

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2021-2022 Regular Session**

AB 317 (Patterson)  
Version: July 7, 2021  
Hearing Date: July 13, 2021  
Fiscal: Yes  
Urgency: No  
JT

**SUBJECT**

Foster care

**DIGEST**

This bill strengthens the role of the Office of the Foster Care Ombudsperson's (OFCO). Specific to this Committee's jurisdiction are provisions in the bill related to confidentiality, evidence in civil and criminal proceedings, and immunity.

**EXECUTIVE SUMMARY**

The Ombudsperson is an autonomous entity in the DSS that is required to inform foster children about their rights and what services are available through the office; investigate and resolve complaints made by foster youth regarding their care; and compile data regarding contacts, investigations, and unresolved complaints.

This bill seeks to clarify the Ombudsperson's independence and invigorate their role with respect to the investigation of complaints. The bill makes a number of changes clarifying the authority of the Ombudsperson to investigate complaints, including authority to enter licensed placements and other facilities. These changes were recently amended into the bill upon recommendations from the OFCO, which has been working for the past several months to assess what additional clarity the OFCO needs in statute to meet their ongoing duties and obligations to children and youth in the state's foster care system. Specific to this Committee's jurisdiction, the bill contains provisions to ensure confidentiality of certain records and communications, generally prohibits testimony by, and disclosure or production of records of, OFCO staff, and clarifies that provisions under the Government Tort Claims Act that provide immunity to the exercise of discretionary duties apply to OFCO staff.

The bill is sponsored by the Children's Advocacy Institute of University of San Diego School of Law and is supported by Children Now. There is no known opposition. The bill passed the Senate Human Services Committee by a vote of 5-0.

**PROPOSED CHANGES TO THE LAW**

- 1) Establishes a state and local system of child welfare services, including foster care, for children who have been adjudged by the court to be at risk of abuse and neglect or to have been abused or neglected, as specified. (Welf. & Inst. Code § 202.)<sup>1</sup>
- 2) Establishes a system of juvenile dependency for children for specified reasons, and designates that a child who meets certain criteria is within the jurisdiction of the juvenile court and may be adjudged as a dependent child of the court, as specified. (§ 300 et seq.)
- 3) Enumerates the rights of minors and nonminors in foster care, including but not limited to the right to: live in a safe, healthy, and comfortable home where they are treated with respect; be free from physical, sexual, emotional, or other abuse, corporal punishment, or exploitation; receive adequate and healthy food, clothing, and age appropriate allowance; be placed in the least restrictive setting possible; have a placement that utilize trauma-informed and evidence-based de-escalation and intervention techniques; receive medical, dental, vision, mental health and substance use disorder services, and reproductive and sexual health care; have a caregiver, child welfare and probation personnel, and legal counsel who have received instruction on cultural competency and sensitivity relating to sexual orientation and gender identities and expression; attend religious services and activities of their choice; be involved in the development of their own case plan and plan for permanent placement; review their own case plan and plan for permanent placement, if they are 10 years of age or older, and receive information about their out-of-home placement and case plan, including being told of changes to the plan; and, be provided with contact information for the Ombudsperson, at the time of each placement, and be free from threats or punishment for making complaints. (§ 16001.9.)
- 4) Establishes the Office of the State OFCO as an autonomous entity within the California Department of Social Services (CDSS) for the purpose of providing children who are placed in foster care with a means to resolve issues related to their care, placement, or services. (§16161.)
- 5) Requires the Director of CDSS, in consultation with a committee of interested individuals, to appoint an Ombudsperson who is qualified by training and experience to perform the duties of the office for a term of four years. Further requires the Director to select the committee members, the majority of whom shall be representatives of children's advocacy organizations and current or former foster youth. (§ 16162.)

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<sup>1</sup> All further section references are to the Welfare and Institutions Code unless otherwise specified.

