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March 30, 2023

TO: The Honorable Luke Clippinger, Chair, Judiciary Committee

FROM: Jer Welter, Assistant Attorney General
Deputy Chief for Legal Affairs, Criminal Appeals Division
Office of the Attorney General

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

The Office of the Attorney General (“OAG”) asks the Judiciary Committee to issue a favorable-with-amendments report on Senate Bill 21, 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 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.

OAG also supported the cross-file of the bill, HB 226, which passed the House in a somewhat different form than SB 21 as passed by the Senate. Aside from relatively minor differences in the way that the two versions of the bill define a “person in a position of authority,” there are four significant differences between the two versions:

- (1) under SB 21, a person only qualifies as a “person in a position of authority” over a minor if the person is at least 6 years older than the minor in question;
- (2) under HB 226, the prohibition on sexual activity with a minor by a person in a position of authority continues after the minor’s enrollment in the school or participation in the program at issue ends, until the minor turns 18—whereas, under SB 21, the prohibition only applies while the minor is actually enrolled or participating in the school or program;
- (3) HB 226’s anti-merger provision (proposed subsection (e) of the statute) provides that a violation “may not be considered a greater inclusive crime of any other crime,” while SB 21’s does not; and

This bill letter is a statement of the Office of Attorney General’s policy position on the referenced pending legislation. For a legal or constitutional analysis of the bill, Members of the House and Senate should consult with the Counsel to the General Assembly, Sandy Brantley. She can be reached at 410-946-5600 or sbrantley@oag.state.md.us

(4) HB 226 amends both subsections (c)(1) and (c)(2) of the statute to maintain consistency with other law, while SB 21 amends only subsection (c)(1).

OAG would generally support amendments conforming SB 21 to the version of HB 226 that was passed by the House, but we particularly wish to highlight the third and fourth differences mentioned above.

As to the anti-merger provision, as OAG's favorable-with-amendments testimony on HB 226 stated, inclusion of the language that a violation "may not be considered a greater inclusive crime of any other crime," is important to address a scenario where fourth-degree sexual offense, including by a person in positions of authority, is charged along with another crime that has a higher potential penalty but fewer elements—such as second-degree assault, as in *State v. Frazier*, 468 Md. 627 (2020), or third-degree sex offense (both of which carry 10-year maximum penalties). Without that anti-merger language, in a case where the fourth-degree sexual offense is deemed a greater inclusive offense of the other crime, the fourth-degree sexual offense charge will have the unintended and undesired effect of capping the maximum possible sentence for *both* crimes at the *lower* one-year maximum sentence that is available for fourth-degree sexual offense—even when the defendant's conduct also justifies conviction and sentencing for the crime that carries greater potential penalties. Therefore, we ask the Committee to adopt an amendment to SB 21 (on page 5, line 13), that a violation "may not be considered a greater inclusive crime of any other crime," conforming it to HB 226 as passed by the House.

As to subsection (c) of the statute, the version that the Judiciary Committee already approved and that passed the House (placing the prohibition on vaginal intercourse in subsection (c)(2) of the statute) maintains better and clearer consistency with other law, specifically § 3-307 of the Criminal Law Article (third-degree sex offense). We ask the Committee to amend SB 21 to conform to the version of HB 226 passed by the House in this regard as well.

OAG urges the Committee to favorably report Senate Bill 21 with those amendments.

cc: Senator Folden, Members of the Committee