

**REPORT OF THE JUDICIAL COUNCIL JUVENILE OFFENDER / CHILD IN NEED OF CARE
ADVISORY COMMITTEE ON 2018 H.B. 2751**

DECEMBER 1, 2018

In April 2018, Representative Erin Davis asked the Judicial Council to study 2018 H.B. 2751 which proposed to establish the office of the child advocate for children protection services within the Kansas department of administration. Rep. Davis requested the Judicial Council study the sections in the bill regarding the confidentiality of records and ex parte communication. (See Attachment #1.) The Judicial Council accepted the study and assigned it to its Juvenile Offender/Child in Need of Care (JO/CINC) Advisory Committee. The Judicial Council expanded upon the study request and authorized the JO/CINC Advisory Committee to review the bill in its entirety and opine on the concept of establishing the office of the child advocate.

COMMITTEE MEMBERSHIP

The members of the Judicial Council JO/CINC Advisory Committee are:

Hon. Maritza Segarra, Chair, Junction City; District Court Judge in the 8th Judicial District and member of the Judicial Council.

Kathy L. Armstrong, Shawnee Mission; Assistant General Counsel for Preventive and Protection Services, Kansas Department for Children and Families.

Charlene Brubaker, Hays; Assistant Ellis County Attorney.

Kathryn Carter, Topeka; Assistant Attorney General.

Jeff Cowger, Topeka; General Counsel with the Kansas Department of Corrections.

Mickey Edwards, Emporia; State Director of Kansas CASA Association.

Hon. Lori Bolton Fleming, Pittsburg; District Court Judge in the 11th Judicial District.

Donald W. Hymer, Olathe; Assistant District Attorney in Johnson County.

Hon. Greg Keith, Wichita; District Court Judge in the 18th Judicial District.

Sandra Lessor, Wichita; Assistant Sedgwick County District Attorney.

Prof. Richard E. Levy, Lawrence; J.B. Smith Distinguished Professor of Constitutional Law at the University of Kansas School of Law.

Sen. Julia Lynn, Olathe; State Senator from the 9th District.

Rachel Y. Marsh, Lawrence; Vice-President and Attorney with Saint Francis Ministries.

Rep. Leonard Mastroni, LaCrosse; State Representative from the 117th District.

Dawn Rouse, Topeka; Court Improvement liaison, non-voting member.

METHOD OF STUDY

The Committee met three times between August and October 2018. In preparation for the discussion of H.B. 2751, the Committee reviewed the bill and the following materials:

- Written testimony from the House of Representatives Committee on Children and Seniors hearing on H.B. 2751.
- The research and overview of Children’s Ombudsman Offices/Office of the Child Advocate written by the National Conference of State Legislatures.
- A memorandum and research provided by the Kansas Legislative Research Department providing information about Children’s Ombudsman Offices and Offices of the Child Advocate that exist in other states, as well as information about the current Kansas Department for Children and Families (DCF) Director of the Consumer and Communications Sections who also serves as the Foster Parent and Youth Ombudsman.
- Statutes and regulations governing the children’s ombudsman or other children’s complaint service organizations in Michigan, Nebraska, New York, and South Dakota; and reports published by those organizations.
- The August 2018 Client Services Report, published by the Kansas DCF Office of Customer Service and the Foster Parent and Youth Ombudsman.
- The report of the Child Welfare System Working Groups to the Child Welfare System Task Force dated July 31, 2018.
- DCF’s written response to the Child Welfare System Task Force Working Group Recommendations.
- Information provided by the Kansas Long-Term Care Ombudsman regarding the structure and function of the Long-Term Care Ombudsman office.

DISCUSSION

2018 H.B. 2751 proposed to establish an independent Office of the Child Advocate for Children’s Protection and Services. The bill tasked the child advocate with assuring children are receiving adequate protection and care through services offered by the Department for Children and Families (DCF) and the Kansas Department of Corrections (KDOC). The bill set up

the child advocate to act independently of DCF and KDOC, and to have broad authority to review confidential files relating to abuse and neglect cases and complaints.

