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VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act to amend and reenact §§ 2.2-438 through 2.2-444, 2.2-446, and 2.2-447 of the Code of Virginia, relating to Office of the Children's Ombudsman; powers and duties; report; recommendations.

[S 125]

Approved

Be it enacted by the General Assembly of Virginia:
1. That §§ 2.2-438 through 2.2-444, 2.2-446, and 2.2-447 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-438. Definitions.

As used in this chapter, unless the context requires another meaning:

"Abused or neglected child" means the same as that term is defined in § 63.2-100.

"Administrative act" includes an action, omission, decision, recommendation, practice, or other procedure of the Department, a local department, a children's residential facility, or a child-placing agency with respect to a particular child related to agency placement adoption, foster care, or child protective services.

"Agency placement adoption" means adoptions facilitated by child-placing agencies or local boards pursuant to Article 2 (§ 63.2-1221 et seq.) of Chapter 12 of Title 63.2.

"Central registry" means the system maintained at the Department of Social Services pursuant to § 63.2-1515.

"Child" means an individual who is (i) younger than the age of 18 or (ii) for purposes of the Fostering Futures program established pursuant to Article 2 (§ 63.2-917 et seq.) of Chapter 9 of Title 63.2, younger than the age of 21 and meets the eligibility criteria set forth in § 63.2-919.

"Child-placing agency" means (i) any person who places children in foster homes, adoptive homes, or independent living arrangements pursuant to § 63.2-1819; (ii) a local board that places children in foster homes or adoptive homes pursuant to §§ 63.2-900, 63.2-903, and 63.2-1221; or (iii) an entity that assists parents with the process of delegating parental and legal custodial powers of their children pursuant to Chapter 10 (§ 20-166 et seq.) of Title 20. "Child-placing agency" does not include the persons to whom such parental or legal custodial powers are delegated pursuant to Chapter 10 (§ 20-166 et seq.) of Title 20. Officers, employees, or agents of the Commonwealth or any locality thereof, acting within the scope of their authority as such, who serve as or maintain a child-placing agency shall not be required to be licensed.

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

"Children's residential facility" means the same as that term is defined in § 63.2-100.

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

"Commissioner" means the Commissioner of Social Services or his designee or authorized representative.

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

"Department" means the Department of Social Services.

"Foster care" means 24-hour substitute care provided to a child by a foster parent, children's residential facility, or group home licensed or approved by the Department under Chapter 9 (§ 63.2-900) of Title 63.2; care provided to a child in a relative's home under a court order; or any other care provided at the time the child's custody has been given to a government agency for children in the custody of the local board or who remain in the custody of their parents, but are placed away from their parents or guardians and for whom the local board has placement and care responsibility through a noncustodial agreement. "Child in foster care" includes children committed to the Department of Juvenile Justice who were in the custody of a local board immediately prior to their commitment to the Department of Juvenile Justice.

"Foster care services" means the provision of a full range of casework, treatment, and community services, including independent living services, for a planned period of time provided to a child meeting the requirements set forth in § 63.2-905.

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

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

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

60 **§ 2.2-439. Children's Ombudsman; appointment; removal.**

61 A. There is hereby created the Office of the Children's Ombudsman as a means of effecting changes in
62 policy, procedure, and legislation; educating the public; investigating and reviewing actions of the
63 Department, local departments, child-placing agencies, or children's residential facilities; and monitoring and
64 ensuring compliance with relevant statutes, rules, and policies pertaining to child protective services and the
65 placement, supervision, and treatment of, and improvement of delivery of care to, children in foster care and
66 adoptive homes *in agency placement adoptions*.

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

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

74 **§ 2.2-440. Procedures; training; notification of safety concerns.**

75 A. The Ombudsman shall establish procedures for the Office for budget, expenditures, and employment.
76 Subject to annual appropriations, the Ombudsman shall employ sufficient personnel to carry out the duties
77 and powers prescribed by this chapter.

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

81 C. Personnel employed by the Office shall receive ~~mandatory~~ training in ~~domestic violence and in~~
82 ~~handling complaints alleging that a child is an abused or neglected~~ *the areas of child abuse and neglect as*
83 *determined by the Ombudsman.*

84 D. The Ombudsman shall notify a child-serving agency of any immediate safety concerns regarding a
85 child or children who are part of an active or open child protective services or foster care case. This
86 notification shall occur as soon as possible, but not later than one business day after the Ombudsman
87 becomes aware of the concerns.

