

To: NH House Children and Family Law Committee

From: Leah Cushman

Rebuild NH

NH Family Justice

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Opposition testimony to HB553-FN

Members of the Committee,

Thank you for allowing me to present this testimony today.

This bill, HB553-FN, presents numerous issues concerning due process and the fundamental rights of both children and parents. Children have a right to care and protection from their parents, while parents have the right to direct the upbringing of their children. These rights should not be easily overridden by a low evidentiary threshold or processes that bypass constitutional protections.

Part 1 Article 15 of the New Hampshire Constitution states that no one shall be deprived of their rights without due process of law. Similarly, the **14th Amendment** of the U.S. Constitution guarantees due process. However, HB553-FN continues and expands the rebuttable presumption of harm which inverts the legal principle of innocence until proven guilty. This presumption means that without a criminal conviction, a parent is deemed unfit unless they can meet vague, subjective standards, made more vague by this bill, to retain custody of their child. This is a clear violation of due process, as it places an undue burden on parents to prove their fitness rather than requiring the state to prove unfitness.

The bill could be constitutionally sound if it simply changed the definition of an abused child to one who was the victim in a case for which there was a conviction for crimes like domestic violence, assault, or endangering the welfare of a child. If RSA 169-C simply referenced those criminal statutes in defining abuse, neglect, and abandonment, it would ensure that due process has already been served in a court of law.

For the first 150 or so years of our nation's existence, a matter of law was determined, and then equity followed the law for remedy that law could not provide. Law was the bed, equity was the blanket, but equity was never used to deprive rights or liberty interests without law. The family court is a court of equity, according to RSA 490-D, yet it is operating under statutes that do not adhere to the principles of law or equity. Somewhere along the way, legislators, though well-intending, were ignorant of the principles of equity and law that have been tried and tested since time immemorial, and created statutes that have resulted in broad judicial discretion, arbitrary decision-making, unpredictable application of rules and weighing of evidence, presumption of guilt until proven innocence, and other egregious violations of due process.

In **SEC v. Jarkesy**, the Supreme Court emphasized that actions concerning private rights must be adjudicated by an Article III court (a court of law), underscoring the need for due process in legal matters. This case also highlights the importance of originalist interpretations of due process, which should include the right to due process protections, including a trial by jury for actions traditionally requiring it at the founding of our nation. The Court stated: "If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory."

The **American Bar Association** has clearly stated, referencing cases like **Troxel v. Granville** and **Hollingsworth v. Hill**, that parental rights are fundamental liberty interests protected under the Fourteenth Amendment. This amendment is invoked whenever there is an attempt to separate parents from their children, necessitating due process. Due process requires that the application of law cannot be arbitrary or capricious.

HB553-FN expands the scope of the Child Protection Act to include a definition of abuse that includes emotional or psychological welfare, which is broad and subject to magistrate discretion. Broad discretion is antithetical to our system of jurisprudence and so is vague law. Judges are supposed to follow the law, and because of its vagueness this expansion could lead to arbitrary decisions on what constitutes neglect or abuse.

Will a magistrate decide that it is psychological abuse to not refer to your child as their preferred pronouns? What about allowing children to engage in typical childhood activities like walking to school? Setting disciplinary boundaries? The question becomes, who decides what presents a risk or harm to a child's emotional or psychological welfare? It's left to the court's discretion, not the parents, even when no crime has been charged or proven. We want to believe that these magistrates are reasonable and will make fair and reasonable decisions, but with little accountability, flexible court rules, and numerous allegations of misconduct, it is important that discretion be limited and the law be clear.

It redefines physical injury that is considered abuse as follows, where bold text is new proposed language: ***Physical injury to a child*** by other than accidental means, ***or indeterminate means if the parents, guardians, or custodians are the primary or sole caregivers and have offered no reasonable alternative explanation for said injuries.***

This means if a child has an injury of unknown origin it is presumed the child is abused, without proof, further shifting burden of proof from the state to parents. This is antithetical to constitutional due process protections.

Moreover, the bill introduces concepts like "serious impairment" as **an adverse impact on** rather than **"a substantial weakening or diminishment"** of a child's emotional or psychological well-being, **"which may result from a single event"** that may be currently observed **or predicted**, and also adds **"a single occurrence of serious injury or illness."** This greatly expands cases where the court can determine a serious impairment has occurred and could classify a simple childhood accident like a broken arm from biking or a case of the flu as evidence of neglect or abuse.

The inclusion of "trauma-informed care" language, which lacks robust clinical evidence and is often criticized for overemphasizing trauma, further complicates the bill, and it is unclear exactly how this "lens" will be used from the language in the bill. Critics argue that focusing solely on "trauma-informed" approaches might neglect other important factors contributing to an individual's well-being, potentially leading to a reductionist perspective on complex experience.

The concept of "parentification" is also a controversial term and expands government encroachment on families in a way that normal family support could be misconstrued as abuse. What might be seen as a child taking on reasonable responsibilities could be interpreted as harmful, again at the discretion of magistrates in family court.

Lastly, the use of the "preponderance of the evidence" standard in cases involving abuse and neglect, rather than "beyond a reasonable doubt," is inappropriate when the stakes are as high as the loss of child rights to their parents and parental rights to their child. Separation of families is akin to a life sentence in prison. Children get one childhood. The court should be required to prove guilt beyond a reasonable doubt prior to tearing a family apart, given the severity of the consequences.

In conclusion, HB553-FN undermines constitutional protections by allowing for the circumvention of due process, expanding state control over family life without clear legal justification or prior conviction, and giving undue discretion to judges. This bill needs significant revisions to align with constitutional guarantees and ensure fairness in family law adjudications. Thank you for considering this testimony.