The JO/CINC Advisory Committee (the Committee) discussed the concepts in the bill with the bill's original sponsor, Rep. Jarrod Ousley. Though the bill gave the office of the child advocate the authority to work in a wide range of areas, Rep. Ousley made it clear that his primary concern was how a child advocate might assist children in the Kansas child in need of care (CINC) system. Therefore, the Committee focused its discussion on DCF and the CINC system.

Long-Term Care Ombudsman

In her study request, Rep. Davis suggested that the child advocate may be helpful in the child welfare system, similar to how the Long-Term Care Ombudsman has been helpful in the long-term care system. The Long-Term Care Ombudsman (LTCO) works exclusively to address the needs of residents in long-term care facilities. The LTCO office is an independent office within the Office of Administration that advocates on behalf of a long-term care resident's wishes. If the LTCO is involved in a court case, the involvement is typically limited to testifying or otherwise providing evidence. The LTCO most often functions as a facilitator – informally addressing issues on behalf of the long-term care resident. The LTCO has no authority to sanction or dictate the behavior of anyone involved in the long-term care system.

The CINC system is very different from the long-term care system. The most significant difference is that the court directs the care of a child in a CINC case. It is rare for the care of a long-term care resident to be directed by a court. The Committee agreed that establishing a long-term-care-ombudsman-type office is unnecessary because the CINC system already has two similar programs in place – guardians ad litem (GAL), and Court Appointed Special Advocates (CASA). Kansas statutes require that every child in a CINC case is assigned a GAL. A GAL is a specially trained attorney tasked with advocating for the child's best interest. DCF and DCF contractors have no authority over GALs. GALs are tasked with conducting independent investigations and making independent arguments and recommendations in the case. If the child strongly disagrees with the guardian ad litem, the court may appoint the child an additional attorney who is tasked with advocating for the child's wishes.

The court may also appoint a CASA for a child in a CINC case. The CASA program is an independent, non-governmental organization that provides trained and qualified volunteers from the community who independently investigate, monitor, and review a child's situation. A CASA is assigned to only a few children at a time. This allows the CASA to get to know the children, parents, professionals, and service providers involved in those children's lives very well. Building these relationships allows the CASA to work with all parties to address issues and

solve problems together. The CASA reports directly to the court. The CASA is not employed or otherwise beholden to DCF, a DCF contractor, the state, or any other child welfare organization. This independence empowers the CASA to provide a unique evaluation and recommendations to the court.

Unfortunately, Kansas has a shortage of attorneys willing to serve as GALs. The attorneys who are trained and serve as GALs are often expected to complete the tasks of a full-time job on a part-time salary. GALs in the larger judicial districts have so many cases that GALs struggle to provide each child with the necessary level of advocacy. Ideally, all children would have both a GAL with enough time to focus on his or her case, and an assigned CASA. However, eight of Kansas's thirty-one judicial districts do not have a CASA program. Even in judicial districts with CASA programs, those programs do not have enough resources to provide a CASA for every child in a CINC case. Rather than starting from scratch and establishing and funding a new advocacy office, the Committee agreed funds would be better spent investing in and expanding the existing advocacy programs, such as GALs and CASAs.

Oversight of CINC cases and the broader system

Creating the office of the child advocate was also proposed as a way to provide oversight in CINC cases. However, CINC cases already have many entities providing oversight. The following entities are independent from DCF or any DCF contractor.

General system oversight

- U.S. Department of Health and Human Services (HHS) (Federal government)
 - DHHS conducts thorough audits of the child welfare system, requires the creation and implementation of comprehensive state child welfare plans, and ensures compliance with national standards and outcomes related to safety, permanency and well-being.
- Kansas Supreme Court Task Force on Permanency Planning (Judicial Branch)
 - The Task Force is a multidisciplinary committee established with the purpose of promoting meaningful, ongoing collaboration among the district courts of Kansas, the DCF, and Indian tribes located in the State of Kansas. The Task Force develops and implements strategic plans and monitor progress toward outcomes to meet requirements of pertinent program instructions. The Task Force also assists in overseeing state compliance with federal laws such as the Adoption and Safe Families Act, Fostering Connections, and the new Family First Prevention Services Act.