88 **§ 2.2-441. Individuals making complaint to Children's Ombudsman.**

89 A. *Any individual may submit a complaint to the Ombudsman. The Ombudsman has the sole discretion*
90 *and authority to determine if a complaint falls within the Ombudsman's duties and powers to investigate and*
91 *if a complaint involves an administrative act.*

92 B. Any of the following individuals may make a complaint to the Ombudsman with respect to a particular
93 child, alleging that an administrative act is contrary to law, rule, or policy; imposed without an adequate
94 statement of reason; or based on irrelevant, immaterial, or erroneous grounds:

95 1. The child, if the child is able to articulate a complaint, in accordance with the provisions of subsection
96 A of § 2.2-446;

97 2. A biological parent of the child;

98 3. A foster parent of the child;

99 4. An adoptive parent or a prospective adoptive parent of the child;

100 5. A legally appointed guardian of the child;

101 6. A guardian ad litem for the child;

102 7. A relative of the child or any person with a legitimate interest as defined in § 20-124.1;

103 8. A Virginia legislator;

104 9. An individual required to report that a child is alleged to be an abused or neglected child under
105 § 63.2-1509; and

106 10. An attorney for any individual described in subdivisions 1 through 7.

107 ~~B. Any individual may submit a complaint to the Ombudsman. The Ombudsman has the sole discretion~~
108 ~~and authority to determine if a complaint falls within the Ombudsman's duties and powers to investigate and~~
109 ~~if a complaint involves an administrative act.~~ C. The Ombudsman may initiate an investigation upon receipt
110 of a complaint from an individual not meeting the definition of complainant, *alleging that an administrative*
111 *act is contrary to law, rule, or policy, imposed without an adequate statement of reason, or based on*
112 *irrelevant, immaterial, or erroneous grounds. An individual not meeting the definition of complainant is not*
113 *entitled to receive information under this chapter as if such individual is a complainant. The individual is*
114 *entitled to receive the recommendations of the Ombudsman and the Department or local department's*
115 *response to the recommendations of the Ombudsman in accordance with state and federal law.*

116 D. During the course of *or prior to initiating* an investigation, the Ombudsman may refer a case to a
117 child-serving agency if the Ombudsman determines that such agency received a complaint on the case but did
118 not conduct an investigation. If the Ombudsman refers a case to a child-serving agency, such agency shall

119 conduct an investigation of the case or provide notice to the Ombudsman explaining why an investigation
 120 was not conducted or what alternative steps may have been taken to address the situation. If an investigation
 121 has been conducted, the child-serving agency shall report the results to the Ombudsman.

122 **§ 2.2-442. Children's Ombudsman; powers and duties.**

123 In addition to any powers described in this chapter, the Children's Ombudsman has the authority to do all
 124 of the following with regard to *children for whom a report of abuse or neglect was made*, children receiving
 125 child-protective or foster care services, in foster care, or placed for adoption in an agency placement
 126 adoption, and children who ~~may have~~ died as a result of alleged or suspected abuse or neglect:

- 127 1. Pursue all necessary action, including legal action, to protect the rights and welfare of such children;
- 128 2. Pursue legislative advocacy in the best interest of such children;
- 129 3. Review policies and procedures relating to any child-serving agency's involvement with such children
 130 upon the Ombudsman's own initiative or upon receipt of a complaint and make recommendations for
 131 improvement;
- 132 4. Initiate investigations of administrative acts of the Department, a local department, a children's
 133 residential facility, or a child-placing agency in cases relating to such children upon the Ombudsman's own
 134 initiative or upon receipt of a complaint; and

135 5. ~~Subject to an appropriation of funds, commence and conduct~~ Conduct investigations into alleged
 136 violations of the rights of a foster parent.

137 **§ 2.2-443. Children receiving child-protective services, in foster care, or placed for adoption in
 138 agency placement adoption; powers of Children's Ombudsman; child fatality cases; investigation.**

139 A. The Ombudsman may do all of the following:

- 140 1. Determine, in the Ombudsman's sole discretion, if a complaint involves an administrative act.
- 141 2. Decide, in the Ombudsman's discretion, whether to investigate an administrative act.
- 142 3. Upon the Ombudsman's own initiative or upon receipt of a complaint ~~and subject to an appropriation of~~
 143 ~~funds~~, investigate an alleged violation of the rights of a foster parent.

