OFFICE OF RESPONDENT
PARENTS' COUNSEL

June 20, 2023

Child Welfare System Interim Study Committee
Old State Library
Colorado State Capitol
200 E. Colfax Ave.
Denver, CO 80203

Dear Chair Young, Vice Chair Fields, and Members of the Child Welfare System Interim Study Committee,

On behalf of the Office of Respondent Parents' Counsel (ORPC), I extend our gratitude for listening to the concerns raised by our agency, parents, and community members about the harm created by our child welfare system. We appreciate your commitment to listening, learning more, and moving forward with broad and effective solutions to the inequities and destruction caused by our current system.

The legislature enacted legislation to create the ORPC in 2015. Just seven years ago, in July 2016, the agency took over responsibility for appointing counsel to represent all indigent parents in dependency and neglect (D&N) cases throughout the state. The Task Force that recommended the creation of the ORPC found that attorneys representing parents had high caseloads, inadequate compensation, a lack of access to resources like expert witnesses, and a lack of training.

The ORPC acted quickly to increase the rate of pay for respondent parents' counsel and to move away from flat fee billing to hourly billing for all contract attorneys. With the help of the legislature, our attorneys, who are all independent contractors, will receive an increase in compensation next fiscal year and automatic raises at set intervals to keep up with inflation and to try to bring their compensation into line with similar legal positions. The ORPC has also provided access to expert witnesses and extensive training. Most importantly, the ORPC contracts with over 60 independent social workers and parent advocates to ensure that parents facing separation from their children have access to an interdisciplinary team to provide them support and bolster them in finding their way towards safe reunification.

Over the past seven years of operation, we have seen firsthand the barriers families still face to remain safely together and to achieve reunification. As a result, the ORPC has increasingly engaged in policy and legislative advocacy, both at the state and national levels, and we welcome the work of this Committee. Across our country, many states have engaged in broad legislative reforms of their child welfare system. We want to support the Committee in considering reforms that have been implemented in other states, as well as provide some new ideas. The ORPC is fortunate to have staff attorneys, social workers, and researchers with decades of experience. We hope that we can work together to provide data, research, stories, and expertise to support your work. We have listed some ideas for study below and would be happy to further discuss any of these ideas or other topics the Committee may address.

Advocating for the Civil Rights of Parents and Children Must Come First. The Administration on Children, Youth, and Families recently released a call for grant proposals to address racial bias and inequity in child welfare. In announcing the grants, the Administration wrote that the child welfare system,

> "like many other 'people serving' systems, is responsible for many structural barriers and racial biases that have contributed to family dysfunction, separation, and destruction under the guise of safety and well-being. . . . Once families most impacted by racial disparities come to the attention of the child welfare system, they are often embarking on a seemingly continuous journey of surveillance, interruption, removal, and for many, eventual break down, leading to lasting adverse outcomes impacting generations."

In all the work the Interim Committee takes on, the ORPC urges the Committee to consider the important federal civil rights and constitutional protections for parents and children in this system. Any legislative efforts must consider and incorporate the anti-discrimination protections of the Americans with Disabilities Act (ADA), Title VI of the Civil Rights Act of 1964, and other similar state and federal civil rights laws and constitutional protections. We urge the committee to consider the following when drafting legislation:

- **Parents and Children with Disabilities Are Overrepresented and Discriminated Against from Investigation to Removal to Termination of Parental Rights.** At least half of indigent parents subject to dependency and neglect proceedings in Colorado have a disability, more than double the percentage of people with disabilities in our state. While 70% of parents without a disability and their children reunify, less than half of parents with a disability with a child welfare case in our state reunify with their children, and a quarter of parents with disabilities have their rights terminated.

  The Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and Colorado's Carrie Ann Lucas Parental Right for People with Disabilities Act require, at a bare minimum, that departments of human services, courts, and service providers:

  - Evaluate persons with disabilities on an individualized basis;
  - Provide treatment plans that address disability-related needs and the individualized services the department will provide to ensure equal opportunities;
  - Tailor services to any family members with disabilities.