- Kansas Office of Judicial Administration (Judicial Branch)
 - The Office of Judicial Administration (OJA) monitors and ensures that local court systems are trained and implementing Kansas and federal laws. This includes overseeing the training and certification of guardian ad litem, court appointed special advocates, and citizen review board members. It also provides specialized training to the judges overseeing CINC cases.
- The Judicial Council JO/CINC Advisory Committee (Judicial Branch)
 - The Judicial Council JO/CINC Advisory Committee studies legal issues relating to the child welfare system, recommends changes when appropriate, and prepares resources to assist courts handling CINC cases.
- Child Death Review Board (Kansas Attorney General’s Office)
 - The Child Death Review Board examines trends and patterns that identify risk factors in the deaths of children from birth through 17 years of age.
- The Behavioral Sciences Regulatory Board (Executive Branch)
 - The Behavioral Sciences Regulatory Board oversees the licensing, ethical standards, and practices of social workers, marriage and family therapists, professional counselors, psychologists, addiction counselors, and behavior analysts.

Specific case oversight

- Kansas district court (Judicial Branch)
 - The district court makes the final decisions regarding the status and future plans for each child in a CINC case. The district court hears evidence and recommendations, which provide the basis for the court to make case specific decisions and orders.
- Kansas appellate courts (Judicial Branch)
 - The Kansas court of appeals and supreme court review district courts’ decisions to ensure the district court followed the law. The Kansas supreme court also oversees the licensing and ethical standards for all attorneys and judges.
- A guardian ad litem (GAL) (Judicial Branch)
 - GALs are specially trained Kansas attorneys. The GAL conducts an independent investigation of the case and advocates for the best interest of the child.

- Court Appointed Special Advocate (CASA) (Independent non-government organization)
 - CASAs are trained volunteers from the community who independently investigate, monitor, and review a child’s situation and make recommendations to the court.
- Citizen Review Boards (Independent non-government organization)
 - Citizen Review Board members are trained volunteers from the community who monitor and review a child’s case and situation in a quasi-judicial hearing.

The following entities also provide oversight to the child welfare system but are connected to DCF. This list does not include the numerous levels of individual case reviews conducted by DCF and DCF contractors.

- Citizen Review Panel – Intake to Petition
 - This Citizen Review Panel is a multi-disciplinary body required under the federal Child Abuse Prevention and Treatment Act (CAPTA). The panel focuses on gathering citizen input and making recommendations to modify and/or improve the child welfare system from the intake of a child when a report of abuse or neglect is made to the point a CINC petition is filed.
- Citizen Review Panel – Custody to Transition
 - This Citizen Review Panel is a multi-disciplinary body required under the federal Child Abuse Prevention and Treatment Act. The panel focuses on gathering citizen input and making recommendations to modify and/or improve the child welfare system from when a child enters the custody of the state to the child’s transition out of the custody of the state (through reintegration, adoption, guardianship, or by reaching adulthood).
- DCF Foster Parent and Youth Ombuds
 - The foster parent and youth ombuds works to ensure that youth are receiving thorough services and foster parents are being provided the necessary assistance and encouragement they need to care for children in the care of DCF.
- DCF Office of Customer Service
 - The DCF Office of Customer Service monitors the delivery of DCF program services and handles customer concerns.

The CINC system has numerous oversight entities already in place. If the oversight already in place is insufficient, the Committee recommends working to improve existing oversight entities rather than adding yet another entity into an already congested system.

Concerns with 18 H.B. 2751

The Committee carefully considered the concepts and provisions in H.B. 2751. The Committee identified the following general and specific issues.

General Issues:

- The establishment of a child advocate office would provide a false sense of addressing the serious overarching problems with the child welfare system. The Committee acknowledges that the issues are complex and agrees that a system-wide, multi-agency approach to resolving those issues is necessary rather than the creation of a small advocacy or regulatory office.
- The bill includes an overly broad mandate and would put further strain on the insufficient resources available to the child welfare system. The office would be inadequate to successfully advocate across so many different fields - CINC, Juvenile Offender, education, and legal.
- The bill would fund the child advocate office by drawing funds from both DCF and DOC. This would reduce the amount of money available to provide direct services to children.
- Tasking the advocate to conduct an independent investigation may interfere with other investigations by DCF, the guardian ad litem, law enforcement, and CASA.
- The bill does not include sufficient provisions to ensure any investigation and actions of the child advocate office would be in compliance with state and federal confidentiality statutes.
- The bill tasks the child advocate with the conflicting roles of an enforcer, an ombuds, and a mediator. Under the Kansas Dispute Resolution Act, a mediator is a neutral third-party. If the Child Advocate was to function as a mediator, he or she could not be an advocate for the child or whomever brought the complaint to the advocate's attention. The child advocate would need to remain neutral through the mediation process. Additionally, anything discussed in the mediation must remain confidential. Only the final resolution can be revealed to anyone outside the parties involved in the mediation. Working as a mediator is not compatible with the goals of the child advocate as portrayed in the bill.

