



# **FIXING PA'S CHILD ABUSE COURTS**

**How to better protect children, ensure fairness**



**A "State of the Child" Special Report by  
PA Auditor General Eugene A. DePasquale**

# DEAR FELLOW PENNSYLVANIANS,

Protecting children from abuse and neglect is one of our society's most pressing needs as well as one of our government's most critical functions. In Pennsylvania, that vital mission is carried out by county children and youth services (CYS) caseworkers, who work on the front lines to help thousands of children each year.

This special report is another follow-up to my 2016 audit of ChildLine, the state's child-abuse hotline, and it focuses on the administrative process for appealing child-abuse determinations.

Only a fraction of child-abuse cases result in criminal charges. In fact, most people who are deemed child abusers and are listed on Pennsylvania's statewide database of protective services<sup>1</sup> — also known as the ChildLine and Abuse Registry — never have their cases heard in a criminal court.

Being permanently listed in the child abuse database has immediate and lifelong consequences: Any time people apply for a caregiving job or volunteer role that involves children, their names will be flagged during a background check. This means the administrative methods of appeal for someone deemed an abuser are critically important to ensure that those who have hurt children remain on the list and that those who are innocent are removed from it.

Statistics show about one-third of those identified as abusers each year — about 1,900 people — appeal their cases to either the Department of Human Services' (DHS) administrative review panel or to the Bureau of Hearings and Appeals (BHA), which is an administrative agency tribunal that hears and adjudicates child-abuse appeals, among many other types of cases.

BHA and the administrative review panel, which currently have modified operations because of the COVID-19 crisis, have nearly opposite records: The review panel upholds what CYS caseworkers have found 99.6 percent of the time, while BHA overturned caseworkers' abuse determinations 91 percent of the time in 2019 alone.

BHA may be an obscure entity within state government, but it wields an immense amount of power over people's lives.



Particularly for cases dealing with child abuse, there is potential for a child of any age to be retraumatized if they are forced to testify in front of their abuser — and, worse, forced to answer questions directly from their abuser during cross-examination. Yet what I heard is that this scenario happens at BHA

hearings regularly, placing children in harm's way instead of protecting them from further trauma.

Over the last year, my team and I have spoken with nearly two dozen people — including DHS senior staff, child abuse experts, child advocates, families who have been through the CYS system, CYS solicitors, defense attorneys and more — about how this system works and how it could be improved. The input we received shaped this report, which offers seven recommendations for ways DHS and the General Assembly could improve the process and, in the end, better protect Pennsylvania's children from abuse and neglect. When the safety of children is at stake, it is difficult to put a price tag on the process; however, improving the system should include equivalent savings for taxpayers.

Implementation of this report's recommendations is critical because children across the state are even more vulnerable under the aggravated circumstances brought about by the COVID-19 crisis.<sup>2</sup>

Thank you for the opportunity to serve you.

Sincerely,

A handwritten signature in black ink that reads "Eugene A. DePasquale". The signature is fluid and cursive, with the first name being the most prominent.

Eugene A. DePasquale

<sup>1</sup> See 23 Pa.C.S. § 6331

<sup>2</sup> Various articles point to children in Pennsylvania experiencing more abuse during the pandemic. See, among others: May 11, 2020, <https://www.ydr.com/story/news/2020/05/11/coronavirus-pa-hospitals-seeing-more-severe-child-abuse-injuries/3103045001/>; June 20, 2020, <https://www.buckscountycouriertimes.com/news/20200620/state-more-child-abuse-calls-coming-in-than-at-start-of-pandemic-but-still-being-underreported>; and July 17, 2020, <https://www.goerie.com/news/20200717/child-abuse-in-pandemic-as-hospitals-see-more-severe-injuries-the-worst-is-yet-to-come>.

# WHAT IS THE BUREAU OF HEARINGS AND APPEALS?

The Bureau of Hearings and Appeals (BHA) is an administrative agency tribunal whose jurisdiction comprises more than 280 issues within the Department of Human Services (DHS) and, through an interagency agreement, the Department of Aging. The adjudicatory decisions it makes have a real and lasting impact on individuals and families across Pennsylvania.

The Formal Pre-Hearing Unit processes hearings pertaining to roughly 100 issues.<sup>3</sup> Those hearings decide issues such as denials of adoption subsidy, appeals of an audit determination, child day care facility licensure denials or revocations, reports of elder abuse and more.

