

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Committee Substitute

for

House Bill 4094

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

ROWAN, WORRELL, FLEISCHAUER, PUSHKIN, C.

THOMPSON, AND WALKER

[Originating in the Committee on the Judiciary;

January 17, 2020.]

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, foster parent, or kinship parent, or on the Foster Care Ombudsman's
8 own initiative on behalf of a foster child, relating to action, inaction, or decisions of the state
9 agency, child placing agency, or residential care facility, which may adversely affect the foster
10 child, foster parent, or kinship parent;

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

15 (3) Pursuant to an investigation, provide assistance to a foster child, foster parent, or
16 kinship parent who the Foster Care Ombudsman determines is in need of assistance including,
17 but not limited to, collaborating with an agency, provider, or others on behalf of the best interests
18 of the foster child;

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

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

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

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

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

§49-9-102. Investigation of complaints.

1 (a) Upon receipt of a complaint filed on behalf of a foster child, foster parent, or kinship
2 parent, on his or her own initiative, or by court order within the scope of the Foster Care
3 Ombudsman Program, the Foster Care Ombudsman shall investigate any act, practice, policy, or
4 procedure of any state agency, child placing agency, or residential care facility which affects the
5 health, safety, welfare, or rights of a foster child, a foster parent, or a kinship 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, via the Office of the Attorney
22 General, on behalf of the foster child, the foster parents, or the kinship parents to obtain injunctive
23 and declaratory relief, but not damages. In order to enable ombudsman to bring such actions, the
24 Office of the Attorney General, acting on behalf of the Foster Care Ombudsman, shall:

25 (1) Establish an administrative hearing process under the procedures for contested cases
26 defined at §29A-5-1 et seq. of this code to be available to the Foster Care Ombudsman bringing
27 an action on behalf of a foster child, foster parent, or kinship parent against a governmental
28 agency; or

29 (2) Ensure that the Foster Care Ombudsman has sufficient access to legal counsel to
30 bring actions on behalf of the foster child, the foster parents, or kinship parents in civil court:
31 Provided, That this subsection does not prevent a foster child, foster parent, or kinship parent
32 from filing directly, on his or her own behalf, a suit for relief of any sort in any state or federal court.

33 (e) The Office of the Inspector General and other appropriate state governmental agencies
34 may establish and implement cooperative agreements for receiving, processing, responding to,
35 and resolving complaints involving state governmental agencies under the provisions of this
36 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, foster
17 parents, or kinship parents;

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

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

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

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

34 (e) Access to a foster family home, a state agency, a child placing agency, or a residential
35 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, foster parents' or
2 kinship parents' records, including medical records reasonably necessary to any investigation,
3 without fee.

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

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

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

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

3 (1) Where disclosure is authorized in writing by the complainant foster child, foster parent,
4 kinship parent, or the guardian.

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

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

11 (b) Notwithstanding any other section within this article, all information, records, and
12 reports received by or developed by the Foster Care Ombudsman Program which relate to a
13 foster child, foster parent, or kinship parent including written material identifying a foster child,
14 foster parent, or kinship parent are confidential pursuant to §49-5-101 et seq. of this code, and
15 are not subject to the provisions of §29B-1-1 et seq. of this code, and may not be disclosed or
16 released by the Foster Care Ombudsman Program, except under the circumstances enumerated
17 in this section.

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

22 (d) The Inspector General shall have access to the records and files of the Foster Care
23 Ombudsman Program to verify its effectiveness and quality where the identity of any complainant
24 or foster child, foster parent, or kinship 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, foster parent, or kinship parent complaint, causes a foster child, foster
8 parents', or kinship parents' rights to be violated, no foster family home, state agency, a child
9 placing agency, or a residential care facility, its owners, administrators, officers, director, agents,
10 consultants, employees, or any member of management may be held civilly liable as a result of
11 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, foster parent, or kinship parent for having filed a complaint
6 with or provided information in good faith to the Foster Care Ombudsman in carrying out the duties

7 pursuant to this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not
8 more than \$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, the foster parents, or the kinship 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.

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