To: Idaho House Judiciary, Rules & Administration Committee
Re: Written Testimony in Opposition of Idaho SB 1181
Date: March 27, 2025

Rep. Bruce D. Skaug and House Judiciary, Rules & Administration Committee Members:

The National Coalition for a Civil Right to Counsel (NCCRC) writes in **opposition** to SB 1181, which would apparently eliminate in whole or in part the right to counsel for indigent parents in termination of parental rights (TPR) matters.

The NCCRC is a coalition of over 600 participants and partners from 45 states (including Idaho) that seeks to advance the recognition of a right to counsel in civil cases involving basic human needs. We worked closely with the American Bar Association (ABA) on its 2006 Resolution urging federal, state, and territorial governments to recognize a right to counsel in basic human needs civil cases such as child custody. And we have been involved in litigation and legislation efforts in many states around the right to counsel for parents in neglect and termination of parental rights (TPR) proceedings, including litigation that has established a constitutional right to counsel in such proceedings.

Currently, Idaho Code § 16-2009(1) provides that in TPR cases, parents and guardians are entitled to appointed counsel upon request if they are unable to afford representation. SB 1181 would specify that appointment of counsel occurs only where "such representation is constitutionally required," which would demand a case-by-case analysis, an approach discussed in more detail below. In addition, the bill would amend § 19-6009 to preclude public defender representation in matters "brought exclusively under chapter 20, title 16, Idaho Code." Although we understand that public defense offices around the country face challenges in meeting the demand for their services, we believe that the bill as currently drafted would have severe (and potentially unintended) consequences.

First, in his recent testimony regarding the bill, Judiciary and Rules Committee Chair Senator Lakey stated that SB 1181 would only impact *private* TPR cases – in other words, that it would not impact TPR cases where there is *state* involvement. However:

- It is our understanding that § 16-2009 is the sole source of the statutory right to counsel for both state-initiated *and* private TPR cases, especially since § 16-1613 (which governs hearings under the Child Protective Act) refers to parents' "right to be represented by counsel" but makes no mention of appointed counsel. Indeed, relying on § 16-2009 for the right to appointed counsel in Child Welfare Act matters, including TPR cases, appears to be the understanding of the Supreme Court of Idaho as well.[1] If so, the effect of the amendment to § 16-2009 would not be limited to private TPR cases.

[1] *See* Idaho Supreme Court, *Child Protection Manual*, Chapter 9: Termination of Parental Rights, at p. 97 footnote 16, which cites to § 16-2009 as the source of parents' right to counsel; see also *In re Doe Children*, 365 P.3d 420, 425 (Idaho Ct. App. 2015) (relying on Section 16-2009 and an Idaho Supreme Court decision in stating, "[I]ntervention by the Department to terminate the relationship between a parent and a child must be accomplished by procedures meeting the requisites of due process … For instance, when a petition to terminate parental rights is initiated, the court must protect the parent's due process rights by appointing competent counsel if the parent cannot afford counsel. I.C. § 16–2009; *In Interest of Baby Doe*,

- Idaho Code Ann. § 16-2004 provides that a TPR petition may be filed by either private individuals *or* an "authorized agency." Thus, it appears there is a way in which state-initiated TPR petitions can be filed under Title 16 Chapter 20.

Next, even if SB 1181 were to only affect private TPR cases, the changes proposed may create:

- **A conflict with court rule**. Idaho Juv. R. 37(c) provides, "The parent(s), guardian, or legal custodian has the right to be represented by counsel *in all proceedings before the court*. *The court shall appoint counsel to represent the parent(s), guardian, or legal custodian* if it finds that they are financially unable to pay for such legal services, unless representation is competently and intelligently waived."[2] There is no limiting language in Juv. Rule 37(c), which suggests the right to counsel it creates applies not only to Chapter 16 TPR proceedings, but to Chapter 20 TPR proceedings as well. If § 16-2009 is amended to make appointment of counsel in Chapter 20 proceedings occur only when constitutionally required, that would seemingly conflict with the right to appointed counsel provided by Idaho Juv. R. 37(c).

- **An equal protection violation**. Numerous courts around the country have held that it is a violation of equal protection for a state to guarantee counsel for parents in state-initiated TPR cases but not in private TPR cases, which is the situation that SB 1181 would create.[3] Notably, the Supreme Court of Iowa found the lack of a right to appointed counsel in private TPR cases violated equal protection,[4] and even after the state authorized appointment of counsel in private TPR cases on a case-by-case basis, the Court held that this legislative change did not fix the problem.[5] Thus, SB 1181's legislative change may create a constitutional infirmity.

