

HB 188 - AS INTRODUCED

2021 SESSION

21-0225

05/04

HOUSE BILL **188**

AN ACT relative to appointment of counsel in juvenile court proceedings.

SPONSORS: Rep. Berch, Ches. 1; Rep. M. Smith, Straf. 6; Rep. Gordon, Graf. 9; Rep. Belanger, Rock. 9; Rep. Walz, Merr. 23; Rep. Levesque, Straf. 4; Rep. Salloway, Straf. 5; Rep. Rouillard, Hills. 6

COMMITTEE: Children and Family Law

ANALYSIS

This bill directs the court to appoint counsel for a minor when the juvenile delinquency petition is filed or the summons issued. The bill also provides that a confession or statement from an unrepresented minor shall not be used in any judicial proceeding.

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears ~~[in brackets and struckthrough.]~~
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty One

AN ACT relative to appointment of counsel in juvenile court proceedings.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 Statement of Findings.

2 I. The United States Supreme Court has found that “[a] lack of maturity and an
3 underdeveloped sense of responsibility are found in youth more often than in adults and are more
4 understandable among the young. These qualities often result in impetuous and ill-considered
5 actions and decisions.” It has further found that “juveniles are more vulnerable or susceptible to
6 negative influences and outside pressures, including peer pressure...[Y]outh is more than a
7 chronological fact. It is a time and condition of life when a person may be most susceptible to
8 influence and to psychological damage. This is explained in part by the prevailing circumstance that
9 juveniles have less control, or less experience with control, over their own environment.”

10 II. Children need access to counsel when they come in contact with the juvenile justice
11 system.

12 III. The role of the juvenile defender is complex and reflects the unique status of childhood
13 in terms of immaturity, disability, and trauma. The juvenile defender must be knowledgeable as to
14 legal jurisprudence relating to the representation of children, including child development, capacity
15 to participate in legal proceedings, methods and effectiveness and availability of treatment and
16 dispositional alternatives.

17 IV. Juvenile defenders play a critical role in the fair administration of justice for children,
18 including both legal and extralegal processes.

19 V. Counsel must receive appropriate training in juvenile justice law and statutes; services
20 for children; communication with children in a developmentally appropriate and effective manner;
21 effective interviewing techniques involving children and to recognize how trauma, disability and
22 immaturity affect the behavior and relationships of young people.

23 VI. Effective representation of youth requires consultation and advocacy at the earliest stage
24 possible and until the child is no longer subject to the juvenile justice system.

25 VII. The courts have long noted that young persons are more susceptible to police coercion
26 and in more need of counsel when facing police questioning. Special protection is particularly
27 necessary in the context of affording young persons their Miranda rights, as they are less capable of
28 comprehending such warnings than adults. The Supreme Court ruled in 2011 that the age of the
29 suspect can determine whether a person is in custody for purposes of Miranda. "It is beyond dispute
30 that children will often feel bound to submit to police questioning when an adult in the same
31 circumstances would feel free to leave.”

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1 2 Delinquent Children; Issuance of Summons and Notice; Appointment of Counsel. Amend the
2 section heading of RSA 169-B:7 to read as follows:

3 169-B:7 Issuance of Summons and Notice; ***Appointment of Counsel.***

4 3 Delinquency Children; Issuance of Summons and Notice; Appointment of Counsel. RSA 169-
5 B:7, III is repealed and reenacted to read as follows:

6 III. The court shall appoint counsel for the minor upon receipt of the petition. Such
7 appointment shall occur no later than the time the summons is issued. The summons shall contain
8 the contact information of the appointed counsel. The appointment shall be made sufficiently before
9 any hearing to allow for consultation between counsel and client, as well as for any appropriate
10 investigation. Notice of the appointment shall be provided to counsel and to the petitioner
11 telephonically, electronically, or in some other manner that is calculated to provide actual notice on
12 the same day as the appointment.

13 4 Appointment of Counsel; Waiver of Counsel. Amend RSA 169-B:12, I and I-a to read as
14 follows:

15 I. [~~Absent a valid waiver, the court shall appoint counsel at the time of arraignment of an~~
16 ~~indigent minor, provided that an indigent minor detained pursuant to RSA 169-B:11, III, shall have~~
17 ~~counsel appointed upon the issuance of the detention order.] ***Absent a valid waiver, the court***
18 ***shall appoint counsel for an indigent minor pursuant to RSA 169-B:7, III.*** For purposes of
19 [~~the appointment of counsel under~~] this section, an indigent minor shall be a minor who satisfies the
20 court, after appropriate inquiry, that the minor is financially unable to independently obtain
21 counsel. If the court has received information indicating that the minor has an intellectual,
22 cognitive, emotional, learning, or sensory disability, the court shall require the minor to consult with
23 counsel.~~