Among those roughly 100 issues is child-abuse reports. In 2019, BHA received 2,053 formal appeals; of that number, 1,308 — or 63.8 percent — were child-abuse-expunction appeals, according to DHS.

Through BHA, people who have been found by a county children and youth agency (CCYA) to have committed child abuse can appeal their placement on the ChildLine and Abuse Registry and to have the information surrounding the investigation expunged.

Of BHA's 71 administrative law judges (ALJs) in four regional and three field offices, not all are required to be licensed attorneys. However, the 10 ALJs qualified to hear child-abuse appeals are attorney examiners, who are required to be licensed attorneys.<sup>4</sup>

According to DHS senior staff, ALJs are taught how to handle all kinds of witnesses, including “how to handle the questioning of a child as well as how to address preliminary motions that may affect a child’s comfort level in a courtroom setting.”<sup>5</sup>

<sup>3</sup> The Formal Pre-Hearing Unit is subject to the General Rules of Administrative Practice and Procedure under 1 Pa. Code Chapters 31, 33, and 35. See <http://www.pacodeandbulletin.gov/Display/pacode?file=/secure/pacode/data/001/partIItoc.html&d=reduce>.

<sup>4</sup> Note that child-abuse appeals cases make up nearly 64 percent of BHA’s caseload, yet only 14 percent of its staff handles that caseload. That numerical breakdown means that each attorney examiner qualified to hear child-abuse appeals handles an average of 130 cases each year.

<sup>5</sup> Email response from DHS dated July 2019

# INVESTIGATING REPORTED ABUSE AND NEGLECT

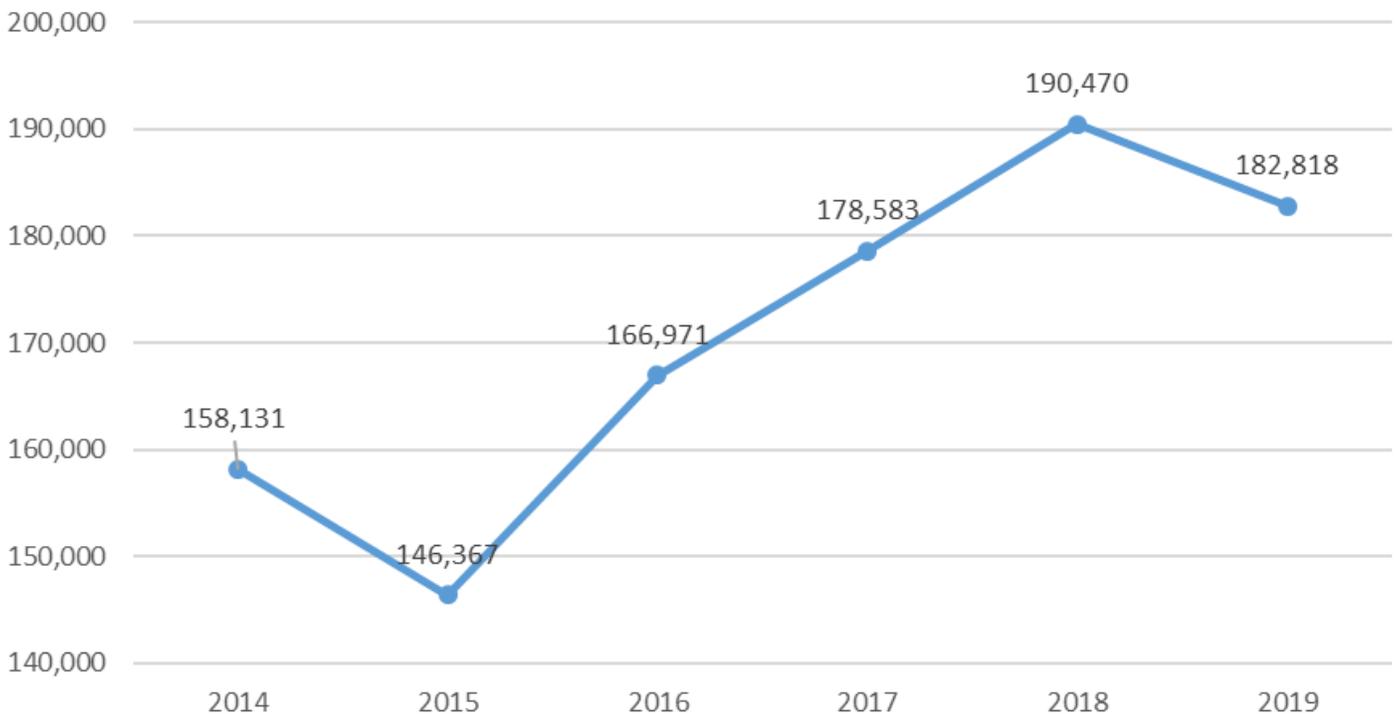
All reports of suspected child abuse or neglect must be routed through Pennsylvania’s ChildLine system, which, over the last six years, has handled an average of more than 170,000 reports per year.

