



January 22, 2022

Dear House Children and Youth Committee,

My name is Brian Bornman. I am the Executive Director for the PA Children and Youth Administrators Association, an affiliate of the County Commissioners Association. Our association consists of all 67 county child welfare agencies and a number of associate members, primarily provider agencies. I have worked in the field of social work since 1988 in various roles, including those of child therapist, a child welfare caseworker, and legal counsel representing both parents and a county child welfare agency. I thank you for the opportunity to present to this body and appreciate the efforts being made here to address the critical issues impacting children and families in the Commonwealth.

Child welfare in Pennsylvania is very much a symbiotic relationship between the county child welfare agencies and the private providers of child welfare services without which the entire system would collapse. As such, it is critical to ensure the health of the providers the counties contract with, much as it is critical to ensure the health of the county child welfare agencies. To that end, our association meets regularly and works closely with PCCYFS (the provider association) to try and address ongoing challenges in the field.

The issue of liability coverage for providers has been an ongoing issue for several years. The costs of such coverage have increased exponentially and the level of coverage has decreased. This has caused challenges for some providers to be able to continue to operate and those costs result in higher per diem rates for services to compensate for the increased costs.

There have been multiple possibilities set forth to explain the dramatic increases in coverage rates and the solutions proposed are based on such explanations. Ultimately, it is likely a combination of factors that result in the increased rates and finding a single solution will be almost impossible. Additionally, every proposed solution will have someone to oppose it on various grounds.

The insurance industry is, by its very nature, risk adverse and does not like uncertainty. Pennsylvania, with the recent attention on the sexual abuse by organizations and proposed legislation to open a window to bring law suits whose statutes of limitation have already run, is the very definition of uncertainty at this time. This is not to say that PCYA opposes those proposed bills or the right of survivors to seek recompense for their suffering, but it is nonetheless a fact that such a possibility creates an unknown regarding what level damages may need to be paid by insurance companies covering such entities. This is certainly one of the factors for increasing rates in provider coverage.

Other suggested explanations for the increased rates have been counties requesting higher than necessary coverage levels in contracts, large jury verdicts in civil suits, and unilateral indemnification provisions that seek to shift risk from the county to the provider, regardless of who is at fault. While all

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of these may factor in to varying degrees, it is unlikely that even all of them combined would equal the uncertainty of numerous possible suits that were otherwise precluded, but are now potentially viable, would bring about.

The bills today are considering the invalidation of indemnification provisions that attempt to make providers liable for all damages deriving from the contract, regardless of which party may be negligent, and a cap on damages for civil suits. It's important to note that Philadelphia County does not have such unilateral indemnification provisions in their child welfare contracts, contrary to some remarks made to our association when considering possible solutions. This is important because Philadelphia County frequently accounts for about a third of the state child welfare budget and children being served. Additionally, most other counties indicated that they did not have such unilateral indemnification provisions either. As such, it is uncertain to what extent invalidating such unilateral indemnification provisions would have the intended effect.

Just to make it clear, PCYA does not have a position either for or against either bill being considered (HB 2213 and HB 2214). However, there are some things we believe the committee should consider when looking at this issue. First, if HB 2214 becomes law, it should not become effective until the next budget cycle for child welfare. Current contracts frequently run from July 1 through June 30th of the following year, as that is the fiscal cycle for child welfare. Since this bill would effectively invalidate provisions of contracts that have been agreed to by both parties, and that will have fiscal impacts for the parties, it should not be implemented mid-contract. Allowing it to go into effect along with the budget cycle will allow the impacted parties to be able to make such adjustments to the contracts as are needed and fair.

Additionally, as a general policy, PCYA always has concerns regarding the legislature invalidating provisions that have been agreed to in contracts, although there are a multitude of rules and regulations that the county agencies must abide by in the contracting process. The use of federal, state, and local tax dollars always creates a rigid framework for the use of such funds and the counties are well acquainted with contract compliance requirements.

Consideration should be given to make the language in HB 2214 mutual. As it is written, it is only invalid if the county tries to shift liability to the provider, but not vice versa. For instance, if a provider agrees to take a child into placement, but only if the county indemnifies them against anything arising from the contract, it would seem as if that provision would not be prevented by this bill. It is suggested that, should this bill be passed, the language should be mutual. Additionally, there should be consideration to how this may impact comparative negligence judgements. It does not appear that it is the intent of the legislature to invalidate indemnification provisions if there is any level of negligence on the part of the county, but to make it mutually fair. It is unclear how this language as currently written would impact this and it could well be argued that a provider would not be liable for any indemnification to the county if the county were to be found even 1% negligent, due to the included "or in part" language. This could be true even if the provider were to be found to be the other 99% of the negligence.

Lastly, there should be consideration regarding how the inclusion of the "municipal government entity" language would impact other contracts. While this is specifically meant to address service contracts for child welfare, the inclusion of the above language could muddy the waters in other contracts, such as property rental agreements. While I do not profess any expertise in tort law or contracting, as I have

always practiced in the area of law of child welfare, I think that those issues should be considered to ensure that appropriately precise language is used to ensure that the intent of legislature is enacted and not the creation of a different set of problems.

In conclusion, PCYA does not have a position of either support or opposition to the proposed bills. We do want to see the provider liability issue resolved in some way, but believe it is unclear if this will do so. We would hope that this committee would consider the potential issues brought up above when considering this legislation.

Thank you for taking the time to consider this important issue that is impacting the field.

Sincerely,

Brian Bornman

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