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**ROBERT L. COWLES**

**Wisconsin State Senator  
2nd Senate District**

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**Justice for Children Package Testimony**

October 22, 2015

Senator Rob Cowles

Over the past year, the Department of Justice, the Attorney General's office, advocacy groups and I have collaborated to address some major crimes against children and victims of sexual assault and create a collaborative approach to protect children and sexual assault victims and provide them with an opportunity for better outcomes. I am very pleased today to have the "Justice for Children package" heard.

These bills are aimed to reform major crimes against children and victims of sexual assault to ultimately keep kids safe. In researching these crimes and collaborating with the Department of Justice, it was clear that something needed to be done to address cases of abuse, neglect, and sexual assault and again, and most importantly, to keep kids safe.

In this package we have put together four bills to aid in the fight against these crimes.

Senate Bill 323 allows victim advocates to play a larger role in cases of sexual assault and human trafficking, both against adults and children. Through research, we have found that survivors of sexual crimes who have received services from a victim advocate have experienced better outcomes and are in less distress through such a difficult and trying time. National statistics estimate nearly 23million women in the United States have experienced sexual violence, while child sexual assault is a grossly under reported crime. We needed to address the needs of our victims in this state. This bill, specifically, gives victims greater access to victim advocates during examinations and consultations performed at a hospital, as well as, during preliminary law enforcement interviews. This bill gives victims, free of charge to them, someone who is there, solely, for their needs.

Senate Bill 324 reforms the neglect statutes and adds substance and clarity. Under current law, you have to prove intent to neglect, in addition to, a felony schedule that is inflexible and leaves out many instances that certainly constitute neglect that is happening in our communities. This bill redefines neglect as the negligent failure to provide necessary care. The bill further defines necessary care as appropriate food, clothing, medical and dental care, shelter, supervision, the opportunity for education, and protection from the exposure to the distribution, manufacture or use of controlled substances; modeled after the statutes governing jurisdiction over children alleged to be in need of protective services (§48.13(10m)). This bill also creates a new felony schedule, while the ceiling and floor remain that same, we have included instances where children are at unreasonable and substantial risk of harm, great bodily harm, or death are included as well as accounting for emotional harm, and if the child neglected becomes the victim of a child sex offense. The new schedule clearly provides greater detail and flexibility to identify neglect while maintaining the discretion District Attorneys and jurors currently have.

Senate Bill 324 also creates the crime of repeated acts of neglect of the same child. This is modeled after the crime of repeated acts of sexual assault of the same child (§948.025). This gives prosecutors a new tool to identify situations in which a very young or non-verbal child has been neglected. For very young or non-verbal children, dates and specific instances may be challenging to identify. This new crime does not change any of the elements necessary to convict someone of neglect.

Senate Bill 325 is similar to Senate Bill 324 in that it too creates a new crime. The bill creates repeated acts of physical abuse of the same child. Again, modeled after repeated acts of sexual assault of the same child (§948.025) this crime helps prosecutors convict the more grievous cases of physical abuse against children, many of whom are very young or possibly non-verbal. Through our research, the children who are victims of these crimes are very young. In the State of Wisconsin, from 2008-2012, 61% of physical abuse deaths of children were aged 3 or younger, with 35% of the deaths were children under the age of one. We hope that the two new crimes created in this package will save such young children who are victims to these horrible crimes.

Senate Bill 326 expands referral of all reports of suspected or threatened child abuse or neglect to law enforcement. Under current law, suspected cases of child abuse and neglect are referred by mandated reporters to Child Protective Services and not law enforcement. Child abuse and Neglect are the only two felonies not referred to law enforcement. This bill requires that Child Protective Services refer all suspected or threatened cases to law enforcement and coordinate a response if necessary. This legislation lets law enforcement decide if law enforcement needs to be involved. Unfortunately, we have amassed several examples from all over the state where law enforcement was not involved in an investigation of neglect or abuse and the child/children suffered continued maltreatment and, in the saddest cases, death. Law enforcement has different tools available for investigating, such as the ability to obtain search warrants and subpoenas. We feel that this legislation is going to be a vastly improved approach to identifying cases of abuse and neglect and help to keep kids out of harm's way.

It is so important to ensure that victims of such terrible crimes are protected in Wisconsin and receive justice from those who have wronged them. By aligning our District Attorneys, Law Enforcement, Victim Advocates, Child Protective Services and our communities together we can create a proven environment to protect the victims of these crimes and aim towards achieving greater outcomes for these victims.

I want to thank all those involved with these bills especially Attorney General Schimel, and Representatives Heaton, Macco, Murtha and Tranel for their work on this package of bills.

With these bills, I hope we can strive to give kids a violence-free and safe childhood and deter acts of abuse neglect and sexual assault in our communities. I hope that these bills can bring criminals to justice and of course, keep kids safe.



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Governor Scott Walker  
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Date: October 22, 2015  
To: Members of the Senate Committee on Judiciary and Public Safety  
From: Sara Buschman, Assistant Deputy Secretary  
Re: Information Memo on SB323, SB324, SB325, and SB326

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Senator Wanggaard and Senate Committee on Judiciary and Public Safety,

The Department of Children and Families appreciates the opportunity to submit information for your consideration on the following four bills: SB 323, SB 324, SB 325, and SB 326.