144 4. Except as otherwise provided in this subdivision, access records and reports necessary to carry out the
 145 Ombudsman's powers and duties under this chapter to the same extent and in the same manner as provided to
 146 the Department *and local departments, including reports submitted in accordance with §§ 9.1-153 and*
 147 *16.1-274*. The Ombudsman shall be provided access to medical and mental health disorder records in the
 148 same manner as access is provided to the Department *and local departments*. The Ombudsman may request
 149 substance use disorder records if the Ombudsman obtains a valid consent or a court order under 42 C.F.R.
 150 Part 2. In the course of a child fatality investigation, the Ombudsman may access records from the court of
 151 jurisdiction, *the Office of the Attorney General, prosecuting attorney, the local attorney for the*
 152 *Commonwealth*, or any attorney retained by the Department or local department ~~and reports from a county~~
 153 ~~child fatality review team~~ to the same extent and in the same manner as provided to the Department or local
 154 department under state law.

155 5. ~~Request a subpoena from a court requiring the production of a record or report necessary to carry out~~
 156 ~~the Ombudsman's duties and powers, including a child fatality investigation. If the person to whom a~~
 157 ~~subpoena is issued fails or refuses to produce the record or report, the Ombudsman may petition the court for~~
 158 ~~enforcement of the subpoena~~ Make an *ex parte* application to the circuit court for the county or city wherein
 159 evidence is sought for the issuance of a subpoena *duces tecum* in furtherance of an investigation or to request
 160 production of any relevant records, documents, and physical or other evidence of the Department, local
 161 department, child-placing agency, children's residential facility, or any person, partnership, association, or
 162 corporation located in the Commonwealth.

163 6. Hold informal hearings and request that individuals appear before the Ombudsman and give testimony
 164 or produce documentary or other evidence that the Ombudsman considers relevant to a matter under
 165 investigation.

166 7. Make recommendations to the Governor and the General Assembly concerning the need for child
 167 protective services, adoption, or foster care legislation, policy, or practice without prior review by other
 168 offices, departments, or agencies in the executive branch in order to facilitate rapid implementation of
 169 recommendations or for suggested improvements to the recommendations. No other office, department, or
 170 agency shall prohibit the release of an Ombudsman's recommendation to the Governor or the General
 171 Assembly.

172 B. The Ombudsman may investigate ~~at~~ child fatality cases that occurred or are alleged or suspected to
 173 have occurred due to abuse or neglect of a child in the following situations:

- 174 1. A child died during an active child protective services investigation or open services case, or there was
 175 a valid or invalid child protective services complaint within 12 months immediately preceding the child's
 176 death.
- 177 2. A child died while in foster care, unless the death is determined to have resulted from natural causes
 178 and there were no prior child protective services or licensing complaints concerning the foster home.
- 179 3. A child was returned home from foster care and there is an active foster care case.
- 180 4. A foster care case involving the deceased child or sibling was closed within 24 months immediately

181 preceding the child's death.

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

184 D. The Ombudsman is subject to the same standards for safeguarding the confidentiality of information
185 under this section and the same sanctions for unauthorized release of information as the Department.

186 **§ 2.2-444. Decision to investigate; notice; pursuing administrative remedies or channels of**
187 **complaint; further investigation; violation of state or federal criminal law; complaint against child-**
188 **placing agency.**

189 A. Upon deciding to investigate a complaint from a complainant or an individual not meeting the
190 definition of complainant, the Ombudsman shall notify the complainant or the individual not meeting the
191 definition of complainant of the decision to investigate and shall notify the Department or local department
192 or children's residential facility, or child-placing agency of the intention to investigate. If the Ombudsman
193 declines to investigate a complaint or continue an investigation, the Ombudsman shall notify the complainant
194 or the individual not meeting the definition of complainant and the Department or local department, or
195 children's residential facility, or child-placing agency of the decision and of the reasons for the Ombudsman's
196 action.

