

Legislative Analysis



CHILDREN'S OMBUDSMAN/PROTECTION RECORDS

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House Bill 4096 as enrolled
Public Act 560 of 2004
Sponsor: Rep. Lauren Hager

House Bill 4586 as enrolled
Public Act 563 of 2004
Sponsor: Rep. Barb Vander Veen

House Committee: Family and Children Services
Senate Committee: Families and Human Services

Second Analysis (2-24-05)

BRIEF SUMMARY: House Bill 4096 would amend several provisions regarding the Office of Children's Ombudsman relating to the appointment process; complaint process; powers and duties of the ombudsman; conduct of investigations; confidentiality and disclosure of information; and report of findings. House Bill 4586 would amend the Child Protection Law by adding to the list of persons eligible to obtain otherwise confidential child abuse records and increasing the disclosure of certain specified information.

FISCAL IMPACT: House Bill 4096 would result in an indeterminate workload increase for the Office of Children's Ombudsman. The information technology cost related to providing the OCO access to Family Independence Agency computer networks would be negotiated by the OCO, the FIA, and the Department of Information Technology. Any new costs related to the bill would be limited by annual appropriations. The bill would have no fiscal impact on the Family Independence Agency. House Bill 4586 would have no significant measurable fiscal impact.

THE APPARENT PROBLEM:

Public Act 204 of 1994 created the Office of Children's Ombudsman as an autonomous agency charged with responsibility for independently investigating complaints regarding children under the supervision of the Family Independence Agency (FIA) and other private child placing agencies. Specifically, the act states that the office was created "as a means of monitoring and ensuring compliance with relevant statutes, rules, and policies pertaining to children's protective services and the placement, supervision, and treatment of children in foster care and adoptive homes" (MCL 722.923). The office was established amid concerns that confidentiality laws covering children in the child welfare system, while designed to protect the identities of the children, served also to prevent outside investigatory entities from reviewing the actions or inaction of the Family Independence Agency or its contracted private child placing agencies when their conduct was called into question.

Chief among its statutory duties, the office is permitted to act upon its own initiative or upon the receipt of a complaint from certain individuals, and investigate an action (or inaction) of the FIA or child placing agency alleged to be contrary to a law, rule, policy of the department, or policy of the agency, imposed without an adequate statement of reason, or based on irrelevant, immaterial, or erroneous grounds.

As of the 2002 annual report, the Office of Children's Ombudsman had completed 1,687 investigations since it was officially established on January 1, 1995. For the 2001-2002 fiscal year, the office received 821 complaints, involving 1,350 children from 77 counties throughout the state. Of the complaints received, the office opened 145 investigations. These investigations include 77 complaints involving child protective services, 28 complaints involving foster care, 7 complaints involving adoption services, and 33 complaints involving more than one area of concern. During the same period, the office concluded 154 investigations. Of the concluded investigations, the office affirmed the actions of the FIA or the child placing agency in 83 cases and found violations in the remaining cases. Based on its findings during each investigation, the office issues its finding and recommendations, which are then circulated among the ombudsman, the investigative team, and the FIA or the agency involved. During FY 2001-2002, the OCO issued 354 separate findings in response to its investigations.

For the past few years, there has been much discussion about the duties and responsibilities of the office, and the role it plays in the state child welfare system. Much of this discussion resulted from the findings during the 2001-2002 legislative session of the House Committee on Family and Children Services' subcommittee on Child Protective Services, chaired by Representative Hager. The subcommittee was charged with examining child protective services in the state, and particularly with determining the extent of child maltreatment, the processes and players involved in protecting at-risk children, and the accountability mechanism in place to ensure that the child welfare system was properly achieving its goals. The subcommittee was established, in part, as a response to a series of articles in the *Detroit Free Press* that chronicled the murder of 2-year-old Ariana Swinson at the hands of her abusive parents. [The series originally appeared December 4-8, 2000 and is available on the newspaper's website at www.freep.com/index/ariana.htm.] As the subcommittee report states, the *Free Press* series, "highlighted what appeared to be a series of bureaucratic miscues by the state's child protection machinery, composed of the Family Independence Agency and the courts."

