



# North Dakota House of Representatives

STATE CAPITOL  
600 EAST BOULEVARD  
BISMARCK, ND 58505-0360



## **Representative Zachary Ista**

District 43  
3850 15th Avenue South  
Grand Forks, ND 58201-3727

C: 701-361-6671

*zmista@ndlegis.gov*

**COMMITTEES:**  
Finance and Taxation  
Energy and Natural Resources

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Mr. Chairman and Members of the Judiciary Committee:

For the record, Zac Ista from District 43, Grand Forks.

HB 1492 addresses an omission in North Dakota's existing laws protecting children from abuse by defining the currently undefined term "mental injury" and making clear that it applies to harm caused by exposing a child to domestic violence. In doing so, the Legislature would better protect victims of child abuse and put citizens on notice as to what exactly constitutes the criminal offense of child abuse.

Since at least 1999, our state's definition of child abuse has included conduct that causes "mental injury." However, we have never separately defined what that term means. Thus, prosecutors are left not knowing how to prove a case alleging child abuse by mental injury, and defendants likewise are left not knowing how to defend against such allegations.

This omission in law reached the North Dakota Supreme Court in the 2022 case of State v. Castleman. There, a defendant was convicted of child abuse after evidence at trial showed that the defendant entered his daughter's bedroom, screamed at the child's mother, held her by the neck, pushed her face into a pillow, and threatened to kill her in a graphic manner. The child was present for all of this domestic violence, and trial testimony showed that the girl felt scared, was shaking, and cried. There was no evidence, however, that the defendant physically harmed his child during this incident. Under these facts, the State charged the defendant with child abuse, alleging that he caused mental injury to his daughter. During deliberations, the jury asked the court to provide a definition of "mental injury," but the court was unable to elaborate on the term. Ultimately, the jury returned a guilty verdict on the offense of child abuse by mental injury.

On appeal, the North Dakota Supreme Court overturned the conviction. In doing so, the Court conducted an extensive analysis of what the term “mental injury” means in § 14-09-22(1) after observing that the term is neither defined nor explained in Century Code. Applying various conventions of statutory construction, the Court ultimately held that the term means “mental suffering that has some lasting, non-transitory effect,” which “may be shown by evidence of a medical diagnosis, behavioral changes, or other lasting effect of psychological, emotional, or mental trauma.” The Court rejected what it characterized as a more sweeping definition that could include only “temporary mental discomfort.” Applying this newly adopted definition to the record before it, the Court concluded that the evidence at trial was insufficient to support a conviction. In her concurrence, Justice McEvers, joined by Justice VandeWalle, further noted that children’s exposure to domestic violence can often lead to long-term detrimental mental health effects. Though she concurred that none of those effects were documented during trial, she did invite the Legislature to consider including exposure of a child to domestic violence to our existing definition of child abuse by mental injury.

HB 1492 takes up Justice McEvers’s suggestion while also filling the statutory gap the Court highlighted in Castleman. In doing so, I believe we better assert our legislative prerogative to write the laws, leaving our courts to interpret and apply them rather than having to create their own definitions where we provide none.

Including mental injuries as one type of child abuse certainly is not unique to North Dakota, and many other states—including Florida, Alaska, Idaho, Minnesota, Iowa, Maryland, Missouri, Nevada, and Pennsylvania—already define what constitutes “mental injury” in their state codes. While none of those definitions is exactly the same, they do have some common elements. First, like the Court held in Castleman, they require some sort of sustained adverse impact on the child’s mental well-being. Second, they generally require the mental injury to have a substantial or serious impact on the child. Third, they require evidence that the mental injury has caused the child to function at a level below that which would otherwise be expected in terms of the child’s emotional, behavioral, or psychological performance, *i.e.* a measurable impact. The combination of these elements—a substantial impact of sustained duration and measurable impact—creates a high bar for prosecution under a mental injury theory of child abuse.

