Senate Aging and Youth Committee Public Hearing on Senate Bill 20

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Written Testimony by Jonathan Budd, Esq. on behalf of the Pennsylvania Bar Association

On behalf of the 28,000 members of the Pennsylvania Bar Association, we first want to sincerely thank Chairman Mensch, Minority Chairwoman Washington, members of the Committee, and the Committee staff for your efforts to strengthen our existing child abuse laws and for your openness to listening to feedback on those efforts from the Association.

With regards to this legislation, there are four key points that we'd like to make related to the definition of child abuse, the use of force exclusions, the peer-on-peer contact exclusion and the expunction of records for child perpetrators. But before discussing the specific points, we'd like to emphasize that child abuse investigations can happen in three different ways on three different levels, each with a specific purpose. The Child Protective Services Law ("CPSL") is just one of those three.

Dependency proceedings, which may involve removal of children from their parents due to abuse and neglect, happen in juvenile court proceedings under the Juvenile Act. The Crimes Code involves prosecuting and potentially imprisoning a perpetrator for endangering the welfare of a child or another criminal offense and happens in criminal court. The CPSL is designed to require that suspicions of abuse be investigated, with the opportunity to provide services and when the allegations are indicated or founded, to provide a mechanism by which the perpetrator will be identified on a list such that he or she will not be in a position to become a teacher, coach, school bus driver, day care worker, etc. and put other children at risk. It is important to note that having an indicated or founded report does not necessarily mean that a crime has been committed, that a person will go to jail or that a child is dependent and should be removed from the perpetrator.

1. **We support S.B. 20's bodily injury definition and the use of bodily injury in the definition of child abuse as the legal threshold for physical abuse of a child but have concerns that using the terms "intentionally or recklessly" but not "knowingly" in the definition of child abuse will create an unnecessary loophole.**

   Rationale: There have been significant problems in practice with the current definition of "serious physical injury" as it requires there to be "severe pain" or significant impairment of a child's functioning. This is too high a standard and historically has caused many fairly egregious cases to be unsubstantiated. That will be far less likely to occur with a definition of child abuse that establishes "bodily injury" as the standard as

"bodily injury" requires a showing of "substantial pain" or impairment of physical condition as the threshold for abuse rather than "severe pain."

S.B. 20 defines child abuse as "intentionally or recklessly" engaging in certain conduct but for some reason excludes the "knowingly" standard. S.B. 20 does not provide a definition for the terms "intentionally" or "recklessly." However, if the intention is for "intentionally" and "recklessly" to have the same meaning as provided for in the Crimes Code § 302 definitions, then an unnecessary loophole will be created.

Crimes Code Section 302(b) lays out the hierarchy of culpability which includes "intentionally", "knowingly", "recklessly" and "negligently". Section 302(e) further specifies that "knowingly" is established if a person acts "intentionally." Section 302 does not state that "knowingly" is established if a person acts "recklessly." Therefore, it is possible that in certain circumstances a person could act "knowingly" but not "intentionally" or "recklessly" and would argue that his/her conduct was not child abuse since the legislature, while specifically referencing the Crimes Code, purposefully left out "knowingly" from the definition of child abuse. Adding the word "knowingly" would resolve the issue and eliminate the ambiguity and potential loophole.

2. **We support S.B. 20's "Use of force for disciplinary purposes" exclusion but oppose the reference to the Crimes Code (18 PA.C.S. § 509) contained in the "Effect on rights of parents" exclusion.**

   Rationale: S.B. 20 Section 6304(d) states that "Notwithstanding subsection (c), this chapter does not restrict the generally recognized existing rights of parents to use reasonable supervision and control when raising their children, **subject to the provisions of 18 Pa.C.S. § 509 (relating to the use of force by persons with special responsibility for care, discipline or safety of others)."**

   Importing the Crimes Code Section 509 exception language -- "the use of force is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation" – into the CPSL is very problematic for several reasons. As explained above, there are different purposes and consequences involved in CPSL proceedings, criminal proceedings and dependency proceedings. There is also a different and higher standard of proof required for criminal prosecution of child abuse than the standard of proof required in dependency cases or CPSL cases.

   Because the purposes, consequences and standards of proof -- beyond a reasonable doubt v. clear and convincing evidence -- have always been different and should remain so, the CPSL should not be made to require the same level of greater offense/conduct as

the Crimes Code. S.B. 20 does this by incorporating the Crimes Code language into the CPSL and in so doing, will do less to protect children than the current law does.

This is especially troublesome for two reasons. First, because Section 6302(c) of the CPSL already recognizes parents' rights – "This chapter does not restrict the generally recognized existing rights of parents to use reasonable supervision and control when raising their children."