Reports of suspected child abuse and neglect can come from anyone at any time. ChildLine workers field the referrals — most of which come via telephone, but some of which are reported through an online portal — and determine the level of severity of the allegations.<sup>6</sup> They then send the reports to the appropriate CCYA, which has up to 60 days to investigate and determine whether abuse or neglect occurred.

CYS caseworkers then either determine that a case is unfounded — meaning there is a lack of evidence that abuse or neglect occurred — or that it is substantiated in some way. (For definitions of potential investigation outcomes, see page 4.)

For a comprehensive explanation of what a CYA investigation entails, see the [Auditor General’s 2017 “State of the Child” report](#).<sup>7</sup>

Number of calls to ChildLine



Source: Pennsylvania Department of Human Services Annual Child Protective Services Reports

<sup>6</sup> Child Protective Services reports, which include an allegation that a child might have been a victim of child abuse, require a county children and youth agency to see children either immediately or within 24 hours to determine their safety. General Protective Services cases do not rise to the level of suspected child abuse but allege a need for intervention to prevent serious harm to a child.

<sup>7</sup> [https://www.paauditor.gov/Media/Default/Reports/RPT\\_CYS\\_091417\\_FINAL.pdf](https://www.paauditor.gov/Media/Default/Reports/RPT_CYS_091417_FINAL.pdf)

# INVESTIGATING (cont.)

If a CYS agency determines there is substantial evidence<sup>8</sup> that someone committed child abuse or neglect, that person is immediately listed on DHS ChildLine and Abuse Registry, a statewide database used during background checks. Before determining that the report should be 'indicated,' both the director of the CYS agency and the agency solicitor must review and sign off on the outcome.

It's important to note that "indicated" reports are those that have been investigated by the CCYA and found to have substantial evidence of having occurred, but they are not criminal convictions.<sup>9</sup> Unlike most founded reports of abuse, an indication of child abuse does not mean that police will file charges against the alleged abuser.<sup>10</sup>

However, both indicated and founded reports will result in the alleged abuser being listed on the statewide registry, which is used during background checks to clear employees and volunteers for any type of care-giving position, including those involving contact with children.<sup>11</sup> The person's name remains on the registry for life, and the only way for people to have their names removed from the registry is to appeal the substantiated report.<sup>12</sup>

All people involved in a report are notified about what

## DEFINITIONS OF POTENTIAL OUTCOMES

**UNFOUNDED:** There is a lack of evidence that the child was abused.

**INDICATED:** CCYA or regional staff find substantial evidence that abuse has occurred based on medical evidence, the child protective service investigation and/or an admission by the perpetrator.

**FOUNDED:** There is court action including a judicial adjudication that the child was abused, acceptance into an accelerated rehabilitative disposition program, consent decree entered in a juvenile proceeding or granting of a final protection-from-abuse order.

**SUBSTANTIATED:** Reports that have been indicated or founded.

*Source: Pennsylvania Department of Human Services  
Annual Child Protective Services Reports;  
see also 23 Pa.C.S. § 6303.*

an investigation has yielded, which means the person named as the perpetrator knows when a report has been substantiated. When they are notified of a report's substantiation, they are also notified about their right to file an appeal. Within 90 days of that notification, they can file an appeal of an indicated report of child abuse.

<sup>8</sup> Under the Child Protective Services Law (CPSL), "substantial evidence" is defined as "[evidence] which outweighs inconsistent evidence and which a reasonable person would accept as adequate to support a conclusion." See 23 Pa.C.S. § 6303. A founded report may be founded if it is based on the same facts and circumstances as in the initial abuse report and (1) there is a plea of guilty or nolo contendere, (2) a finding of guilt, (3) a finding of dependency where the court finds that the subject child has been abused, (4) a finding of delinquency where the court finds that the subject child was abused by the child adjudicated delinquent, (5) acceptance into an accelerated rehabilitative disposition program, (6) a consent decree in a juvenile proceeding, or (7) a final protection from abuse order that extends protection to the subject child.