24 I-a. When an attorney is appointed as counsel for a child, representation shall include
25 counsel and investigative, expert, and other services, including process to compel the attendance of
26 witnesses, as may be necessary to protect the rights of the child. ***Representation also shall***
27 ***include representation in related proceedings when such matters are based on the same***
28 ***factual circumstances as the petition under this chapter. Such appointment shall remain***
29 ***in effect until the court no longer has jurisdiction over the child pursuant to this chapter,***
30 ***except in situations where the only remaining issue involves the payment of costs and fees.***

31 5 Waiver of Counsel. Amend RSA 169-B:12, II-a to read as follows:

32 II-a. If the minor and the parent, guardian, or custodian have not consulted with counsel
33 about the possible consequences of the proposed waiver of the right to counsel, the court [~~may only~~
34 ~~accept a waiver pursuant to paragraph II after making case-specific written findings with regard to~~
35 ~~each of the required conditions for waiver]~~ ***shall not accept a waiver of counsel pursuant to***
36 ***paragraph II.***

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1 6 New Section; Use of Statement or Confession from a Minor; Appointment of Counsel Required.
2 Amend RSA 169-B by inserting after section 12-a the following new section:

3 169-B:12-b Use of Statement or Confession from a Minor. No statement or confession from a
4 person who was a minor at the time the statement or confession was made may be used against that
5 person at any judicial proceeding unless the person was represented by counsel at the time the
6 statement or confession was made and that the person had adequate time to consult with such
7 counsel. Any law enforcement agency may petition the court to appoint counsel for a minor that the
8 agency wishes to question. Upon receipt of such petition, the court shall follow the procedures under
9 RSA 169-B:12, and if appointment is made, promptly notify the minor and appointed counsel.

10 7 Adequate Representation of Indigent Defendants in Criminal Cases; Contracts for
11 Representation in Juvenile Delinquency Cases. Amend RSA 604-A:2-b to read as follows:

12 604-A:2-b Contract Attorneys. The state of New Hampshire, by the judicial council and with the
13 approval of governor and council, may, within the limits of available appropriations, contract with
14 any qualified attorney in the state to provide for the representation of indigents in circumstances
15 where, pursuant to RSA 604-B, the public defender program is unavailable to provide such
16 representation. The executive director of the judicial council shall authorize payments to contract
17 attorneys provided for under this section. ***All contracts providing for the representation of***
18 ***juveniles under RSA 169-B shall be based upon an hourly rate, set by the judicial branch.***

19 8 Adequate Representation for Indigent Defendants in Criminal Cases. Amend RSA 604-A:9,
20 I(a) and (b) to read as follows:

21 I.(a) Any adult defendant [~~or juvenile respondent~~] who has been assigned counsel or a public
22 defender shall be subject to an order by the court, pursuant to this section, regarding payment to the
23 state for counsel fees and expenses paid by the state on behalf of the defendant [~~or juvenile~~], and
24 regarding payment of an administrative service assessment. Any payment obligation shall apply
25 only to a defendant who has been convicted [~~or a juvenile who has been found delinquent~~]. ***No***
26 ***payment obligation shall accrue to a juvenile, or the person legally liable for support of the***
27 ***juvenile, for the appointment of counsel under this chapter.***

28 (b) Upon entering a judgment of conviction [~~or a finding of delinquency~~], and the
29 issuance of sentence or disposition, the court shall enter a separate written order setting forth the
30 reasons for the court's conclusion regarding the financial ability of the defendant [~~or the juvenile,~~
31 ~~including any person liable for the support of the juvenile pursuant to RSA 604-A:2-a,~~] to make
32 payment of counsel fees and expenses, and administrative service assessment. In its discretion, the
33 court may conduct an ability-to-pay hearing to assist in its determination. If the court finds that
34 there is an ability to pay some or all of the counsel fees and expenses and the assessment, either
35 presently or in the future, it shall order payment in such amounts and upon such terms and
36 conditions it finds equitable; any payment obligation shall not commence until the conviction and

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1 sentence [~~or the finding of delinquency and disposition~~] has become final. If the court finds that
2 there is no such ability to pay, it shall so order, and any payment obligation shall terminate.

3 9 Repeal. RSA 169-B:12, I-b, relative to the appointment of counsel for consultation with an
4 indigent minor, is repealed.

5 10 Effective Date. This act shall take effect January 1, 2022.

HB 188-FN- FISCAL NOTE
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AN ACT relative to appointment of counsel in juvenile court proceedings.