The underlying goals of the four proposed bills are to keep children safe from maltreatment and to strengthen the coordination between the child welfare and law enforcement systems in protecting the safety of children. The Department of Children and Families is firmly committed to these goals: protecting the safety of children is a core mission of the Department and effective collaboration with law enforcement is a critical building block in achieving this mission.

A number of the provisions in the bills enhance children's safety and well-being in productive ways. However, a number of the provisions in SB 324 and SB 326 may have unintended negative consequences that will impair the healthy and positive growth and development of children. The Department encourages that further discussion among all stakeholders be pursued to refine SB 324 and SB 326 to avoid unintended negative consequences to the children affected by the bill.

SB 324 changes the standard of neglect for criminal purposes and establishes a criminal penalty for all types of neglect. The proposed changes in the neglect standard of neglect include some criteria that are not well-defined and some criteria that broadens the standard to cover actions that do not necessarily involve safety threats to a child's safety. For example, the criterion "the opportunity for education" as a new category of neglect is not well-defined and does not have a statutory definition and therefore could be interpreted in ways other than which the authors intend. In addition, the proposed new criterion "exposure to the use of controlled substances" could involve a parent using prescription drugs in a responsible manner that does not create a threat to the child.

The Department recognizes that the current criminal neglect statutes may not provide the tools for law enforcement to intervene in circumstances where that is the appropriate intervention. However, SB 324 creates the possibility that a parent may face criminal charges even for low level incidents of neglect. This could have significant negative unintended consequences for children. Many types of neglect that are addressed in the child welfare system and that would be covered by the criminal neglect standard in the proposed bill are situations that involve low to moderate risk to the child that can be ameliorated by providing appropriate supports and services

to the parent, so that the parent is able to provide a safe, stable, and nurturing home. For example, in cases where neglect is occurring due to mental illness, with appropriate intervention and supports and services through the child welfare system, the parent can change their behavior and maintain a safe and loving home for their children without disruption to the children that would be caused due to a parent's incarceration under these provisions.

Furthermore, to the extent that a single parent is incarcerated due to the new criminal penalties in the bill, the child may need to be removed to an out-of-home placement, such as a foster home. In addition to the neglect that the child experienced, separation from a parent and removal from home imposes additional trauma on the child. Scientific research has shown that trauma in childhood impedes the healthy development of the brain, resulting in negative impacts on the child's physical health, cognitive development, behavior, and social and emotional relationships in both the short and long term.

SB 326 also creates the potential for negative unintended consequences for the children impacted by the bill. SB 326 requires child welfare agencies to refer all suspected cases of abuse and neglect to law enforcement within 12 hours and requires that law enforcement coordinate with the child welfare agency on the investigation of all cases. Currently, child welfare agencies refer to law enforcement agencies all sexual abuse cases and other cases as specified in the local Memorandum of Understanding in place between each child welfare agency and local law enforcement agencies. Child welfare agencies already involve law enforcement immediately in high risk cases.

Involvement of law enforcement in all low-moderate risk cases may create negative unintended consequences for the child and family. Many families involved in the child welfare system distrust and/or are intimidated by law enforcement. National research has shown that for low to moderate risk child welfare cases, a non-threatening, supportive approach enhances parental engagement and participation in services, and thereby increases the likelihood that the family can achieve safety and stability. The notification and involvement of law enforcement for all cases of abuse and neglect has the potential to stigmatize the family and hinder the family's future ability to access employment, housing and develop positive social connections. It may also deter non-mandated reporters, such as neighbors and relatives, from reporting concerns about possible abuse and neglect, leaving children at risk.

The requirement in SB 326 that investigations must be coordinated between child welfare agencies and law enforcement may hinder both systems from performing their duties. The child welfare and the criminal justice systems are designed to support different goals that are important to society. The child welfare system is focused on protecting children, preserving family unity and finding permanency for children when the family cannot be preserved. The agency staff, attorneys and court personnel are guided by the best interests of the child. The criminal justice system is focused on investigating and prosecuting crimes on behalf of the state. These two systems overlap in some areas but are governed by completely different statutory provisions and court procedures. The investigatory process used to support each system is necessarily different. Linking the two processes together in all cases may impede the ability of each system to reach the goals that are important to each.

It is important to coordinate in cases where each has a major stake in the outcome and to reduce the burden on those the systems are endeavoring to protect. That coordination exists today in most jurisdictions and could be strengthened. As stated at the outset, the Department supports strong, effective collaboration between the child welfare and law enforcement systems. The

Department would like to work with the authors and stakeholders to discuss how we can strengthen and improve current collaborative mechanisms between the two systems without creating unintended negative consequences such as those described above.

The Department would also like to bring to the attention of the Committee a possible technical revision to SB 323. As currently drafted, SB 323 provides access to a victim advocate for victims of sexual assault, human trafficking, and children who were victims of physical as well as sexual abuse. Given that the bill appears to be focused on victims of a sexually abusive action, it may be appropriate to narrow the scope of child abuse cases covered in the bill to sexual abuse cases.

The Department has no comments on SB 325 which creates stronger criminal penalties for individuals who commit repeated physical abuse to a child. The Department views that the bill provides a useful additional tool to help ensure that children are not subject to egregious abusers.

In summary, the Department appreciates the authors of these bills for opening the conversation on a topic that we all care deeply about: protecting our children and strengthening families. We would like to encourage additional thoughtful discussion among all stakeholders on SB 324 and SB326 to refine the bills so that they achieve their intended goals of protecting the safety of children without creating negative unintended consequences. The Department welcomes participating in any future discussions on these bills.