<sup>9</sup> <https://www.ydr.com/story/news/watchdog/2019/08/05/child-abuse-pennsylvania-mother-childline-and-abuse-registry/1660299001/>

<sup>10</sup> DHS Annual Child Protective Services Reports

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

# METHODS OF APPEAL

## AN EXAMPLE CASE

On June 1, 2017, Bedford County Children and Youth Services (BCCYS) received a report involving the suspected abuse of a then-17-month-old child (B) by a parent (M) and her paramour (C).

BCCYS sent letters on June 2, 7 and 26, notifying M as well as B's biological father that it had received the abuse report and an investigation was underway.

On July 31, 2017, BCCYS filed an indicated report against M as a perpetrator of abuse against B. On Aug. 21, DHS sent M a letter informing her that she was listed on the registry as a perpetrator in an indicated report of child abuse.

M requested that DHS's secretary review BCCYS's report, and on Oct. 16, the secretary's designee stated that the report was accurate.

On Jan. 12, 2018, M appealed to the BHA. M's hearing was held in May 2018 before an administrative law judge.

The ALJ issued an adjudication and recommendation in June 2018 that BHA grant M's appeal because BCCYS failed to prove that M committed child abuse.

BCCYS then appealed to the Commonwealth Court of Pennsylvania, arguing that it did meet its burden of proof to show that M committed child abuse.

The court agreed that BCCYS met its burden and that M's indicated report was accurate, reversing BHA's order and keeping M on the abuse registry.

There are several ways a case can reach BHA. In 2019, 4,865 reports of child abuse were substantiated, and 1,955 appeals were made, showing that about a third of people who have been indicated for abuse appeal the reports.<sup>13</sup>

Under the Child Protective Services Law (CPSL), someone wishing to appeal an indicated report can request:

- an administrative review,
- a hearing before BHA, and/or
- a review by the DHS Secretary.<sup>14</sup>

Administrative reviews are conducted by the Department of Human Services' Office of Children, Youth and Families (OCYF) administrative review panel. If the appellant is successful, their name and identifying information are removed from the ChildLine and Abuse Registry database.

If either party disagrees with the administrative review panel's decision, then they can also request a BHA hearing.

It is well documented that OCYF administrative review panels virtually always uphold the decisions of investigating CCYAs; in fact, since 2013, the administrative review panel has an average uphold rate of 99.6 percent.<sup>15</sup>

<sup>13</sup> <https://www.rural.palegislature.us/documents/reports/Child-Sexual-Abuse-and-Exploitation-2020.pdf>

<sup>14</sup> An appeal to the DHS Secretary must be based on "good cause shown," which can include newly discovered evidence that an indicated report is inaccurate or is not being maintained consistent with the CPSL; or a determination that the perpetrator no longer presents a risk of child abuse and there is no public purpose for maintaining the individual's name on the statewide database. See 23 Pa. C.S. § 6341(a)(1).

<sup>15</sup> See Appendix A. *Note:* The parties involved in this process are the alleged perpetrator and the investigating CCYA that indicated the abuse. What is under consideration by the administrative review panel, BHA and the DHS Secretary is whether the investigating CCYA had substantial evidence to determine that child abuse or neglect occurred by ascertaining whether the existence of evidence in the narrative of the investigating CCYA's decision is sufficient to support the child abuse report .

# METHODS (cont.)

## BHA HEARINGS

After an appeal is filed, BHA has 10 days to schedule a hearing, making a reasonable effort to coordinate the hearing date with the alleged perpetrator and the investigating CCYA.

Proceedings before BHA start within 90 days of the date that the scheduling order is made. Whenever possible, proceedings and hearings are scheduled to be heard on consecutive days, but if that is not possible, they need to take place over no more than 30 days from start to finish.

At a BHA hearing, both the alleged perpetrator and the investigating CCYA present testimony and evidence.

Neither the investigating CCYA nor the alleged perpetrator must be represented by counsel for BHA hearings. The CCYA typically has its counsel involved; however, the alleged perpetrator may engage an attorney or may represent themselves.

Once the hearing is complete, the ALJ must render a decision and notify the following parties within 45 days:<sup>17</sup>

- The statewide abuse registry,
- The investigating CCYA,
- Appropriate law enforcement, and
- All people who are subjects of the report.

