March 30, 2017

The Honorable Katrina Frye Shealy
Chairman
General Committee
South Carolina Senate
303 Gressette Bldg.
Columbia 29201

Dear Chairman Shealy:

On behalf of the American Bar Association (ABA) and its over 400,000 members, I write to express our support for H. 3538, the Persons with Disabilities Right to Parent Act. This important legislation safeguards the right of people with disabilities to parent and have custody of, or visitation with, a child by prohibiting discrimination solely on the basis of disability. Furthermore, the bill would provide people with disabilities the right to access supportive services such as adaptive parenting equipment and instruction in adaptive parenting techniques and reasonable accommodations. The ability to access supportive services would help parents with disabilities compensate for those aspects of their disability that affect the ability to care for a child and enable them to fulfill parental responsibilities adequately.

In February 2017 the American Bar Association adopted policy urging state governments to “enact legislation and implement public policy providing that custody, visitation, and access shall not be denied or restricted, nor shall a child be removed or parental rights be terminated, based on a parent’s disability, absent a showing—supported by clear and convincing evidence—that the disability is causally related to a harm or an imminent risk of harm to the child that cannot be alleviated with appropriate services, supports, and other reasonable modifications.” Our policy further urges state governments to enact legislation providing that a prospective parent’s disability shall not be a bar to adoption or foster care when the adoption or foster care placement is determined to be in the best interests of the child. Nothing in this policy limits the rights of the state to protect abused or neglected children, but helps ensure that decision-making is driven by child-centered devotion to their well-being and the law, not disability biases or assumptions.

Notably, H. 3538 does not limit the state’s right to protect the child’s health and safety. The goals of child welfare and disability nondiscrimination are mutually attainable and complementary. Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 protect parents and prospective parents with disabilities from unlawful discrimination in the administration of child welfare programs, activities, and services. At the same time, child welfare agencies and courts have the
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responsibility to protect children from abuse and neglect. In keeping with the ABA’s recommendations, H. 3538 shifts the focus from a parent or prospective parent’s disability to a parent’s behavior or conduct.

The U.S. Supreme Court has long recognized that the fundamental right of parents to make decisions concerning the care, custody, and control of their children is protected under the Due Process Clause of the Fourteenth Amendment. Yet, people with disabilities have been, and continue to be, denied full enjoyment of this right based solely on discriminatory biases and stereotypes about disabilities and the ability to parent, instead of individualized determinations supported by objective evidence. Many parents with disabilities are denied access to appropriate family-based services, support, and other reasonable modifications that would provide them with a full and equal opportunity to keep or reunite with their child.

There has been a rising number of disability discrimination complaints from parents with disabilities who have had their children taken away or their visitation and access rights restricted, or who have been denied reasonable accommodations, as well as from prospective parents with disabilities who have not been given equal opportunities to become foster or adoptive parents. In August 2015, the U.S. Department of Health and Human Services and the U.S. Department of Justice issued joint technical assistance to state and local child welfare agencies and courts “to help ensure that parents and prospective parents with disabilities are not discriminatorily deprived of custody of their children, or denied the opportunity to adopt or serve as foster parents, because of stereotypes and unfounded assumptions about persons with disabilities, which we have seen in our complaints.”

Twenty-six years after the enactment of the Americans with Disabilities Act, the American Bar Association believes that it is time to ensure that individuals with disabilities and their children have a right to live free from discriminatory state actions that can result in traumatic separations of parents and their children. We urge you to support H. 3538 and prohibit discrimination solely on the basis of disability to protect the right of people with disabilities to parent and have custody of, or visitation with, a child.

Sincerely,

[Signature]

Thomas M. Susman