

Fairness, Accountability, and
Service Continuity for Children's
Services Provider Agencies

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About PCCYFS

The Pennsylvania Council for Children, Youth and Family Services (PCCYFS) is the collective voice for private agencies that serve Pennsylvania's most vulnerable children and their families. PCCYFS represents nearly 100 private agencies employing more than 10,000 professionals statewide. Services include foster care/kinship care, adoption, residential treatment, behavioral health services, education, counseling, independent living/transitional living services and others.

Summary

Provider agencies are facing limited liability insurance coverage options and high premium prices, driven in part by contracts that require providers to defend and indemnify government agencies against all errors and accidents. After evaluating and researching various solutions, PCCYFS supports legislation to make unenforceable any contract that shifts liability onto the provider agency for the negligence or intentional conduct of the public agency via indemnification. This simple legislative fix would curtail government risk shifting to

provider agencies, and while not a cure-all, is one contributing factor to the unfairly high cost of provider insurance, thereby allowing each party to retain ownership over their own liability. It would also have the further benefit of reinforcing the accountability of individual government actors for negligent or inappropriate conduct, reducing harm to children and the corresponding liability. Each party would be required to take responsibility for their own errors, a key tenant of good risk management and a fair system for all parties, including children and families.

Background

Pennsylvania relies on private children's services providers ("provider agencies") to provide critical state-mandated child welfare and juvenile services as well as children's behavioral health services. PCCYFS estimates that the provider community delivers about 80 percent of all direct services to children and youth in Pennsylvania. The size and operating budget of these provider agencies, many of whom are not-for-profit, mean they need every dollar to provide critical assistance across the state. Unfortunately, unforeseen increases in insurance costs and reduction in coverage availability has reduced and may ultimately eliminate safety net services for children, youth, and families.

Provider agencies deliver these services by working in partnership with government entities such as counties or municipalities, as established by a contractual agreement. Many of these contracts require the provider agency to defend and indemnify the public agency against errors and accidents, even those caused by the government agency. Provider agencies must also meet liability insurance requirements to sign these agreements. These terms of these contracts are not regularly open to meaningful negotiation to alter indemnification language or liability insurance requirements. A provider, regardless of size, composition, or budget, must insure

the county whenever a claim occurs and insurance companies are now starting to eliminate or curtail coverage.

These indemnification provisions make provider agencies unattractive clients to insurers. Insurers are particularly resistant to insuring risk exposures over which the provider agency has no control. In areas of child welfare, juvenile justice, or children's behavioral health, while the county contracts out some services, they continue to operate as an active authority and participant in each case. Public agencies simultaneously sustain authority

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to mandate provider operations, impacting provider efforts at risk mitigation. The practice of shifting liability to providers coupled with the provider's diminished role in decision making has a crippling effect on provider agencies' ability to find coverage. Providers may be forced to settle for inadequate

Background

coverage (limits, deductibles, exclusions), or may be forced to overpay to obtain limited coverage in the surplus lines market. Indeed, professional liability insurance for child welfare is almost only available exclusively in the alternative market.

On a policy level, these indemnification clauses also enable employees whose action or inaction caused the liability to evade responsibility. This lack of accountability condones or, even worse, encourages repeated injury of the child or other children being served, an outcome that neither providers, nor counties would like to see. Rather than perpetuate this cycle, PCCYFS encourages the use of a fair contracting model that evokes accountability and allows a victim of injury to collect from the responsible party.

At a time when Pennsylvania is preparing to transition to implementing Family First Prevention Services Act, legislation that emphasizes use of foster homes, supporting the safety net of child welfare providers is critical now more than ever. The provider community has seen closures directly due to untenable insurance costs with other agencies barely managing to stay open. Many agencies, in fact, have closed only their children and families services programs, while keeping other programs open because of the direct impact insurance has had on this area of programming in particular, and this trend will only continue.

Potential Remedies

County child welfare agencies and private providers must work together to protect and care for at-risk children in our Commonwealth. PCCYFS has explored the following possibilities when identifying an appropriate solution to address the insurance challenges that agencies are experiencing:

Accountability-Based Solution

Pennsylvania needs a legislative solution to reduce the risk of harm to children and the associated liability by creating a system where each party insures against their own mistakes. The goal is not legislation that specifies contract language or creates blame where it does not exist. Rather, PCCYFS recommends the use of legislation that would make any contract unenforceable that attempts to shift the liability onto the provider agency for the negligence or intentional conduct of the public agency via indemnification. Potential statutory language (patterned after language in other states) for the Fairness, Accountability, and Service Continuity for Children's Services Providers Act:

A Provider Agency, whether nonprofit or for profit, who contracts to provide children, youth, or family services for a Public Entity (whether a Commonwealth party or local agency, both as defined in 42 Pa C.S. § 8501) is liable for injury or damage caused by the negligence of the Provider Agency

but not for the injury or damage caused by the Public Entity. The Provider Agency and the Public Entity shall each bear the cost of insuring against their respective risks and shall each bear the costs of defending itself against claims arising from those risks.

Notwithstanding any other law, this subdivision shall not be waived or suspended by any court; any contract which purports to impose on a Provider Agency any liability for injury or damage caused by a Public Entity or official shall be void and unenforceable. This subdivision does not limit or affect the immunity provided by other laws or statutes that would otherwise be an available defense to either party.