Finally, the case-by-case approach called for by the language of SB 1181 is problematic for two primary reasons:

- The Supreme Court of Idaho has held that due process protections apply when the state initiates a termination of parental rights. *See e.g.*, *In re Doe Children*, 365 P.3d 420 (Idaho Ct. App. 2015) ("[T]he requisites of due process must be met with the Department intervenes to terminate the parent-child relationships.") (citing *State v. Doe*, 146 P.3d 649, 652 [Idaho 2006]). Specifically, "the court must protect the parent's due process rights by appointing competent counsel if the parent cannot afford counsel." *In re Doe*, 365 P.3d at 425. If indigent parents in Idaho have a

936 P.2d 690, 695 [Idaho 1997] …").

[2] (emphasis added). This rule would appear to apply to all phases of child welfare proceedings, including TPRs, as Juv. R. 48(b) specifies that "[a]ll appointments of attorneys and guardians ad litem in the proceeding under the Child Protective Act shall remain in effect for purposes of proceedings on the petition to terminate, unless otherwise ordered by the court."

[3] See e.g., *In re K.L.J.*, 813 P.2d 276 (Alaska 1991) (state constitution's due process clause); *In re Adoption of L.T.M.*, 824 N.E.2d 221 (Ill. 2005) (federal constitution's equal protection clause); *In re S.A.J.B.*, 679 N.W.2d 645 (Iowa 2004) (state constitution's equal protection clause); *Adoption of Meaghan*, 961 N.E.2d 110 (Mass. 2012) (state constitution's due process and equal protection clauses); *Matter of Adoption of K.A.S.*, 499 N.W.2d 558 (N.D. 1993) (state constitution's equal protection clause); and *Zockert v. Fanning*, 800 P.2d 773, 776 (Or. 1990) (state constitution's equal protection clause, and commenting, "The pioneers who adopted the Oregon Constitution clearly had in mind that assistance of counsel was among the privileges of Oregon citizenry.").

[4] *In re S.A.J.B.*, 679 N.W.2d 645, 648 (Iowa 2004).

[5] *Crowell v. State Pub. Def.*, 845 N.W.2d 676 (Iowa 2014).

constitutional right to counsel when facing termination of parental rights, SB 1181's requirement that trial judges decide in each case whether appointment of counsel is "constitutionally required" would conflict with such a categorical right.

- Our research has shown that a case-by-case approach to appointing counsel, such as that proposed by SB 1181, has failed nearly everywhere it has been tried. SB 1811 would force courts to weigh, in each case, the nature of the parent's interests and the state's interests and then measure the likelihood of the court reaching an erroneous conclusion on the TPR petition if the parent lacked counsel. This approach forces courts to speculate on the necessity and value of counsel in a particular case without any information other than what the parties have alleged in their pleadings.

Unrepresented parents cannot be expected to identify legal issues or factual disputes that justify appointment in their case. Moreover, the judge is not in a position to conduct an independent investigation but rather must rely solely on the information before the court. In such a situation, different judges will come to different conclusions based on similar operative facts, creating a situation of fundamental unfairness. Experience has shown that in jurisdictions with judicial elections (which we believe includes Idaho), judges may be reluctant to exercise their discretion to appoint counsel because of potential political fallout from the cost it incurs to the county or state. Such a political problem is eliminated when the judge is obligated to appoint counsel.

Most recently, in *In re T.M.*, the Supreme Court of Hawaii found that the Court of Appeals had abused its discretion under Haw. Rev. Stat. § 587A-17(a) (which made appointment of counsel discretionary) by refusing to appoint counsel for the mother in the case. 319 P.3d 338 (Haw. 2014). In ruling that all indigent parents have a constitutional right to appointed counsel, the court went on to say:

> The foregoing review of the instant case reveals the inadequacy of an approach that allows the appointment of counsel to be determined on a case-by-case basis once DHS moves to assert foster custody over a child ... Mandating the appointment of counsel for indigent parents once DHS moves for custody would remove the vagaries of a case-by-case approach.

We thank you for your consideration and urge you to preserve the right to counsel in order to safeguard the fundamental rights of parents. If we can be of any further assistance, please do not hesitate to reach out.

Sincerely,

John Pollock
Coordinator, NCCRC
jpollock@publicjustice.org

A. Vern Insalaco
Legal Research & Legislative Specialist
insalacoa@publicjustice.org