- 6) Allows the Director of CDSS to reappoint the Ombudsperson for consecutive terms. (§ 16162.)
- 7) Requires the Ombudsperson to, among other things, disseminate information and provide training and technical assistance to foster youth and relevant parties on the rights of children and youth in foster care, reasonable and prudent parent standards, and the services provided by the OFCO; investigate and attempt to resolve complaints made by or on behalf of children placed in foster care, related to their care, placement, or services; decide, in its discretion, whether to investigate a complaint, or refer complaints to another agency for investigation; update a complainant on the progress of the investigation and notify the complainant of the final outcome; document the number, source, origin, location, and nature of complaints; and, have access to copies of any record of a state or local agency, and contractors with state and local agencies, that is necessary to carry out their responsibilities, and may meet or communicate with any foster child in their placement or elsewhere. (§ 16164.)
- 8) Authorizes the Ombudsperson, in his or her efforts to resolve complaints related to foster care, to do all of the following:
  - a) conduct whatever investigation they deem necessary;
  - b) attempt to resolve the complaint informally; and,
  - c) submit a written plan to the relevant state or county agency recommending a course of action to resolve the complaint, and if a written recommendation, requires the county or state agency submit a written response within 30 days. (§ 16165.)

This bill:

- 1) Defines “foster care,” for the purposes of the OFCO’s jurisdiction, as including voluntary placement in a licensed children’s residential facility or with an approved resource family; placement in a licensed or approved children’s residential facility or with an approved resource family, as provided; and placement by a governmental entity in a licensed or approved children’s residential facility or with an approved resource family.
- 2) Requires the Director of DSS to receive a list of possible nominees from a committee of at least five interested individuals before appointing the Foster Care Ombudsperson.
- 3) Requires the Ombudsperson, in the performance of their duties during the duration of their appointment, to be independent and prohibits the exercise of the Ombudsperson’s discretion from being controlled, supervised, or directed, directly or indirectly, by the Director of DSS or any other official. Further requires the Ombudsperson devote their entire time to the duties and powers provided to the

Ombudsperson and provides that they may not be removed from office for exercising their independence and discretion in furtherance of those duties and powers.

- 4) Provides that if the term of an Ombudsperson expires without the appointment of a successor, the incumbent Ombudsperson may continue in office until a successor is appointed. Further provides that if the Ombudsperson dies, resigns, becomes ineligible to serve, or is removed or suspended from office, the Director of DSS shall designate an acting Ombudsperson until the Ombudsperson is appointed. Requires the Director of DSS to appoint a new Ombudsperson, as provided, no later than nine months from the date of the office becoming vacant and limits the acting Ombudsperson from remaining in office longer than nine months, as provided.
- 5) Adds to the duties and responsibilities of the Ombudsperson to include:
  - Receiving complaints made by or on behalf of children placed in foster care, related to their care, placement, or services;
  - After rendering a decision to investigate a complaint, attempt to resolve the complaint, without using a judicial or administrative proceeding; and,
  - Updating the complainant on the attempts to resolve the complaint.
- 6) Requires disclosure of information that is not confidential under relevant state and federal confidentiality laws occur only as necessary to carry out the mission of the office, including as necessary to provide explanation and support for the office's recommendations for improving the child welfare system to the Legislature and state and local agencies that provide services and supports to children placed in foster care.
- 7) Requires the Ombudsperson to maintain confidentiality with respect to the identities of the complainants or witnesses coming before the Ombudsperson, except insofar as disclosure may be necessary to enable the Ombudsperson to carry out the duties of the office, specific to investigating and attempting to resolve complaints. Further requires the Ombudsperson not to disclose a record that is confidential under relevant state and federal confidentiality laws.
- 8) Expands the Ombudsperson's authority and responsibilities related to resolving complaints related to foster care in the following ways:
  - Allows the Ombudsperson to establish the policies and procedures for receiving and processing complaints, conducting investigations, and reporting findings;
  - Specifies their authority to conduct investigations they deem necessary, including but not limited to:
    - i) Enter and inspect premises within any state or local agency's control and contractors with any state and local agencies, and enter any licensed children's residential facility, at any time with or without

prior notice or complaint and shall be granted access to records and residents at all times for the purpose of carrying out the duties of the office.