Second, Crimes Code Section 509 has been specifically rejected by the courts as the appropriate standard for determining when corporal punishment becomes abuse under the CPSL. In the 2010 case, *F.R. v. D.P.W.* (4 A.3d 779, 785), the Commonwealth Court, relying on the 2002 Supreme Court case *P.R.* (801 A.2d 478) where the Supreme Court distinguished between criminal and CPSL proceedings and standards, specifically considered whether Section 509 of the Crimes Code is applicable to CPSL proceedings and definitively rejected its application:

> While there is little doubt that the Crimes Code and CPSL are linked in some ways, it is clear, as acknowledged by our Supreme Court in *P.R.*, that the Crimes Code standard applies in criminal proceedings, while the CPSL standard applies to administrative proceedings. This does not imply that corporal punishment is barred under the CPSL, but rather the standard of determining when corporal punishment crosses the threshold into child abuse is different in the criminal and administrative contexts (cites to *P.R.*). The appeal now before the court is from an administrative proceeding under the auspices of the CPSL, and, thus, the Crimes Code does not apply.

In the unpublished Commonwealth Court opinion *T.H.* (2010 Pa. Commw. Unpub Lexis 906), where Father specifically uses Section 509 as his defense, the Court cited *F.R.* in holding that Section 509 does not apply:

> The next issue is what is the proper standard for determining child abuse in a case where the injury suffered by the child is a result of corporal punishment ….. This court recently addressed this issue in *F.R.* and determined that Crimes Code standard applies in criminal proceedings, while the CPSL standard applies to administrative proceedings. This does not imply that corporal punishment is barred under the CPSL, but rather the standard of determining when corporal punishment crosses the threshold into child abuse is different in the criminal and administrative contexts. Thus, Section 509 of the Crimes Code, 18 PaCS § 509, does not apply in this case.

Using the Crimes Code exception language also creates a significant internal inconsistency and confusion within the bill itself which will make it harder for caseworkers to administer consistently and reliably across 67 counties. Child abuse is defined as "bodily injury" --"substantial pain or impairment of physical condition" -- yet the bill creates a huge loophole by creating an exception for parents, caregivers and many others that uses a "not designed to cause or known to create a substantial risk of

causing death … extreme pain", etc. threshold. By creating two different standards for CYF workers to follow when investigating CPSL cases, the original version of HB 726 would likely afford children less protection than what they receive even under the current law's "severe pain" standard.

Because of these problems, we recommend that the phrase "subject to the provisions of 18 Pa.C.S. § 509 (relating to the use of force by persons with special responsibility for care, discipline or safety of others)" be deleted from that sentence such that the sentence read "Notwithstanding subsection (c), this chapter does not restrict the generally recognized existing rights of parents to use reasonable supervision and control when raising their children."

When combined with subsection (c) ("Use of force for disciplinary purposes" exclusion), this change is preferable for several reasons. First, it maintains an internal consistency with the "bodily injury" standard as the baseline threshold for everyone before looking at whether the action was reasonable. Second, it distinguishes between parents and guardians who have a generally recognized right to use reasonable force for disciplinary purposes and other persons responsible for the welfare of children who should only be using reasonable force for safety-related purposes. Third, it is consistent with the current CPSL and not contrary to existing case law.

3. **We support S.B. 20's Peer-on-peer contact exclusion but oppose the "mutually entered into by mutual consent" language.**

Rationale: Labeling students who engage in a school yard fight, siblings who fight at home or teens who have been removed from their parents due to abuse or neglect and fight in their new group home placement as child abusers makes no sense and the reports of this type of behavior would likely overwhelm the limited resources of the child welfare system charged with investigating child abuse cases. The concept of these fights or scuffles being "mutually entered into by mutual consent" is just not realistic or applicable to how physical altercations between children occur – in many cases they just happen. For those cases where there are children causing harm to other children through bullying-type behavior, the current juvenile justice and child welfare systems are able to hold them accountable and provide treatment as needed.

We suggest that the Peer-on-peer contact language be revised to read – "No child shall be deemed to be physically or mentally abused based on injuries that result solely from a fight or scuffle with a peer."

4. **We support a process for a minor who has been placed on the child abuse registry to expunge their record at the age of 21 and be removed from the registry so long as there have not been intervening indicated or founded reports of abuse.**

   Rationale: We believe that when children are considered perpetrators of child abuse and are placed on the registry, they should have their record expunged at age 21 provided there have been no subsequent substantiated reports. This is consistent with societal and legal norms and balances the interests of child protection as well as the interests of children who we believe should be treated differently because of the likelihood of their rehabilitation and the developmental capacities of children to change as they grow older. We do not think that child protection is furthered by labeling children as child abusers for life on the basis of something they did as a teen when there have been no further abusive acts.