

# Testimony of Christopher A. Reed

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Committee on Children and Youth  
Pennsylvania House of Representatives

Hearing:  
Government Contract with Private Children and Youth Social Service  
Agencies  
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Chair Delozier and Chair DeLissio, and Members of the Subcommittee:

Thank you for the opportunity to testify as part of the Committee's Hearing on this important topic in support of HB 2213 and HB 2214 which would reduce harm to children and would increase insurance availability for child serving provider agencies by making unenforceable contract terms that require the provider to defend and indemnify the state for the wrongdoing or negligence of the state. In my testimony today I will provide the perspective of the Alliance of Nonprofits for Insurance, RRG (ANI), detail the current problem, provide specific examples of the problem, make clear why that is driving insurance companies out of the market, and detail how this bill will help solve the problem.

## **A. ANI's Perspective and Mission of Service to Nonprofits**

ANI is well-positioned to understand this issue as ANI is faced with the problem each day.

ANI is a 501(c)(3) tax-exempt nonprofit insurance company governed by its 501(c)(3) federally tax-exempt nonprofits, including animal rescues and shelters, volunteer centers, group homes for children, teens and the disabled, art programs, library associations, foster family agencies, Meals on Wheels, United Way, Goodwill, Boys and Girls Clubs, veterans assistance programs, charter schools and others. It has grown from initial capital grants of \$10 million from the David and Lucile Packard Foundation and the Bill & Melinda Gates Foundation to an insurance company rated A IX (Excellent) by A.M. Best, insuring more than 11,000 nonprofits in 32 states and the District of Columbia. Member-insureds of ANI include 580 community-based nonprofit organizations in Pennsylvania such as ChildFirst Services, Inc. of Lehigh county, Christian Concern Management Corp. Berks county, Children's Home of York, Tabor's Children Services of Philadelphia county, Maternity Care Coalition of Philadelphia, and many more.

ANI owes its existence to the Liability Risk Retention Act (LRRRA) of 1986. In the mid-1980s, the insurance industry found itself in financial difficulty and dramatically reduced its capacity for providing insurance. Nonprofits were particularly hard hit by the capacity crisis as they faced huge rate increases, mass cancellations of coverage, and unavailability at any price of entire lines of insurance, as commercial insurers abandoned these markets. To end this crisis, Congress passed the 1986 Amendments to the LRRRA, which expanded the lines of liability insurance that RRGs could offer to their member-owners in order to preserve the ability of these nonprofits to serve their communities.

Over the past several years nonprofits are once again finding it difficult to obtain the insurance coverage they need from commercial carriers, and Pennsylvania is particularly hard hit. Community-based organizations in our neighborhoods that work with the most vulnerable among us, such as child serving organizations, homeless shelters, programs for those with Alzheimer's, victims of sexual abuse and the developmentally disabled. They are animal shelters, adoption agencies, foster family agencies, elder care services, food banks, and after-school art programs. Several prominent commercial insurance companies that long competed for nonprofit business have announced that they are shutting their nonprofit programs and/or drastically reducing their willingness to offer coverage—particularly to child-serving and animal rescue organizations. Considering the headlines around sexual abuse and sexual harassment, many child-serving nonprofits are finding it difficult to obtain adequate amounts of sexual abuse liability insurance coverage. This is putting additional pressure on nonprofits' own RRGs who are working to fill the gaps left by departing commercial insurance companies. Over the last 3 years ANI has faced enormous pressure to grow to provide insurance for these community-serving nonprofits that have been abandoned by the commercial insurance market. It has done so safely and efficiently while itself being a 501(c)(3) nonprofit. However, Pennsylvania nonprofits should not be required to rely on a single carrier for the coverage they need. Nor will ANI be able to continue growing in Pennsylvania until the subject of this hearing today is cured.

**B. Provider Agencies Indemnifying the State for Liability the Agencies did not cause is Uninsurable**

The current insurance crisis for nonprofit organizations has multiple causes and will require multiple complementary solutions, but this proposed legislation addresses one of the components of the insurance crisis in Pennsylvania.

