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BILL ANALYSIS



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House Bill 4096 (Substitute H-4 as passed by the House)
Sponsor: Representative Lauren Hager
House Committee: Family and Children Services
Senate Committee: Families and Human Services

Date Completed: 10-1-03

CONTENT**The bill would amend the Children's Ombudsman Act to do the following:**

- **Require the Governor, with the advice and consent of the Senate, to appoint a Children's Ombudsman from a list submitted by a committee.**
- **Allow any individual to submit a complaint to the Ombudsman.**
- **Give the Ombudsman the sole discretion and authority to determine whether to investigate a complaint, whether the complaint involved an administrative act, and the scope and duration of an investigation.**
- **Authorize the Ombudsman to investigate each child's death that could have resulted from child abuse or neglect.**
- **Allow the Ombudsman to have access to Family Independence Agency (FIA) computer networks and records and reports, including medical and mental health records, necessary to carry out his or her powers and duties.**
- **Authorize the Ombudsman, for five years, to subpoena records and report.**
- **Revise the Act's confidentiality requirements, and allow the Ombudsman to disclose confidential information under certain circumstances.**
- **Require Children's Ombudsman Office personnel to receive training in handling child abuse or neglect complaints that involved a history of domestic violence.**
- **Prescribe penalties for intentionally making a false complaint of child abuse or neglect.**
- **Repeal a requirement that the Ombudsman maintain an adoption attorney registry.**

The bill is described below in more detail.

Establishment of Office

The Act states that the Children's Ombudsman's Office is created as an autonomous entity in the Department of Management and Budget (DMB) 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. Under the bill, the Office also would be established as a means of effecting changes in policy, procedure, and legislation; educating the public; investigating and reviewing actions of State agencies or entities receiving State funding; and improving delivery of care of children in foster care and adoptive homes. The bill further specifies that the office of Children's Ombudsman would be established in the Children's Ombudsman's Office.

The Act requires the Ombudsman to establish procedures for budgeting, spending money, and employing personnel. The bill would require the Ombudsman to do this independently from the DMB and the Executive Office of the Governor.

Appointment of Ombudsman

The bill would require the Governor to appoint an individual as the Ombudsman, with the advice and consent of the Senate, from a list of at least three people submitted by a committee consisting of the following members:

- Two attorneys, one appointed by the Governor and one appointed by the State Bar of Michigan.

- Two judges serving in the Family Division of Circuit Court (family court), one appointed by the Supreme Court and one by the Governor.
- One physician appointed by the Governor.
- One member of the House of Representatives appointed by the Speaker of the House.
- One member of the Senate appointed by the Senate Majority Leader.
- One psychologist appointed by the Governor.
- One social worker appointed by the National Association of Social Workers of Michigan.
- One representative of a child placing agency appointed by the Governor.
- One representative of the Michigan Domestic Violence Prevention and Treatment Board, appointed by the Board or its designee.
- One member of the general public appointed by the Governor.
- One representative of the Department of State Police appointed by the Governor.

The committee could not recommend a person unless he or she were qualified by training and experience to perform the duties and exercise the powers of the Ombudsman and the Ombudsman Office as provided in the Act.

On the bill's effective date, the committee would have to be formed and would have to meet to interview and consider individuals for recommendation to the Governor. Within 60 days of the bill's effective date, the committee would have to recommend at least three individuals, ranked in order of committee preference. If the office of Children's Ombudsman became vacant, the committee would have to submit a list of at least three individuals within 60 days.

Within 60 days after the committee submitted its recommendations, the Governor would have to appoint one of the individuals to fill the vacancy, subject to the advice and consent of the Senate. If the Governor failed to make the appointment within 60 days, the individual ranked highest in the committee's recommendation would be appointed as the Children's Ombudsman.

The Governor could remove the Ombudsman from office for cause, and would have to report the reason for removal to the Legislature.

The Ombudsman serving in office on the bill's effective date would serve at the pleasure of the Governor until the Governor made an appointment.