- 1) Defines "access" as meaning the right to do all of the following: enter any licensed children's residential facility, upon providing identification; communicate privately and without restriction with any resident, caregiver, personnel, or volunteer; review and copy any records of a resident, or caregiver file; observe all resident and staff areas of a facility; review and reproduce administrative records, policies, and documents of any licensed children's residential care facility; review and copy all licensing records maintained by the state, county or agency; review and reproduce any records of a state, county or local agency and their contractors, except sealed court records, production of which may only be compelled by subpoena; and interview all relevant witnesses.
  - 2) Defines "record" as meaning a document, paper, memorandum, book, letter, file, drawing, map, plat, photo, photographic file, motion picture, film, microfilm, microphotograph, exhibit, magnetic or paper tape, punched card, or other item developed or received under law or in connection with the transaction of official business, but does not include material that is protected by privilege.
    - ii) Observe proceedings and attend hearings, as provided.
      - Strikes permissive language that they may resolve complaints informally.
      - Allows the Ombudsperson to submit a written plan to contractors with state or local agencies in addition to relevant state or county agencies, as provided.
- 9) Provides that, in order to encourage candor during the Ombudsperson's investigation of complaints made by or on behalf of foster youth, and to facilitate the Ombudsperson's ability to resolve complaints, the following apply:
- The Ombudsperson and staff of the OFCO shall not be compelled to testify or be deposed in a judicial or administrative proceeding regarding matters coming to their attention in the exercise of their official duties, except as may be necessary to enforce the provisions governing the OFCO's duties.
  - The records of the Ombudsperson and the staff of the Ombudsperson, including notes, drafts, and records obtained from an individual or agency during intake, review, or investigation of a complaint, and any reports not released to the public shall not be subject to disclosure or production in response to a subpoena or discovery in a judicial or administrative proceeding, except as necessary to enforce or implement the provisions governing the OFCO's duties. These evidentiary restrictions trigger a 2/3 vote requirement under the Right to Truth-in-Evidence provision in the California Constitution, which prohibits exclusion

of relevant evidence from criminal proceedings unless the Legislature passes the exclusion by a 2/3 vote. (Art. I, § 28(f)(2).)

- When exercising the investigative, complaint resolution, and technical assistance functions of the OFCO, the Ombudsperson and staff shall have all immunities afforded to the discharge of discretionary duties by public entities and their employees under existing law, as provided.
- If the Ombudsperson believes, based on information received during the exercise of their official duties, there is a breach of duty or misconduct by an employee of a state or local agency or their contractors in the conduct of the employees' official duties, the Ombudsperson shall refer the matter to the agency director or other responsible officer and/or, if the conduct would be a crime, to an appropriate law enforcement body or agency.

10) Requires probation officers to provide foster children with the toll-free number of the OFCO and verbal or written information regarding the existence and purpose of the office.

### COMMENTS

#### 1. Author's statement

The author writes:

AB 317 will bring the Office of the State Foster Care Ombudsman in line with the standards and expectations laid out by the United States Ombudsman Association in their Model Ombudsman Act. Specifically, this bill makes a handful of significant yet noncontroversial changes to the office, such as ensuring the freedom to investigate claims and protection against removal from office for exercising their independence, giving the office clear responsibility to receive and investigate complaints made by foster youth, and ensuring the confidentiality of the office's work. These changes will significantly strengthen the ability of this office to advocate for and protect our state's foster youth.

#### 2. Background

##### *a. Foster youth bill of rights*

The Foster Youth Bill of Rights (FYBR), established in 2002, initially provided that foster youth have the right to live in a safe, healthy, and comfortable home, to be treated with respect, and to be free from physical, sexual, emotional, or other abuse. (AB 899, Liu, Ch. 683, Stats. 2001.) Additional rights have been added to the FYBR over time. SB 731 (Leno, Ch. 805, Stats. 2015), added the right of foster youth to be placed in out-of-home care according to their gender identity, regardless of the gender or sex listed in their

court or child welfare records. The current list of rights for all minors and nonminors in foster care includes 27 enumerated rights, including the right to live in a safe, healthy, and comfortable home where the youth is treated with respect; be free from physical, sexual, emotional, or other abuse, or corporal punishment; receive adequate and healthy food, adequate clothing, and, for youth in group homes, an allowance; and receive medical, dental, vision, and mental health services.

AB 2119 (Gloria, Ch. 385, Stats. 2018) provided that the rights of minors and nonminors in foster care includes the right to be involved in the development of the case plan with consideration of the youth's gender identity, and the right to health care and mental health care includes gender affirming health care and mental health care, as defined. This bill also required DSS to develop and issue guidance describing best practices to identify, coordinate, and support foster youth seeking access to gender affirming care by January 1, 2020.