During the last 3 years, most commercial insurers did not believe that they could profitably insure the complex risks of nonprofits like vans full of kids driven by volunteers or the risk of caring for kids who had been sexually abused. Every day these nonprofits care for foster children, for emotionally disturbed children in group homes and for fragile elderly in their homes or in communal living environments. They provide services to help the homeless, those with mental health issues and parolees try to find a better life.

Yet a significant cause of the current insurance crisis for many nonprofits is due to contracts that require provider agencies to indemnify the state even when the provider agencies are not the cause of the harm. Provider agencies have taken over services that were done by the state in the past and are mandated by law. However, whereas the state has sovereign immunity these provider agencies do not. The result is that the agencies remain liable for harm they cause and so must carry considerable liability insurance. Nevertheless, the issue today is not about nonprofits trying to shirk liability for their own errors or wrongdoing. It is about state agencies forcing nonprofits via contract to provide defense and indemnity for the errors and wrong-doing of government agencies.

Insurance companies considering underwriting a given provider agency gather information about the agency and determine the cost to provide coverage based on that information. This will include things like the number of children being served, the type of services being provided, qualifications of the employees of the agency, operational excellence of the agency, etc. All these are things the insurance company can learn about allows them to underwrite in an economically responsible way. However, if a contract requires that the agency indemnify the state in cases where the agency did not cause the harm, the risk becomes uninsurable. This causes more and more insurers to abandon the very child serving agencies that are taking on the state mandated work. ANI's sole purpose is to serve other nonprofit organizations by providing a stable source of reasonably priced liability insurance tailored to the specialized needs of the nonprofit sector and to assist these organizations to develop and implement successful loss control and risk management programs. Yet, even our organization is finding it more and more difficult to justify staying in the Pennsylvania insurance market, largely due to contracts requiring provider agencies to indemnify the state even in cases where the provider agency did not cause the harm. The proposed bill will help improve insurability of provider agencies.

### **C. Increased Harm to Children When the Cause of the Harm is not Held Responsible**

Ideally, when a person or organization causes an injury, they are held accountable. The very nature

of this negative feedback process is understood to reduce the risk of future harm by virtue of the linkage. People who are held responsible are less likely to repeat the behavior. Organizations that are held responsible are more likely to change procedures, educate employees, and in some cases terminate employees. When, on the other hand, a contract requires a provider agency to indemnify the state for harm caused by the state, there is no linkage and no negative feedback between the harm and the behavior that helped lead to the harm. The result is that behavior causing harm to children can continue by the individual or entity and there is no incentive for them to make changes to reduce future harm to children. The proposed bill will help reduce future harm to children

#### **D. Problematic Contract Language**

An example of this type of language from an actual agreement between a provider agency and a public entity in Pennsylvania appears below. The example clearly states that regardless of what level of fault the county has and regardless of it being active or passive negligence by the county, the nonprofit must defend and indemnify the county. So, the county could be 99% of the cause, be negligent and be the legal proximate cause, and yet the county would expect the nonprofit to accept and pay for defense, and then pay all money legally owed by either or both parties. The “arising out of” language further shifts the burden to the nonprofit because Pennsylvania state courts and Federal courts all treat this “arising out of” language as creating a duty to defend and indemnify even if there is no negligence by the indemnifying party.<sup>1</sup> So the nonprofit has to defend and indemnify when the government agency is 99% at fault and negligent, even when the other 1% is the fault of a third party. This in a relationship that is already tilted heavily in the favor of the government agency.

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<sup>1</sup> Arising Out of: How Strong Is the Connection? | Expert Commentary | IRMI.Com.” <https://www.irmi.com/articles/expert-commentary/arising-out-of-how-strong-is-the-connection> (May 10, 2021).