Among its findings and recommendations, the subcommittee report noted the importance of maintaining accountability in child protection matters. This could be achieved, in part, the report said, through reinforcing and guaranteeing the independence of the Office of Children's Ombudsman's from the executive branch. The subcommittee report also noted, "[p]resently, the public and their elected policymakers are left with few options to make judgments and decisions about the state's care for children at-risk for abuse and neglect."

To bring about greater public accountability, the subcommittee also recommended the passage of legislation that would open up child protection records when a child dies.

THE CONTENT OF THE BILLS

House Bill 4096 (Children's Ombudsman Act)

The bill would amend several provisions in the Children's Ombudsman Act (MCL 722.922 et al.) relating to the appointment process; complaint process; powers and duties of the ombudsman; conduct of investigations; confidentiality and disclosure of information; and reporting of findings. The bill would also add that, in addition to duties prescribed in current law, the office would be established as a means of effecting changes in policy, procedures, and legislation; educating the public; and investigating and reviewing actions of state agencies or entities receiving state funding.

Appointment of Ombudsman

Under current law, the ombudsman is appointed by, and serves at the will of, the governor. Under the bill, the ombudsman would be appointed by the governor, with the advice and consent of the Senate. The governor would be permitted to remove the ombudsman from office for cause, including incompetence, official misconduct, habitual or willful neglect of duty, or any other misfeasance or malfeasance in connection with the operation of the office. Furthermore, the bill would require the governor to report to the legislature the reason for removing the ombudsman from office. The individual serving as the children's ombudsman on the bill's effective date would continue to serve at the pleasure of the governor.

Who Can File Complaints

The current law lists several individuals who may file a complaint with the ombudsman. These individuals include the child, a biological parent, a foster parent, a current or prospective adoptive parent, a legal guardian, a guardian ad litem, an adult relative within the fifth degree of consanguinity (blood relation), a state legislator, and an attorney for any of the above individuals (except for a legislator). The bill would also add a person who is required to report instances of child abuse or child neglect under the Child Protection Law.

In addition, the bill would also permit *any* individual to make a complaint to the ombudsman. The ombudsman would have the sole discretion and authority to determine if a complaint falls within his or her duties and powers, and could initiate an investigation upon the complaint of a person not listed above. An individual not listed above would receive the recommendations of the ombudsman and the FIA's responses although, under the act, he or she would not receive information provided to listed individuals.

Similar to current law, the bill would allow the ombudsman to conduct an investigation without receiving a complaint, and to define the scope, duration, and issues considered as part of the investigation. The bill would add that during the course of an investigation, the ombudsman could refer a case to the FIA if he or she determined that the FIA received a report on the case but did not conduct a field investigation. If the ombudsman were to refer a case to the department, the department would be required to conduct a field investigation and report its findings to the ombudsman or notify the ombudsman

why an investigation was not conducted or what alternative actions may have been taken to address the situation.

An individual who intentionally makes a false complaint of child abuse or neglect would be subject to the same penalties for doing so under the Child Protection Law (MCL 722.633).

Duties of the Ombudsman

The bill states that the ombudsman would have the authority to do all of the following:

- Pursue all necessary action to protect the rights and welfare of a child under the jurisdiction of the FIA, the Michigan Children's Institute, the family division of the circuit court, a child caring institution, or a child placing agency.
- Pursue legislative advocacy in the best interest of children.
- Review the policies and procedures relating to the FIA's involvement with children and make recommendations.
- Review each departmental death review team study in which a child's death may have resulted from child abuse or neglect, and issue recommendations on ways to prevent similar occurrences.

The bill provides that, with certain exceptions, the bill would permit the ombudsman to access records and reports necessary to carry out the office's responsibilities, to the same extent and in the same manner as provided to the FIA under the Child Protection Law. The ombudsman would be provided access to medical records and mental health records in the same manner as provided to the FIA under the Public Health Code and the Mental Health Code, respectively. However, the ombudsman would be subject to the same confidentiality standards regarding those records as placed upon the FIA.

In addition, the ombudsman could request a subpoena requiring a person to produce a record or report. If a person who was subpoenaed failed to produce the record, the ombudsman could petition the court for the enforcement of the subpoena. [Note: *This provision would be repealed five years after the bill's effective date.*]

The act permits the ombudsman to make recommendations to the governor and legislature. The bill would specify that the ombudsman would be allowed to make such recommendations without prior review by other offices, departments, or agencies within the executive branch, in order to facilitate rapid implementation of recommendations or for suggested improvements to the recommendations.