October 22, 2015

To: Senator Cowles  
Senator Wanggaard, Chair  
Senator Vukmir, Vice-Chair  
Members, Senate Committee on Judiciary and Public Safety

From: Lisa Pugh, Public Policy Director  
Kit Kerschensteiner, Managing Attorney

**RE: Justice for Children Package: SB 324 and SB 326**

Thank you for the opportunity to provide testimony on this important package of legislation. Protecting individuals with disabilities, including children, from abuse and neglect is the core of our work at Disability Rights Wisconsin. We are the state's protection and advocacy agency designated by the Governor to assure that the basic rights of people with disabilities are enforced.

These bills brought to light for our agency disturbing trends in Department of Children and Families child welfare data that indicate something must change. We hope our testimony today can highlight the right intentions in these bills and provide suggestions to avoid unintended consequences. You will hear from us the careful balance between protecting our most vulnerable children from abuse and neglect as well as providing appropriate supports and avoiding the stigma and discrimination often experienced by both parents of children with disabilities and parents with disabilities themselves as they raise their children under difficult circumstances.

These bills were introduced and are being voted on very quickly. We hope you will follow up with our agency to fix some technical issues in these bills to get the appropriate solutions in state statutes. Today we testify for information only.

**Background on Abuse and Neglect of Children with Disabilities:**

Studies and available data indicate that children with disabilities are three times more likely to be a victim of some type of abuse compared to children without disabilities.<sup>1</sup> Children with intellectual disabilities may be twice as likely to experience physical or sexual abuse as their peers without disabilities.<sup>2</sup> Legislation to improve oversight and investigation of child abuse cases must improve protections for children with disabilities in Wisconsin.

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<sup>1</sup> Davis, L.A.; Abuse of Children with Intellectual Disabilities; The Arc; 2011. <http://www.thearc.org/document.doc?id=3666>

<sup>2</sup> Smith, N.; Harrell, S.; Sexual Abuse of Children with Disabilities: A National Snapshot; 2013. <http://www.vera.org/sites/default/files/resources/downloads/sexual-abuse-of-children-with-disabilities-national-snapshot-v2.pdf>

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In preparation for this hearing our staff reviewed DCF data including 90-day Summary Reports for Child Death, Serious Injury or Egregious Incidents from 2011 – 2015. It is important to note this data does not include all reports, only the most serious. We noted the following trends:

- Since February 2010, 12 children with special needs of some kind have died due to abuse or neglect in Wisconsin. An additional 8 suffered an egregious injury.
- Many cases involving children with special needs indicate repeated calls to child protective services. In one fatal case there were more than 20 calls.
- Some cases document the inability of the child to provide information or a case involving a non-verbal child. Several children were identified as having Down syndrome or autism.
- Children experiencing abuse ranged from 3 months to 17 years old. Many children in these serious cases were over age 5 and several over age 10, indicating they should have been able to clearly communicate and substantiate what had occurred, but perhaps due to their disability, they were unable to do so. However this conclusion is only an inference.
- There is little specificity on referrals to community supports of any kind, and none indicating specific supports for children with disabilities.

An overarching and disturbing trend in these reports is that most cases do not result in any charges and there are often many contacts before something really bad occurred. In a 2015 Waukesha case involving a 13-year-old child with autism, 40 calls were made to child welfare with repeated allegations of physical, emotional and sexual abuse and only when the police were called was the parent finally arrested and charged. This was a child who had been kept in the basement without access to a bathroom or running water, and no place to sleep.

Just last week our agency took a call in which a Child Protective Services (CPS) worker declined to conduct a forensic interview of a child with autism when there was an allegation of sexual abuse. The CPS worker indicated they would not be able to get enough information from the child due to communication difficulties. They planned no further action.

Unfortunately national studies verify significant differences in the responses of CPS case workers when the alleged victim of abuse has a disability. Children with disabilities are sometimes seen as contributing to their abuse and CPS workers were found to demonstrate more empathy with abusive parents of children with disabilities, particularly when the child had emotional or behavioral disabilities. Even when severe injuries, such as a concussion or broken bones were involved, the CPS workers in one study responded differently when the child victim had a disability.<sup>3</sup>

### **Background on Parents with Disabilities**

Historically, individuals with mental disabilities have faced severe societal biases regarding their fitness to serve as parents. For many years the chief governmental response to the challenges of parenting with a mental disability was compulsory sterilization. While societal attitudes have evolved, the stereotypes about the ability of persons with mental disabilities to parent persist. Although recent research has found that parents with disabilities are not more likely to maltreat their children than parents without disabilities, studies demonstrate high rates of termination of the rights of parents with disabilities.<sup>4</sup>

<sup>3</sup> Manders, J. E. & Stoneman, Z.; Children with disabilities in the child protective services system: an analog study of investigation and case management. *Child Abuse & Neglect*, 33(4), 229-237. 2007.  
<http://www.nationalcac.org/professionals/images/stories/pdfs/disabilities%20bibliography4.pdf>

<sup>4</sup> Lightfoot, LaLiberte, & Hill; Guide for Creating Legislative Change: Disability in the Termination of Parental Rights and Other Child Custody Statutes\_ (2007) <http://cascw.umn.edu/wp-content/uploads/2013/12/LegislativeChange.pdf>



Parents with disabilities, especially psychiatric disabilities are much more likely to be adversely affected by the child welfare and legal systems. The National Council of Disability, an independent federal agency found that the removal rates for parents experiencing mental illness disproportionately high at 70 to 80%.<sup>5</sup> According to the Council, parents with disabilities are “the only distinct community of Americans who must struggle to retain custody of their children,” citing a study finding that parents with a disability label in their school records were more than three times as likely to have their parental rights terminated than parents without such a label.<sup>6</sup> The structure of state laws and the failure of the state child welfare system and mental health system to offer these parents the help they need all contribute to the high rate of loss.

