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House Children & Youth Committee hearing on HB 2213
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The Pennsylvania Association for Justice, representing approximately two-thousand attorney members, submits this written testimony in opposition to House Bill 2213.

HB 2213 reduces the compensation that a child can receive from a jury award after being harmed, abused, or even killed while receiving care from entities that provide foster care, adoption services, residential care, or treatment. Children are among our most vulnerable populations. The children affected by HB 2213 are an even more vulnerable segment of that population, because these children oftentimes have no one to care for them, or those who care for them are incapable of doing so properly – which is why they are (supposed to be) protected by one of the welfare service categories mentioned in this legislation.

It is alleged that entities that provide such services “are finding it increasingly cost prohibitive – and sometimes literally impossible” to obtain professional liability insurance.”¹ Instead of promoting safety – which would ultimately make insurance more affordable and available – HB 2213 incentivizes bad conduct by protecting egregious behavior against children. These children have already suffered – how does reducing their jury-awarded recovery solve an alleged insurance crisis? And why are the people tasked with protecting marginalized children contemplating solving this alleged crisis on the backs of the same children who have been harmed, abused, or killed?

How HB 2213 Works

Before discussing the reasons for our opposition to HB 2213, we think it’s helpful to explain how this legislation would work, should it become law.

HB 2213 caps damages for entities that provide foster care, adoption, residential treatment, and other placement services. Specifically, HB 2213 caps damages for nonprofit organizations that are subject to the requirements of 55 Pa. Code Ch. 3680 or Ch. 3800.

Chapter 3680 applies to foster care and adoption services. Chapter 3800 applies to child residential facilities and child day treatment centers. This includes child detention centers, transitional living facilities, and facilities that serve children with disabilities (so long as the facility serves exclusively children).

It is important to note that although Chapters 3680 and 3800 apply to both for-profit and not-for-profit organizations, the cap granted by HB 2213 only applies if the facility is a nonprofit.

Such nonprofit organizations would be granted the same cap on damages that applies to local political subdivisions (\$500,000).²

HB 2213 provides an exception to the cap so long as the claim arises “from conduct that constitutes an offense enumerated under 42 Pa.C.S. § 5551(7) if the injuries to the plaintiff were caused by actions or omissions of the nonprofit organization.” The enumerated crimes listed

¹ See, HB 2213 Cosponsor Memorandum from Representative Kate Klunk.

² 42 Pa.C.S. § 8553.

under Section 5551(7), assuming that the victim is minor, include: human trafficking, involuntary sexual servitude, rape, statutory sexual assault, involuntary deviate sexual intercourse, sexual assault, and aggravated indecent assault.

There are a few things to note. First, the cap applies to any offense so long as the offense is not sexual in nature. Shaken-baby syndrome, physical or mental abuse, deprivation of care, malnutrition, etc., would all be protected by this legislation. Second, it is important to note how a cap on damages works. The child or their family (or estate) would file a lawsuit against the organization to recover for the harm, abuse, or death that occurred. The jury would hear / see all the evidence of the atrocities that occurred and enter a verdict. If the jury felt that the child should receive compensation for the tragedy that befell them, they would calculate an amount that includes past and future medical bills, loss of future wages, loss of life's consortium, pain and suffering, etc. The jury is not told that there is a cap on damages. The jury awards damages and is then excused. The judge would then, as a matter of law, reduce the jury verdict to whatever the cap is – in this case, \$500,000. No matter how horrific the tragedy, no matter how much it will cost to provide care and treatment for that child, no matter how much the jury awarded or their reasons, the damages are reduced to the statutory cap.

Incidents Protected by HB 2213

Below is a list of incidents that would be protected by HB 2213. These are actual examples of abuse against children that PAJ members have represented across Pennsylvania:

- Shaken-baby syndrome
- Physical abuse
- Fraud
- Children being forced to use their body to train attack dogs
- Scalding
- Murder of a child
- Theft of taxpayer dollars
- Home surgery of a foster child

Reasons to Oppose HB 2213

HB 2213 is fraught with flaws. HB 2213 is dangerous as a matter of public policy. It is tragic to think that the General Assembly is holding a hearing on a bill that incentivizes egregious conduct against children in foster care, adoption service facilities, or treatment centers. This bill literally reduces compensation to children who have been intentionally battered (as an example,) because insurers don't want to sell insurance anymore. When was the last time insurers actually decreased costs to consumers after legislative action? There were no reductions in premium costs after joint and several. There were no reductions in premiums after the Venue Rule was suspended in medical malpractice cases. It's safe to say there won't be a reduction in costs if HB 2213 becomes law. And it is our hope that the elected officials who support capitalism and free, unregulated markets without government interference will oppose this bill.

This legislation further hurts children already hurt by reducing their recovery – for battery, for malnutrition, for not receiving contracted services, for abuse, etc. – because of an alleged insurance crisis. How does punishing children who have been harmed while residing in foster care, adoption facilities, or residential treatment centers solve this alleged insurance crisis? There may be ways to help offset the cost of insurance for these facilities, but depriving harmed children of their settlement or judge- or jury-awarded recovery should not be the solution. Caps on damages is not a serious effort in this regard.