197 B. The Ombudsman shall advise a complainant of administrative remedies and may advise the individual
198 to pursue all administrative remedies or channels of complaint open to the complainant before pursuing a
199 complaint with the Ombudsman. Subsequent to the administrative processing of a complaint, the
200 Ombudsman may conduct further investigations of a complaint upon the request of the complainant or upon
201 the Ombudsman's own initiative.

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

207 *D. The Ombudsman may refer any complaints regarding administrative acts related to a child receiving*
208 *protective or foster care services in any facility as defined in § 37.2-100 to the Office of the State Inspector*
209 *General.*

210 **§ 2.2-446. Confidentiality of record of Children's Ombudsman; disclosure; limitations; release of**
211 **certain information.**

212 A. All statements, documentation, and other evidence received or maintained by the Office or its agents in
213 connection with complaints made to or investigations undertaken pursuant to the Ombudsman's powers
214 enumerated in § 2.2-442 shall be confidential and not subject to the Virginia Freedom of Information Act
215 (§ 2.2-3700 et seq.) and are not discoverable in legal proceedings. If the Ombudsman identifies action or
216 inaction by the state through its agencies or services that failed to protect children, the Ombudsman shall
217 provide any findings and recommendations to the agency affected by those findings and to the *Governor or*
218 *General Assembly* upon request; ~~and may provide those findings and recommendations to the complainant, to~~
219 ~~the extent consistent with state or federal law.~~ The Ombudsman shall not disclose any information that
220 impairs the rights of the child or the child's parents or guardians.

221 If the child is the complainant, the Ombudsman need not gain the consent of the Department or local
222 department, the children's residential facility, the child-placing agency, or the foster parent or guardian of the
223 child or other person having custody or care of the child to receive information from or communicate with the
224 child.

225 B. Unless otherwise part of the public record, the Office shall not release any of the following confidential
226 information to the general public:

- 227 1. Records relating to a mental health evaluation or treatment of a parent or child;
- 228 2. Records relating to the evaluation or treatment of a substance abuse-related disorder of a parent or
229 child;
- 230 3. Records relating to a medical diagnosis or treatment of a parent or child;
- 231 4. Records relating to domestic violence-related services and sexual assault services provided to a parent
232 or child; or
- 233 5. Records relating to educational services provided to a parent or child.

234 C. Notwithstanding subsection B, if the Ombudsman determines that disclosure of confidential
235 information is necessary to identify, prevent, or respond to the abuse or neglect of a child, the Ombudsman
236 may disclose such information to the Department or local department, a court, a law-enforcement agency, or
237 a prosecuting attorney investigating a report of known or suspected abuse or neglect of a child. The
238 Ombudsman shall not release the address, telephone number, or other information regarding the whereabouts
239 of a victim or suspected victim of domestic violence unless ordered to by a court.

240 D. Except as provided in subsection C, the Ombudsman shall not disclose information relating to an
241 ongoing law-enforcement investigation or an ongoing child protective services investigation. The
242 Ombudsman may release the results of its investigation to a complainant, or an individual not meeting the

243 definition of complainant, if the Ombudsman receives notification of and determines that releasing the results
 244 of its investigation is not related to and will not interfere with an ongoing law-enforcement investigation or
 245 ongoing child protective services investigation.

246 E. The Ombudsman shall not disclose the identity of an individual making a complaint alleging that a
 247 child is an abused or neglected child unless that individual's written permission is obtained first or a court has
 248 ordered the Ombudsman to release such information.

249 F. The Ombudsman may release an individual's identity who makes an intentionally false report alleging
 250 that a child is an abused or neglected child, subject to other laws relating to such disclosure.

251 **§ 2.2-447. Report of findings; recommendations; consultation with individual, Department, local**
 252 **department, children's residential facility, or child-placing agency; publication of adverse report;**
 253 **notice of actions; information provided to complainant; child fatality investigation; report.**

254 A. The Ombudsman shall prepare a report of the factual findings of an investigation and make
 255 recommendations to the Department, local department, children's residential facility, or child-placing agency
 256 if the Ombudsman finds any of the following:

257 1. A matter should be further considered by the Department, local department, children's residential
 258 facility, or child-placing agency.

259 2. An administrative act or omission should be modified, canceled, or corrected.

260 3. Reasons should be given for an administrative act or omission.

