

SESSION OF 2023

**SUPPLEMENTAL NOTE ON SENATE SUBSTITUTE FOR
HOUSE BILL NO. 2070**

As Recommended by Senate Committee on
Judiciary

Brief*

Senate Sub. for HB 2070 would enact the Child Advocate Act (Act) on and after July 1, 2023, which would establish the Office of the Child Advocate (OCA) as an independent state agency. The bill would also amend law in the Revised Kansas Code for Care of Children (CINC Code) and the Revised Kansas Juvenile Justice Code (Juvenile Code) concerning various related provisions.

[*Note:* The amendments to current law would be effective upon publication in the *Kansas Register* unless a different effective date is specified.]

Child Advocate Act (Sections 1–6)

The bill would state the Act's provisions would be effective on and after July 1, 2023.

Definitions

The Act would define the following terms:

- “Office” would mean the OCA and would include the Child Advocate and staff;
- “Child” would mean an individual less than 18 years of age at the time such individual:

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- Is in the custody of the Secretary for Children and Families (Secretary);
- Was previously in the custody of the Secretary;
- Is alleged to be a child in need of care; or
- Is or was receiving services from the Department for Children and Families (DCF) or any contracting agency, for whom DCF has an open case file, or who has been, or whose siblings, parents, or other caretakers have been the subject of a report of abuse or neglect to DCF within the previous five years.

Establishment of Office of the Child Advocate; Selection and Appointment of Child Advocate

The Child Advocate would be established as the independent head of the OCA, and the bill would specify nothing in the Act would be construed to permit any governmental agency to exercise control or supervision over the Child Advocate or the OCA. The Child Advocate would be appointed by the Governor and subject to confirmation by the Senate.

The bill would require the Child Advocate to be selected without regard to political affiliation and on the basis of integrity and capacity for effectively carrying out the duties of the OCA. The bill would prohibit any former or current executive or manager of any program or agency or contracting agency subject to oversight by the OCA from being appointed as Child Advocate within 12 months of such individual's period of service within the program or agency.

The Child Advocate would serve a term of five years or until a successor has been appointed and confirmed. The Child Advocate would be in the unclassified service and receive an annual salary equal to that of a district court judge.

The bill would require the Child Advocate exercise independent judgment in carrying out the duties of the office.

The bill would specify the Child Advocate would have general managerial control over the OCA and would be required to establish the organizational structure of the OCA as appropriate to carry out the responsibilities and functions of the OCA.

The bill would provide that all budgeting, purchasing, personnel, and related administrative functions of the OCA would be administered under the direction and supervision of the Child Advocate.

Within the limits of appropriations, the Child Advocate could hire unclassified employees necessary to administer the OCA who would serve at the pleasure of the Child Advocate. The Child Advocate could obtain the services of other professionals necessary to independently perform the functions of the OCA, including obtaining legal services from the Attorney General as provided elsewhere in statute. The Child Advocate could enter into agreements with the Secretary of Administration for the provision of personnel, facility management, and information technology services.

Purpose of the Child Advocate

The bill would identify the purpose of the Child Advocate is to ensure that children and families receive adequate coordination of child welfare services for child maltreatment prevention, protection, and care through services offered by:

- DCF or its contracting agencies;
- Kansas Department for Aging and Disability Services (KDADS);
- Kansas Department of Corrections (KDOC);

- Kansas Department of Health and Environment (KDHE); and
- Juvenile courts.

Duties and Powers of the OCA and the Child Advocate

The bill would require the OCA to:

- Receive and resolve complaints that allege that DCF or DCF's contracting agencies by act or omission have:
 - Provided inadequate protection or care of children;
 - Failed to protect the physical or mental health, safety, or welfare of any child; or
 - Failed to follow established laws, rules, and regulations or written policies.