Of 1,544 BHA cases that concluded between 2013 and 2019, an average of 78 percent resulted in ALJs overturning the indicated reports of abuse.<sup>18</sup> Some years — such as 2019 — 90 percent of the indications of abuse that BHA heard were overturned.<sup>19</sup>

## DHA RECONSIDERATION PROCESS AND THE COMMONWEALTH COURT

If either party disagrees with the BHA's ruling, they may appeal to the Secretary of DHS for reconsideration and/or to the Commonwealth Court.

### **About reconsideration**

DHS' Secretary can reconsider a BHA determination. The Secretary can also direct BHA to make further findings, if necessary.

### **About appellate review**

Commonwealth Court is an appellate court that hears and reviews cases that have already been heard by a lower-level tribunal or court; it is not a trial court. Because of that, "the weight and credibility of the evidence [are] solely within the discretion of the BHA as factfinder."<sup>20</sup>

Commonwealth Court considers whether BHA made correct legal determinations. Because Commonwealth Court does not re-find facts, the circumstances of an investigation and whether it successfully proved substantial evidence of child abuse will not be explored again after a BHA hearing.

It should be noted, however, that the Commonwealth Court can direct BHA to make further findings on credibility if the BHA credibility analysis is not supported by the hearing record.

<sup>17</sup> Even if a request for an extension is filed, the decision must be entered within 60 days after the hearing's conclusion.

<sup>18</sup> See Appendix A.

<sup>19</sup> Ibid. DHS provided preliminary data that showed BHA overturn rates were closer to 50 percent during 2020, but final data will not be made publicly available until April 2021.

<sup>20</sup> *J.M. in Re: I.M. v. Dep't of Public Welfare*, 52 A.3d 552 (Pa. Cmwlth. 2012). Although BHA is an administrative tribunal similar but not equal to a court of law, it, along with the various county Courts of Common Pleas, are the only triers of facts in CYS matters (i.e., have the ability to make findings of fact in each CYS case). This means that if a case is appealed to a higher appellate court, such as the Commonwealth Court, the facts determined to be admissible at the BHA or county Courts of Common Pleas level are not redetermined by the higher court. Further, the Court of Common Pleas can also hear CYS matters and make findings of abuse in dependency proceedings. In these circumstances, the status of the child abuse report would be changed to founded and BHA would not hear the case on the merits of the underlying abuse report.

# METHODS (cont.)

CCYA solicitors said they are, generally, hesitant to pursue cases to Commonwealth Court because its judges usually support BHA rulings, and those rulings can establish legal precedent.<sup>21</sup>

In 2012, Commonwealth Court determined in the case of *G.V. v. Dep't of Public Welfare* that, although the evidentiary standard for a child abuse investigation was “substantial evidence,” a “clear and convincing” standard was required to justify why someone should be listed in the statewide registry as a child abuser.<sup>22</sup>

In 2014, that case was appealed to the Pennsylvania Supreme Court, which decided that the evidentiary standard of “substantial evidence” had to apply to any legal defense of someone being listed in the statewide registry as a child abuser:

“By permitting a lower burden of proof, substantial evidence, for creating and entering an indicated report summary in the ChildLine Registry, and then imposing a higher burden of proof, clear and convincing evidence, to maintain such a report in the Registry, the Commonwealth Court created an outcome where the ChildLine Registry will inevitably contain reports based on different evidentiary standards.

“Because not all individuals named in the Registry will challenge their indicated status within the forty-five day statutory period, many reports of abuse will remain in the Registry after being established by substantial evidence, while those that are challenged will remain only if they are established by clear and convincing evidence.

“As we presume the General Assembly does not intend a result that is absurd or unreasonable, we respectfully reject the Commonwealth Court's construction of the CPSL as contrary to the General Assembly's intent on the basis of our statutory construction analysis.”<sup>23</sup>

Despite that ruling six years ago, several CCYA solicitors interviewed for this report said they believe BHA is still using the “clear and convincing” evidence standard to decide whether CCYAs successfully prove instances of child abuse, which would make it virtually impossible for them to successfully argue for BHA to uphold a CCYA’s indication of abuse.

DHS disputes this claim, indicating that BHA does use substantial evidence as the evidentiary standard for all cases it hears.

<sup>21</sup> Interview with Brian Bornman, executive director of Pennsylvania Children & Youth Administrators, an arm of the County Commissioners Association of Pennsylvania

<sup>22</sup> *G.V. v. Dep't of Public Welfare*, 52 A.3d 434 (Pa. Cmwlth. 2012).

