

VIRGINIA ACTS OF ASSEMBLY -- 2020 SESSION

CHAPTER 1090

An Act to amend the Code of Virginia by adding in Title 2.2 a chapter numbered 4.4, consisting of sections numbered 2.2-438 through 2.2-449, relating to Office of the Children's Ombudsman established; Children's Advocacy Fund.

[H 1301]

Approved April 10, 2020

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 2.2 a chapter numbered 4.4, consisting of sections numbered 2.2-438 through 2.2-449, as follows:

CHAPTER 4.4.

OFFICE OF THE CHILDREN'S OMBUDSMAN.

§ 2.2-438. Definitions.

As used in this chapter, unless context requires another meaning:

"Administrative act" includes an action, omission, decision, recommendation, practice, or other procedure of the Department, a local department, an adoption attorney, or a child-placing agency with respect to a particular child related to adoption, foster care, or protective services.

"Adoption attorney" means an attorney acting as counsel in an adoption proceeding or case.

"Central registry" means the system maintained at the Department of Social Services pursuant to § 63.2-1515.

"Child" means an individual under the age of 18.

"Child abuse" means harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, abandonment, or maltreatment by a parent, a legal guardian, or any other person responsible for the child's health or welfare or by a teacher, a teacher's aide, or a member of the clergy.

"Child-caring institution" means a child care facility that is organized for the purpose of receiving minor children for care, maintenance, and supervision, usually on a 24-hour basis, in buildings maintained by the child-caring institution for that purpose, and that operates throughout the year. An educational program may be provided, but the educational program shall not be the primary purpose of the facility. "Child-caring institution" includes a maternity home for the care of mothers who are minors, an inpatient substance use disorder treatment facility for minors, and an agency group home that is described as a small child-caring institution, owned, leased, or rented by a licensed agency providing care for more than four but less than 13 minor children. "Child-caring institution" also includes institutions for developmentally disabled or emotionally disturbed minor children. "Child-caring institution" does not include (i) a licensed or accredited educational institution whose pupils, in the ordinary course of events, return annually to the homes of their parents or guardians for not less than two months of summer vacation; (ii) an establishment required to be licensed as a summer camp by § 35.1-18; or (iii) a licensed or accredited hospital legally maintained as such.

"Child neglect" means harm or threatened harm to a child's health or welfare by a parent, legal guardian, or any other person responsible for the child's health or welfare that occurs through either of the following:

1. Negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care, though financially able to do so, or the failure to seek financial or other reasonable means to provide adequate food, clothing, shelter, or medical care; or

2. Putting the child's health or welfare at unreasonable risk through failure of the parent, legal guardian, or other person responsible for the child's health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of any such risk.

"Child-placing agency" means (i) any person who places children in foster homes, adoptive homes, or independent living arrangements pursuant to § 63.2-1819; (ii) a local board that places children in foster homes or adoptive homes pursuant to §§ 63.2-900, 63.2-903, and 63.2-1221; or (iii) an entity that assists parents with the process of delegating parental and legal custodial powers of their children pursuant to Chapter 10 (§ 20-166 et seq.) of Title 20. "Child-placing agency" does not include the persons to whom such parental or legal custodial powers are delegated pursuant to Chapter 10 (§ 20-166 et seq.) of Title 20. Officers, employees, or agents of the Commonwealth or any locality thereof, acting within the scope of their authority as such, who serve as or maintain a child-placing agency shall not be required to be licensed.

"Children's Ombudsman" or "Ombudsman" means the individual appointed to head the Office of the Children's Ombudsman under § 2.2-439.

"Child-serving agency" means (i) a state agency that provides services to children, including the

Department of Behavioral Health and Developmental Services, the Department of Education, the Department of Health, the Department of Juvenile Justice, the Department of Social Services, and the Office of Children's Services, and (ii) a local entity that provides services to children and that receives funding from a state agency under clause (i). "Child-serving agency" does not include any law-enforcement agency.

"Complainant" means an individual who makes a complaint pursuant to § 2.2-441.

"Department" means the Department of Social Services.

"Foster care" means care provided to a child by a child-caring institution or a foster parent, children's residential facility, or group home licensed or approved by the Department under Chapter 9 (§ 63.2-900) of Title 63.2; care provided to a child in a relative's home under a court order; or any other care provided at the time the child's custody has been given to a government agency.