The bill would require the Child Advocate to:

- Establish and implement procedures for receiving, processing, responding to, and resolving complaints made by or on behalf of children that adversely or may adversely affect the health, safety, and welfare of such children that relate to:
 - State agencies;
 - Service providers, including contractors and subcontractors; and
 - Any juvenile court.
- Provide DCF with a notice of availability that describes the OCA and how to contact the OCA, which DCF would be required to prominently display in DCF offices and facilities receiving public moneys for the care and placement of children;

- Maintain a public website;
- Publicize and notify individuals of the OCA's services, purpose, and contact information;
- Compile, collect, and preserve a record of complaints received and processed, which may reveal concerning patterns to be addressed; and
- Recommend changes to policies, procedures, or adopted or proposed rules and regulations of any state or local agency that adversely affect or may adversely affect the health, safety, and welfare of any child.

OCA Investigations

The OCA would be required to independently investigate complaints received if the OCA reasonably believes the complaint's allegations may be independently verified through an investigation. In conducting such investigations, the OCA would be required to:

- Establish and implement procedures for investigating complaints;
- Have access to the following information:
 - Names and physical locations of all children in protective services, treatment, or other program under the jurisdiction of DCF or KDOC;
 - All written reports of child abuse and neglect;
 - All records of any public or private agency or institution having custody of the child under court order, providing education, medical or mental health services to the child, or any placement or potential placement provider determined by the Secretary; and

- All current records required to be maintained as provided in the CINC Code and the Juvenile Code;
- Communicate privately with:
 - Any child or child's siblings, after consultation with treatment professionals and service providers; and
 - Anyone working the child, including the family, relatives, employees of DCF, employees of KDOC, and other persons or entities providing treatment and services;
- Have access to, including the right to inspect and copy, relevant child records held by:
 - Law enforcement agencies;
 - The clerk of any Kansas court;
 - Juvenile officers;
 - Public or private institutions; and
 - Other agencies with whom a particular child has been voluntarily or otherwise placed for care or has received treatment within Kansas or in another state;
- Work in conjunction with:
 - Juvenile intake and assessment workers;
 - Juvenile community corrections officers;
 - Guardians *ad litem*; and
 - Court-appointed special advocates; and
- Subpoena materials or witnesses, take statements under oath, serve interrogatories, and obtain judicial enforcement of compulsory processes.

Complaint Resolution by the OCA

The bill would require the OCA to resolve complaints by:

- Establishing and implementing procedures to resolve the complaints;
- Independently reviewing the complaint and accompanying documents;
- Recommending the appropriate agency or department do one of the following:
 - Review the matter further;
 - Modify or cancel the actions;
 - Change a rule, order, or internal policy;
 - Explain the action further; or
 - Within a reasonable amount of time, provide the OCA information as to the implementation or not of the recommendation by the appropriate agency or department;
- Submitting any findings and recommendations to DCF or KDOC as appropriate;
- Making referrals of child abuse or neglect to law enforcement agencies if there is reason to believe a criminal investigation is warranted and notifying the Abuse, Neglect, and Exploitation Unit of the Office of the Attorney General; and
- Producing reports of findings of fact or conclusions of law regarding any complaint, and if appropriate, the Attorney General could file such reports in any pending CINC case on behalf of the OCA.

Child Welfare System Oversight Assistance

The bill would outline the actions the OCA may take to assist the Legislature in oversight of the child welfare system. The OCA could:

- Meet and discuss any matter in the scope of the Act with the Joint Committee on Child Welfare System Oversight in regular or executive session under applicable duties of confidentiality;
- Review relevant statutes, rules and regulations, policies and procedures for the health, safety, and welfare of children;
- Evaluate the effectiveness of and recommend changes to procedures for reports of child abuse and neglect for child protective services, including, but not limited to, the involvement of DCF, service providers, guardians *ad litem*, court appointed special advocates, and law enforcement agencies; and
- Review and recommend changes to law enforcement investigative procedures for and emergency responses to reports of abuse and neglect.

