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February 1, 2023

TO: The Honorable William C. Smith, Jr., Chair, Judicial Proceedings Committee

FROM: Jer Welter, Assistant Attorney General

RE: SB 21 - Criminal Law - Person in a Position of Authority - Sexual Offenses With a Minor
(SUPPORT WITH AMENDMENT)

The Office of the Attorney General asks the Judicial Proceedings Committee to issue a favorable with amendment report on Senate Bill 21.

The Office of the Attorney General fully supports Senator West's bill, which expands the definition of a "person in a position of authority" over a minor for purposes of the prohibition of sexual activity by such persons with minors under the fourth-degree sexual offense statute (§ 3-308 of the Criminal Law Article). Under the bill, the statute would more clearly cover a variety of adults in positions of authority, such as coaches, extracurricular instructors, childcare providers, and camp counselors, who under no circumstances should be permitted to engage in sexual activity with the children in their care.

We suggest one amendment, which will clarify the statute and avoid unintended consequences when prosecuting fourth-degree sexual offenses, including by persons in positions of authority over minors. In *State v. Frazier*, 468 Md. 627 (2020), the Supreme Court of Maryland held that fourth-degree sexual offense is a greater-inclusive offense of second-degree assault. Second-degree assault can include any offensive touching without consent or justification, and need not be sexual. It carries a potential sentence of up to 10 years' imprisonment—higher than the one-year potential sentence for the "greater" offense of fourth-degree sexual offense.

What the decision in *Frazier* means in practice is that, if a prosecutor charges a defendant with both fourth-degree sexual offense and second-degree assault, it can have the paradoxical effect of capping the potential maximum penalty to only the lower one-

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year sentence that is allowed for fourth degree sexual offense. Therefore, in order to preserve appropriate sentencing discretion by the court for particularly serious sexual crimes, the prosecutor must *avoid* charging fourth-degree sexual offense and instead charge only second-degree assault—which fails to acknowledge the distinctively sexual nature of such offenses, including when committed by a person in a position of authority over a minor.

The practical solution is to include an anti-merger provision in the fourth-degree sexual offense statute. This would ensure that courts may sentence separately for fourth-degree sexual offense and take full account of the sexual nature of this form of violation, including by persons in positions of authority. This could be accomplished by amending the proposed new subsection (e) in the first reader of Senate Bill 21 (page 3, lines 35–36 and page 4, line 1) to read: “A violation of this section may not be considered a greater inclusive crime of any other crime and, unless specifically charged by the State, may not be considered a lesser included crime of any other crime.”

The Office of the Attorney General urges the Committee to favorably report Senate Bill 21 with that amendment.

cc: Members of the Committee