"Law-enforcement agency" means any crime victim and witness assistance program whose funding is provided in whole or in part by grants administered by the Department of Criminal Justice Services pursuant to § 9.1-104, any state or local police or sheriff's department, any office of an attorney for the Commonwealth, or the Office of the Attorney General.

"Local department" means the local department of social services of any county or city in the Commonwealth.

"Office" means the Office of the Children's Ombudsman established under § 2.2-439.

§ 2.2-439. Children's Ombudsman; establishment; appointment; removal.

A. There is hereby created the Office of the Children's Ombudsman as a means of effecting changes in policy, procedure, and legislation; educating the public; investigating and reviewing actions of the Department, local departments, child-placing agencies, or child-caring institutions; and monitoring and ensuring compliance with relevant statutes, rules, and policies pertaining to child protective services and the placement, supervision, and treatment of, and improvement of delivery of care to, children in foster care and adoptive homes.

B. The Office of the Children's Ombudsman shall be headed by the Children's Ombudsman, who shall be appointed by the Governor, subject to confirmation by the General Assembly. The individual shall be qualified by training and experience to perform the duties and exercise the powers of the Children's Ombudsman and the Office of the Children's Ombudsman as provided in this chapter.

C. The appointment shall be for a term of four years. The Governor may remove the Ombudsman for cause in accordance with § 2.2-108. Vacancies shall be filled by appointment by the Governor for the unexpired term.

D. The operation and administration of the Office shall be funded by the Children's Advocacy Fund established pursuant to § 2.2-449.

§ 2.2-440. Procedures; training; complaint; investigation; notification of safety concerns.

A. The Ombudsman shall establish procedures for the Office for budget, expenditures, and employment. Subject to annual appropriations, the Ombudsman shall employ sufficient personnel to carry out the duties and powers prescribed by this chapter.

B. The Ombudsman shall establish procedures for receiving and processing complaints from complainants and individuals not meeting the definition of complainant, conducting investigations, holding informal hearings, and reporting findings and recommendations resulting from investigations.

C. Personnel employed by the Office shall receive mandatory training in domestic violence and in handling complaints of child abuse or child neglect that include a history of domestic violence.

D. Any individual may submit a complaint to the Ombudsman. The Ombudsman has the sole discretion and authority to determine if a complaint falls within the Ombudsman's duties and powers to investigate and if a complaint involves an administrative act. The Ombudsman may initiate an investigation without receiving a complaint. The Ombudsman may initiate an investigation upon receipt of a complaint from an individual not meeting the definition of complainant. An individual not meeting the definition of complainant is not entitled to receive information under this chapter as if such individual is a complainant. The individual is entitled to receive the recommendations of the Ombudsman and the Department or local department's response to the recommendations of the Ombudsman in accordance with state and federal law. During the course of an investigation, the Ombudsman may refer a case to a child-serving agency if the Ombudsman determines that such agency received a complaint on the case but did not conduct an investigation. If the Ombudsman refers a case to a child-serving agency, such agency shall conduct an investigation of the case or provide notice to the Ombudsman explaining why an investigation was not conducted or what alternative steps may have been taken to address the situation. If an investigation has been conducted, the child-serving agency shall report the results to the Ombudsman.

E. The Ombudsman shall notify a child-serving agency of any immediate safety concerns regarding a child or children who are part of an active or open child protective services or foster care case. This notification shall occur as soon as possible, but not later than one business day after the Ombudsman becomes aware of the concerns.

§ 2.2-441. Individuals making complaint to Children's Ombudsman.

Any of the following individuals may make a complaint to the Ombudsman with respect to a

particular child, alleging that an administrative act is contrary to law, rule, or policy; imposed without an adequate statement of reason; or based on irrelevant, immaterial, or erroneous grounds:

1. The child, if the child is able to articulate a complaint;
2. A biological parent of the child;
3. A foster parent of the child;
4. An adoptive parent or a prospective adoptive parent of the child;
5. A legally appointed guardian of the child;
6. A guardian ad litem of the child;
7. A relative of the child or any person with a legitimate interest as defined in § 20-124.1;
8. A Virginia legislator;
9. An individual required to report child abuse or child neglect under § 63.2-1509; and
10. An attorney for any individual described in subdivisions 1 through 7.