  Too often, departments remove children based on parents' mental health or intellectual disabilities, or soon learn that parents or children have disabilities. Yet departments then claim to have no notice that a parent or child had a disability. Departments also often ignore this legislature's mandate that parents' treatment plans address accommodations. Departments often act on stereotypes and assumptions about people with disabilities, rather than providing individualized services to support at least half of parents in D&N cases who have disabilities. We must reinforce the ADA's, Section 504's, and Carrie's Law's non-discrimination principles and requirements in any legislative changes.

- **Parents with Limited English Proficiency (LEP) Must Have Access to Treatment Plans, Court Orders, and Other Documents in their Native Languages**. One-fifth of Colorado's children speak a

language other than English at home. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of national origin, including the ability to speak English. Courts, departments of human services, and service providers must provide access to services, translation of court documents and other important documents, and interpretation at meetings and in court for parents with limited English proficiency (LEP). Yet families with LEP routinely encounter language access barriers affecting their ability to succeed in their case. We must also reinforce language access principles and requirements in any legislative changes.

- **Legislative Change Must Tackle the Disproportionate Impacts of Surveillance and Family Separation on Families of Color.** As the U.S. Supreme Court has recognized:

> Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values...In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent. Because parents subject to termination proceedings are often poor, [less formally] educated, or members of minority groups...such proceedings are often vulnerable to judgments based on cultural or class bias. *Santosky v. Kramer*, 455 U.S. 745, 762-63 (1982).

Colorado families are on the receiving end of these subjective standards and bias every day in D&N cases:

- Families of color are more likely to be the subject of child welfare investigations and child abuse and neglect findings;
- Children of color are overrepresented among children in foster care;
- Black youth are overrepresented among children who are placed in congregate care and more likely to emancipate from the system without achieving permanency.

Such biases often also violate state and federal civil rights laws and constitutional protections against discrimination based on sex, marital status, age, race, and disability. We must ensure that our laws proactively work to keep children safe with their parents or families whenever possible to reduce the generational trauma caused by family separation of families of color.

Given the requirements of federal law and the Constitution, our office provides the following suggestions for legislative changes:

1. **Repeal Expedited Permanency Planning (EPP).** In Colorado, children six and under must be in a permanent placement within 12 months of removal. This is much shorter than the federal requirements for permanency, which require that termination be considered when a child has been in foster care for 15 of the last 22 months. These expedited timeframes are devastating for families because:

    - **Insufficient Time for Treatment of Substance Use Disorder.** The majority of dependency and neglect cases in Colorado involve substance use concerns. Yet, the vast majority of experts agree

that the timeframes for permanency in EPP cases are not sufficient for the recovery process to be a reality for most parents. As one former trial and appellate juvenile judge observed: "The realities of accepting the need for a program, the occurrence of relapse, waiting for re-admission, and eventual graduation are almost impossible to align with the timelines as currently applied."

- **Arbitrary Deadlines Lead to Legal Orphans.** These arbitrary deadlines prioritize legal permanency over relational permanency. As Jerry Milner, the former Associate Commissioner of the Children's Bureau wrote: "We need to stop creating impermanence in the name of permanency as we do with premature and unnecessary termination of parental rights when there are sources of permanent love and support in a child or youth's life, and instead implement approaches to cultivate and support those relationships."

- **Disproportionate Impact on Families of Color.** Our system is much more likely to create Black, Native American, and Latine legal orphans who emancipate from the system or end up in congregate care settings, so children of color are disproportionately harmed by policies that encourage termination of parental rights at a prescribed timeframe rather than focusing on the unique needs of the family.

- **Loss of Federal Funds.** Colorado is expected to lose over $1.5 million in federal funding because it has not met its goal to have children in permanent homes within 12 months of removal. Because the EPP goal is shorter than federal requirements, if Colorado aligned its requirements with federal timeframes, Colorado would have more freedom to meet families' needs and avoid huge financial penalties.