Further, under the bill, no other office, department, or agency could obstruct the ombudsman in releasing a recommendation to the governor or the legislature.

Duties of the FIA

The bill would add that upon the request of the ombudsman, the FIA and a child placing agency would be required to provide any requested information within 10 business days. If the FIA determines that the release of such information would violate federal or state law, the ombudsman would be notified within the same 10-day period.

In addition, the ombudsman, FIA, and the Department of Information Technology would be required to enter into an agreement by June 20, 2005 ensuring that the ombudsman has access, in his or her own office, to the FIA's computer networks regarding child protective services, foster care, and adoption, except as prohibited by state or federal law or if the release of such information to the ombudsman would result in the loss of federal funding.

Disclosure of Information

Under the act, records of the ombudsman are confidential and exempt from disclosure under the Freedom of Information Act and would not be subject to a court subpoena or discoverable in a legal proceeding. The bill provides, that the ombudsman could release information regarding the FIA's actions in a case under the Child Protection Law or generated during the course of an investigation to a complainant or to a closed session of a legislative committee that has jurisdiction over family and children's issues.

Unless otherwise part of a public record, the ombudsman would be prevented from releasing to the general public any confidential information on a parent or child relating to mental health evaluations or treatments; evaluations or treatments of a substance-abuse related disorder; medical diagnoses or treatments; domestic violence-related or sexual assault services. However, the ombudsman could disclose such information to a court or the FIA if necessary to identify, prevent, or respond to child abuse or child neglect. Nonetheless, the ombudsman could not disclose the address, telephone number, or other information regarding the whereabouts of a victim of suspected victim of domestic violence, unless otherwise ordered by the court.

The ombudsman would be prohibited from disclosing any confidential information about an active law enforcement investigation or from disclosing the identity of an individual making a complaint of child abuse or child neglect under the Child Protection Law without prior written permission from that individual or upon a court order. The ombudsman could, however, release the identity of an individual who intentionally makes a false report of child abuse or child neglect under the Child Protection Law.

Report of Findings

The bill specifies that a report by the ombudsman would not be subject to prior approval by a person outside of the office.

The act requires the ombudsman to provide the complainant with a copy of his or her recommendation regarding a complaint. The bill would permit (though not require) the ombudsman to provide the individual filing the complaint with a copy of the

ombudsman's report of findings, recommendations to the department, the department's response, as well as any information that has been made public. However, the ombudsman would be prohibited from releasing to the complainant any information that would endanger the health or welfare of the child or other individual.

Repealed Sections

The bill would repeal Section 13 (MCL 722.933), which requires the ombudsman to maintain a registry of adoption attorneys. Section 6(e) [MCL 722.926(e)], pertaining to the subpoena power of the ombudsman, would be repealed five years after the bill's effective date. The bill would also repeal sections 14 and 15 (MCL 722.934 and 722.935), concerning the current act's effective date and tie-bars to other legislation enacted in 1994.

House Bill 4586 (Child Protection Law)

The bill would amend the Child Protection Law (MCL 722.622 et al.) by expanding the list of persons eligible to obtain otherwise confidential child abuse records and increasing the disclosure of certain "specified information." Specifically, the bill would require the director of the Family Independence Agency to release specified information in a child abuse or neglect case in which a child who was part of the case had died. There are several provisions in that act currently that govern the disclosure of "specified information" for child protective services records (see Background Information).

Under the act, "specified information" is defined to generally mean information in a central registry case record that is specifically related to any referrals or reports of child abuse or neglect. The bill would amend the definition so that specified information would be any information in a children's protective services case record that is related to the Family Independence Agency's actions in response to a complaint of child abuse or neglect. The bill would specifically exclude any information that is not related to the department's actions in response to a report of child abuse or neglect.

The act also lists several individuals and organizations that may obtain a written report, document, or photograph filed with the FIA that is otherwise confidential, including law enforcement agencies, physicians, a court, a grand jury, and the alleged perpetrator, among others. The bill would add that the confidential information may also be disclosed to a foster care review board for the purpose of meeting the requirements of Public Act 422 of 1984.