§ 2.2-442. Children's Ombudsman; powers.

The Children's Ombudsman has the authority to do all of the following with regard to children receiving child-protective services, in foster care, or placed for adoption:

1. Pursue all necessary action, including legal action, to protect the rights and welfare of such children;
2. Pursue legislative advocacy in the best interest of such children;
3. Review policies and procedures relating to any child-serving agency's involvement with such children and make recommendations for improvement; and
4. Subject to an appropriation of funds, commence and conduct investigations into alleged violations of the rights of a foster parent.

§ 2.2-443. Victim of child abuse or child neglect; powers of Children's Ombudsman; child fatality cases; investigation.

A. The Ombudsman may do all of the following in relation to a child who may be a victim of child abuse or child neglect, including a child who may have died as a result of suspected child abuse or child neglect:

1. Upon the Ombudsman's own initiative or upon receipt of a complaint, investigate an administrative act that is alleged to be contrary to law or rule; contrary to any policy of the Department, a local department, or a child-placing agency; imposed without an adequate statement of reason; or based on irrelevant, immaterial, or erroneous grounds. The Ombudsman has sole discretion to determine if a complaint involves an administrative act.
2. Decide, in the Ombudsman's discretion, whether to investigate an administrative act.
3. Upon the Ombudsman's own initiative or upon receipt of a complaint and subject to an appropriation of funds, investigate an alleged violation of the rights of a foster parent.
4. Except as otherwise provided in this subdivision, access records and reports necessary to carry out the Ombudsman's powers and duties under this chapter to the same extent and in the same manner as provided to the Department. The Ombudsman shall be provided access to medical and mental health disorder records in the same manner as access is provided to the Department. The Ombudsman may request substance use disorder records if the Ombudsman obtains a valid consent or a court order under 42 C.F.R. Part 2. In the course of a child fatality investigation, the Ombudsman may access records from the court of jurisdiction, Attorney General, prosecuting attorney, or any attorney retained by the Department or local department and reports from a county child fatality review team to the same extent and in the same manner as provided to the Department or local department under state law.
5. Request a subpoena from a court requiring the production of a record or report necessary to carry out the Ombudsman's duties and powers, including a child fatality investigation. If the person to whom a subpoena is issued fails or refuses to produce the record or report, the Ombudsman may petition the court for enforcement of the subpoena.
6. Hold informal hearings and request that individuals appear before the Ombudsman and give testimony or produce documentary or other evidence that the Ombudsman considers relevant to a matter under investigation.
7. Make recommendations to the Governor and the General Assembly concerning the need for child protective services, adoption, or foster care legislation, policy, or practice without prior review by other offices, departments, or agencies in the executive branch in order to facilitate rapid implementation of recommendations or for suggested improvements to the recommendations. No other office, department, or agency shall prohibit the release of an Ombudsman's recommendation to the Governor or the General Assembly.

B. The Ombudsman may investigate all child fatality cases that occurred or are alleged to have occurred due to child abuse or child neglect in the following situations:

1. A child died during an active child protective services investigation or open services case, or there was a valid or invalid child protective services complaint within 12 months immediately preceding the child's death.
2. A child died while in foster care, unless the death is determined to have resulted from natural causes and there were no prior child protective services or licensing complaints concerning the foster

home.

3. A child was returned home from foster care and there is an active foster care case.

4. A foster care case involving the deceased child or sibling was closed within 24 months immediately preceding the child's death.

C. Subject to state appropriations, an investigation under subsection B shall be completed within 12 months after the Ombudsman opens a child fatality case for investigation.

D. The Ombudsman is subject to the same standards for safeguarding the confidentiality of information under this section and the same sanctions for unauthorized release of information as the Department.

§ 2.2-444. Decision to investigate; notice; pursuing administrative remedies or channels of complaint; further investigation; violation of state or federal criminal law; complaint against child-placing agency; petition requesting court jurisdiction or termination of parental rights.

A. Upon deciding to investigate a complaint from a complainant or an individual not meeting the definition of complainant, the Ombudsman shall notify the complainant or the individual not meeting the definition of complainant of the decision to investigate and shall notify the Department or local department, adoption attorney, or child-placing agency of the intention to investigate. If the Ombudsman declines to investigate a complaint or continue an investigation, the Ombudsman shall notify the complainant or the individual not meeting the definition of complainant and the Department or local department or child-placing agency of the decision and of the reasons for the Ombudsman's action.