## **5. INDEMNIFICATION:**

A. The CONTRACTOR agrees to indemnify, protect, defend and hold harmless the COUNTY, its elected officials, officers, appointees and employees from and against any and all liability, damages, claims, lawsuits, liens and judgments of whatever nature, including but not limited to, claims for contribution and/or indemnification, for injuries to or the death of any person(s), and/or the loss of real, personal or intangible property of any kind or nature caused by, in conjunction with, or arising out of the Scope of Services provided, performed, carried out or undertaken by the CONTRACTOR pursuant to this AGREEMENT. The CONTRACTOR's obligation to indemnify, protect, defend and hold the COUNTY harmless, as set forth in this Article 5, shall include any and all attorney's fees incurred by the COUNTY, in the defense of and/or handling of any lawsuits, demands, liens, judgments, claims and the like and all attorney's fees and investigation expenses incurred by the COUNTY in enforcing and/or obtaining compliance with the provisions of this paragraph.

### **E. Examples of Nonprofits Paying for Liability Caused by the State**

These three are just a few representative examples of real cases from Pennsylvania where negligence of a county employee caused great harm to a child and the county was not held accountable. This lack of accountability is only possible because county contracts are forcing county-caused liability onto children's services providers ("provider agencies") through indemnification clauses. The results include county employees who cause the harm with impunity, more children harmed, provider agencies becoming uninsurable, and insurance companies abandoning the child-serving segment of the market.

1. A county signs a contract with a provider agency that shifts state caused liability to the provider agency, 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 3<sup>rd</sup> 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.
2. A county signs a contract with provider agency that shifts state caused liability to the provider agency, 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 the parent kills the child via neglect and abuse. The county seeks to have the provider agency defend and indemnify the county for all liability, simply based on the contract and not based on any negligence by the provider agency.
3. A county signs a contract with a provider agency that shifts state caused liability to the provider agency, 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, simply based on the contract and not based on any negligence by the provider agency.

Real harm is being done without accountability. The proposed bill will help ensure that those individuals and entities responsible for causing harm to children are held accountable.

**F. HB 2213 and HB 2214 will help solve the problem**

This proposed bill is about accountability and fairness. It makes clear that children's services provider agencies will be liable for harms caused by their own negligence, but not for harms caused by the contracting public governmental agency. It will make unenforceable any contract that shifts liability onto the provider agency for the negligence or intentional conduct of the public agency via indemnification. Since this bill would nullify any contract requiring that a provider agency indemnify the state in cases where the agency did not cause the harm, provider agencies will only be held liable for harms within their control. By agencies only being held liable for harms within their control, this bill will help improve insurability of provider agencies, thereby directly addressing a key factor in the current liability crisis. The improved insurability of provider agencies will help ensure continuity of vital safety net services for the children, youth, and families of Pennsylvania. Even more importantly, this bill holds each party accountable for harms they cause. By holding responsible individuals and entities who actually cause harm to children, the proposed bill will help reduce future harm to children.

**G. Similar legislation already in place in Pennsylvania and other states**

Many states have laws that limit exactly this type of liability shifting in the construction industry for exactly the same public policy reasons. Specifically, these laws tie the liability back to the cause. Further some states have already passed such laws to limit schools from shifting liability to nonprofits when the school is the cause. This is good public policy that will reduce harm.

**H. Legislative solution necessary**

We saw a similar problem occur 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. ANI, which is 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, we were able to persuade the state not to ask provider agencies to defend and pay for liability that was caused by a state 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.

## **G. Conclusion**

This is an important, prudent, and well-suited regulation for a specific segment of the market. This legislation would restore accountability to state actors when they cause harm because it would create a negative feedback loop, not present today, that will connect the accountability to the cause of the liability. This will reduce overall harm to those being served by nonprofits, which furthers the primary reason for the public policy behind state entities funding the services, namely, to care for some of the most vulnerable members of our communities. The communities served by organizations that oversee tens of thousands of foster families, provide support and education to help keep families together, provide enrichment and afterschool programs for young people, provide daycare and enrichment for children and more will directly benefit from this legislation.

This legislation would also stop unfair and unnecessary public agency risk shifting to provider agencies which results in unfairly high cost of insurance and impinges their ability to provide essential services to our communities. The result would be more reliable and affordable delivery of these mandated services. It would have the further benefit of restoring accountability to state actors causing the liability. Each party would be required to take responsibility for their own errors, a key tenant of good risk management.