- **Colorado Terminates More Quickly than 45 Other States.** Colorado is one of the quickest states to terminate parental rights, with a national study showing that 84.3% of terminations of parental rights in Colorado occurred within 17 months of removal. Only Texas, Utah, and West Virginia had higher rates of termination within 17 months of removal.

Solution: Remove expedited permanency planning provisions from Colorado state law and align Colorado's permanency laws with federal requirements under the Adoption and Safe Families Act.

2. **Reform Child Abuse and Neglect Investigations.** In 2022, Colorado recognized the need to study its mandatory reporting system for child abuse and neglect. Mandated reporters account for most child abuse and neglect reports, and they are subject to criminal penalties if they fail to report suspected abuse and neglect. As the legislature recognized in creating the mandatory reporting task force, "under-resourced communities, communities of color, and persons with disabilities are disproportionately impacted by the mandatory reporting system."

   While the Task Force is continuing its work, there are many commonsense reforms that have either been adopted or considered in other states to ensure that families of color, families experiencing poverty, and

persons with disabilities are not targeted by investigations and that the investigations are targeted at keeping children safe while providing help to the family. Some ideas:

- **Family Miranda Rights**. Ensure that families interacting with the child welfare system know their rights and have access to resources such as legal advice, support, and knowledge of how to make complaints when their rights are violated. In addition to ongoing efforts in New York to require families be advised of their rights, Texas recently passed legislation requiring such information be provided to parents interacting with child welfare agencies.

- **Differentiating Abuse from Neglect**. Some states have structures that differentiate screening and response mechanisms for reports of abuse versus reports of neglect. The vast majority of reports are based on neglect, not abuse. Such systems permit a greater focus of resources on cases where children are at the most serious risk of harm. For example, New York recently passed a law that findings for neglect automatically are expunged after eight years. Pennsylvania has separate reporting mechanisms and investigation processes for reports of neglect and reports of abuse.

- **Reforming Child Abuse and Neglect Findings**. When a department of human services finds a person responsible for abuse or neglect, they make a finding which is then available in most circumstances to other departments of human services, childcare and educational institutions, and employers authorized to access such records. This system is used very inconsistently across counties. Over the last 15 years, counties have begun using a system called differential response, which allows counties flexibility in how they investigate cases and avoids the need to make child abuse and neglect findings in an effort to provide support to families rather than focusing on fault. Some counties have high rates of use of differential response, which means that many investigations do not result in any findings of child abuse or neglect. In other counties that do not use differential response, even minor cases might result in a finding for something like lack of supervision. Child abuse and neglect findings disproportionately impact families of color and families experiencing poverty, resulting in many families having bars to employment, further entrenching the type of poverty that can lead to D&N cases, and to helping their own family members by caring for a relative's child if the relative is subject to a D&N case.

  Many states have recently taken approaches to address these inequities and to more narrowly target their child abuse registry and reporting systems. Michigan allows people to petition every ten years to have their names removed from the central registry. Michigan also passed a bill requiring that only serious child abuse, sexual abuse, or methamphetamine production with a child present be reportable to the child abuse registry.

- **Right to Counsel for Administrative Appeals of Child Abuse and Neglect Findings.** The House Public and Behavioral Health and Human Services Committee heard compelling testimony on HB 23-1160 this past session and unanimously approved an amended bill, but the bill was never voted on in the House.

- Multiple other states have either provided the right to counsel for indigent parents appealing findings of abuse or neglect or had a judge find that the Constitution requires appointment of counsel in such circumstances.
- Michigan passed legislation requiring administrative hearings prior to people being added to the child abuse registry.
- New Jersey provides a right to counsel for indigent parents appealing child abuse and neglect findings.
- There is even model legislation that addresses much of the same requirements of HB 23-1160 prior to its amendment.
- The ORPC is prepared to recruit, train, and appoint attorneys to indigent parents facing these proceedings. If findings were used more sparingly, as suggested above, the fiscal impact should be manageable.

