

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  
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**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/VQ1E5S>

<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.