

## INTERIM STUDY PROPOSAL 2023-098

REQUESTING THAT THE LEGISLATIVE COUNCIL REFER TO THE HOUSE COMMITTEE ON JUDICIARY A STUDY OF PROTECTIONS FOR ALLEGED OFFENDERS INVOLVED IN AN INVESTIGATION UNDER THE CHILD MALTREATMENT ACT WHEN A SECOND OPINION OR DIFFERENTIAL DIAGNOSIS MAY BE RELEVANT AS TO WHETHER THE ALLEGED VICTIM WAS SUBJECT TO ABUSE; AND A STUDY OF WAYS TO PROVIDE RECOURSE FOR PERSONS ACCUSED OF MALTREATMENT UNDER THE CHILD MALTREATMENT ACT WHO ARE LATER EXONERATED.

WHEREAS, in the 2021 Regular Session, the Ninety-Third General Assembly passed "Quincy's Law", Acts 2021, No. 976, which provides that, in the context of a child maltreatment investigation under the Child Maltreatment Act, Arkansas Code § 12-18-101 et seq., an alleged offender may, for the purpose of obtaining a second opinion, request that the alleged victim be examined by a licensed healthcare provider who did not perform the initial examination, test, or procedure and who routinely provides medical care to pediatric patients; and

WHEREAS, "Quincy's Law" also provides that an alleged offender may, for the purpose of ruling out a possible differential diagnosis, request that a licensed healthcare provider who routinely provides medical care to pediatric patients examine the alleged victim to determine whether the alleged victim has certain medical conditions; and

WHEREAS, despite the passage of "Quincy's Law", parents are continuing to face obstacles in obtaining due process when accused of subjecting their children to abuse under the Child Maltreatment Act; and

WHEREAS, parents continue to have difficulty obtaining their children's medical records from hospitals, especially if the child in question has been diagnosed as abused; and

WHEREAS, a diagnosis of abuse by a child abuse pediatrician leaves other medical professionals hesitant to dispute the diagnosis, despite that

there may be differential diagnoses at play or that a second opinion may find that the symptoms the child presents are not caused by abuse; and

WHEREAS, Arkansas Code § 12-18-908(a)(1) states that "an adult offender shall permanently remain on the Child Maltreatment Central Registry" if the adult offender "is convicted of a criminal offense for an act or omission that constitutes child maltreatment and for which the adult offender is named in the registry, even though scenarios may exist where, after a finding of abuse is entered against an offender, a differential diagnosis may be made that accounts for the symptoms or condition previously diagnosed as abuse,

NOW THEREFORE,

BE IT PROPOSED BY THE LEGISLATIVE COUNCIL OF THE NINETY-FOURTH GENERAL ASSEMBLY:

THAT the House Committee on Judiciary study the issues presented above, specifically studying how the following may affect or improve child maltreatment investigations:

(1) Passing legislation that:

(A) Identifies certain types of medical disorders that, according to medical professionals, may have a differential diagnosis presenting as abuse, including without limitation a congenital cutaneous variant, bone fragility, a coagulation disorder, or another medical condition or genetic condition that may appear to be caused by suspected abuse or increase the risk of misdiagnosis of abuse as defined in Arkansas Code § 12-18-103; and

(B) Imposes a duty on a physician conducting an initial examination of a child under the Child Maltreatment Act to inquire of the child's parents whether there are any known genetic conditions that could present as abuse and rule out any genetic disorders during the forensic portion of the examination of the child, including without limitation through identification of whether one (1) or more of the parents or the child have any of the primary known symptoms of the genetic disorders in subdivision (1)(A) of this study that would make the child vulnerable to a misdiagnosis of abuse;

1           (2) Providing each person accused of abuse under the Child  
2 Maltreatment Act or parent, guardian, or custodian whose child has been  
3 diagnosed as abused with the following, in a language that the person  
4 understands:

5           (A) Notification by the investigating agency under the Child  
6 Maltreatment Act immediately after a:

7           (i) Report is accepted by the Child Abuse Hotline under  
8 Arkansas Code § 12-18-303(a), including stating specifically that the person  
9 is under investigation for alleged abuse;

10           (ii) Diagnosis of abuse is communicated by a physician or  
11 other medical, hospital, or clinical personnel to the investigating agency;  
12 and

13           (iii) Decision has been made by the investigating agency  
14 to issue a true determination under Arkansas Code § 12-18-702;

15           (B) A statement of rights, including without limitation the  
16 right to:

17           (i) Obtain a second opinion under "Quincy's Law";

18           (ii) Request a justifiable extension of time to obtain a  
19 second opinion under Quincy's Law;

20           (iii) Seek legal counsel before agreeing to a proposed  
21 protection plan, safety plan, or case plan;

22           (iv) Have counsel present during interactions with the  
23 investigating agency; and

24           (v) Exercise his or her right against self-incrimination  
25 under the Fifth Amendment of the United States Constitution; and

26           (C)(i) A timeframe in which the alleged offender must notify the  
27 investigating agency that he or she intends to exercise his or her right to a  
28 second opinion under "Quincy's Law", including a warning that if the alleged  
29 offender fails to notify the investigating agency of his or her intent to  
30 seek to a second opinion under "Quincy's Law" or otherwise submit additional  
31 evidence within a certain timeframe, the investigating agency may move  
32 forward with issuing its true determination of abuse under Arkansas Code §  
33 12-18-702 based on the information it has already ascertained.