Complaint Submission; Investigation

The Act allows the following individuals to 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:

- The child, if he or she is able to articulate a complaint.
- A child's biological parent.
- A child's foster parent.
- A child's adoptive or prospective adoptive parent.
- A child's legally appointed guardian.
- A child's guardian ad litem.
- An adult who is related to the child within the fifth degree by marriage, blood, or adoption, as defined in Section 22 of the Adoption Code.
- A Michigan legislator.
- An attorney for any of the individuals mentioned above.

The bill would delete that provision, and would allow any individual to submit a complaint to the Ombudsman, as long as the subject matter fell within the duties and powers of the Ombudsman to investigate.

Under the bill, the Ombudsman would have the sole discretion and authority to determine if a complaint fell within his or her duties and powers to investigate and if a complaint involved an administrative act. The Ombudsman could initiate an investigation without receiving a complaint. The Ombudsman would define the scope, duration, and issues to be considered as part of the investigation. During the course of the investigation, the Ombudsman could refer a case to the FIA if he or she determined that the FIA had received a report on the case, but did not conduct a field investigation. If the Ombudsman referred a case to the FIA, the FIA would have to conduct a field investigation and report its findings to the Ombudsman.

(Under the Act, "administrative act" includes an action, omission, decision,

recommendation, practice, or other procedure of the FIA or a child placing institution with respect to a particular child related to adoption, foster care, or protective services.)

Ombudsman's Authority

The bill would give the Ombudsman the authority to pursue all necessary action, including, but not limited to, legal action, to protect the rights and welfare of each child or the class of children under the jurisdiction, control, or supervision of the FIA, the Michigan Children's Institute, the family court under Section 2(a)(1) of the juvenile code, a child caring institution, or a child placing agency. (Section 2(a)(1) states that the court has exclusive original jurisdiction over a juvenile younger than 17 who is found within the county and has violated a municipal ordinance or State or Federal law; has run away from home; has been repeatedly disobedient to his or her parents or legal guardian; or has been repeatedly truant or insubordinate in school.)

The bill also would authorize the Ombudsman to pursue legislative advocacy in the best interests of children; review policies and procedures relating to the FIA's involvement with children and make recommendations for improvement; and investigate each child's death that could have resulted from child abuse or child neglect.

The Act authorizes the Ombudsman, on his or her own initiative or upon receiving a complaint, to investigate an administrative act that is alleged to be contrary to law or rule or a policy of the FIA or a child placing agency, imposed without an adequate statement of reason, or based on irrelevant, immaterial, or erroneous grounds. Under the bill, the Ombudsman would have this authority in relation to a child who could be a victim of child abuse or neglect. The bill also specifies that, in relation to a child who could be an abuse or neglect victim, the Ombudsman would have sole discretion to determine if a complaint involved an administrative act.

The bill would delete a provision allowing the Ombudsman to file a petition on behalf of a child requesting the court to take jurisdiction under Section 2(b) of the juvenile code, or a

petition for termination of parental rights to a child who is in foster care or in the custody of a guardian, if the Ombudsman is satisfied that the complainant has contacted the FIA, the prosecuting attorney, the child's attorney, and the child's guardian ad litem, if any, and that none of them intends to file a petition. (Section 2(b) of the juvenile code gives the family court jurisdiction over a juvenile under 18 in cases of abuse or neglect.)

The Act allows the Ombudsman to conduct a preliminary investigation to determine whether an adoption attorney may have committed an administrative act that is alleged to be contrary to law, rule, or the Michigan Rules of Professional Conduct. The Act also requires the Ombudsman to refer the complaint to the Attorney Grievance Commission of the State Bar of Michigan, if the preliminary investigation leads the Ombudsman to believe that the matter may involve misconduct by the adoption attorney. The bill would delete these provisions.