<sup>23</sup> See 91 A.3d 667 (Pa. 2014). See also <https://caselaw.findlaw.com/pa-supreme-court/1664940.html>

# WHAT WE HEARD:

## BHA'S ADMINISTRATIVE LAW JUDGES ARE NOT BEING PROPERLY TRAINED TO HANDLE CHILD WITNESSES AND ARE NOT FOLLOWING LONGSTANDING, NATIONAL BEST PRACTICES TO PREVENT RETRAUMATIZATION OF ABUSED CHILDREN.

Both BHA staff and CCYA solicitors answered questions for this report, and they painted vastly different pictures of how children are treated during child-abuse-expungement appeal hearings.

The CCYA solicitors said that BHA's administrative law judges (ALJs) do not do enough to help prevent abused children from being retraumatized during hearings. Children, these solicitors said, are reduced to being treated as pieces of evidence as to whether CCYA caseworkers properly performed their job.

ALJs can allow accommodations to help children feel safer — such as testifying via videoconference in another room, away from their alleged abuser — but do so too infrequently, solicitors said.

However, BHA staff said, it is the solicitors' job to request accommodations for every child in every case, if they feel it is necessary, because there are no guaranteed protections for children participating in child-abuse-expungement hearings.

One area solicitors specifically highlighted was whether ALJs admit forensic interviews with children into evidence. These interviews, which are conducted and recorded by specially trained forensic interviewers at child advocacy centers (CACs), are designed to minimize the potential for retraumatization by reducing the number of times a child alleging abuse has to recount their experiences.<sup>24</sup> Per the [Auditor General's "State of the Child Action Plan,"](#) CACs play a vital role in assisting

CCYA caseworkers with abuse investigations.<sup>25</sup>

However, just because a forensic interview was conducted with a child does not mean an ALJ will admit it as evidence for the hearing.

Even if an ALJ allows a forensic interview to be admitted, the child — regardless of age — often must also testify during the hearing about the abuse they suffered. BHA staff said that a forensic interview without the child's testimony could be considered uncorroborated hearsay and therefore not be admissible.

BHA staff said for this report that regional BHA offices have the capability to keep children separate from their alleged abusers at all times and allow them to testify from another room via videoconference, among other accommodations to protect the child's mental health.

Solicitors disputed that claim, saying not all regional BHA offices have those accommodations available, including the technological capabilities for testimony via videoconference. Despite legal statutes allowing for adults to testify on behalf of a child if the child would suffer "emotional distress,"<sup>26</sup> ALJs are generally resistant to allowing children to testify remotely, solicitors said, and most children are forced to sit in a small room with no physical or emotional support and, in front of their alleged abusers, recount the abuse they've already detailed having suffered. (*See "What Pennsylvania law says," page 9.*)

<sup>24</sup> <https://www.rural.palegislature.us/documents/reports/Child-Sexual-Abuse-and-Exploitation-2020.pdf>

<sup>25</sup> For more information, see [https://www.paauditor.gov/Media/Default/Reports/RPT\\_StateofChild\\_Action\\_Plan\\_051618\\_FINAL.pdf](https://www.paauditor.gov/Media/Default/Reports/RPT_StateofChild_Action_Plan_051618_FINAL.pdf), page 28.

<sup>26</sup> See 42 Pa.C.S. § 5981 *et seq.* (related to subchapter on Children Victims and Witness). Specifically, 42 Pa.C.S. § 5986(b).

# WHAT WE HEARD (cont.)

If a child does not testify, solicitors said, the alleged abuser is virtually guaranteed to win the appeal.

In denying children the ability to either testify via videoconference or have a trained professional adult such as a forensic interviewer testify on their behalf, ALJs are also not following longstanding best practices suggested by national legal and medical agencies.

For example, the American Bar Association (ABA) recommends that children should not have to sit in a room and, in front of their abuser, recount the abuse they endured.<sup>27</sup> In fact, the ABA has recommended for 35 years — since July 1985 — that law enforcement, social services and prosecutors work together to ensure a victim is interviewed as few times as possible, preferably only once, to prevent retraumatization.<sup>28</sup>

The American Academy of Pediatrics (AAP) recommends that courts “do whatever is necessary, within the framework of existing state laws and resources, to prevent psychological harm to the child victim/witness as a result of participating in the judicial process.”<sup>29</sup>

According to BHA staff, ALJs can allow accommodations for children only when solicitors advocate for them.

Making matters worse in Pennsylvania is the fact that, if an alleged abuser cannot afford or chooses not to have legal representation, they can serve as their own counsel at child-abuse-expungement hearings — which means they have the opportunity to directly cross-examine the child they were determined to have abused. (See “Jane’s son,” page 10.)