Caps on damages are unconstitutional per the Pa. Constitution.

Article 3, Section 18 of the Pennsylvania Constitution provides that “in no . . . cases [other than Workers’ Compensation] shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property.” The sovereign immunity cap, which applies to the Commonwealth and its agencies, and the cap on local political subdivisions³ has been upheld only insofar as the defendants were public entities funded with taxpayer dollars.⁴ The organizations being protected by this legislation are not. Additional dialogue regarding the unconstitutionality of caps on damages can be found below.

Artificially reducing damages for negligence, gross negligence, or intentional conduct incentivizes bad conduct.

HB 2213 reduces the exposure of a defendant to \$500,000. Fear of repercussion often governs human nature, and it certainly governs business behavior. If an organization can engage in bad conduct, knowing what the worst-case scenario is, there is little incentive to do the right thing. Furthermore, caps on bad conduct are unfair to organizations that behave appropriately and professionally and uphold the best interests of the children.

It should also be noted that the cap applies to all cases, regardless of whether the conduct was negligent or intentional.

The bad conduct incentivized by HB 2213 is conduct against children.

It needs to be said again – because of an alleged insurance crisis, HB 2213 caps damages in cases involving children, reducing a jury-awarded-recovery for the pain and/or trauma that was inflicted upon them. These are children who often have no family or no one they can count on to protect them: children in foster care houses, adoption centers, or treatment facilities. HB 2213 reduces the recovery available for children who have been beaten, malnourished or starved, not properly cleaned, not properly educated, or children who did not receive the services that the county hired the organization to provide for them. This bill incentivizes egregious conduct against this already vulnerable and marginalized population.

While HB 2213 does provide an exception where the cap doesn’t apply for crimes involving sexual abuse, the cap would still apply for other horrific crimes such as battery and child abuse (so long as the crime is not sexual).

This is another example of how bewildering this legislation is. The cap on damages would apply in a case where a child at an adoption facility was beaten or starved to death, but not if the crime was sexual in nature. This is not to say that we should minimize the horrific impact of sexual crimes – but this legislation does minimize all other types of crimes.

HB 2213 protects an organization that intentionally harmed a child.

“An action for damages . . . shall be limited . . . if the injuries to the [child] were caused by actions or omissions of the organization.” If somehow an organization decided to create a sweatshop with the children in their care and force these children to work in awful conditions,

³ 42 Pa.C.S. § 8528 and § 8553, respectively.

⁴ See, Zaufflik v. Pennsbury Sch. Dist., 104 A.3d 1096 (Pa. 2014) and Grove v. Port Authority of Allegheny County, 218 A.3d 877 (Pa. 2019).

that conduct is protected by the cap in HB 2213. If the organization was not properly feeding or caring for the children under their care, that conduct is protected by HB 2213. If an organization knew that a child walked off property from time-to-time because they didn't have properly secured gates and that child was hit by a car, that conduct is protected by HB 2213.

An organization that knew of an employee's bad conduct and did nothing to stop it would be protected by this legislation.

If an organization knows that an employee is abusing a child in a non-sexual manner and does nothing about it, the organization is protected by this legislation. If an organization knows that its employees are not providing the care that is required or care that is expected (feeding, cleaning, etc.,) the organization is protected by this legislation.

HB 2213 violates Equal Protection

This legislation reduces the recovery for children who have been harmed at one of the covered entities, so long as that entity is a nonprofit. This violates Equal Protection as children at entities that are run by for-profit organizations can obtain a full jury award that isn't reduced by the cap on damages provided in HB 2213. This is particularly problematic as the children likely have no say as to whether they are placed in a facility run by a nonprofit versus one run by a for-profit. Additionally, a seventeen-year-old with a disability at a covered facility would be denied a full recovery while an eighteen-year-old with the same disability can have a full recovery for the same action, strictly because Chapter 3800 does not cover anyone over eighteen years of age with a disability. This seems arbitrary to say the least.

There is no evidence, guarantee, or statement of record that shows insurers will continue to choose to sell this product within this market should this bill become law.

Again, how does punishing children (by reducing their recovery) who have been harmed while residing in foster care, adoption facilities, or residential treatment centers solve this alleged insurance crisis?

This bill is likely being offered because insurers for such organizations that are facing lawsuits are trying to reduce their exposure.

HB 2213 caps damages on cases where litigation may currently be ongoing, which gives the appearance that legislators might be trying to help organizations being sued for such abhorrent conduct. Should this bill become law, it will "take effect immediately."

PAJ asks the General Assembly to see this bill for what it is – a dangerous proposal that further harms children who have already been harmed or killed. It was only a few short years ago that the Legislature made a massive overhaul of the Child Protective Services Law. It was as recently as last year that the Legislature advanced a constitutional amendment to eliminate the statute of limitations in cases involving childhood sexual assault. In the wake of these monumental efforts to protect our children, let's set aside this bill and work together to ensure the tragedies that occur to children in and by these facilities and organizations don't happen again. Let's make Pennsylvania safer for all children, regardless of where or how they were hurt.