Report of Investigation

The Act requires the Ombudsman to prepare a report of the findings of an investigation and make recommendations to the FIA or a child placing agency if the Ombudsman finds that a matter should be further considered by the FIA or child placing agency; an administrative act should be modified or canceled; reasons should be given for an administrative act; or other action should be taken by the FIA or child placing agency. The bill would require the Ombudsman to make a report and recommendations if he or she found that an administrative act or omission should be modified, canceled, or corrected; reasons should be given for an administrative act or omission; or the FIA or child placing agency should further consider a matter or take other action.

Currently, before announcing a conclusion or recommendation that expressly or implicitly criticizes an individual, the FIA, or a child placing agency, the Ombudsman must consult with that person, the FIA, or the agency. When publishing an opinion adverse to the FIA or child placing agency, the Ombudsman must include a statement made to him or her by the FIA or child placing agency in defense or mitigation of

the action. The Ombudsman may request to be notified by the FIA or child placing agency of any action taken on any recommendation presented. The bill would delete these provisions.

Ombudsman's Access to Information

Under the bill, the Ombudsman would have the authority to gain access to records and reports necessary to carry out his or her duties and powers to the same extent and in the same manner as provided to the FIA under the Child Protection Law. The Ombudsman also would have to be given access to medical records and mental health records in the same manner as access is given to the FIA under Section 16281 of the Public Health Code and Section 748a of the Mental Health Code. (Under those sections, if there is a compelling need for medical or mental health records or information to determine whether child abuse or neglect has occurred, an FIA caseworker or administrator must notify a licensee, registrant, or mental health professional from whom the child received services that an abuse or neglect investigation has been initiated, and request in writing the child's records and information pertinent to the investigation. The licensee, registrant, or mental health professional then has 14 days to release the information. Under these circumstances, the physician-patient, dentist-patient, licensed professional counselor-client, limited licensed counselor-client, psychologist-patient, and any other health professional-patient privileges do not exist.)

The bill would authorize the Ombudsman to issue a subpoena requiring the production of a record or report necessary to carry out his or her powers and duties. If the person to whom a subpoena was issued failed or refused to produce the record or report, the Ombudsman could petition the court for enforcement of the subpoena. (These provisions would be repealed five years after the bill's effective date.)

The Act requires the FIA and a child placing agency to grant the Ombudsman or his or her designee, upon request, access to all relevant information, records, and documents in its possession that the Ombudsman considers necessary in an investigation. The bill would require the FIA and a child placing agency to provide this information within five business

days after the Ombudsman requested it. The Attorney General could take appropriate action to require that the requested information be provided to the Ombudsman, upon the Ombudsman's request.

The bill also would require the FIA to give the Ombudsman access, in the Ombudsman's own office, to departmental computer networks, including the central registry, service workers support system/foster care, adoption, juvenile justice (SWSS), and customer information management system (CIMS), unless otherwise prohibited by Federal law, or the release of the information to the Ombudsman would jeopardize Federal funding. (The central registry is a system maintained at the FIA to keep a record of all reports filed with the FIA in which relevant and accurate evidence of child abuse or neglect is found to exist.)

Disclosure of Information

The Act requires the Ombudsman to treat all matters under investigation, including identities of recipients or individuals providing information, as confidential, except as disclosures may be necessary to enable the Ombudsman to perform the duties of the Office and to support any recommendation resulting from an investigation. A record of the Office is confidential, may be used only for the purposes set forth in the Act, and is not subject to court subpoena. The Office's records are exempt from disclosure under the Freedom of Information Act. The bill would delete these provisions.

Under the bill, subject to the exceptions described below, all information obtained or generated by the office of Children's Ombudsman would be confidential, not subject to a court subpoena, and would not be discoverable in a legal proceeding. The bill would prohibit the Ombudsman from disclosing confidential information in response to a request under the Freedom of Information Act, unless the public interest in disclosure outweighed the public interest in nondisclosure. The Ombudsman would not be allowed to disclose any information that impaired the rights of the child or the child's parents or guardian.

The Ombudsman could release information to a complainant or to a closed session of a

legislative committee that had jurisdiction over family and children's services issues regarding the FIA's handling of a case under the Child Protection Law that was obtained or generated during an investigation conducted by the Ombudsman's Office.