We are concerned that the enhanced criminal penalties associated with these bills may have a detrimental and discriminatory impact on parents with disabilities unless the committee takes very specific precautions. Some states are adopting model legislation that addresses concerns related to parents with disabilities and we will suggest these solutions for Wisconsin.

### **SB 326: Referring cases of child abuse and neglect to law enforcement**

This bill has the potential to address concerns about egregious cases that frequently slip through the cracks or when multiple contacts should have led to criminal charges much sooner. The bill does not address our concerns about the ability of law enforcement to handle an increased volume of cases and their capacity – and that of Child Protective Services - to address the unique needs of children with disabilities and parents with disabilities.

According to our calculation using DCF child abuse report data, there were 27,281 maltreatment allegations from mandatory reporters in 2013 and a total of 45,547 allegations of maltreatment from all sources. Adding a new law enforcement referral would be a significant increase in calls for investigation.

While we support increased scrutiny of certain cases, particularly those involving children with disabilities, we are concerned that the involvement of more people in an investigation will not necessarily improve the investigative process. We suggest several improvements to this bill to ensure abuse or neglect of vulnerable children with disabilities is adequately addressed:

#### **Role of the child welfare agency:**

1. **Problem:** Children with intellectual and other developmental disabilities, including autism, may have significant difficulty communicating and participating in the substantiation of an abuse allegation. This puts the child at greater risk of continued abuse and neglect. Clearly cases in the current DCF data and our own experience as a disability advocacy agency show this is a concerning gap in the current system.

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<sup>5</sup> National Council on Disability. Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and their Children 14 (2012). <http://1.usa.gov/VQIE5S>

<sup>6</sup> Kundra & Leslie B Alexander, Termination of Parental Rights Proceedings: Legal Considerations and Practice Strategies for Parents with Psychiatric Disabilities and the Practitioners Who Serve them, 33 Psychiatric Rehabilitation Journal. 142 143 (2009).

Solutions:

- Other states have developed resources to address this problem. The New York State Office of Children and Family Services provides information to work more effectively with child abuse cases that may involve children with special needs and their families.<sup>7</sup> The New York resources address best practice interviewing strategies, medical concerns, and disability-specific information. Wisconsin DCF should be directed to develop, share and require policies addressing similar disability-specific resources and information: <http://disabilityabuse.org/>
- Child welfare agencies, including DCF, should be required to develop policies to address the unique issues involved when investigating cases involving a child with a disability or a parent with a disabilities.
- When a child is identified as having an intellectual disability or has a known barrier to communication impacting his/her ability to participate fully in an investigation about an allegation of abuse or neglect the child welfare agency or law enforcement should be required to:
  - access available information about the child's communication modalities (methods), accommodations and documented communication potential as documented through various sources (IEP, medical records);
  - access medical records to determine history of communication interventions and assessment.

2. Problem: When a child with a disability that includes a communication deficit is interviewed regarding an allegation of abuse, the allegation may be determined as “unsubstantiated” merely because of the child’s inability to fully participate in the investigation. This obstacle in the investigatory process puts the vulnerable child at continued risk.

Solutions:

- The investigation process should differentiate the term “unsubstantiated” to clarify a category of “unsubstantiated due to communication difficulties related to disability”
- When “unsubstantiated due to communication difficulties related to disability” is declared – this should trigger an assessment by an individual with expertise related to the child’s specific communication impairment.

3. Problem: Child welfare agency professionals and law enforcement have little training, professional requirements or experience working with children with significant communication disorders or intellectual disabilities or parents with disabilities. Additionally, victim services agencies often do not have therapeutic approaches tailored to children with intellectual disabilities.

Solutions:

- Staff assigned to investigate a case involving a child with an intellectual disability or a known barrier to communication impacting his/her ability to participate fully in an abuse or neglect investigation should be required to have specialized training or certification or be required to access such expertise.

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<sup>7</sup> New York State *Child Advocacy Resource and Consultation Center*; New York State Office of Children and Family Services. Copyright © 2005, 2007, 2014, 2015. <http://disabilityabuse.org/about/>

- Many states require interagency or multidisciplinary teams to be involved in various parts of a child abuse or neglect case, including the investigation. For cases involving parents or guardians with a disability, teams should include people with expertise in parental supports and adaptive equipment. The goal in most cases should be to provide the parent with necessary supports to keep the family together and the child safe. The Disability and Parental Rights Legislative Change Project has developed model language to identify individuals required as part of the investigative team. We suggest that when a parent with a disability is involved in a child abuse or neglect investigation, that Wisconsin statute require the involvement of: “Persons knowledgeable about parental supports and adaptive equipment for parents or guardians with disabilities”.

#### **Role of DCF:**

4. **Problem:** There is not enough data to assess the status of abuse and neglect of children with disabilities, including specific disabilities. DCF Reporting data does not accurately track data related to disability or special needs. Specifically Wisconsin Child Abuse and Neglect reports that are published annually keep track by gender and race, but not by disability.<sup>8</sup>

#### **Solution:**

- Require DCF and related child welfare agencies to specifically report when a child has a known disability. Annual report data should be disaggregated by children with disabilities.

