is in these cases where important familial relationships may be disturbed or permanently severed. And these consequential decisions arise out of cases that are themselves often fluctuating – from who the caseworker is, to what the goal is, to who is adjudicating the matter. Appointment of counsel at the beginning stages of the proceedings and for the duration of every case can be an important stabilizer for a child, when their entire worlds are in constant flux.

The issues before a Juvenile Court might be inherently personal and distressing, but it is especially *because* they come before the Juvenile Court that the issues must then be thoroughly dissected, investigated, litigated and ultimately adjudicated by strangers to the child and family. Child welfare proceedings are difficult civil cases governed by exacting statutes, decades of case law, and detailed rules of evidence and procedure. They are subject to a web of federal, state, and local laws, rules, and regulations. For these reasons, the state, which brings these cases, is *always* represented by counsel with access to vast resources and power. This is to be compared against that of children, who are typically considered legally incompetent to even file suit on their own. The power imbalance between the state and the family, including the child, is striking, and errors are made regularly in the name of protection.

The law related to the appointment of children, as it currently stands in North Dakota, is insufficient. It is not enough to appoint counsel when the child's interests are different from the parent's or where they are not represented by the parent. Children often cannot articulate their interests or might be hesitant to express a change in their position to their parent or parents' attorney. A lawyer for the child is essential because they have a confidential relationship with the child and can assess and properly advocate a child's changing positions on important decisions including visitation, placement, schooling, services, etc. Finally, when children are brought into proceedings under the Juvenile Court, they are like other parties in the case. They may need to testify or be cross-examined, they may need to produce evidence to support their position, and/or they may need to follow through with requisite court orders. If they are subject to these realities of child welfare proceedings, they must have an attorney by their side.

Attorneys for children, who bear an ethical and professional responsibility to zealously advocate for their clients, improve outcomes for children. They advance children's legal interests and rights in crucial decisions, including those about placement, medical and

mental healthcare, services, education, housing, visitation, and so on. The ABA Model Act states that “Our notion of basic civil rights, and ABA Policy and Standards, demand that children and youth have a trained legal advocate to speak on their behalf and to protect their legal rights ... Attorneys can identify legal issues regarding their child clients, use their legal skills to ensure the protection of their clients’ rights and needs, and advocate for their clients.”¹

Attorneys for children benefit all parties and the child welfare system in general. The Children’s Bureau has said that “[t]he absence of legal representation for any party at any stage of child welfare proceedings is a significant impediment to a well-functioning child welfare system.”² When reviewing the benefits of legal representation for parents and children, the Bureau found numerous identifiable benefits including an enhanced sense of procedural fairness, better case planning, increased visitation, and expedited permanency. It strongly encouraged “all jurisdictions to provide legal representation to all children and youth at all stages of child welfare proceedings.”³

Representation has also proven essential when crises, such as the current pandemic, disrupt or prevent the child welfare system from functioning. Anecdotal reports show that throughout the pandemic, attorneys for children, in states where those roles are specifically established, have zealously advocated to have their clients return to their families when there are no safety concerns, and have opposed blanket visitation halts.

Children do not make the initiating decisions in these cases. They do not choose to become entangled in the system. Yet, they bear the brunt of these proceedings – *they* are moved, *they* are prevented from seeing important family members, and they have to engage in services that are determined to be in their best interest. At a minimum, they need representation to help them navigate this system- and to emerge whole. For these reasons, the NCCRC **strongly supports** the passage of HB 1035.

Thank you for your consideration, and please let us know if there is any additional information we could provide.

Sincerely,



John Pollock, Coordinator
The National Coalition for a Civil Right to Counsel

¹ American Bar Association, *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, 21 (2011).

² ACF, Information Memorandum 17-02 at 2 (2017).

³ *Id.*, at 11.