- **End Use of Predictive Analytics in Investigations**. At least three Colorado counties use predictive analytics tools in responding to reports of child abuse. These tools use historical data to predict the likelihood of some outcome in the child welfare system that is considered a proxy for child maltreatment (such as removal within the next 2 years). Research has found similar tools to (1) be based on factors that are proxies for race or disability and thereby expressly discriminatory, and (2) enhance rather than decrease implicit bias. The use of predictive analytics in child welfare ensures the biases of the system against people living in poverty, people with disabilities, and people of color will continue. Oregon recently dropped its use of a predictive analytics tool from the same developer as Colorado's, and the federal Department of Justice is investigating the same developer's tool in Pennsylvania. One concrete step this body can take to address race and disability discrimination in child welfare is to bar these tools in Colorado.

- **Provide Access to Second Opinion in Non-Accidental Injury and Medical Neglect Cases**. When a child abuse pediatrician makes an assessment that a child has been abused, it often sets into motion a chain of events that may include restraining orders, criminal charges, findings of no appropriate treatment plan, and ultimately termination of parental rights. In some cases, families have been irreparably harmed where medical professionals misread X-rays or failed to investigate alternative explanations for injuries or medical conditions. In response to these concerns, Texas provided a right to a second opinion at state expense in these cases.

- **Require Consent for Drug Testing of Newborns**. When hospitals decide whether to administer drug testing for newborns, decisions are often influenced by implicit bias, resulting in far greater testing of people of color and low-income parents, despite higher rates of use by White parents. New York has pending legislation to require informed consent of parents in these circumstances in order to reduce the disproportionate impact of child removal and investigations on people of color and low-income families.

Solution: Consider legislation from other states that provides for a more equitable commonsense investigatory structure that reduces the disproportionate impact of investigations on families of color, families with disabilities, and families experiencing poverty.

3. **Preventing Removals and System Involvement.** Removal and family separation are frequently knee-jerk responses to things like substance use or lack of supervision. The law does not provide adequate safeguards to encourage safety planning and keeping families together. Other states have introduced safeguards to reduce the overall number of removals and subsequent overall system involvement. Ideas include:

    - **Emergency Hearing Reform.** When a department decides to remove a child, they call a judge to get an oral order for removal. These conversations do not have to be on the record, and they are *ex parte,* meaning that when the judge decides to remove a child, the only information they are provided comes from the department, and neither parents, children, nor their attorneys are part of the discussion.

      There are few standards for what information needs to be provided by the caseworker or county attorney when requesting removal, and parents do not have an opportunity to challenge these orders until 72 business hours after removal. Even then, parents often lack the ability to get witnesses to the removal hearings, talk with their counsel prior to the hearings, obtain records relating to removal such as the safety assessment departments must – but often don't – complete, or access any meaningful judicial review of removal decisions. Several states have led the way in reforming this system, including:

        - **Raising Standard for Removal**. Washington State recently passed legislation that requires that evidence be produced to show a causal relationship between imminent physical harm to the child and the conditions in the home. Further, the bill specified that the existence of community or family poverty, isolation, single parenthood, age of the parent, crowded or inadequate housing, substance abuse, prenatal drug or alcohol exposure, mental illness, disability or special needs of the parent or child, or nonconforming social behavior does not by itself constitute imminent physical harm.

        - **Requiring Consideration of the Harm of Removal**. When judges remove children in Colorado, they only consider the risk to the child if they remain in the home, not the harm that would be caused by removal. Washington State requires that the danger of imminent physical harm must outweigh the harms of removal. It also requires mandatory consideration of whether any prevention services would prevent or eliminate the need for removal. Children removed from their caregivers have a 2-3 times greater rate of delinquency, higher rates of teen birth, twice the rate of learning and developmental delays, and six times the rates of behavioral problems. As adults, they experience premature death, substance-related and mental health disorders, lower earnings, and a greater likelihood of criminal

involvement. Removal should be a drastic option only used when necessary to keep a child safe after all other options have failed.

- **Expedited Appeals.** Currently in Colorado, a judge's decision to remove a child from the child's home is not reviewable, even by a district court judge. It is not considered a final and appealable order even though it is one of the most damaging decisions that can be made in a case. This decision must be reviewable for real change to happen.