In addition, the bill would delete a provision stating that in releasing information to a child placing agency, child care center, or child caring institution, or to a person seeking employment with such an organization, a case that investigated before July 1, 1999 and entered in the central registry is considered a central registry case if the case is one in which abuse or neglect is the suspected cause of a child's death; the child is the victim of suspected sexual abuse or sexual exploitation; or abuse or neglect results in severe physical injury to the child requires and requires medical treatment or hospitalization.

Finally, the act provides that the identity of an individual who has reported suspected incidents of child abuse is confidential and only made available upon the written consent of the individual, except that it is made available to the child protective services agency or law enforcement agency investigating the suspected abuse. The bill would also allow the reporting individual's identity to be made available to the children's ombudsman.

BACKGROUND INFORMATION:

Confidentiality of Child Abuse or Neglect Records

Under the Child Protection Law (Public Act 238 of 1975), unless made public by a decision of the FIA director, a written report, document, or photograph filed with the FIA about a matter of alleged child abuse is confidential and may only be disclosed to certain individuals including, among others, police or law enforcement agencies; a physician treating the child; a person legally authorized to place a child in protective services; a person named in the report or record as the perpetrator or alleged perpetrator; a court; a grand jury; a legislative committee with jurisdiction over protective services; a child care regulatory agency; and the children's ombudsman (MCL 722.627). The Child Protection Law (MCL 722.627d) permits the director upon his or her initiative, or upon a written request, to release specific information if there is clear and convincing evidence that either of the following is true:

** The release of such information is in the best interest of the child to whom the specified information relates.

** The release of such information is not in conflict with the best interest of the child and one or more of the following is true:

- The release is in the best interest of a member of the child's family or of an individual who resides in the same home as the child.
- The release clarifies actions taken by the department on a specific case.
- The report or record concerns a child who has died or concerns a member of that child's family.
- All or part of the report or record is publicly disclosed in a judicial proceeding.
- A complaint or investigation to which the report or record pertains has been part of the subject matter of a published or broadcast media story.
- The report or record concerns a substantiated report of sexual abuse, serious injury, or life threatening harm involving the child or a sibling or the child identified in the request.

In addition, the CPL prohibits the FIA director from denying a request for specific information based on a desire to shield a lack of or an inappropriate performance by the department (MCL 722.627e).

Complaint Process and Investigative Procedures for the Children's Ombudsman

The following is based on the complaint/investigative process of the office as described in the office's 2002 annual report.

Upon receiving a complaint, it is classified into one of three categories: inquiries, referrals, and valid complaints. *Inquiries* are complaints that do not involve child protective services, foster care, or adoption services, but often concern custody matters and child support problems. *Referrals* are complaints that concern a child involved with child protective services, foster care, or adoption services, but where the concern involved an aspect of the child welfare system other than the FIA or a private agency, providing the ombudsman with no authority to investigate. *Valid complaints* are those complaints that fall under the Children's Ombudsman's Act. However, not all valid complaints result in an open investigation.

Once an investigation is opened, a letter is sent to the complainant informing him or her that a case will be reviewed. The goals of the investigation are established by the intake investigator and the ombudsman. Generally, the investigation focuses on, though is not limited to, the issues raised by the complainant. Investigations include an extensive review of the case file, interviews with agency or FIA personnel and other interested parties, court appearances, case conferences, and consultation with outside experts.

When the investigations are complete, the ombudsman will affirm or disaffirm the actions of the FIA or agency. If the ombudsman affirms the actions of the agency or the FIA, it notifies the agency or the FIA, and the complainant. If it is determined that the agency or the FIA did not comply with the applicable laws, the ombudsman issues a draft report of findings and recommendations to the FIA or the agency, which then have 60 days to respond. The complainant then receives a letter indicating that the case has been closed, and includes the ombudsman's recommendations, the agency's or FIA's response, and any corrective actions taken by the FIA or the agency.