FISCAL IMPACT: State County Local None

STATE:	Estimated Increase / (Decrease)			
	FY 2021	FY 2022	FY 2023	FY 2024
Appropriation	\$0	\$0	\$0	\$0
Revenue	\$0	\$0	\$0	\$0
Expenditures	\$0	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase
Funding Source:	<input checked="" type="checkbox"/> General	<input type="checkbox"/> Education	<input type="checkbox"/> Highway	<input type="checkbox"/> Other

METHODOLOGY:

This bill directs the court to appoint counsel for a minor when the juvenile delinquency petition is filed or the summons issued. The bill also provides that a confession or statement from an unrepresented minor shall not be used in any judicial proceeding.

The Judicial Council indicates this bill makes several changes to the juvenile justice process, including the following:

- Earlier appointment of counsel.
- No waiver of counsel for a juvenile who may have a disability.
- Representation of juvenile at related proceedings.
- Prohibiting use of juvenile’s statements to law enforcement unless represented by counsel.
- Appointment of counsel would continue until court no longer has jurisdiction.
- Elimination of the flat fee reimbursement model for juvenile cases.
- Elimination of legal fees assessed against juveniles.

The bill addresses several findings of the National Juvenile Defender Center’s recent assessment of indigent juvenile representation in New Hampshire. The Council assumes it would be responsible for the costs of legal representation for indigent juveniles. Earlier appointment of counsel would not impact expenditures, and may allow cases to resolve more expeditiously.

It is assumed the bill would significantly decrease the number of juveniles proceeding without counsel. According to information provided by the court, approximately 89 juveniles waived the

right to counsel last year. Because the Public Defender is the State's institutional provider of indigent-defense services it might absorb such a small increase of additional appointments with no change in the cost of its operations. There may be increased costs to the indigent-defense delivery system for those new appointments that need to be handled by the Contract-Attorney System or the Assigned-Counsel System. The Council states it is not clear what representation at the related proceedings would involve. Counsel will need to be competent in all areas in which they provide representation. Currently, the indigent defense system does not provide representation to juveniles outside of delinquency proceedings. This requirement would require additional training and attorney time. A reimbursement model for contract attorneys and assigned counsel would need to be developed. While the time commitment and resources necessary to provide representation until the court no longer has jurisdiction would be case specific, keeping cases open will result in more ethical conflicts of interest that will prevent the Public Defender from accepting new cases.

Currently, the indigent defense system does not provide representation until a delinquency petition has been filed against a juvenile. This bill would prevent the use of statements to law enforcement unless the juvenile was represented by counsel. It is assumed that law enforcement would request appointment occur as expeditiously as possible. The Council cannot accurately predict the number of appointments that would result from this change, but it would require additional attorney time and resources.

It is not possible for the Council to predict the additional attorney time that representation at related proceedings and police interrogations will require, but it is assumed that the Public Defender would require additional attorneys on staff to meet these obligations. The cost for a new attorney, including benefits, is approximately \$95,000.

The bill eliminates the flat-fee reimbursement model for contract attorney representation of juveniles. The assessment found that "flat-fee contracts provide a disincentive for attorneys to spend the requisite time and resources on a case and encourages attorneys to close cases quickly" This is a long-standing criticism of flat-fee reimbursement models. In FY 2020, contract attorneys were appointed on 165 juvenile matters at an approximate cost of \$44,475. It is assumed that the flat-fee model would be replaced with the assigned counsel model. Assigned counsel cases are reimbursed at \$60/hour with fee caps imposed by court rule. Based on the maximum fees, the cost of representation on juvenile felonies would be \$196,800. The cost of representation on juvenile misdemeanors and similar proceedings would be \$130,200.

The Judicial Branch assumes this bill would result in the filing of a number of petitions by law enforcement for appointment of counsel on nights, weekends and holidays to allow for interviews

of minors, and further suggests immediate review and decisions would be required for such petitions filed by law enforcement without regard to when the petitions are filed. The Branch does not currently have in place a system for receiving such petitions and coordinating with the Judicial Counsel and public defender's office. Therefore, the Branch assumes there will be an indeterminate cost to develop and implement the necessary processes to ensure timely appointment of counsel 24 hours a day, 365 days a year. Once the system is established, there would also be a fiscal impact for court staff and judges to review all petitions for appointment of counsel for minors, to conduct interviews, and reach a determination. This may include the need for a record and testimony, and the need to immediately issue the necessary paperwork to provide notice to the Judicial Council, law enforcement, public defender's office and the minor. There will also likely be a fiscal impact to address the expanded scope of legal representation to include all "related proceedings". While the overall fiscal impact is indeterminate, the Judicial Branch anticipates it will be significant.

AGENCIES CONTACTED:

Judicial Council and Judicial Branch