#### **Role of Law Enforcement:**

5. **Problem:** Law enforcement will not have sufficient resources to adequately respond to new child abuse and neglect cases referred, including those cases involving children with disabilities. Criminal investigators often lack the skills and knowledge to effectively interview parents with disabilities or children with communication disabilities who use American Sign Language, communication boards or other methods.

#### **Solution:**

- Allocate additional resources to ensure that law enforcement are appropriately trained and can respond appropriately.

### **SB 324: Providing Criminal penalties for neglect of a child**

We are concerned that SB 324 casts an overly broad net for child abuse and neglect investigations that will add criminalization to the stigma experienced by parents with disabilities. We also believe the bill has constitutional problems. We would like for the committee to address these concerns.

#### **Constitutional Concerns – Void of Vagueness:**

To pass muster on a due process challenge of under the long standing constitutional doctrine of “void for vagueness,” a penal statute must define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and it must do so in manner that does not encourage arbitrary and discriminatory enforcement.<sup>9</sup> SP 324, as it currently stands is clearly susceptible to a constitutional challenge on void for vagueness grounds. Under this bill a felony crime of neglect occurs when anyone responsible for a child’s welfare should have realized that something does not measure up to the undefined standard of “appropriate” care in certain enumerated areas, even if the child has not actually

<sup>8</sup> <http://dcf.wisconsin.gov/cwreview/reports/CAN/2013/2013CANReport.pdf>

<sup>9</sup> U.S. v. Jackson, S.D.N.Y.1991, 768 F.Supp. 97, vacated on other grounds 968 F.2d 158, certiorari denied 113 S.Ct. 664, 506 U.S. 1024, 121 L.Ed.2d 589, on remand 856 F.Supp.

experienced any harm. It is left unstated who or what is the controlling authority on what should be considered within the bounds of appropriateness and how this will be clearly and unambiguously established. Parents with disabilities already face an uphill climb battling stigma and lack of support services. It is all too predictable that they will face incarceration at a higher rate if such a vague and far ranging standard is enacted when the pressing need is for more preventative services and supports to keep a family intact not send a disabled parent to jail.

At least one study has found that children and youth experiencing similar levels of neglect or abuse who were raised in foster care did not do as well in life as those raised by their biological parents *with supports*.<sup>10</sup> It only follows that children with disabilities could be even more adversely impacted than the population at large if removed from their families. Of course there will always be situations where involvement of the child welfare and criminal justice systems is necessary to keep a child safe. However, it is critical to examine each situation individually and consider whether the child can be safe at home *with appropriate services to the family*. This falls within the area of expertise of human services, not law enforcement.

### **Constitutional Concerns - Rebuttal Presumption of Guilt:**

The bill's rebuttal presumption where a young child with certain disabilities is involved amounts to "guilty until proven innocent" and raises serious constitutional questions on several fronts. First, a fundamental precept of the criminal justice system is that a defendant is presumed innocent until proven guilty. By shifting the burden of proof onto the defendant to prove their innocence the rebuttable presumption, SB 324 flips the presumption of innocence on its head—with the default being that the defendant is guilty unless he or she can prove their innocence. This presumption arises if the child is under 6 years old and has a disability covered by this bill. Nothing more must be proved about the neglect allegation. The defendant can be found guilty on these facts alone unless they present sufficient evidence to persuade the court otherwise. If they can't provide evidence to acquit themselves or choose to exercise their constitutional right to not testify SB 324 requires them to be found guilty on the strength of this statutory presumption alone.

### **Concerns Related to Specific Disability Types:**

DRW is concerned about the singling out of certain disabilities for this protection. Only children with physical, cognitive or developmental disabilities discernible by an ordinary person viewing the child or known to the actor are covered by this added protection. Children with emotional or behavioral disorders or mental illness are completely shut out from protection, despite the fact that studies show they are particularly susceptible to abuse or neglect. Additionally, other children with less visible disabilities, such as deafness or traumatic brain injuries, and even those with covered disabilities that are less obvious would fall outside this protection. This raises clear constitutional questions of equal protection when children are categorized into two classes of disabilities, one that gets protection and one does not.

### **Possible Solutions:**

In our experience, overwhelmed parents of children with disabilities can languish on waiting lists and without access to or knowledge of appropriate supports, leaving their children at risk. Parents are often denied necessary supports and attempt to address issues in the best way they are able.

DRW recently supported a family who had been attempting for years to get the county to approve a backyard fence (an allowable Medicaid expense) for their child with a disability who was a "runner" and a danger to himself if left outside alone. Even if no harm had come to the child, such a case may have been

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<sup>10</sup> Doyle, J. Child Protection and Child Outcome Measuring the Effects of Foster Care. American Economic Review 97(5) December 2007 1583-1610.

deemed as not providing “appropriate supervision” on the part of the parent, even though they had asked repeatedly for support.