Unless otherwise part of the public record, the office would not be allowed to release any of the following confidential information to the general public:

- Records relating to mental health evaluation or treatment of a parent or child.
- Records relating to the evaluation or treatment of a substance abuse-related disorder of a parent or child.
- Records relating to medical diagnosis or treatment of a parent or child.
- Records relating to domestic violence-related services and sexual assault services provided to a parent or child.
- Records relating to educational services provided to a parent or child.

If the Ombudsman determined, however, that disclosure of confidential information was necessary to identify, prevent, or respond to the abuse or neglect of a child, he or she could disclose information in his or her possession to a public or private agency responsible for the welfare of the child or to a court. The Ombudsman could 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.

The bill also would prohibit the Ombudsman from disclosing information relating to an ongoing law enforcement investigation or an ongoing children's protective services investigation, except as necessary to support legal action. The Ombudsman could not disclose the identity of an individual making a child abuse or neglect complaint under the Child Protection Law unless the individual gave written permission or a court ordered the Ombudsman to release the information.

Provision of Information to Complainant

Under the bill, the Ombudsman could provide the following to an individual making a complaint to the Office:

- A copy of the Ombudsman's report regarding the investigation's findings,

recommendations to the FIA made according to the investigation, the FIA's response to the Ombudsman's findings and recommendations, and any epilogue to the Ombudsman's report and the FIA's response.

- Information that had otherwise been made public.
- Confidential information, but only to the extent that release was necessary to enable the individual making the complaint to take action to protect the child from abuse or neglect.

The Ombudsman could not release to the complainant information that would endanger the health or welfare of a child or another person.

False Report of Child Abuse or Neglect

A person who intentionally made a false complaint of child abuse or neglect under the Act would be subject to the penalties contained in Section 13(5) of the Child Protection Law, which are as follows:

- If the child abuse or neglect reported would not constitute a crime or would constitute a misdemeanor if the report were true, the person is guilty of a misdemeanor punishable by up to 93 days in prison or a maximum fine of \$100, or both.
- If the child abuse or neglect reported would constitute a felony if the report were true, the person is guilty of a felony punishable by the lesser of the following: the penalty for the child abuse or neglect falsely reported; or imprisonment for up to four years or a maximum fine of \$2000, or both.

The Ombudsman could release the identity of an individual who made an intentionally false report of child abuse or neglect under the Child Protection Law.

Other Provisions

Under the bill, Children's Ombudsman Office personnel would be required to receive mandatory training conducted by the Michigan Domestic Violence Prevention and Treatment Board in domestic violence and in handling complaints of child abuse or neglect that involved a history of domestic violence.

The Act allows the Ombudsman to make recommendations to the Governor and the

Legislature concerning the need for protective services, adoption, or foster care legislation. Under the bill, the Ombudsman could make recommendations on 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. No other office, department, or agency could prohibit or inhibit the release of an Ombudsman's recommendation to the Governor or the Legislature.

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

Repealers

Section 13 of the Act requires the Ombudsman to maintain a registry of adoption attorneys who provide services described in the Adoption Code, and remove an adoption attorney from the registry if the attorney requests to be removed, the attorney fails to register as provided in the Foster Care and Adoption Services Act, or the Ombudsman receives notice that the attorney's license to practice law has been suspended or revoked. The bill would repeal Section 13.

The bill also would repeal Section 14, which provides for the Act's effective date, and Section 15, which tie-barred the Act to certain Senate and House bills.

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Legislative Analyst: Julie Koval

FISCAL IMPACT

The bill would result in an indeterminate workload increase for the Office of Children's Ombudsman. Any new costs related to the bill would be limited by annual appropriations. The FY 2003-04 budget for the Office of the Children's Ombudsman includes 14.0 FTEs and \$1,215,100.

The bill would have no fiscal impact on the Family Independence Agency.

Fiscal Analyst: Bill Bowerman
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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.