Further, solicitors interviewed for this report also said

## WHAT PENNSYLVANIA LAW SAYS

Under Section 5986 (related to Hearsay) of the Judicial Code, children are required to testify in dependency hearings unless the judge determines the child is “unavailable as a witness.” See 42 Pa.S.C. § 5986 (a)(2)(ii).

To determine if a child is unavailable as a witness, “the court must determine, based on evidence presented to it, that testimony by the child as a witness will **result in the child suffering serious emotional distress that would substantially impair the child’s ability to reasonably communicate.**” (Emphasis added.) See 42 Pa.S.C. § 5986 (b).

This standard is unreasonably high, and Pennsylvania law should be amended to provide every child with accommodations so they are not retraumatized by testifying in any court or tribunal hearing.

ALJs pose age-inappropriate competency questions to children, then find them to be not credible witnesses based on their answers to those questions. The solicitors said they believe practices such as these speak to a lack of training for ALJs on child development and how to appropriately question child witnesses.

BHA staff said that every child-abuse-expungement hearing is different and that decisions on accommodations to protect children must be made on a case-by-case basis. As with all facets of a child-abuse-expungement hearing, final decisions rest with the ALJ hearing the case.

<sup>27</sup> [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/attorneys/child\\_witnesses\\_inabusecases/](https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/child_witnesses_inabusecases/)

<sup>28</sup> Ibid.

<sup>29</sup> <https://pediatrics.aappublications.org/content/139/3/e20164008>.

## CASE IN POINT: JANE'S SON

Jane's 6-year-old son was forced to participate in a BHA hearing after his alleged abuser appealed a CYS indication of abuse.

Jane said she talked to an attorney with the Department of Human Services and learned her son could not have an advocate in the room with him. The solicitor representing the CCYA told Jane that it would be up to the judge whether her child could have any support in the room during the hearing.

Jane was not allowed in the room during the hearing. Present with her child during the hearing, she was told, would be the original CYS caseworker assigned to him, the judge, the solicitor, his alleged abuser and his alleged abuser's attorney.

A month later, she learned the BHA hearing had been delayed. She used the time to attempt to get accommodations for her son to avoid his being retraumatized. She asked if he could have an advocate in the room with him, a therapy dog, or if he could testify from another room via videoconference.

The solicitor advised that the alleged abuser's attorney had to agree in order for her child to have any of those accommodations.

A month later, as Jane negotiated for those accommodations for her son, her child's alleged abuser fired his attorney.

The alleged abuser chose to represent himself — which meant he would be allowed to cross-examine Jane's child directly.

"He'll be in front of [his abuser] with no other person as a support for him," Jane said during one of her interviews for this report. "To take away a child's support system of family or friends or an advocate or counselor is horrific ... I think it's very horrible how this works out for children. ... As a mother, I'm completely heartbroken."

At the hearing, her son had to testify in the same room as his alleged abuser, who questioned the boy for about an hour. BHA hearings are closed and records are inaccessible by the public; DHS did not furnish Jane with any information on what took place during the hearing. Jane later found out that, with her child's report of sexual trauma in question, the ALJ allowed his alleged abuser to show him mementos from times they had shared and reached people to testify over the telephone during the hearing.

Jane was also told that, during the cross-examination, her son put his head down, hid behind the table where he was seated, and whispered his responses to questions. He was retraumatized, Jane said.

Jane was told the case had been extended, but not what that meant, and while she was told her son would not have to testify again, she had to wait four months for a ruling. Just before the end of 2019, Jane learned that her son's alleged abuser won his appeal with BHA and that her son would be vulnerable to his alleged abuser again.

The boy's therapist then began, Jane said, to teach the 6-year-old to assert boundaries to try and stay safe.