- If the child advocate was authorized to act as an enforcer of rules, regulations, and possibly, the advocate's own opinions, such a role would conflict with various oversight authorities already in place. The federal government Title IVE funding and regulatory decisions cannot be transferred from the state's designated IVE agency, which is DCF. Attorneys and specifically guardians ad litem are accountable to the Kansas Supreme Court and are tasked with exercising independent judgement. The same is true of judges. It would be inappropriate for the child advocate to have the authority to make the attorneys, guardians ad litem, and judges do what the advocate deemed appropriate.

Specific Issues:

- New section 3 would authorize the child advocate to communicate privately with the court. Such communication would be considered ex parte communication, which is prohibited by the Kansas Code of Judicial Conduct, Rule 2.9. The court cannot communicate about the substance of a case outside the presence of the parties or their lawyers. It would be a direct violation of the Code of Judicial Conduct for a judge to meet with a child advocate in a private setting to discuss a case.
- New section 3 allows the child advocate to file any findings or reports with the appropriate court and issue recommendations regarding the disposition of an investigation to the court and to the investigating agency. It is unclear whether this section is broadly referencing any findings and conclusions made by the advocate at the end of the advocate's investigation or whether it is referencing the law enforcement or DCF investigation into the alleged child abuse or neglect.
- New section 3 discusses that the child advocate could provide recommendations to the court. The court already receives recommendations from the child's case manager, guardian ad litem, parents, and CASA. While the child advocate could provide recommendations, the court is independent and the child advocate's recommendations could not be binding on the court. If a party to a case is unhappy with a court decision, the remedy is to appeal the decision to the Kansas Court of Appeals and Supreme Court.
- New Section 3 would allow the child advocate to file any findings or report with the court, and file an amicus curiae brief or pleadings. If the advocate was not an attorney, such actions would be considered the unauthorized practice of law. Additionally, if the child advocate was an attorney or had an attorney representing the office, the current statutes do not bestow standing on such an office to intervene in a case. The current

CINC, JO, domestic, and civil procedure codes would need to be amended to bestow legal standing on the child advocate.

- New section 4 would authorize the child advocate to mediate disputes between alleged victims of sexual misconduct and school districts or charter schools. Mediating possible criminal action is not appropriate and a need for such a system has not been identified in Kansas.
- New section 9 would allow for the use of unpaid volunteers who would be treated as representatives of the office. CASA utilizes volunteers but the volunteers are trained and certified. Similar training and certification should be required of any volunteers working with the child welfare system. The Committee was also concerned that new section 9 provided immunity to possibly untrained and uncertified volunteers.

RECOMMENDATIONS

For the reasons discussed above, the Committee recommends against the passage of 18 H.B. 2751 or the creation of an office of the child advocate.

However, if an office were to be created, the Committee recommends the office's scope focus on providing information and serving as an educational resource. People involved as parties in a CINC or juvenile offender court case have many professionals assigned to the case who can provide information and bring important issues before the court. Individuals in situations without an open court case or who are not parties to a case do not have access to the same group of professionals and resources. Informational resources that could help individuals navigate the child welfare system would be especially helpful for people (1) who are not parties in a CINC or juvenile offender case, (2) when a CINC or juvenile offender case has not yet been initiated, or (3) when the decision has been made not to initiate a CINC or juvenile offender case.

CONCLUSION

The Committee does not believe the creation of an office of the child advocate is necessary or desirable. The tasks of the child advocate program outlined in H.B. 2571 are already covered by guardians ad litem and CASA. When addressing the current problems in the child welfare system, current programs should be provided adequate resources before adding another program to the system.