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HOUSE BILL NO. 1301

Offered January 8, 2020

Prefiled January 8, 2020

A *BILL 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 2.2-448, relating to Office of the Children's Ombudsman established.*

Patrons—Hurst, Austin, Carroll Foy, Adams, D.M., Aird, Brewer, Campbell, R.R., Collins, Delaney, Fowler, Guzman, Kory, Levine, Mullin, Murphy, Roem, Tran and VanValkenburg

Referred to Committee on General Laws

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 2.2-448, 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, 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 unmarried mothers who are 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. Placing a child at an unreasonable risk to the child's health or welfare by 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 the 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

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58 acting within the scope of their authority as such, who serve as or maintain a child-placing agency,
59 shall not be required to be licensed.

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

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

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

69 "Department" means the State Department of Social Services.

70 "Foster care" means care provided to a child by a child-caring institution, or a foster parent,
71 children's residential facility, or group home licensed or approved by the Department under Chapter 9
72 (§ 63.2-900) of Title 63.2, or care provided to a child in a relative's home under a court order.

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

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

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

80 **§ 2.2-439. Children's Ombudsman; establishment; appointment; removal.**

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

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

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

94 **§ 2.2-440. Procedures; training; complaint; investigation; notification of safety concerns.**

95 A. The Ombudsman shall establish procedures for the Office for budgeting, expending money, and
96 employing personnel. Subject to annual appropriations, the Ombudsman shall employ sufficient
97 personnel to carry out the duties and powers prescribed by this act.

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

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

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

117 E. The Ombudsman shall notify a child-serving agency of any immediate safety concerns regarding a
118 child or children who are part of an active or open child-protective services or foster care case. This
119 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.

All 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 he 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. An adult who is related to the child within the fifth degree by marriage, blood, or adoption;
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:

1. Pursue all necessary action, including but not limited to legal action, to protect the rights and welfare of a child under the jurisdiction, control, or supervision of a child-serving agency, a child-caring institution, or a child-placing agency;
2. Pursue legislative advocacy in the best interests of children;
3. Review policies and procedures relating to any child-serving agency's involvement with 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 his or her own initiative or upon receipt of a complaint, investigate an administrative act that is alleged to be contrary to law or rule, contrary to policy of the Department, 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 his or her discretion, whether to investigate an administrative act.
3. Upon his or her 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 act 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. 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. 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 legislature concerning the need for children's 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,

181 or agency shall prohibit the release of an Ombudsman's recommendation to the Governor or the
182 legislature.

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

185 1. A child died during an active child protective services investigation or open services case, or there
186 was an assigned or rejected child protective services complaint within 24 months immediately preceding
187 the child's death.

188 2. A child died while in foster care, unless the death resulted from natural causes and there were no
189 prior child protective services or licensing complaints concerning the foster home.

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

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

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

195 **§ 2.2-444. Decision to investigate; notice; pursuing administrative remedies or channels of**
196 **complaint; further investigation; violation of state or federal criminal law; complaint against**
197 **child-placing agency; petition requesting court jurisdiction or termination of parental rights.**

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

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

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

215 **§ 2.2-445. Department and child-placing agency; duties; information to be provided to biological**
216 **parent, adoptive parent, or foster parent; access to departmental computer networks.**

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

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

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

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

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

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

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

236 **§ 2.2-446. Confidentiality of record of Children's Ombudsman; disclosure; limitations; release of**
237 **certain information.**

238 A. Subject to subsections B through F, a record of the Office is confidential, shall only be used for
239 purposes set forth in this act, is not subject to court subpoena, and is not discoverable in a legal
240 proceeding. If the Ombudsman identifies action or inaction by the state through its agencies or services
241 that failed to protect children, the Ombudsman shall provide his findings and recommendations to the
242 agency affected by those findings, and make those findings and recommendations available to the

complainant and the legislature 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 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 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 information in his or her possession 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 children's 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 that information.

F. The Ombudsman may release an individual's identity who makes an intentionally false report of child abuse or child neglect.

§ 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 the 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, local department, or 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 that will 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 A 4 of § 2.2-443 in the course of a

304 child fatality investigation, if there is no ongoing child protection proceeding involving a sibling of the
305 child who died, the Ombudsman shall provide any necessary recommendations for improving systemic
306 issues that are discovered during the investigation of the child fatality. The recommendations may be
307 provided to the court of jurisdiction, the state court administrative office, the county child fatality review
308 team, medical professionals, or attorneys or other legal professionals involved with the particular child
309 who died. The recommendations shall also be summarized and included in the annual report referenced
310 in subsection G.

311 G. The Ombudsman shall submit to the Governor, the director of the Department, and the legislature
312 an annual report on the Ombudsman's conduct, including any recommendations regarding the need for
313 legislation or for change in rules or policies.

314 **§ 2.2-448. Penalty for filing complaint or cooperating in investigation prohibited; intentional false**
315 **complaint.**

316 A. Subject to subsection D, an official, the Department, a local department, a child-serving agency,
317 or a child-placing agency shall not penalize any person for filing a complaint or cooperating with the
318 Ombudsman in investigating a complaint.

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

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

323 D. An individual who intentionally makes a false complaint of child abuse or neglect under this act
324 is subject to the penalties as follows:

325 1. If the child abuse or neglect reported would not constitute a crime or would constitute a
326 misdemeanor if the report were true, the person is guilty of a Class 3 misdemeanor.

327 2. If the child abuse or neglect reported would constitute a felony if the report were true, the person
328 is guilty of a Class 1 misdemeanor.