Specified Information from a Child Protective Services Record

Sections 7c through 7i of the Child Protection Law set the ground rules under which the director of the Family Independence Agency may release "specified information" from a child protective services record. The release of specified information does not subject a report or record that is confidential under the act to disclosure under the Freedom of Information Act. In general, the director may release specified information, upon receiving a proper request, if the release is in the best interest of the child to whom the information relates or the release of information does not conflict with the child's best interest and is in the best interest of a family member or other person who resides with the child. One of the following must also be true of the information: it clarifies actions taken by the department; the record concerns a child who has died or a member of that child's family; all or part of the report is publicly disclosed pursuant to a judicial proceeding; a complaint or investigation of child abuse or neglect has been part of the subject matter of a published broadcast media story; or the record containing specified information concerns a substantiated report of sexual abuse, serious injury, or life threatening harm involving the child or a sibling identified in the request. (MCL 722.627c and 722.627d)

The director of the FIA is prohibited from releasing any specified information if the request for release does not include sufficient information in order to properly identify the specific case subject to the request; an investigation of the report of child abuse or

neglect is in progress and the report has not been substantiated nor unsubstantiated; there is an ongoing criminal investigation and the release of any specified information would interfere with that investigation; the individual requesting the release of the specified information is incarcerated in a state, county, or federal correctional facility; or the child to whom the record relates is 18 years of age or older. In addition, the director of the FIA is specifically prohibited from denying a request based on a desire to shield a lack of, or an inappropriate, performance by the department. (MCL 722.627e)

If the specified information is released, the department is required to notify each individual named in the report as a perpetrator or alleged perpetrator of child abuse or neglect; each parent or legal guardian of the child; each attorney representing the child, a parent or legal guardian, or actual or alleged perpetrator; and the child's guardian ad litem. A person that is required to be notified is permitted to appeal the decision of the director to release the specified information. (MCL 722.627g and 722.627h)

ARGUMENTS:

House Bill 4096

For:

Under current law, the children's ombudsman is designed to be an "autonomous entity" ensuring compliance with relevant statutes, rules, and policies pertaining to children's protective services through its role as a watchdog of the state's Family Independence Agency and contracted private agencies. However, some people believe the process for appointing the ombudsman raises questions about the independence of the office.

First, the ombudsman is appointed by, and serves at the pleasure of, the governor. Indeed, the second person to hold the position had previously served as the governor's human services policy coordinator. While in no way questioning that person's integrity or qualifications for the position, or the office's operations during that time, it is that sort of situation that clouds the oversight capacity of the office. Being a gubernatorial appointee gives rise to questions about the ombudsman's ability to be critical of the FIA and, ultimately, the administration. There are concerns that the children's ombudsman may not investigate the actions of the FIA as critically or as thoroughly as he or she should, due to loyalty or for fear of retribution or retaliation.

Second, due to the fact that the office and the FIA both fall under the control of the executive office, the relationship between the two offices could become too "comfortable." This, in turn, could compromise the impartiality of the ombudsman's office, and its ability to ensure proper oversight of the department's actions. While the two offices should work together to some degree, there also should exist a certain amount of tension between the two offices to ensure that the findings and recommendations of the ombudsman carry enough weight to affect the decisions, policies, and procedures of the FIA. As an oversight agency, the ombudsman's office should be granted enough independence to thoroughly investigate the actions or inaction of the FIA without undue influence from the department or the executive office, and should be granted adequate authority to ensure that its findings and recommendations are taken into consideration and addressed by the department.

Under the House Bill 4096 the ombudsman would still be appointed by the governor, but with the consent of the Senate. In addition, the governor would have to report to the legislature the reasons for removing an ombudsman from office. These changes should help to ensure that the ombudsman's office can operate with a certain degree of separation and independence from the executive branch.

Response:

If the intent of the bill is to ensure the independence of the ombudsman, the office should be established within the Legislative Council in a manner similar to that of the Legislative Corrections Ombudsman, created under Public Act 46 of 1975 (before the office was abolished in 2003). Under that act, the corrections ombudsman was appointed by, and served at the pleasure of, the council. In fact, the bill in the 1993-1994 session that originally established the children's ombudsman at one time proposed putting the office within the Legislative Council. Under House Bill 4096, the children's ombudsman would remain a gubernatorial appointee, which still fails to guarantee the full independence of the office. Finally, the bill grants the governor the sole authority to remove the ombudsman from office. The governor is only required to report the reason for such removal to the legislature. If the legislature finds that the ombudsman was unjustly removed from office, there are no provisions in the bill to overturn the governor's action.