This legislation is applicable to differing contract structures. We are hoping that this legislative language will be broadly appealing in its goal of each party only paying its fair share and allowing for negative feedback to hold the appropriate parties accountable

Accountability-Based Solution

in order to encourage future improvements. While this legislation would not alleviate all affordability challenges that providers currently face, it will ultimately help insurance providers stay in this market, thereby increasing the pool of insurance options and driving down costs for providers.

Legislative solution necessary

A similar problem occurred in Florida. Children's service providers in Florida were being dropped by insurers or having their premiums drastically raised, and risked settling for inadequate coverage for nearly out-of-reach costs, largely due to contracts that unfairly shifted liability to the provider agencies through one-sided indemnification contract language. A nonprofit major insurer of 501(c)(3)s, whose mission

is to help nonprofits, went so far as to reconsider whether it was economically feasible to continue offering coverage to Florida's provider agencies. Working with the state and provider agencies, they were able to persuade the state not to ask provider agencies to defend and pay for liability that was caused by a government employee. Without those changes, provider agencies were becoming uninsurable. Unfortunately, no laws or regulations were changed to align with the contractual changes. As a result, Florida provider agencies are starting to see reversions in contract language. *Ultimately, what is needed in Florida, as in Pennsylvania, is a legislative solution to prevent backsliding and permanently require entities to be accountable for their actions.*

Damage Caps

Damage caps legislation would limit the amount of damages a plaintiff can be awarded. This would help solve the problem of unreasonable, out-of-control damage awards which can have serious immediate impacts on children's services providers. We support damage caps as a good complementary long-term solution. However, damage caps, while helping to preserve continuity of services,

may be opposed for failing to hold government employees accountable for harms they cause, may be opposed by prosecuting attorneys, may unintentionally prevent some abused children from receiving compensation they need to recover, and fail to address the underlying unfairness of some current contracts. This indicates that we should also consider a complementary solution.

Captives

Captive insurance can be formed when parent companies cannot find suitable insurance options to insure them against business risks, similar to the predicament that Pennsylvania's providers currently face. A captive allows companies to pool their own capital to create an insurance option outside of the traditional marketplace to support their risk-mitigation efforts. After much exploration, however, our providers have found that a captive is not a feasible option for them for a number of reasons:

- A captive is ideal for larger accounts with clean loss histories because members vote on who is allowed in. A captive involves putting all high-risk providers in one group and eventually, in order to create sustainability, will become an exclusionary structure to help keep costs stable for those in the captive.
- Captives require a significant amount of fundraising to become justifiable – a requirement that is not readily accessible for agencies in this line of work. As mentioned earlier, many of these child-serving agencies are already operating with limited budgets.
- A captive created by Pennsylvania children's service providers would not be diverse geographically or in risk type. It would not have a track record or sufficiently large capital reserves and would therefore not be attractive to reinsurers.

Other Jurisdictions & Systems

Laws currently exist that prohibit unfair indemnification shifting. Almost every state has legislation that renders "void and unenforceable" any construction contracts "that purport to impose on the contractor, or relieve the public agency from, liability for the active negligence of the public agency" (e.g., California Civil Code §2782(b), Florida Statutes § 725.06). Additionally, the California Education Code includes a recent subdivision affirming that any school district authorizing the use of school facilities or grounds to a private organization cannot shift liability onto the private organization for "an injury resulting from the negligence of the school district in the ownership and maintenance of the school facilities or grounds" (California Education Code §38134(i)).

Pennsylvania law already prohibits indemnification in some aspects of design and construction. Contracts where architects, engineers, or surveyors attempt to be indemnified or held harmless for damages or claims arising out of their own preparation, approval, or giving or failing to give instructions "shall be void as against public policy and wholly unenforceable" (68 P.S. § 491). Are children's services and protecting children at least as important as construction and design projects? Numerous states, including California and Florida, are now pursuing legislation to make unenforceable any contract language that unfairly shifts liability from the state to those providing services to children.

Case Studies: State-Caused Liability Shifted to Children's Services Providers

These are just a few representative examples of real cases from Pennsylvania where negligence of a government employee caused great harm to a child and the government employee was not held accountable. The results include government employees who caused harm with impunity, more children harmed, provider agencies becoming uninsurable, and insurance companies abandoning the child-serving segment of the market.

Case Study #1:

A county signs a contract with a provider agency with language in their contract that requires county indemnification, even in cases where there is no negligence by the provider agency. The county then places a child with the provider agency. The child has a history of elopement but the county does not tell the provider agency and the child elopes from the provider agency. The child proceeds to injure a 3rd party months later. The county asks the provider agency to defend and indemnify them for the lawsuits brought by the injured third party where the proximate cause of the liability is negligence of the county.

Case Study #2:

A county signs a contract with language in their contract that requires county indemnification, even in cases where there is no negligence by the provider agency. The county then places a child with the provider agency. There is continuous evidence from family and the county's own visits and investigations, and from hospital records that the child is being severely abused by the parents. But the county

does nothing to remove the child and does not share this information with the provider agency. Months later due to parental neglect/abuse, the child dies. The county seeks to have the provider agency defend and indemnify the county for all liability based on the contract and not based on any provider negligence.

Case Study #3:

A county signs a contract with a provider agency with language in their contract that requires county indemnification, even in cases where there is no negligence by the provider agency. The county then places a child with the provider agency. The child has a known history of sexually abusing other children, and the county knows this, but does not inform the provider agency. The child is placed by the provider agency in a situation that provides an opportunity for sexual abuse by the child of other children. This abuse occurs and is discovered. The county asks the provider agency to defend and indemnify them for the lawsuits brought by the other children's families based on the contract and not based on any provider negligence.

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