Annual Report

The bill would require the Child Advocate, on or before the beginning of each regular Legislative Session, to submit an annual report to the Governor, Chief Justice of the Supreme Court and the Office of Judicial Administration, Secretary for Children and Families, President of the Senate, Speaker of the House of Representatives, Joint Committee on Child Welfare Oversight, House Committee on Child Welfare and Foster Care (or successor committee), Senate Committee on Public Health and Welfare (or successor committee), and any other relevant legislative committee.

The reports would be required to include the following items:

- The number of complaints received by the OCA;
- The disposition of the complaints;
- The number of children involved in such complaints;
- The outcome of such complaints;
- Recommendations for changes in statute, policies, procedures, or rules and regulations;
- The OCA's proposed annual budget; and
- Any other topics the OCA deems appropriate to properly perform the powers, duties, and functions provided by the Act.

Cooperation by State Agencies With the OCA

The bill would require DCF and its contracting agencies, KDOC, juvenile intake and assessment workers, juvenile community corrections officers, guardians *ad litem*, and court appointed special advocates to cooperate with the OCA and:

- Work diligently, promptly, and in good faith to assist the OCA in performing its powers, duties, and functions provided by the Act;
- Provide full access to and production of records and information requested by the OCA. Such access would not be a violation of confidentiality if provided and produced in good faith for the purposes of the Act;

- Require employees and contractors of such department or agency to comply with requests from the OCA;
- Allow employees of such department or agency to file a complaint with or provide records or information to the OCA without supervisory approval;
- Not willfully interfere with or obstruct any of the OCA's duties; and
- Promptly meet and consult with the OCA upon request.

Confidentiality

The bill would state the OCA would be subject to the same state and federal statutory disclosure restrictions and confidentiality requirements applicable to the state agency or other entity providing information to the OCA, with regard to the information received from the agency or other entity.

Any files maintained by the OCA would be confidential and disclosed only at the discretion of the Child Advocate, except that the identity of any complainant or child would not be disclosed by the OCA unless the complainant or child, or either's legal representative, consents in writing to such disclosure; or such disclosure is required by court order.

The bill would provide that any statement or communication made by the OCA relevant to a complaint being investigated by the OCA and any complaint or information made or provided in good faith by any person would be absolutely privileged, and the person would be immune from suit.

The bill would prohibit a representative of the OCA conducting or participating in any investigation of a complaint from knowingly disclosing to any person other than the OCA,

or a person authorized by the OCA, the name of any witness examined or any information obtained or given during such investigation. Such disclosure would be a class A nonperson misdemeanor.

The bill would require the OCA, after conducting or participating in any investigation of a complaint, to disclose the final result of the investigation with the consent of the child or the child's legal representative.

The OCA could not be required to testify in any court with respect to matters held to be confidential in this section, except as the court may deem necessary to enforce the provisions of the Act or when otherwise required by court order.

The bill would state the provisions providing for confidentiality of records would expire on July 1, 2028, unless the Legislature reviews and reenacts the provisions, pursuant to the Kansas Open Records Act (KORA), prior to July 1, 2028.

Retaliation; Prohibited Actions

Any person who knowingly takes "retaliatory action," as defined in the bill, against a child, DCF employee, an employee of contracting agencies of DCF, or KDOC employee for any communication made or information given to the OCA would be guilty of a class A nonperson misdemeanor, except when an employee discloses:

- Information the employee knows to be false or information without regard for the truth or falsity of the information; or
- Without lawful authority, information that is confidential as provided by any other provision of law.

Employees of the OCA would be prohibited from knowingly disclosing false information or disclosing confidential information without legal authority.

Amendments to CINC Code (Sections 7–14)

Jurisdiction of ICWA (Section 7)

The bill would amend law governing jurisdiction of proceedings under the CINC Code to specify if orders granting custody for adoption involve a child who is Indian, the federal Indian Child Welfare Act (ICWA) would apply instead of the CINC Code.