Rebuttal:

The bill's appointment provisions provide adequate assurances that the office will remain independent of the executive branch. The current system for appointing the ombudsman is problematic because the governor is granted unfettered discretion over the hiring and firing of the ombudsman. The bill addresses this by subjecting the governor's appointment to the scrutiny of the State Senate.

For:

The bill improves current law by permitting any individual to file a complaint with the ombudsman. Current law lists several individuals who may file a complaint with the ombudsman, including the child, a biological parent, a foster parent, a current or prospective adoptive parent, a legal guardian, a guardian ad litem, an adult relative within the fifth degree of consanguinity, a state legislator, and an attorney for any of the above individuals (except for a legislator). However, current law does not permit a neighbor, teacher, or any other responsible adult who may have regular contact with a child to file a complaint directly with the office. Anyone not explicitly listed as a possible complainant would have to first contact their state legislator or hope that the situation is brought to the attention of the office in some other way to prompt the office to open an investigation on its own. By permitting any individual to file a complaint with the ombudsman, the bill enhances the protection, safety, and well-being of children within the child welfare system.

For:

The bill strengthens and clarifies the duties and responsibilities of the ombudsman. Under current law the duties of the ombudsman include investigating an administrative act of the department; determining whether to investigate a complaint; investigating an action of an adoption attorney; holding informal hearings; and making recommendations to the governor and the legislature. The bill adds several duties that will ensure the safety and protection of children, by permitting the ombudsman to take certain affirmative

actions. The bill requires the ombudsman to take the steps necessary, including legal action, to protect the rights and welfare of each child in the child welfare system. This added responsibility grants clear authority to the ombudsman to remove children residing in a dangerous environment, notwithstanding any actions or determinations by the department and the courts.

For:

In written testimony provided to the Committee on Family and Children Services, the Office of Children's Ombudsman provided the following comments on an earlier, though substantially similar, version of the bill:

** "...we support the provision that would allow any person to file a complaint with OCO. We currently open investigations in cases where it seems appropriate, even if the complainant is not a listed person, by listing the Ombudsman as the complainant." [See Section 4(4)]

** "We strongly support language in Section 4(4) that gives the Ombudsman sole discretion to determine whether a complaint falls within his or her duties and powers to investigate and to refer cases immediately to the department for investigation or action. We use a process much like the one described in this section and find it a valuable mechanism for protecting children."

** "We strongly support language...that gives OCO authority to make recommendations to the governor and legislature without review by any other entity in the executive branch." [See Section 6(g)]

** "We strongly support language in Section 8(3) that would give OCO access to FIA computer systems including the Central Registry, SWSS, and CIMS. We are pleased to report that the Department also supports this language, and we are engaged in discussion with FIA regarding the implementation of this section."

** "We strongly support language in Sec. 11 that assures the ability of OCO to accomplish its work and issue reports without the review of other parties."

House Bill 4586

For:

Providing for the disclosure of child protection records when a child dies while in the custody of the state, a contracted agency, or a foster care parent, serves as just one mechanism to bring about greater accountability in the child welfare system. Opening the records, which would occur in the most egregious of cases, provides for public oversight of the child welfare system by making those records open to public scrutiny and examination. This permits the records to be viewed by child advocacy organizations and other parties and organizations with a vested interest in the protection of children, and helps guard against any unprincipled or substandard behavior on the part of the courts, the children's ombudsman, and the FIA and its contracted private agencies.

For:

Currently under the act, the director *may* release a record or report containing specified information that concerns a child who has died (see the process described above in the (Background Information)). There have been strict limits on what may be released and to whom it may be released. In addition, the release of this information is time consuming and requires significant amounts of notification. Reportedly, it has been difficult to obtain information from the department when a child dies. The bill, by requiring the director to release specified information without regard to the act's current process and limitations, provides greater public accountability over the child welfare system.

Against:

Requiring the director to release information overrides a process designed to limit the dissemination of sensitive information so that only those who have a legitimate interest and stake in the release of such information are provided access. This bill potentially provides the public with free and unfettered access to every morsel of information contained in a child protective services record, even when such a disclosure could subject the family (including siblings) to irreparable harm.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.