

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Introduced

House Bill 4094

FISCAL
NOTE

BY DELEGATES HILL, PACK, SUMMER, ESPINOSA, MANDT,

ROWAN, WORRELL, FLEISCHAUER, PUSHKIN, C.

THOMPSON, AND WALKER

[Introduced January 10, 2020; Referred to the
Committee on Health and Human Resources then the
Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §49-9-101, §49-9-102, §49-9-103, §49-9-104, §49-9-105, §49-9-106, §49-9-
3 107, §49-9-108, §49-9-109, and §49-9-110, all relating to the Foster Care Ombudsman
4 Program; continuing the Foster Care Ombudsman; providing authority to the ombudsman;
5 permitting access to foster care children; providing access to certain records; providing
6 the ombudsman with subpoena authority; requiring government entities to cooperate with
7 the ombudsman; requiring investigations to remain confidential; providing the ombudsman
8 with a limitation of liability; setting forth criminal penalties; providing funding for the
9 ombudsman.

Be it enacted by the Legislature of West Virginia:

ARTICLE 9. FOSTER CARE OMBUDSMAN PROGRAM.

§49-9-101. The Foster Care Ombudsman.

1 (a) There is continued within the Office of the Inspector General the position of the West
2 Virginia Foster Care Ombudsman. The Office of the Inspector General shall employ a Foster Care
3 Ombudsman to affect the purposes of this article.

4 (b) In addition to the duties provided in §9-5-27 of this code, the duties of the Foster Care
5 Ombudsman include, but are not limited to, the following:

6 (1) Establishing a statewide procedure to receive, investigate, and resolve complaints filed
7 on behalf of a foster child or foster parent, or on the Foster Care Ombudsman's own initiative on
8 behalf of a foster child, relating to action, inaction, or decisions of the state agency, child placing
9 agency, or residential care facility, which may adversely affect the foster child or foster parent;

10 (2) Review periodically, and make appropriate recommendations, the policies and
11 procedures established by any state agency providing services to foster children, foster parents,
12 or both including, but not limited to, the system of providing foster care and treatment;

13 (3) Pursuant to an investigation, provide assistance to a foster child or foster parent who
14 the Foster Care Ombudsman determines is in need of assistance including, but not limited to,

15 collaborating with an agency, provider, or others on behalf of the best interests of the foster child;

16 (4) Recommend action when appropriate including, but not limited to, undertaking
17 legislative advocacy and making proposals for systemic reform and formal legal action, in order
18 to secure and ensure the legal, civil, and special rights of foster children who reside in this state;

19 (5) Conduct programs of public education when necessary and appropriate;

20 (6) Have input into the creation of, and thereafter make recommendations consistent with,
21 the foster children and foster parents bill of rights;

22 (7) Take appropriate steps to advise the public of the services of the Foster Care
23 Ombudsman, the purpose of the ombudsman, and procedures to contact the office; and

24 (8) Make inquiries and obtain assistance and information from other state governmental
25 agencies or persons as the Foster Care Ombudsman requires for the discharge of his or her
26 duties.

§49-9-102. Investigation of complaints.

1 (a) Upon receipt of a complaint filed on behalf of a foster child or foster parent , on his or
2 her own initiative, or by court order within the scope of the Foster Care Ombudsman Program,
3 the Foster Care Ombudsman shall investigate any act, practice, policy, or procedure of any state
4 agency, child placing agency, or residential care facility which affects the health, safety, welfare,
5 or rights of a foster child or a foster parent.

6 (b) Investigative activities of the Foster Care Ombudsman include, but are not limited to:
7 Information gathering, mediation, negotiation, informing parties of the status of the investigation,
8 notification to any aggrieved party of alternative processes, reporting of suspected violations to a
9 licensing or certifying agency, and the reporting of suspected criminal violations to the appropriate
10 authorities.