AB 175 (Gipson, Ch. 416, Stats. 2019) subsequently revised, recast, and expanded the Foster Youth Bill of Rights based on the working group's recommendations. AB 175 clarified that all children placed in foster care, either voluntarily or after being adjudged a ward or dependent of the juvenile court have their rights delineated in the Foster Youth Bill of Rights. Additionally, it provided that these rights also apply to nonminor dependents except in circumstances when they conflict with nonminor dependents' retention of their legal decision-making authority as an adult. The current list of rights for all minors and nonminors in foster care includes 41 enumerated rights, which includes the right to: live in a safe, healthy, and comfortable home where they are treated with respect; be free from any abuse, including physical, sexual, emotional, or corporal punishment; receive adequate and healthy food, clothing; receive medical, dental, vision, mental health services, and substance use disorder services; and to be involved in the development of their own case plan.

*b. Foster Care Ombudsperson*

The OFCO was established as an autonomous entity within CDSS to provide children placed in foster care with an independent forum for review and resolution of concerns related to the care, placement or services provided to children and youth in foster care. As such, the OFCO has the ability to investigate, and try to resolve, complaints regarding foster care, including complaints against state and local agencies. Additionally, the OFCO is responsible for compiling data on the complaints they receive to share with the Legislature and other relevant stakeholders so that this data may be considered in the development of recommendations made regarding the improvement of the child welfare system. The OFCO is also responsible for disseminating information relating to the Foster Youth Bill of Rights and ensuring that children and youth in foster care know their rights.

3. Strengthens the role of the OFCO

*a. Purpose of the bill*

This bill seeks to clarify the Ombudsperson's independence and invigorate their role with respect to the investigation of complaints. The bill makes a number of changes clarifying the authority of the Ombudsperson to investigate complaints, including specifying that the Ombudsperson has authority to enter licensed placements and other facilities to conduct investigations. These changes were recently amended into the bill based on recommendations from the OFCO, which has been working for the past several months to assess what additional clarity the OFCO needs in statute to meet their ongoing duties and obligations to children and youth in the state's foster care system.

Children Now, which supports this bill, writes to describe the bill's impetus:

The Office of the State Foster Care Ombudsman was enacted in 1998 in part to investigate and resolve complaints made by foster youth regarding their care. During the current public health crisis, stay at home orders, social distancing, and school and court closures have created new and often traumatic challenges for children and youth in foster care as well as their biological families and caregivers, including barriers to family visitation, placement stability and accessing education. During the pandemic, the Foster Care Ombuds office has received a record number of critical complaints needing an immediate response, requiring increased independence and resources.

*b. Provisions in this Committee's jurisdiction*

Provisions that bring the bill within the jurisdiction of this Committee relate to confidentiality, immunity, and evidentiary restrictions relating to the operations of the OFCO. Existing law governing the OFCO is modeled in large part on the United States Ombudsman Association and American Bar Association (ABA) standards. These provisions are intended to line up with comparable provisions under those standards.

*i. Confidentiality provisions*

The bill requires disclosure of information that is not confidential under relevant state and federal confidentiality laws occur only as necessary to carry out the mission of the OFCO, including as necessary to provide explanation and support for the office's recommendations for improving the child welfare system to the Legislature and state and local agencies that provide services and supports to children placed in foster care. The bill also requires the Ombudsperson to maintain confidentiality with respect to the identities of the complainants or witnesses coming before the Ombudsperson, except insofar as disclosure may be necessary to enable the Ombudsperson to carry out the



duties of the office, including investigating and attempting to resolve complaints. Finally, the bill prohibits the Ombudsperson from disclosing a record that is confidential under relevant state and federal confidentiality laws.

Proponents note that in current practice, OFCO staff experience delays and other barriers when investigating or collecting information to assess the validity of a complaint. Foster youth in particular can be reluctant to trust an OFCO investigator out of fear of that their identity will be revealed and of potential reprisal from caregivers, family, or child welfare workers. This reluctance is a significant barrier to ensure the safety and wellbeing of the complainant and other foster youth. Additionally, confidentiality encourages county child welfare and probation staff and staff at licensed residential facilities to be candid during an OFCO investigation without fear of reprisal from their employers.

*ii. Evidentiary restrictions*

The bill provides that in order to encourage candor during the Ombudsperson's investigation of complaints made by or on behalf of foster youth and to facilitate the Ombudsperson's ability to resolve complaints, the following apply:

- The Ombudsperson and staff of the OFCO shall not be compelled to testify or be deposed in a judicial or administrative proceeding regarding matters coming to their attention in the exercise of their official duties, except as may be necessary to enforce the provisions governing the OFCO's duties.
- The records of the Ombudsperson and the staff of the Ombudsperson, including notes, drafts, and records obtained from an individual or agency during intake, review, or investigation of a complaint, and any reports not released to the public shall not be subject to disclosure or production in response to a subpoena or discovery in a judicial or administrative proceeding, except as necessary to enforce or implement the provisions governing the OFCO's duties.