B. The Ombudsman shall advise a complainant of administrative remedies and may advise the individual to pursue all administrative remedies or channels of complaint open to the complainant before pursuing a complaint with the Ombudsman. Subsequent to the administrative processing of a complaint, the Ombudsman may conduct further investigations of a complaint upon the request of the complainant or upon the Ombudsman's own initiative.

C. If the Ombudsman finds in the course of an investigation that an individual's action is in violation of state or federal criminal law, the Ombudsman shall immediately report that fact to the local attorney for the Commonwealth or the Attorney General. If the complaint is against a child-placing agency, the Ombudsman shall refer the matter to the Department or local department for further action with respect to licensing or approval.

§ 2.2-445. Department and child-placing agency; duties; information to be provided to biological parent, adoptive parent, or foster parent; access to departmental computer networks.

A. The Department or local department and a child-placing agency shall do all of the following:

1. Upon the Ombudsman's request, grant the Ombudsman or the Ombudsman's designee access to all information, records, and documents in the possession of the Department or local department or child-placing agency that the Ombudsman considers relevant and necessary in an investigation.

2. Assist the Ombudsman to obtain the necessary releases of those documents that are specifically restricted.

3. Upon the Ombudsman's request, provide the Ombudsman with progress reports concerning the administrative processing of a complaint.

4. Upon the Ombudsman's request, provide the Ombudsman the information requested under subdivision 1 or notification within 10 business days after the request that the Department or local department has determined that release of the information would violate federal or state law.

B. The Department or local department, an attorney involved with an adoption, and a child-placing agency shall provide information to a biological parent, prospective adoptive parent, or foster parent regarding the provisions of this chapter.

C. The Ombudsman shall have access, in the Ombudsman's own office, to departmental computer networks pertaining to protective services, foster care, adoption, juvenile delinquency, and the central registry, unless otherwise prohibited by state or federal law or if the release of the information to the Ombudsman would jeopardize federal funding. The cost of implementing this subsection shall be negotiated among the Office and the custodians of such networks.

§ 2.2-446. Confidentiality of record of Children's Ombudsman; disclosure; limitations; release of certain information.

A. Subject to subsections B through F, a record of the Office is confidential, shall only be used for purposes set forth in this chapter, is not subject to court subpoena, and is not discoverable in a legal proceeding. If the Ombudsman identifies action or inaction by the state through its agencies or services that failed to protect children, the Ombudsman shall provide any findings and recommendations to the agency affected by those findings, and make those findings and recommendations available to the complainant and the General Assembly upon request, to the extent consistent with state or federal law. The Ombudsman shall not disclose any information that impairs the rights of the child or the child's parents or guardians.

B. Unless otherwise part of the public record, the Office shall not release any of the following confidential information to the general public:

1. Records relating to a mental health evaluation or treatment of a parent or child;

2. Records relating to the evaluation or treatment of a substance abuse-related disorder of a parent

or child;

3. Records relating to a medical diagnosis or treatment of a parent or child;

4. Records relating to domestic violence-related services and sexual assault services provided to a parent or child; or

5. Records relating to educational services provided to a parent or child.

C. Notwithstanding subsection B, if the Ombudsman determines that disclosure of confidential information is necessary to identify, prevent, or respond to the abuse or neglect of a child, the Ombudsman may disclose such information to the Department or local department, a court, a law-enforcement agency, or a prosecuting attorney investigating a report of known or suspected child abuse or child neglect. The Ombudsman shall not release the address, telephone number, or other information regarding the whereabouts of a victim or suspected victim of domestic violence unless ordered to by a court.

D. Except as provided in subsection C, the Ombudsman shall not disclose information relating to an ongoing law-enforcement investigation or an ongoing child protective services investigation. The Ombudsman may release the results of its investigation to a complainant, or an individual not meeting the definition of complainant, if the Ombudsman receives notification that releasing the results of its investigation is not related to and will not interfere with an ongoing law-enforcement investigation or ongoing child protective services investigation.