11 (c) The Foster Care Ombudsman need not investigate any complaint upon determining
12 that:

13 (1) The complaint is trivial, frivolous, vexatious, or not made in good faith;

- 14 (2) The complaint has been too long delayed to justify present investigation;
- 15 (3) The resources available, considering the established priorities, are insufficient for an
16 adequate investigation;
- 17 (4) The matter complained of is not within the investigatory authority of the Foster Care
18 Ombudsman; or
- 19 (5) A real or apparent conflict of interest exists and no other person within the office is
20 available to investigate the complaint in an impartial manner.
- 21 (d) The Foster Care Ombudsman may institute actions on behalf of the foster child or the
22 foster parents to obtain injunctive and declaratory relief, but not damages. In order to enable
23 ombudsman to bring such actions, the Office of the Inspector General shall:
- 24 (1) Establish an administrative hearing process under the procedures for contested cases
25 defined at §29A-5-1 et seq. of this code to be available to the Foster Care Ombudsman bringing
26 an action on behalf of a foster child or foster parent against a governmental agency; or
- 27 (2) Ensure that the Foster Care Ombudsman has sufficient access to legal counsel to
28 bring actions on behalf of the foster child or the foster parents in civil court: *Provided*, That this
29 subsection does not prevent a foster child or foster parent from filing directly, on his or her own
30 behalf, a suit for relief of any sort in any state or federal court.
- 31 (e) The Office of the Inspector General and other appropriate state governmental agencies
32 may establish and implement cooperative agreements for receiving, processing, responding to,
33 and resolving complaints involving state governmental agencies under the provisions of this
34 section.

§49-9-103. Access to foster care children.

- 1 (a) The Foster Care Ombudsman shall, with proper identification, have access to a foster
2 family home, a state agency, a child placing agency, or a residential care facility for the purposes
3 of investigations of a complaint. The Foster Care Ombudsman may enter a foster family home, a
4 state agency, a child placing agency, or a residential care facility at a time appropriate to the

5 complaint. The visit may be announced in advance or be made unannounced as appropriate to
6 the complaint under investigation. Upon entry, the Foster Care Ombudsman shall promptly and
7 personally advise the person in charge of his or her presence. If entry is refused by the person in
8 charge, the Foster Care Ombudsman may apply to the magistrate court of the county in which
9 the a foster family home, a state agency, a child placing agency, or a residential care facility is
10 located for a warrant authorizing entry, and the court shall issue an appropriate warrant if it finds
11 good cause therefor.

12 (b) For activities other than those specifically related to the investigation of a complaint,
13 the Foster Care Ombudsman, upon proper identification, shall have access to a foster family
14 home, a state agency, a child placing agency, or a residential care facility between the hours of
15 8:00 a.m. and 8:00 p.m. in order to:

16 (1) Provide information on the Foster Care Ombudsman Program to a foster child or foster
17 parents;

18 (2) Inform a foster child or a foster parent of his or her rights and entitlements, and his or
19 her corresponding obligations, under applicable federal and state laws;

20 (3) Direct the foster child or the foster parents to appropriate legal resources; and

21 (c) Access to a foster family home, a state agency, a child placing agency, or a residential
22 care facility under this section shall be deemed to include the right to private communication with
23 the foster child or the foster parents.

24 (d) A Foster Care Ombudsman who has access to a foster family home, a state agency,
25 a child placing agency, or a residential care facility under this section shall not enter the living
26 area of a foster child or foster parent without identifying himself or herself to the foster child or
27 foster parent. After identifying himself or herself, an ombudsman shall be permitted to enter the
28 living area of a foster child or foster parent unless that foster child or foster parent communicates
29 on that particular occasion the foster child or foster parents' desire to prevent the ombudsman
30 from entering. A foster child or foster parent has the right to terminate, at any time, any visit by

31 the Foster Care Ombudsman.

32 (e) Access to a foster family home, a state agency, a child placing agency, or a residential
33 care facility pursuant to this section includes the right to tour the facility unescorted.

§49-9-104. Access to records.

1 (a) The Foster Care Ombudsman is allowed access to any foster child or foster parents'
2 records, including medical records reasonably necessary to any investigation, without fee.

3 (b) The Foster Care Ombudsman is allowed access to all records of any foster family
4 home, state agency, child placing agency, or residential care facility that is reasonably necessary
5 for the investigation of a complaint including, but not limited to, incident reports; dietary records;
6 policies and procedures that a foster family home, a state agency, a child placing agency, or a
7 residential care facility are required to maintain under federal or state law; admission agreements;
8 staffing schedules; or any document depicting the actual staffing pattern.