For these reasons we ask the Committee to consider the following:

- We do not support the new vague definitions for “necessary care” and “appropriate” and advocate that this section be removed from the bill. We do not support the removal of the measure of “intentionally contributes” when assessing criminal penalties.
- When a child with a disability is referred to the child welfare system through an allegation of neglect, prior to any assessment of a felony charge for “negligent failure” or “contribution to negligent failure”, the initial referral should trigger an automatic review of applications and eligibility for community supports. The system should require that a family of a child with a disability be referred to available crisis supports or moved to the top of a waiting list for supports related to the child’s disability.
- It is important to ensure the rights of parents with disabilities in any investigatory process. When a parent is identified as having a disability, the parent should be referred to appropriate available parenting supports prior to escalation of a felony charge. The Disability and Parental Rights Legislative Change Project has developed model language to ensure this:

*“If the parent or guardian has a disability, the parent or guardian shall have the right to provide evidence to the court regarding the manner in which the use of accommodations such as adaptive equipment or parental supports will enable the parent to carry out the responsibilities of parenting the child. The agency shall advise parents or guardians of such right as soon as disability is identified. Courts shall also advise parents and guardians of this right.”*

- Protocols used during the child abuse or neglect investigation process should be tailored to individuals with varying types of disabilities. Interviews should be based upon the parent’s or guardian’s behavior and not focused on their disability. The Disability and Parental Rights Legislative Change Project has developed model language to address this:

*“Investigations of child maltreatment cases involving people with disabilities shall use a protocol that has been modified based on the individual with disabilities’ abilities.”*

Thank you for the opportunity to provide input on these bills. We welcome the opportunity to work with committee members to seek improvements to ensure the protection of children with disabilities and the rights of parents where necessary.



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October 22, 2015

TO: Members of the Senate Committee on Judiciary and Public Safety

FROM: Ken Taylor, Executive Director Wisconsin Council on Children and Families

RE: SB 324 and SB 326

My name is Ken Taylor and I am the Executive Director of the Wisconsin Council on Children and Families (WCCF). WCCF is a child and family research and advocacy organization that for 134 years has been advocating for a Wisconsin where every child has the opportunity to thrive. I have spent over 20 years working with child welfare systems here in Wisconsin, and across the country, to help improve outcomes for the children and families they serve. I have a great deal of respect for the professionals and foster parents who work in these systems. They are true heroes who are doing very difficult work on behalf of the most vulnerable in our society.

I appreciate having the opportunity to testify today on SB 324 and SB 326. I know the bill's sponsors and co-sponsors, as well as the Attorney General, all want to help keep Wisconsin's children safe. This is my goal too. However, I have concerns about aspects of SB 324 and SB 326 which are part of the *Justice for Children* package. I believe will these bills create some unintended, negative consequences.

Regarding **SB 324**, one of my main concerns revolves around the definition of "Necessary care," and in particular, the use of the term "appropriate" in the definition. This term is open to wide variation in interpretation, and even though elsewhere in the bill it says that neglect cannot be due to poverty, what might be deemed as appropriate or not appropriate is closely linked to poverty. For example, we know that across Wisconsin, and particularly in our rural areas, there is a significant shortage of dentists who are willing to accept Medicaid patients. Given the definition of "necessary care" in SB 324, a low income parent on BadgerCare who cannot find a dentist for their child could be found "criminally negligent" for lack of appropriate dental care. Another example is family homelessness, which is clearly connected to poverty. Nationally there are 2.5 million homeless children and in Wisconsin there are over 32,000 homeless children. Under this proposal it seems those 32,000 children could be determined to lack "appropriate shelter," and thus trigger a charge of criminal negligence. "Appropriate food" could also be an issue. In Wisconsin there are 256,000 children living in households that are food insecure, which again could trigger a charge of criminal negligence. Adequate access to

food, housing, and medical care are very real challenges for children and families in Wisconsin. These are critical issues that must be addressed, but the vast majority of families struggling with these issues are not being “criminally negligent,” and charging them as such would likely make their situations worse, not better.

In addition, it is important to note that 60% of children in out-of-home care in Wisconsin are reunified with their parents. This is a critical bond and an important connection for a child’s well-being. Reunification will be much more difficult if those parents have a felony record due to the changes in SB324.

It is also clear that in Wisconsin poverty is closely linked to race. Over half of Wisconsin’s African American children live in poverty, as do nearly half of our American Indian children and over a third of our Latino children, as compared to 11% of our White children. So, if what is considered “appropriate” is closely linked to income or poverty, and poverty is closely linked to race, then I cannot help but conclude that SB 324 will have disproportionate impact on Wisconsin’s children of color.

Regarding **SB 326**, my concern centers on the requirement that all reports of abuse and neglect must be referred to law enforcement. This has the potential to have a chilling effect on the number of reports being made regarding potential abuse or neglect, and consequently children could be placed at additional risk. I am concerned because approximately one-third of reports are made by people who are non-mandated reporters. These reporters (family members, neighbors, friends), who are concerned about a child but who may not want to involve the family with law enforcement, would be less likely report their concerns to CPS. In 2013, there were nearly 69,000 referrals made to child protection services, with 62% of the referrals screened out. As I understand the implications of SB326, this would result in law enforcement using valuable time and resources investigating nearly 43,000 cases that child protection services would not further assess.

I understand that the intent of this bill is to use the greater investigative power of law enforcement to protect kids. Current law requires each county department and licensed child welfare agencies to “adopt a written policy specifying the kinds of reports it will routinely report to local law enforcement authorities.” Based on my experience, these policies likely vary widely across the state, and some of them may not require reports to law enforcement in some cases that SB326’s authors believe they should. Rather than create a blanket requirement that all cases be referred to law enforcement, my suggestion is for DCF to work to create more consistency in these policies, or, in collaboration with SB326’s authors, clearly state what types of reports must be forwarded to law enforcement. There is no question that law enforcement should be involved in some cases. My concern is that a blanket policy to refer all reports will in many cases unnecessarily tax our law enforcement officials,

unproductively add to the stress that the families being investigated already feel, and most importantly, create the risk that some concerns will go un-reported due to reporters not wanting to involve the family with law enforcement. This will result in some children being less safe.