Proponents argue that a testimonial privilege and limitations on the production of OFCO records allows OFCO staff to assure complainants and witnesses that the information they provide will remain confidential, as it would be in a child welfare or juvenile justice proceeding. They also argue that it frees OFCO staff to investigate as vigorously as necessary.

Importantly, the bill provides that if the Ombudsperson believes, based on information received during the exercise of their official duties, there is a breach of duty or misconduct by an employee of a state or local agency or their contractors in the conduct of the employees' official duties, the Ombudsperson must refer the matter to the agency director or other responsible officer and/or, if the conduct would be a crime, to an appropriate law enforcement body or agency.

iii. *Clarifies immunity related to the OFCO's exercise of discretion*

This bill also provides that when exercising the investigative, complaint resolution, and technical assistance functions of the OFCO, the Ombudsperson and staff have all immunities under the Government Claims Act, as provided in Government Code sections 815–818.9, that are afforded to the discharge of discretionary duties by public entities and their employees.

Under the Government Claims Act (Gov. Code § 810 et seq.), there is no common law tort liability for public entities.<sup>2</sup> Tort liability may be imposed against a public entity only pursuant to statute. (Gov. Code § 815(a); *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 897.) “A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.” (Gov. Code § 815(a).) “In California, a public entity and its employees are not liable for an injury unless there is a statute declaring them to be liable.” (*Grosz v. Lassen Cmty. Coll. Dist.* 572 (2008) F.Supp.2d 1199, 1212.) However, “[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of [their] employment if the act or omission would ...have given rise to a cause of action against that employee” unless “the employee is immune from liability.” (Gov. Code § 815.2(a), (b).)

Government Code section 815.6 provides: “Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.” Regarding this provision, the Fourth District Court of Appeal has stated:

“[A]pplication of section 815.6 requires that the enactment at issue be obligatory, rather than merely discretionary or permissive, in its directions to the public entity; it must require, rather than merely authorize or permit, that a particular action be taken or not taken.” [Citation.] Even where an enactment imposes an obligation, it does not necessarily follow that the obligation gives rise to a mandatory duty. The key question is whether the obligation involves an exercise of discretion. As the Supreme Court explained, “[i]t is not enough ... that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion.” [Citation.]

(*County of Los Angeles v. Superior Court* (2012) 209 Cal.App.4th 543.)

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<sup>2</sup> “Public entity” includes the state, the Regents of the University of California, the Trustees of the California State University and the California State University, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State. (Gov. Code § 811.2.)

4. Support

The sponsor of this bill, the Children’s Advocacy Institute of the University of San Diego School of Law, suggests that more independence is needed from CDSS for the Foster Care Ombudsperson to truly act as a watchdog of California’s child welfare system. They note that the COVID-19 pandemic has highlighted this need, as the Ombudsperson is currently dealing with an unprecedented number of complaints brought about by the pandemic and so “needs increased authority to exercise their own discretion and latitude to triage cases and independently respond to policy decisions in an expeditious manner and under the judgement and authority of the office.”

**SUPPORT**

Children’s Advocacy Institute of University of San Diego School of Law (sponsor)  
Children Now  
Dependency Legal Services

**OPPOSITION**

None known

**RELATED LEGISLATION**

Pending Legislation: AB 1140 (Robert Rivas, 2021) specifies that the duties of the CDSS and the OFCO include children who are in state-licensed foster facilities and homes in the custody of the Office of Refugee Resettlement of the federal Department of Health and Human Services. The bill will be heard in this Committee on the same day as this one.

Prior Legislation: *See* Comment 2.

AB 1988 (Patterson, 2020) would have required the Governor to appoint the Foster Care Ombudsperson, subject to confirmation by the Senate. The bill was set to be heard in the Assembly Human Services Committee but the hearing was postponed by the committee due to COVID-19 restrictions.

**PRIOR VOTES:**

Senate Human Services Committee (Ayes 5, Noes 0)  
Assembly Floor (Ayes 77, Noes 0)  
Assembly Appropriations Committee (Ayes 14, Noes 0)  
Assembly Human Services Committee (Ayes 8, Noes 0)

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