- **Automatic Discovery.** Often, parents meet their attorneys either just before court, during the hearing on removal of their children, or worse, after the hearing to challenge removal has ended. Even though our law and Chief Justice Directive are clear that parents have a right to counsel **at every stage of the proceedings**, some jurisdictions routinely fail to afford parents access to counsel at this crucial stage. And, even when they do have counsel, parents often lack access to information about the allegations against them. Before removal, every caseworker must complete a standardized safety and risk assessment. These assessments should be made available to the parents and the court along with any other information available at the time of the hearing. This will improve outcomes for families, as research links early, meaningful access to counsel to improved case planning, expedited permanency, and cost savings to state government.

- **Right to Continue Hearing.** To subpoena a witness to a hearing in Colorado, the person must be served 48 hours in advance of the hearing. With attorneys not appointed for parents until the time of the emergency removal hearing, parents have no ability to get crucial witnesses to testify on their behalf. It is important to preserve access to rapid hearings after removal, but parents also need to have the right to request a brief continuance of the removal hearing to obtain necessary information and witnesses.

- **Consistent Standards for Marijuana Use**. As this body knows, Colorado recently legalized psilocybin use. In Senate Bill 290, the legislature grappled with how to ensure children are safe when adults caring for them choose to use legal substances. The legislature has not done the same after medical and recreational marijuana legalization. Many parents who use marijuana during pregnancy or who use marijuana after their children go to sleep have been ensnared in child welfare investigations and removals or had reunification prevented due to their use of legal substances. The legislature should follow the lead of other states (like our neighbors in Utah and Arizona) to provide consistent standards for how marijuana use should be assessed in investigatory, removal, treatment planning, and termination decisions.

- **Narrow the Types of Cases Subject to Removal and Filing of Dependency and Neglect Cases.** Our courts have broadly construed the government's authority to intervene in families *without proving parental fault whatsoever*. Specifically, no fault is required to sustain a dependency and

neglect case based on a child's "injurious environment." Parents who leave their child with a babysitter or family member who places their child in an "injurious environment" could be subject to a dependency and neglect proceeding based on this ground. If the child has a serious bodily injury, the court may also find that the parents are not entitled to a treatment plan and move to terminate their parental rights, even without any evidence that the parent caused or could have prevented the injury.

Injurious environment is also often used to file cases related to domestic violence, with no protections for victims who are making efforts to keep their families safe. A statutory committee looking at the definition of domestic abuse in the Children's Code recently recommended a larger overhaul of the Children's Code to include protections for victims. That recommendation has not been acted upon.

Our definitions of child abuse and neglect are overbroad, and it is time to narrow them to ensure that fit parents who had no ability to prevent the harm to their children are not subject to removal and ultimately to termination of parental rights.

Solution: Draft legislation that takes removal of children from their families as seriously as such an important life changing decision demands and narrows definitions of the types of neglect that require government intervention.

4. **Equity for Relative and Kin Placements.** During this year's legislative session, lawmakers heard a great deal about the importance of relative and kin placements. The legislature passed HB 23-1043 and HB 23-1024 to prioritize and make placements with relatives and kin more streamlined. Currently, 36 states place a greater percentage of children in out-of-home care in the homes of relatives and kin, so our state has a long way to go. We need to make sure that when children are placed with relatives and kin, they have access to the same payments and resources that foster parents would. Fortunately, the federal government is proposing a federal rule change that would do just that. To implement the rule, Colorado will need to change the law. We urge this committee to consider the financial resources necessary to fully support kin and to make that commitment.

Solution: Relax non-safety requirements for licensing of relatives and kin placements. Provide support to complete certification. Provide funding to ensure counties have incentives to license relative and kin homes.