§49-9-105. Subpoena powers.

1 (a) The Foster Care Ombudsman may, in the course of any investigation:

2 (1) Apply to the circuit court of the appropriate county or the Circuit Court of Kanawha
3 County for the issuance of a subpoena to compel at a specific time and place, by subpoena, the
4 appearance, before a person authorized to administer oaths, the sworn testimony of any person
5 whom the Foster Care Ombudsman reasonably believes may be able to give information relating
6 to a matter under investigation; or

7 (2) Apply to the circuit court of the appropriate county or the Circuit Court of Kanawha
8 County for the issuance of a subpoena duces tecum to compel any person to produce at a specific
9 time and place, before a person authorized to administer oaths, any documents, books, records,
10 papers, objects, or other evidence which the Foster Care Ombudsman reasonably believes may
11 relate to a matter under investigation.

12 (b) A subpoena or subpoena duces tecum applied for by the Foster Care Ombudsman
13 may not be issued until a circuit court judge in term or vacation thereof has personally reviewed

14 the application and accompanying affidavits and approved, by a signed order entered by the
15 judge, the issuance of the subpoena or subpoena duces tecum. Subpoenas or subpoenas duces
16 tecum applied for pursuant to this section may be issued on an ex parte basis following review
17 and approval of the application by the judge in term or vacation thereof.

18 (c) The Attorney General shall, upon request, provide legal counsel and services to the
19 Foster Care Ombudsman in all administrative proceedings and in all proceedings in any circuit
20 court and the West Virginia Supreme Court of Appeals.

§49-9-106. Cooperation among government departments or agencies.

1 (a) The Foster Care Ombudsman shall have access to the records of any state
2 government agency reasonably necessary to any investigation. The Foster Care Ombudsman
3 shall be notified of and be allowed to observe any survey conducted by a government agency
4 affecting the health, safety, welfare, or rights of the foster child or the foster parents.

5 (b) The Foster Care Ombudsman shall develop procedures to refer any complaint to any
6 appropriate state government department, agency, or office.

7 (c) When abuse, neglect or exploitation of a foster child by a foster parent is suspected,
8 the Foster Care Ombudsman shall make a referral to the Bureau for Children and Families, Office
9 of Health Facility Licensure and Certification, or both.

10 (d) Any state government department, agency, or office that responds to a complaint
11 referred to it by the Foster Care Ombudsman Program shall make available to the Foster Care
12 Ombudsman copies of inspection reports and plans of correction, and notices of any citations and
13 sanctions levied against the foster family home, the child placing agency, or the residential care
14 facility identified in the complaint.

§49-9-107. Confidentiality of investigations.

1 (a) Information relating to any investigation of a complaint that contains the identity of the
2 complainant or foster child or foster parent shall remain confidential except:

3 (1) Where disclosure is authorized in writing by the complainant, or foster child or foster

4 parent or the guardian, committee, attorney in fact, or representative of the foster child or foster
5 parent;

6 (2) Where disclosure is necessary to the Bureau for Children and Families in order for
7 such office to determine the appropriateness of initiating an investigation regarding potential
8 abuse, neglect, or emergency circumstances;

9 (3) Where disclosure is necessary to the Office of Health Facility Licensure and
10 Certification in order for such office to determine the appropriateness of initiating an investigation
11 to determine facility compliance with applicable rules of licensure, certification, or both; or

12 (4) Upon order of any appropriate county circuit court after the judge in term or vacation
13 thereof has conducted a hearing following adequate notice to all parties, including the Foster Care
14 Ombudsman, and rendered a determination as the interests of justice may require.

15 (b) Notwithstanding any other section within this article, all information, records, and
16 reports received by or developed by the Foster Care Ombudsman Program which relate to a
17 foster child or foster parent, including written material identifying a foster child or foster parent,
18 are confidential pursuant to §49-5-1 et seq. of this code, and are not subject to the provisions of
19 §§29B-1-1 et seq. of this code, and may not be disclosed or released by the Foster Care
20 Ombudsman Program, except under the circumstances enumerated in this section.