261 4. Other action should be taken by the Department, local department, children's residential facility, or
 262 child-placing agency.

263 B. *The Department, local department, children's residential facility, or child-placing agency that is the*
 264 *subject of such report may provide the Ombudsman with a written response to the report within 14 calendar*
 265 *days of receiving such report or within a reasonable time agreed to by the Ombudsman. The Ombudsman*
 266 *may prepare an epilogue to such written response. The Ombudsman shall provide the Commissioner with a*
 267 *copy of any such report, written response, or epilogue.*

268 C. *The Ombudsman may request to be notified by the Department, local department, children's residential*
 269 *facility, or child-placing agency of any action taken in response to recommendations provided by the*
 270 *Ombudsman.*

271 D. *The Ombudsman may publish a report prepared pursuant to this section on the Office's website (i)*
 272 *subject to the provisions of subsections B, C, D, and E of § 2.2-446 and (ii) provided that information*
 273 *contained in the report that is confidential under federal or state law and the name of any child, parent, and*
 274 *employee of the Department, local department, children's residential facility, and child-placing agency*
 275 *contained in such report is redacted, unless such information has otherwise been made public.*

276 E. At least 30 calendar days before publishing a report that is adverse to the Department, the local
 277 department, a children's residential facility, a child-placing agency, or the individual that is or was the subject
 278 of an investigation by the Ombudsman, the Ombudsman shall inform the Department, the local department,
 279 the children's residential facility, the child-placing agency, or the individual. When publishing a report
 280 adverse to the Department, local department, children's residential facility, child-placing agency, or
 281 individual, the Ombudsman shall include in the publication any ~~statement of reasonable length made to the~~
 282 ~~Ombudsman written response~~ by the Department, local department, children's residential facility,
 283 child-placing agency, or individual in defense or mitigation of the action. ~~The Ombudsman may request to be~~
 284 ~~notified by the Department, local department, children's residential facility, child-placing agency, or~~
 285 ~~individual, within a specified time, of any action taken on any recommendation presented.~~ *The Ombudsman*
 286 *shall not disclose information in any published report if doing so could endanger the health or welfare of a*
 287 *child or another individual.*

288 ~~C. F.~~ F. The Ombudsman shall notify the complainant of the ~~actions taken~~ *recommendations made by the*
 289 *Ombudsman and by the Department, local department, children's residential facility, or child-placing agency*
 290 *agency's response to such recommendations.*

291 ~~D.~~ G. The Ombudsman may provide to the complainant the following information:

292 1. A copy of the Ombudsman's report regarding the investigation's findings, recommendations to the
 293 Department or local department made according to the investigation, the Department or local department's
 294 response to the Ombudsman's findings and recommendations, and any epilogue to the Ombudsman's report
 295 and the Department or local department's response; or

296 2. Information that has otherwise been made public.

297 H. *The Ombudsman may provide an individual who is not the complainant but has submitted a complaint,*
 298 *subject to the provisions of this section and § 2.2-446, with a copy of the Ombudsman's report regarding the*
 299 *investigation's findings and recommendations.*

300 ~~E.~~ I. The Ombudsman shall not release information to the individual making the complaint if doing so
 301 could endanger the health or welfare of a child or another individual.

302 ~~F.~~ J. With respect to a child fatality case investigated under subsection B of § 2.2-443 and upon review of
 303 records or other information received under subdivision A 3 or 4 of § 2.2-443 in the course of a child fatality
 304 investigation, if there is no ongoing child protection proceeding involving a sibling of the child who died, the

305 Ombudsman shall provide any necessary recommendations for improving systemic issues that are discovered
306 during the investigation of the child fatality. The recommendations may be provided to the court of
307 jurisdiction, the state court administrative office, the ~~county~~ *state or regional* child fatality review team,
308 medical professionals, or attorneys or other legal professionals involved with the particular child who died.
309 The recommendations shall also be summarized and included in the annual report referenced in subsection ~~G~~
310 *K*.
311 ~~G. K.~~ The Ombudsman shall submit to the Governor, the ~~director of the Department~~ *Commissioner*, and
312 the General Assembly an annual report on the Ombudsman's activities, including any recommendations
313 regarding the need for legislation or for a change in rules or policies. *The Ombudsman may publish such*
314 *report.*