5. **Accountability.** Caseworkers make life-altering decisions that culminate in permanent severance of parents' legal relationships with their children in about one out of five dependency and neglect cases filed. Yet, despite this immense power, there is no code of ethics and no uniform system of accountability for caseworkers who falsify records or submit false testimony. Just in the last two years, our state has been rocked by two high profile cases where caseworkers abused their positions and harmed families. We only know about these cases because reporters ran stories about them. These reports raise ongoing questions about accountability and transparency for department workers and we must act to bring more accountability to our system.

- **Improve Data Collection and Analysis**. CDHS and counties collect a great deal of information on many topics, but we lack data in many important respects. Even though we know that parents with disabilities are far more likely to have child welfare involvement, from investigation through termination, there is no requirement to track data on parents with disabilities. Similarly, even though we know that high quality family time leads to better outcomes for children and parents, there is no requirement to track the amount of family time provided to families when they are separated. Our systems also need to talk so that we can compare data across systems.

- **Create a System to Ensure Caseworkers who Falsify Records are Held Accountable.** If a caseworker falsifies records or submits false testimony, or if they fail to do their job, they should not be rehired in another county. There needs to be greater state involvement in certification of caseworkers and oversight in ensuring that bad caseworkers don't just transfer from county to county.

- **Notify Affected families When Records are Falsified.** When former Arapahoe County caseworker Robin Niceta was found to have falsified records and made a false report, there were no efforts to notify families affected by her actions. Parents impacted by false records, caseworkers who did not follow legal requirements, or caseworkers who submit false testimony must be notified.

- **Strengthen the Office of the Child Protection Ombudsman.** The Child Protection Ombudsman (CPO) is an essential part of creating accountability, and the ORPC believes that the CPO can be strengthened. The ORPC is requesting that the CPO be provided with the authority to initiate investigations and subpoena power.

Solution: Strengthen the Office of the Child Protection Ombudsman and create a system to ensure accuracy of information, accountability, and transparency.

These ideas represent the bulk of the ORPC's legislative agenda. If the Interim Committee does not take them up, legislators are likely to see these ideas come up in future sessions. We hope this Committee makes the substantive changes our system needs to support families and children.

The ORPC also wants to highlight one additional legislative effort that this Interim Committee may have interest in, **comprehensive state ICWA legislation**. Colorado passed SB 23-211 this session to codify the protections of the Indian Child Welfare Act in state law. All stakeholders involved in this legislation agree that a more comprehensive approach is needed in 2024. The ORPC expects the state's tribes to lead this effort and anticipates sufficient support and involvement by stakeholders and prior sponsors to get these efforts to the finish line in 2024.

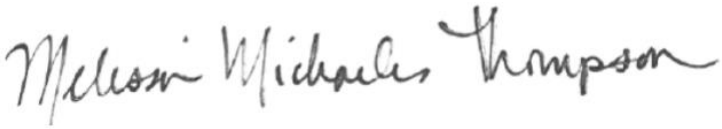
Over four decades ago, the U.S. Supreme Court recognized that deprivation of parental rights may be "more grievous" than deprivation of liberty through incarceration. Ask any parent, and they would likely tell you they would rather temporarily lose their liberty than lose their parental rights. Termination of parental rights is often aptly referred to as the civil death penalty. Yet, our Children's Code lacks many of the due process protections afforded criminal defendants, even those facing minimal jail time or misdemeanors. We hope the Interim Committee will act decisively to support families in staying together. The ORPC would welcome the chance to meet

with individual committee members, coordinate further presentations, or provide further drafting assistance and ideas for legislation.

We also call upon the Committee to hear from people with lived experience throughout the upcoming meetings. The ORPC contracts with over 20 parent advocates, who are all parents who successfully reunified with their children and now assist other parents in navigating these complex systems. Colorado has nationally recognized leaders advocating for greater support for relative and kin placements. The Office of the Child's Representative has youth with lived experience. The Colorado Department of Human Services has a Family Advisory Council. It is crucial that the Committee consider the voices of those who have emerged from and survived a system that is often cruel, arbitrary, discriminatory, and devastating. The ORPC is committed to ensuring these voices are the loudest in this process.

Thank you for your time and consideration of our proposals. We remain available to discuss them and provide further information upon request.

Sincerely,



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