# RECOMMENDATIONS

1. THE DEPARTMENT OF HUMAN SERVICES must better train its administrative law judges on child development and how to appropriately question abused/traumatized children as witnesses. Child-abuse-expungement appeal hearings need to be focused on not retraumatizing children who have potentially already suffered mental, emotional, physical or sexual abuse. This includes allowing testimony via videoconference and other measures as often as possible and as allowed under Pennsylvania law and suggested by national legal and pediatric experts to protect children's mental health.
2. THE GENERAL ASSEMBLY — particularly the Pennsylvania Senate and House of Representatives Children and Youth Committees — should consider legislation to protect the rights of all children being questioned about abuse in all hearings before the courts, as well as during administrative agency hearings before the BHA. See Senate Bill 980, P.N. 1439, which proposes to assign children testifying at the BHA with designated child advocates and would provide for alternative recording of a child's testimony if testifying in front of the defendant or in an open hearing will cause emotional distress.
3. THE GENERAL ASSEMBLY — particularly the Pennsylvania Senate and House of Representatives Children and Youth Committees — should consider closely reviewing (possibly through a panel of child advocates and child experts) the current statutory standard for determining if a child is unavailable as a witness to assess whether the standard is appropriate for ensuring that children are not placed under emotional distress and possibly retraumatized in an open hearing/court.
4. THE DEPARTMENT OF HUMAN SERVICES and THE GENERAL ASSEMBLY should consider working with the nonprofit Pennsylvania Court Appointed Special Advocates (CASA) Association to develop a program for volunteers to support children required to provide testimony before BHA.
5. THE DEPARTMENT OF HUMAN SERVICES and THE GENERAL ASSEMBLY should work closely with the newly appointed Child Advocate Nicole Yancy and the new Council on Reform for the protection of vulnerable populations to ensure they have the opportunity to provide input on the proposed CASA legislation.<sup>29</sup>
6. THE DEPARTMENT OF HUMAN SERVICES should explore ways of creating a new administrative agency tribunal called the Bureau of Review for Vulnerable Populations separate and apart from BHA. This Bureau would directly focus on protecting Pennsylvania's most vulnerable populations, including children and elders and related abuse reports, rather than having these reports be among approximately 100 issues currently handled by BHA, which is unwieldy and ineffective.
7. THE DEPARTMENT OF HUMAN SERVICES should retool its processes to meet the demands of the current COVID-19 crisis to ensure the safety and welfare of children across the commonwealth.

<sup>29</sup> Governor Tom Wolf announced on Feb. 11, 2020, that Nicole Yancy has joined the newly created Office of Advocacy and Reform as Child Advocate, a position recommended by the governor-appointed Council on Reform as part of his executive order to protect Pennsylvania's vulnerable populations. See <https://www.governor.pa.gov/newsroom/gov-wolf-child-advocate-joins-office-of-advocacy-and-reform-2/>.

# APPENDIX A

## CASES CONCLUDED BY ADMINISTRATIVE REVIEW PANELS AND BHA (NOT LEFT PENDING, DISMISSED OR WITHDRAWN)

Source: DHS Annual Child Protective Services reports

### 2019

|                     | Upheld | Overtured | Rate           |
|---------------------|--------|-----------|----------------|
| Admin. review panel | 890    | 0         | Upheld: 100%   |
| BHA                 | 16     | 168       | Overtured: 91% |

### 2018

|                     | Upheld | Overtured | Rate           |
|---------------------|--------|-----------|----------------|
| Admin. review panel | 982    | 0         | Upheld: 100%   |
| BHA                 | 31     | 205       | Overtured: 87% |

### 2017

|                     | Upheld | Overtured | Rate           |
|---------------------|--------|-----------|----------------|
| Admin. review panel | 898    | 2         | Upheld: 99.7%  |
| BHA                 | 174    | 205       | Overtured: 54% |

### 2016

|                     | Upheld | Overtured | Rate           |
|---------------------|--------|-----------|----------------|
| Admin. review panel | 997    | 5         | Upheld: 99.5%  |
| BHA                 | 43     | 242       | Overtured: 85% |

### 2015

|                     | Upheld | Overtured | Rate           |
|---------------------|--------|-----------|----------------|
| Admin. review panel | 755    | 1         | Upheld: 99.8%  |
| BHA                 | 26     | 181       | Overtured: 87% |

### 2014

|                     | Upheld | Overtured | Rate           |
|---------------------|--------|-----------|----------------|
| Admin. review panel | 929    | 5         | Upheld: 99.5%  |
| BHA                 | 80     | 90        | Overtured: 53% |

### 2013

|                     | Upheld | Overtured | Rate           |
|---------------------|--------|-----------|----------------|
| Admin. review panel | 1078   | 13        | Upheld: 98.8%  |
| BHA                 | 9      | 74        | Overtured: 89% |

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**CCYA solicitors** who spoke on condition of anonymity

**James Gallagher**, former solicitor

**Judge Charles Brace**, Regional Manager, Administrative Region for the Bureau of Hearings and Appeals

**Janet Ginzberg and Kathleen Creamer**, Community Legal Services

Families who have appeared before BHA, including Jane and her son, for sharing their experiences



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