21 (c) Nothing in this section prohibits the preparation and submission by the Foster Care
22 Ombudsman of statistical data and reports, as required to implement the provisions of this article
23 or any applicable federal law, exclusive of any material that identifies any foster child, foster
24 parent, or complainant.

25 (d) The Inspector General shall have access to the records and files of the Foster Care
26 Ombudsman Program to verify its effectiveness and quality where the identity of any complainant
27 or foster child or foster parent is not disclosed.

§49-9-108. Limitations on liability.

1 (a) The Foster Care Ombudsman participating in an investigation carried out pursuant to

2 this article who is performing his or her duties is immune from civil liability that otherwise might
3 result by reason of his or her participation in the investigation, as long as such participation is not
4 violative of any applicable law, rule or regulation, and done within the scope of his or her
5 employment and in good faith.

6 (b) If an act or omission by the Foster Care Ombudsman or by acting in good faith pursuant
7 to a specific foster child or foster parent complaint, causes a foster child or foster parents' rights
8 to be violated, no foster family home, state agency, a child placing agency, or a residential care
9 facility, its owners, administrators, officers, director, agents, consultants, employees, or any
10 member of management may be held civilly liable as a result of the act or omission.

§49-9-109. Willful interference; retaliation; penalties.

1 (a) An individual who willfully interferes with or impedes the Foster Care Ombudsman in
2 the performance of his or her official duties shall be guilty of a misdemeanor and, upon conviction
3 thereof, shall be fined not more than \$100.

4 (b) An individual who institutes or commits a discriminatory, disciplinary, retaliatory or
5 reprisal action against a foster child or foster parent for having filed a complaint with or provided
6 information in good faith to the Foster Care Ombudsman in carrying out the duties pursuant to
7 this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than
8 \$100.

9 (c) An individual violating the provisions of subsection (a) or (b) of this section is, for the
10 second or any subsequent offense under either of these subsections, guilty of a misdemeanor
11 and, upon conviction thereof, shall be fined not more than \$250. Each day of a continuing violation
12 after conviction shall be considered a separate offense.

13 (d) There is a rebuttable presumption in any civil action that any reprisal action, as defined
14 below, within 90 days of the incident, is discriminatory, disciplinary, or retaliatory in violation of
15 the public policy of this state. For the purposes of this section, the term "reprisal action" refers to
16 action taken by the entity involved in a complaint or report against the person making the

17 complaint or report, or the person with respect to whom the complaint or report was made because
 18 of the complaint or report, and includes, but is not limited to, the following:

19 (1) Discharge or transfer from a foster family home, a child placing agency, or a residential
 20 care facility;

21 (2) Termination of service;

22 (3) Restriction or prohibition of access to a foster family home, state agency, child placing
 23 agency, residential care facility, or the foster child or the foster parents;

24 (4) Discharge from or termination of employment;

25 (5) Demotion or reduction in remuneration for services;

26 (6) Any restriction of rights affecting the person's ability to perform his or her employment
 27 duties or responsibilities or affecting the person's health, safety, or welfare; or

28 (7) Any restriction against the Foster Care Ombudsman which impedes the performance
 29 of duties pursuant to this article.

30 (e) Nothing in this section infringes upon the rights of an employer to supervise, discipline,
 31 or terminate an employee for other reasons.

§49-9-110. Funding for Foster Care Ombudsman Program.

1 The Foster Care Ombudsman Program shall receive such funds appropriated by the
 2 Legislature for the operation of the program.

NOTE: The purpose of this bill is to establish additional duties of the Foster Care Ombudsman and investigation responsibilities of the Foster Care Ombudsman Program. This bill also creates access to foster care children and records, including subpoena powers, to assist in investigation of complaints and fulfillment of the Foster Care Ombudsman's duties. This bill also establishes the confidentiality of investigations by the Foster Care Ombudsman Program, limitations of liability of the Foster Care Ombudsman and availability of legal counsel. This bill also creates misdemeanor offenses for willful interference with a Foster Care Ombudsman Program investigation and retaliation.

This bill was recommended for passage during the 2020 legislative session by the Joint Committee on Health.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.