Access to Information (Section 8–10)

The bill would amend statutes to add the OCA to the list of entities with access to official files, social files, information from agency records, information in law enforcement records, records of law enforcement officers and agencies, records of municipal courts, and records, reports, and information obtained as part of the juvenile intake and assessment process for juveniles. [Note: Such access would be subject to continuing limits based on relevancy and other factors contained in these statutes.]

The bill also would make technical amendments to these statutes to ensure consistency in statutory phrasing and update a reference to the Commissioner of Juvenile Justice to reflect agency reorganization.

Custody Orders For Adoption Proceedings (Section 11)

The bill would amend law governing orders granting custody for adoption when parental rights have been terminated, as follows. The bill would specify the provisions in this section would be required to be construed and applied

retroactively to all proceedings pending before a court on the effective date of the bill.

Orders granting custody to proposed adoptive parents. In an order granting custody to proposed adoptive parents, the bill would require the court to be guided by the best interests of the child. The bill would also specify in this type of order, any prior custody order would cease upon the granting of custody of the child to the proposed adoptive parents.

Orders granting custody to the Secretary or corporation. In an order granting custody to the Secretary or to a corporation organized to care for and surrender children for adoption as specified by CINC Code, the bill would specify that the Secretary or corporation must be guided by the best interests of the child when making adoption decisions.

Adoption selection preference. The bill would further specify when a child is placed in the custody of the Secretary for the purposes of adoption when parental rights have been terminated or relinquished, the Secretary would be required to give preference, subject to the best interests of the child, in the following manner:

- If a child has been in the custody of the Secretary for less than one cumulative year:
 - First to a relative;
 - Second to a person with whom the child has close and healthy attachments;
- If a child has been in the custody of the Secretary for one cumulative year or more:
 - To a placement that maintains the child's close and healthy attachments.

The bill would allow a foster parent who is not selected by the Secretary for the adoptive placement, but who meets the criteria above, to request direct placement of the child by

the court and appeal such decision to the Kansas Court of Appeals.

The bill would require the Secretary to consider a foster parent as a prospective adoptive parent when:

- The child has lived more than half of the child's lifetime with the foster parent;
- The child has lived more than two years with the foster parent; or
- The Secretary otherwise determines it is in the best interests of the child.

Adoption selection policies, training, and data collection. To implement the provisions of the bill, the Secretary would be required to:

- Develop and enforce adoption selection policies that comply with the bill and ensure caregiver and sibling attachments are appropriately considered;
- Review and update policies to reduce time to adoption permanency;
- Apply adoption selection policies consistently;
- Develop and provide training for contractors and employees;
- Collect data regarding best interest staffing conducted pursuant to the statute, including, but not limited to, data on the number of:
 - Prospective adoptive parents who request the Secretary to reconsider an initial adoptive placement decision;
 - Initial adoptive placement decisions that the Secretary overturns after reconsidering the initial adoptive placement decision; and

- Prospective adoptive parents who request the court to review the Secretary's adoptive placement decision.

Annual report to the Legislature. The bill would require the Secretary to prepare a report on compliance with the provisions above, to be submitted to the Legislature on or before the first day of the 2024 Legislative Session and each session thereafter.

Appeals (Section 12)

The bill would amend law governing orders that may be appealed under the CINC Code to add any order of a placement of a child, including but not limited to, an order entered after termination of parental rights. The bill would state the amendments made to this section are procedural in nature and would be required to be applied retroactively to any order issued on or after February 1, 2022.

Amendments to Juvenile Justice Code (Sections 13–14)

[*Note:* The bill would make the same changes with respect to access to files in the Juvenile Justice Code as in the CINC Code, described previously in Sections 8–10 of this Supplemental Note.]

Background

The Senate Committee on Judiciary recommended a substitute bill incorporating provisions originally contained in Sub. for SB 232, as recommended by the Senate Committee on Judiciary. [*Note:* Sub. for SB 232 was received by the House and subsequently referred to the House Committee Child Welfare and Foster Care on March 1, 2023.]