E. The Ombudsman shall not disclose the identity of an individual making a child abuse or child neglect complaint unless that individual's written permission is obtained first or a court has ordered the Ombudsman to release such information.

F. The Ombudsman may release an individual's identity who makes an intentionally false report of child abuse or child neglect, subject to other laws relating to such disclosure.

§ 2.2-447. Report of findings; recommendations; consultation with individual, Department, local department, or child-placing agency; publication of adverse opinion; notice of actions; information provided to complainant; child fatality investigation; report.

A. The Ombudsman shall prepare a report of the factual findings of an investigation and make recommendations to the Department, local department, or child-placing agency if the Ombudsman finds any of the following:

1. A matter should be further considered by the Department, local department, or child-placing agency.

2. An administrative act or omission should be modified, canceled, or corrected.

3. Reasons should be given for an administrative act or omission.

4. Other action should be taken by the Department, local department, or child-placing agency.

B. Before announcing a conclusion or recommendation that expressly or by implication criticizes an individual, the Department, the local department, or a child-placing agency, the Ombudsman shall consult with that individual, the Department, the local department, or the child-placing agency. When publishing an opinion adverse to the Department, local department, or child-placing agency, the Ombudsman shall include in the publication any statement of reasonable length made to the Ombudsman by the Department, local department, or child-placing agency in defense or mitigation of the action. The Ombudsman may request to be notified by the Department, local department, or child-placing agency, within a specified time, of any action taken on any recommendation presented.

C. The Ombudsman shall notify the complainant of the actions taken by the Ombudsman and by the Department, local department, or child-placing agency.

D. The Ombudsman may provide to the complainant the following information:

1. A copy of the Ombudsman's report regarding the investigation's findings, recommendations to the Department or local department made according to the investigation, the Department or local department's response to the Ombudsman's findings and recommendations, and any epilogue to the Ombudsman's report and the Department or local department's response; or

2. Information that has otherwise been made public.

E. The Ombudsman shall not release information to the individual making the complaint if doing so could endanger the health or welfare of a child or another individual.

F. With respect to a child fatality case investigated under subsection B of § 2.2-443 and upon review of records or other information received under subdivision A 3 or 4 of § 2.2-443 in the course of a child fatality investigation, if there is no ongoing child protection proceeding involving a sibling of the child who died, the Ombudsman shall provide any necessary recommendations for improving systemic issues that are discovered during the investigation of the child fatality. The recommendations may be provided to the court of jurisdiction, the state court administrative office, the county child fatality review team, medical professionals, or attorneys or other legal professionals involved with the particular child who died. The recommendations shall also be summarized and included in the annual report referenced in subsection G.

G. The Ombudsman shall submit to the Governor, the director of the Department, and the General Assembly an annual report on the Ombudsman's activities, including any recommendations regarding the need for legislation or for a change in rules or policies.

§ 2.2-448. Penalty for filing complaint or cooperating in investigation prohibited.

A. An official, the Department, a local department, a child-serving agency, or a child-placing agency shall not penalize any person for filing a complaint or cooperating with the Ombudsman in investigating a complaint.

B. An individual, the Department, a local department, an adoption attorney, a child-serving agency, or a child-placing agency shall not hinder the lawful actions of the Ombudsman or employees of the Ombudsman.

C. A report by the Ombudsman is not subject to prior approval by a person outside of the Office.

§ 2.2-449. Children's Advocacy Fund.

There is hereby created in the state treasury a special nonreverting fund to be known as the Children's Advocacy Fund, referred to in this section as "the Fund." The Fund shall be established on the books of the Comptroller. All funds appropriated for such purpose, and any gifts, donations, grants, bequests, and other funds received on its behalf shall be paid into the state treasury and credited to the Fund. Interest earned on moneys in the Fund shall remain in the Fund and be credited to it. Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert to the general fund but shall remain in the Fund. Moneys in the Fund shall be used solely for the purposes of supporting the Office of the Children's Ombudsman pursuant to § 2.2-439 and for carrying out the purposes of this chapter. Expenditures and disbursements from the Fund shall be made by the State Treasurer on warrants issued by the Comptroller upon written request signed by the Children's Ombudsman.

2. That the provisions of this act shall not become effective unless an appropriation effectuating the purposes of this act is included in a general appropriation act passed in 2020 by the General Assembly that becomes law.