34           (ii) The House Committee on Judiciary should study what an  
35 appropriate timeframe would be for:

(a) An alleged offender to seek a second opinion under "Quincy's Law" when the investigating agency has notified him or her that the investigating agency intends to issue a true determination under Arkansas Code § 12-18-702, including a timeframe for a request for a justifiable extension and what criteria would justify an extension of the timeframe; and

(b) Entry of the true determination of abuse under Arkansas Code § 12-18-702 in the event that the alleged offender fails to notify the investigating agency of his or her intent to exercise his or her right to a second opinion under "Quincy's Law";

(3) Postponing of the investigating agency's finding of abuse under the Child Maltreatment Act if the alleged offender notifies the investigating agency that he or she will be obtaining a second opinion under "Quincy's Law" until the second opinion is available for the alleged offender's and investigating agency's consideration;

(4) In the event that a parent, guardian, or custodian who is an alleged offender in an investigation under the Child Maltreatment Act is present with the child at the time of an evaluation under § 12-18-614(a) or any other forensic evaluation taking place under the Child Maltreatment Act, requiring the provider to inform the parent, guardian, or custodian that he or she suspects abuse;

(5) Amending the Arkansas Code by:

(A) Allowing the Department of Human Services the discretion to grant or deny a petition for removal of an adult offender from the Child Maltreatment Registry who would otherwise permanently remain on the registry under Arkansas Code § 12-18-908(a) in the event that the offender entered a plea of guilty or nolo contendere rather than being found guilty following a trial; and

(B)(i) Providing:

(a) A presumption that a person convicted of only a misdemeanor for an offense of which the basis was acts or omissions found to be child maltreatment in an investigation under the Child Maltreatment Act is entitled to have his or her name removed from the registry;

(b) That a petition for removal of an offender's name from the registry under subdivision (5)(B)(i)(a) of this section shall only be denied if the department presents clear and convincing evidence that

the offender should remain on the registry for reasons involving public safety; and

(c) That if the department is found to have made an unreasonable objection to removal of an offender's name from the registry under subdivision (5)(B) of this section, an assessment of fees and costs may be levied against the department;

(6)(A) Providing additional safeguards to address the issues presented above, especially considering that an alleged offender may act in a risk-averse fashion to avoid being sentenced to incarceration even when he or she has not subjected the alleged victim to abuse, including without limitation requiring the department and the Division of Arkansas State Police to maintain records of investigations for alleged abuse under the Child Maltreatment Act that were unsubstantiated.

(B) The department and division's maintenance of records of investigations for alleged abuse under the Child Maltreatment Act that were unsubstantiated shall include without limitation:

(i) Storing the records for a reasonable period of time not less than the number of years it would take for the alleged victim of an unsubstantiated investigation of abuse to reach eighteen (18) years of age; and

(ii) The name and attending hospital or clinic of the physician who initially made the diagnosis of abuse in each unsubstantiated investigation, if applicable; and

(7)(A) Providing:

(i) A civil cause of action as recourse for a person who demonstrates that he or she was wrongly accused of abuse under the Child Maltreatment Act and the ability to obtain damages if the person prevails in his or her civil cause of action; and

(ii) That an exonerated respondent is entitled to damages including lost income, costs and expenses, attorney's fees, and other reasonable damages that the accused experienced as a result of a child maltreatment investigation for abuse when the alleged offender was later exonerated; and

(B) Determining whether:

1                   (i) The investigating agency or the physician making the  
2 diagnosis of abuse would be liable through the person's claim to the Arkansas  
3 State Claims Commission; and

4                   (ii)(a) A good faith exception should exist as to the  
5 investigating agency or physician making the diagnosis of abuse, if the  
6 investigating agency or physician making the diagnosis can establish good  
7 faith by a preponderance of the evidence; or

8                   (b) The investigating agency's or physician's  
9 liability shall be on the basis of acting with reckless disregard, malice, or  
10 gross negligence in the agency's or physician's investigation or examination.

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12 Respectfully submitted,

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16 Representative Karilyn Brown  
17 District 67

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