As drafted, HB 1492 seeks to emulate these stringent requirements found in other states. The bill does not seek to criminalize behavior that only causes a child brief psychological distress, nor does it seek to turn a parent who occasionally yells at a child or loses their temper in front of their child into a criminal. Rather, it is designed to be used only when misconduct creates a substantial, lasting, and measurable negative impact on a child. As such, I expect prosecutors would only be able to rely on this statute in the most egregious of circumstances. But by defining the term “mental injury” in Century Code, we give both the State and potential defendants proper notice of what conduct is and is not criminal. By no means, though, do I claim that the proposed definition before you is a perfect one, and I invite the Committee to review definitions from other states,

which I have included at the end of this testimony, to find the language you believe to be most appropriate for North Dakota. The Committee may also find that it prefers the definition the Court created in Castleman and choose to make that our statutory definition.

No matter where the Committee lands on wordsmithing this definition, I do encourage you to retain exposure to domestic violence as one basis that could give rise to the mental injury prong of child abuse. To that end, I would direct your attention to the proposed amendment (23.0344.01002) I have uploaded that makes clear the intent of including reference to domestic violence exposure here, which is that abuse in the form of exposing a child to domestic violence can cause the requisite mental injury (which still would have to meet the high definitional bar set forth above). I would also emphasize to the Committee that the intention of the bill only is to make the person *committing* the domestic violence criminally liable if he or she exposes a child to that violence. It is not meant to subject the *victim* of that domestic violence to a charge of child abuse if he or she allegedly allows the child to be exposed to the same violence of which he or she is a victim. I am confident that local prosecutors share this view of the proposed change and will exercise their discretion appropriately in not charging a DV victim who himself or herself may not have a realistic option of leaving an abusive situation. But if the Committee feels additional language needs to be added to the bill to make that abundantly clear, I would welcome such an amendment.

The reasons for specifically including exposure to domestic violence in our child abuse criminal statute is because of the devastating effects it can have on children. As Justice McEvers notes in Castleman, “[i]t is not uncommon for children who are raised in violent homes to experience long-term negative emotional, mental or behavioral impacts of domestic violence, even when they are not the target of the abuse.” She goes on to observe that “[c]hildren who witness domestic violence may also demonstrate aggressive behavior, depression, or have cognitive deficiencies, and are at greater risk to develop serious health problems.” Other supportive testimony, including from child advocacy expert Susan Spivey and the North Dakota State’s Attorney’s Association, further describes the harmful impact that exposing a child to domestic violence can have. That’s why, in the limited but appropriate circumstances proposed in this bill, exposure to domestic violence that causes a substantial, sustained, and measurable mental injury to a child should be included within our definition of child abuse. It will give us an additional tool to protect children from the long-term damage that can arise following exposure to domestic violence.

For these reasons, members of the Committee, I urge a DO PASS recommendation for HB 1492 (with the proposed amendment). It does not expand existing criminal law or create any new crime, but rather clarifies a law we’ve had on the books for over two decades. We should assert our legislative prerogative now and clearly define the language we’ve already put into statute. Thank you for your consideration, and I stand for any questions.

### Sample “Mental Injury” Definitions from Other States

In Idaho, “mental injury” means “a substantial impairment in the intellectual or psychological ability of a child to function within a normal range of performance and/or behavior, for short or long terms.” (See Idaho St. § 16-1602(30)).

In Maryland, “mental injury” means “the substantial impairment of a minor’s mental or psychological ability to function.” (See Md. § 3-602.1(a)(4)).

In Missouri, “mental injury” is defined as “an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within his or her normal range of performance or behavior.” (See Mo. St. § 568.060(1)(3)).

In Nevada, “mental injury” is defined as “an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within a normal range of performance or behavior.” (See Nev. St. § 432B.070).

In Pennsylvania, “serious mental injury” means “a psychological condition, as diagnosed by physician or licensed psychologist, including the refusal of appropriate treatment, that: (1) renders a child chronically and severely anxious, agitated, depressed, socially withdrawn, psychotic or in reasonable fear that the child’s life or safety is threatened; or (2) seriously interferes with a child’s ability to accomplish age-appropriate developmental and social tasks.” (See 23 Penn. Stat. § 6303).