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Senate of Pennsylvania

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ORIGINAL: 2201

July 18, 2001

The Honorable Feather Houstoun, Secretary
PA Department of Public Welfare
Room 333, Health & Welfare Building
Harrisburg, PA 17105-2675

Re: Department of Public Welfare
Proposed Regulation # 14-469
Protective Services

Dear Secretary Houston:

In my capacity as Minority Chair of the Senate Public Health & Welfare Committee, I strongly object to your efforts to redefine "imminent risk" by rewriting and mischaracterizing the Commonwealth Court's holding in E.D. v. Department of Public Welfare, 719 A.2d 384 (Pa. Cmwlth. 1998) opinion. In the preamble to the proposed regulation, DPW makes the following claim:

The Department originally trained county agency staff on imminent risk and defined "imminent risk" as substantial evidence that a child would be a victim of serious physical injury, sexual abuse or exploitation except for happenstance, intervention of a third party or actions by the alleged victim. In E.D. v. Department of Public Welfare, 719 A.2d 384 (Cmwlth. 1998), the Commonwealth Court held that the standard that the child would have suffered serious physical injury was too high a standard to maintain an indicated report and ordered the report expunged. (emphasis added)

Pennsylvania Bulletin, Volume 31, Number 22, page 2799, 2800 (June 2, 2001)

Let us take a considered look at what the case actually said. The facts are these. E.D., a foster parent for ten years, was charged with child abuse for lifting and suspending J.S., his four year old foster son, off the ground by J.S.'s helmet. The child was suspended in the air for two to three seconds and sustained a purple bruise on his face from the pressure against the helmet's chinstrap. DPW's Office of Children, Youth, and Families conducted an investigation and found

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chinstrap. DPW's Office of Children, Youth, and Families conducted an investigation and found that E.D. had exposed J.S. to imminent risk of serious physical injury under 23 Pa. C.S. 6302 (b)(1)(iii) which states:

Any recent act or failure to act or series of such acts or failure to act by a perpetrator which creates an imminent risk of serious physical injury to or sexual abuse or sexual exploitation or a child under 18 years of age.

The Commonwealth Court specifically defined "imminent risk" by holding:

For the risk to be imminent under the Child Protective Services Law, however, the evidence must show that the acts *would have* inflicted serious physical injury. Id., 389. (emphasis in original)

The Court continues:

This is in accordance with the Department's own proposed regulations and the common definitions of 'imminent' found in the dictionaries. Id., 389

It is significant to note that the Court found that its definition of 'imminent risk' was in accordance with the standard established in the OCYF Bulletin, 3490-95-02 and it is that standard that is used throughout the opinion as the minimum standard. Id., 387. In its guidelines, OCYF proposed that to substantiate a case for imminent risk of serious injury, there must be:

- a. a specific act or failure to act must be documented;
- b. the act or failure to act must result in risk of abuse; i.e., be supported by substantial evidence that serious injury...*would have* occurred;
- c. the risk of abuse must be imminent;
 - (1) For the risk of serious physical injury, 'imminent' means during and/or immediately following the act or failure to act.....
- d. [f]or an alleged *act* of imminent risk of serious physical injury:
 - (1) there must be substantial evidence that, but for happenstance, the intervention of a third party or actions by the alleged victim, serious injury would have occurred, and
 - (2) the injury would have been serious; i.e. *would have*
 - (i) caused the child severe pain; or
 - (ii) significantly impaired the child's physical functioning.

OCYF Bulletin, 3490-95-02, pp. 3-4, 2(b)(II) (emphasis in original). Id., 388.

Simply put, the Court states, "In accordance with the Department's proposed regulations, the agency's burden is more particularly described as establishing that but for intervention, the

child would have suffered severe pain or a significant impairment of his or her functioning.” Id., 388.

The Court’s decision to expunge the report of child abuse was based solely on the Department’s failure to provide “substantial evidence” that the child *would have* suffered severe pain or significant impairment of his functioning. “Substantial evidence” as defined by the court, “must demonstrate evidence which so preponderates in favor of a conclusion that it outweighs in the mind of the fact finder, any inconsistent evidence and reasonable inferences drawn therefrom.” Id., 384.

The Department failed to present medical evidence that serious injury would have resulted from the child being suspended in the air, but for the intervention of a third party. Nor did the Department present evidence demonstrating intent of abuse or any prior history of child abuse by E.D. Id., 388.

After reviewing the evidence and arguments presented by the Department, the Court found that the Department did not meet its burden of proof to substantiate the charge of child abuse against E.D. The Court states:

[H]ere, no evidence was presented that J.S. *would have* suffered severe pain or a significant impairment of his functioning had D.S. not cried out....For the risk to be imminent under the Child Protective Services Law, however, the evidence must show that the acts *would have* inflicted serious physical injury. This is in accordance with the Department’s own proposed regulations and the common definitions of ‘imminent’ found in the dictionaries. Id., 389.

There is absolutely nothing in the opinion that suggest “imminent risk” is “too high a standard” to maintain. Furthermore, in footnote three of the opinion, the Court reemphasized that their interpretation of “imminent risk” as an act that *would have* caused serious injury is consistent with the OCYF Bulletin. The Court specifically states:

We believe the proposed regulations quoted in this opinion do sufficiently track the meaning of the related amendments of the Child Protective Services law and are persuasive in our interpretation of ‘imminent risk.’ The OCYF bulletin publishing the proposed regulations indicates that they are to be treated as guidelines until final rulemaking in the *Pennsylvania Bulletin*.” Id., 389.

Should you disregard the specifications of the Commonwealth Court and choose to maintain your definition of “imminent risk” as the exposure of a child to the “substantial probability” of abuse, I hope that you will set up guidelines to limit this broad and subjective standard. “Substantial probability” creates a window for over indulgence in the interpretation of parental activity and could lend itself to serious disruption of families and infringement on basic individual legal rights.

The Honorable Feather Houstoun, Secretary
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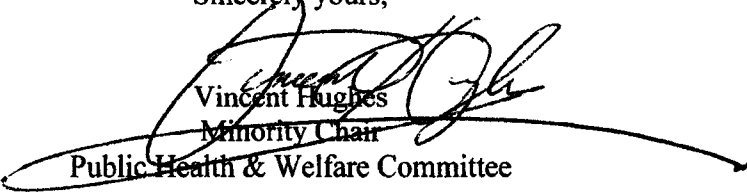
The revised standard may actually lead to fewer reports of child abuse due to a backlog of reports by investigators trying to decide whether activity can be justly defined as creating a "substantial probability" of serious injury.

We want to ensure the safety of all children and provide timely and appropriate intervention against child abuse. However, we must also be cognizant of the range of influence and intervention that the Department can have over the lives and rights of individuals. The proposed revision of "imminent risk" oversteps the mandate of the Commonwealth Court and creates a standard that lends itself to an extremely broad interpretation of activity that is beyond that contemplated by the statute.

Please reconsider your proposal to redefine "imminent risk."

As always, my staff and I stand ready to work with you to correct the deficiencies in the proposed regulation.

Sincerely yours,



Vincent Hughes
Minority Chair
Public Health & Welfare Committee

cc: Senator Harold F. Mowery, Jr.
H. Scott Johnson, Executive Director
Robert E. Nyce, Executive Director, IRRC
Michael J. Stephens, IRRC
John H. Jewett, IRRC