As with SB 324, I also believe that SB 326 will have disproportionate impacts on Wisconsinites who are from communities of color. Currently, in Wisconsin African American children are three times more likely than Whites to have maltreatment substantiated and 4.7 times more likely to enter out-of-home care as White children. Increasing law enforcement involvement with these families, who are already disproportionately from communities of color, is unlikely to have positive effects, and will also likely increase the disproportionality in our justice system, which is already among the most disproportionate in the nation.

I know that the goal of the authors is to improve lives and protect kids. I share that goal. Child welfare systems are very complex and the risk of unintended negative consequences is always present. In summary, I propose taking a pause in the process so that various stakeholders who are committed to improving the child welfare system can be effectively engaged in addressing the challenges identified by the authors. Legislative leaders are currently designing a bi-cameral, bi-partisan Children's Caucus, perhaps these are issues this Caucus could address.

Thanks you for your time and consideration of my perspectives on SB 324 and SB 326. I look forward to the opportunity to partner with members of the legislature to improve the lives of vulnerable children and their families.





**TO:** Senate Committee on Judiciary and Public Safety  
**FROM:** Michelle Mettner, VP of Government Relations & Advocacy, Children's Hospital of Wisconsin  
**DATE:** 10/22/15  
**RE:** SB 324 – Child Neglect

Good afternoon Chairman Wanggaard and members of the committee. Thank you for the opportunity to provide this testimony on SB 324. My name is Michelle Mettner and I am the VP of Government Relations & Advocacy for Children's Hospital of Wisconsin. It is because of our experience with child victims in our emergency room and child advocacy centers as well as our intervention with fragile families through our social services work, we offer the following observations and suggestions on this legislation.

Children's Hospital of Wisconsin serves children and families all across the state. We have inpatient hospitals in Milwaukee and the Fox Valley. We care for every part of a child's health, from critical care at one of our hospitals to routine checkups in our primary care clinics. Children's also provides specialty care, urgent care, emergency care, dental care, school health nurses, foster care and adoption services, family resource centers, child health advocacy, health education, child welfare services, family preservation and support, mental health services, pediatric medical research and the statewide poison hotline.

Children's Hospital of Wisconsin is the largest not-for-profit, community-based agency serving children and families in the state, providing family preservation, counseling and advocacy services to more than 15,000 children and families annually. Research has shown that kids who experience adversity are 25 percent more likely to face lifelong physical, emotional, cognitive and behavioral challenges. We are working to break that cycle through our Child Advocacy Centers and our well-being approach, Strong Families, Thriving Children, which is based on physiological and psychological research that is customized to build on each family's unique strengths and address areas of improvement. Children's operates seven of the 14 Child Advocacy Centers (CACs) across the state that bring together professionals from law enforcement, criminal justice, child protective services, victim advocacy agencies and the medical and mental health communities to provide comprehensive services for child victims and their families. The goal of Child Advocacy Centers is to minimize trauma, break the cycle of abuse and, importantly, increased prosecution rates for perpetrators. In 2014, more than 7,000 families and children were served through our child advocacy and child protection centers.

Current law provides that any person responsible for a child's welfare who intentionally contributes to the child neglect is guilty of a misdemeanor, and if the child is physically harmed they are guilty of a felony. This bill would change the standard of care from intentionally to negligently and provides definition for necessary care that includes appropriate food, clothing, medical and dental care, shelter and supervision, opportunity for education, or protection from exposure to controlled substances. This bill would also create the crime of repeated acts of neglect of the same child. We support all of these changes and applaud the authors for this legislation.





As we review the bill, there is no clear definition of the "person responsible for a child's welfare". We recommend this be defined so it is clear to whom this statute applies. Our suggestion is "parent or legal guardian or those designated by the parent or legal guardian to provide oversight for the child's welfare".

In addition, since neglect is about inaction, we suggest that the bill be changed to replace the use of the term "action" with "conduct".

Chairman Wanggaard and committee members, I thank you again for the opportunity to submit testimony. If you have any questions, comments or concerns please feel free to contact me via email at [mmettner@chw.org](mailto:mmettner@chw.org) or via phone 414-266-5434.





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## Testimony on 2015 Senate Bill 324 October 22, 2015

The State Public Defender's (SPD) office provides representation for individuals accused of crimes that carry the penalty of potential incarceration. The SPD also represents children who are the subject of Children in Need of Protection and Services (CHIPS) petitions. The SPD has identified concerns with Senate Bill 324. We have brought these concerns to the author's attention as well as to the attention of the Department of Justice.

First, the language on page 3, lines 21-22 includes a phrase - "even if the child does not actually suffer from neglect" - which creates a definition of contributing to a failure that could have far reaching consequences. As drafted, this language would allow parents to be charged criminally for actions that all parents would recognize as common among children. Without getting bogged down in hypotheticals, but to demonstrate the possible outcome of this language, consider the child who asks his or her parent for permission to ride a bike in the neighborhood. The parent says OK and reminds the child to wear a helmet. If the child forgets to wear the helmet, a law enforcement officer, perhaps perceiving a pattern with the family, could refer charges to the district attorney under the language in this section.