HB 2070, as passed by the House, would have expanded eligibility for certain offenders for the nonprison chance of placement in a certified drug abuse treatment (SB 123) program. [*Note:* The provisions of HB 2070 were not retained in the substitute bill but are contained in Senate Sub.

for HB 2010, as recommended by the Senate Committee on Judiciary].

Sub. for SB 232

The bill was introduced by the Senate Committee on Judiciary at the request of Senator Baumgardner.

Senate Committee on Judiciary

In the Senate Committee hearing on February 16, 2023, Senator Masterson testified as a **proponent** of the bill, stating that the bill would provide independent oversight to an essential government function. Proponent testimony was also provided by representatives of Kansas Appleseed and Children's Alliance of Kansas, who generally were in favor of the establishment of an independent office of the Child Advocate but offered some amendments to assist in operations of the OCA.

The Senate Committee recommended a substitute bill be passed and incorporated amendments to:

- Expand the definition of a child;
- Lengthen the term of the Child Advocate to five years and to provide for a successor to be selected prior to the incumbent vacating the position;
- Provide legal authority for OCA operations;
- Clarify the purpose of the OCA;
- Require the OCA to resolve complaints;
- Expand the complaints to be investigated to include inadequate protection by the OCA;
- Enhance the procedures required of the OCA;
- Add reporting responsibilities of the OCA;

- Expand the affected parties list who are protected from retaliatory actions to include an employee of DCF contracting agencies;
- Expand the disclosure of information responsibilities of the OCA;
- Add clarification that the OCA is an independent agency;
- Add orders granting custody for adoption to the jurisdiction of ICWA;
- Add provisions regarding orders granting custody for adoption proceedings; and
- Add an appeals process for a placement of a child.

Fiscal Information

Sub. for SB 232

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, the Office of the Attorney General states that its Abuse, Neglect, and Exploitation (ANE) Unit would be required to file findings of fact or conclusions of law regarding the complaints and assist in investigations of child abuse. Because of these requirements, the agency would require \$887,556 from the State General Fund for FY 2024 for 3.0 FTE attorney positions, 3.0 FTE investigator positions, and 4.0 FTE program consultant positions along with related operating expenditures for the positions. Of the total, salary and benefits would be \$818,544 and operating expenditures would be \$69,012.

According to KDADS, enactment of the bill would require the agency to have a dedicated staff to research, track down, and timely respond to complaint inquiries received from the OCA regarding children who have crossed over from DCF

into KDADS licensed facilities or have been placed by a court into KDADS' custody for care and treatment. The agency estimates that starting in FY 2024 it would need 1.0 FTE position for these purposes at a cost of \$93,000 from the State General Fund annually for salaries and wages, including fringe benefits.

The Judicial Branch indicates that the bill could increase the number of cases filed in district courts because it creates a new crime, which would in turn increase the time spent by judicial and nonjudicial personnel in processing, researching, and hearing cases. Since the crime carries a misdemeanor penalty, there could also be more supervision of offenders by court services officers. In addition, the bill could result in the collection of docket fees, fines, and supervision fees that would be deposited into the State General Fund.

According to the State Department of Education, enactment of the bill would not have a fiscal effect on school districts. The Kansas Bureau of Investigation, Kansas Highway Patrol, DCF, and KDOC report that enactment of the bill would have no fiscal effect on their agencies. The KDHE indicates that enactment of the bill would have no direct effect on the agency as any requests for data or records would be handled from within existing resources.

Any fiscal effect associated with the bill is not reflected in *The FY 2024 Governor's Budget Report*.

According to the Kansas Association of Counties, the bill could have a fiscal effect on counties depending on how often county law enforcement and prosecutors would work with the OCA, but a precise fiscal effect cannot be estimated.

The League of Kansas Municipalities indicates that enactment of the bill could have a negligible fiscal effect on Kansas cities.

Child Advocate Act; Office of the Child Advocate; Revised Kansas Code for Care of Children; appeal; children and minors; parental rights termination; adoption