While this scenario may appear unlikely, the language opens the door to this type of charging. Before a district attorney is put in the position of deciding whether to issue charges, the legislature can ensure that the statutory language forecloses this possibility. The SPD suggests removing the phrase "even if the child does not actually suffer from neglect" from the proposed s. 948.21 (1) (am) language.

A second concern is the use of the word "appropriate" on lines 5-8 and 6-7 on page 4. "Appropriate" is a term that leaves the application open to a subjective test. What may seem appropriate food, clothing, or medical care to one person may be subpar to another. Leaving this subjectivity as an issue for a judge or jury means that by the time that determination is made, a parent has publicly been labeled as "bad," the parent has been charged with a felony that, even if dismissed, stays on CCAP in perpetuity, and the child may have been removed from the home under a CHIPS petition. We recommend deleting this subjective standard by removing the word "appropriate." In the alternative, we suggest the term "adequate" to describe the items that are included as "necessary care." That term is used in s. 48.01(1)(ag) to outline certain basic needs for children, including adequate food, clothing and shelter.

Also in that section is the language on page 4, lines 12-13. In current law, only the manufacture of methamphetamines constitutes neglect of a child. Methamphetamine was specifically identified because of the specific risks associated with its manufacture. Exposure to hazardous chemicals and the significant chance of an explosion create a unique risk among schedule 1 narcotics. We understand the argument that manufacture and distribution of any drug would place a child at risk; however "use," or what would be charged as simple possession under Chapter 961, does not pose the same level of risk to a child, absent other indicia of neglect.

Another issue involves the language on page 4, lines 14-17. As constructed, the current statutory language "for reasons other than poverty" appears to be retained only in relation to criminal negligence, but would not apply to the negligent contribution to failure. This inconsistency can be easily corrected

by moving the phrase from its current location on line 15 to the end of line 14 so that the section reads: “Any person who is responsible for a child’s welfare who, for reasons other than poverty, negligently fails to provide the child with necessary care or negligently contributes to the failure commits neglect and is guilty of the following:” could result in felony charges and removal of a child from the home. An argument could also be made that the use of tobacco and alcohol in the presence of a child presents as significant a risk to the child as the use of narcotics.

Finally, the language on page 5, line 21 regarding “discernible by an ordinary person viewing the child” is a problematic standard. There are numerous physical, cognitive and developmental disabilities that would not be discernible by an ordinary person viewing a child. Expanding the standard found in the battery statute (s. 940.19(6)(b)) into this area of the statutes creates a dangerously low threshold. Also, this language could prompt litigation over what is or is not discernible under this unique statutory language. Striking the words “discernible by an ordinary person viewing the child or that is” on line 25 of page 5 should not restrict prosecutors from presenting reliable evidence of neglect.

We understand and appreciate the desire to protect children and families. Very often our adult clients exhibit the effects of childhood trauma - which also manifests as today’s victim being tomorrow’s defendant. Therefore, the focus on trauma-informed care is so critical to the appropriate understanding and treatment of issues that may feed criminogenic behavior. The theme of our concerns is that by linking a significant expansion of criminal neglect to the Children’s Code in Chapter 48, the impact is to significantly reduce the intent of Chapter 48 to protect the best interests of both the child and the family.

We are happy to provide any additional information or work with the author to look at alternative language to address these concerns.

**Testimony to the Senate Committee on Judiciary and Public Safety**

**Senate Bill 324**

**Shel Gross, Director of Public Policy**

Thank you for the opportunity to testify. Mental Health America of Wisconsin (MHA) does not support this bill as written because it has the potential to further criminalize individuals due to their mental health disorders.

MHA is dedicated to improving the mental health of all individuals through advocacy, education and service. As part of our program offerings our Strong Families/Health Homes (SFHH) program provides services to individuals with mental illnesses who are caregivers to dependent children. Part of our experience with this program has been contracting with the Bureau of Milwaukee Child Welfare (BMCW) to work with some of their families who fit these criteria. As it turns out this is not a trivial number; according to the Office of Performance and Quality Assurance, from 2008-2010, 63% of parents in the BMCW had a mental illness, while 58% also had a substance abuse disorder.

The goals of the SFHH program are to:

- Ensure that children are linked to resources in the community that support their physical and emotional development and success at school.
- Empower and support parents in their efforts to nurture and care for their children.
- Prevent children from developing a mental illness.
- Prevent child maltreatment that results from social isolation.
- Keep families intact and reduce involvement with the child welfare system.
- Reduce the need for psychiatric hospitalizations

A study of the program found the following:

- The average length of time from beginning SFHH services to achieving permanence is 9 months.
- 85% of families working with SFHH were reunified.
- 100% of families that were reunified while involved with SFHH between 2010-present, remained successfully reunified.

It is our experience that parents with psychiatric disabilities are much more likely to be adversely affected by the child welfare and legal systems. There is a presumption that they are unable to take care of their children. However our experience clearly demonstrates that with the proper services and supports these individuals can effectively parent their children.

People with mental illnesses are already heavily criminalized due to their disability. SB 324 has the potential to increase this criminalization. We think that where neglect is occurring due to a parental mental illness that the goal should be the assessment of that individual's need and providing the parent with necessary supports to keep the family together and the child safe. Therefore this legislation must minimally ensure there is a mechanism for such assessment before any referral to law enforcement is made and that appropriate services and supports are provided to support the family.