



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

Testimony in Support of Senate Bill 301

**Presented to the Senate Committee on the Judiciary
By Kansas Attorney General Derek Schmidt**

March 23, 2021

Chair Warren, Ranking Minority Member Haley, Members of the Committee:

Thank you for the invitation to testify in support of Senate Bill 301, which proposes to create the Office of Child Advocate.

I am a strong supporter of establishing an Office of Child Advocate in state government. Given the enormous breadth and complexity of our child welfare system, it seems to me having an independent voice within state government to continually review the system, make recommendations for improvement, and address particular complaints and concerns is prudent public policy that can benefit children as well as the system itself. Numerous other states have reached the same conclusion and created similar entities.

The general policy of establishing an independent voice within state government to help with oversight and problem-solving in complex state systems is well-established. Learning from other examples, it seems to me there are two overarching policy decisions the Legislature must make as a threshold matter: First, how best should independence be established; second, how much authority should the independent child advocate have. The answers to those two basic questions have not been uniform in other examples of independent oversight and problem-solving entities in Kansas.

For example, Kansas long has had an office of the Long Term Care Ombudsman, which has certain limited authorities within the long-term care system. That model, while based in the executive branch under authority of the governor, nevertheless establishes independence by operating under federal guidelines. Similarly, the Division of Legislative Post Audit provides independent reviews of state agencies and operations, has broad authority to access information, and establishes independence from the executive branch agencies it can oversee by being housed in the legislative branch.

As attorney general, I have direct experience with three other examples of establishing an independent oversight entity within state government. Each is a different model, and I share them here for your consideration:

Office of Medicaid Inspector General: The Office of Medicaid Inspector General initially was proposed in 2005. The original proposal was to place the OMIG under the jurisdiction of the attorney general in order to create independence from the Medicaid program itself, which is under the jurisdiction of the governor. That model was not adopted, and the bill creating OMIG in 2007 placed the new entity under the Kansas Health Policy Authority. After the KHPA was abolished in 2011, the inspector general was moved to the Kansas Department of Health and Environment. Throughout its early years, OMIG languished, I believe in part because it was ultimately under the same authority as the program it was designed to oversee. In 2017, the Legislature moved OMIG under the jurisdiction of the attorney general. That was the same structure that originally had been proposed, but not adopted, in 2005. Since then, OMIG has operated as an independent entity overseeing the Kansas Medicaid program and making recommendations for improving the program. It does not have enforcement authority for individual cases.

Medicaid Fraud Control Unit: Every state is required by federal law to operate a Medicaid Fraud Control Unit, which federal law requires be structurally independent of the state Medicaid program. In Kansas, as in most states, that independence is achieved by housing the MFCU in the Office of Attorney General. The MFCU differs from the OMIG in that it is an investigative and enforcement entity, not an auditing entity. It may from time to time make recommendations about program integrity or operations, but its principal mission is to independently investigate and prosecute individual cases of provider fraud and patient abuse of Medicaid beneficiaries. A recent change in federal law has broadened the MFCU's jurisdiction over patient abuse cases. The MFCU coordinates closely with the Kansas Medicaid program and the OMIG but has specific duties and authorities that it exercises independently.

Abuse, Neglect and Exploitation Unit: The ANE Unit was created by law in 2006 after the Kaufman House case of adult abuse in Harvey County. While well-intended, the ANE Unit in many ways is the example of how not to structure an independent oversight entity. The decision to place the ANE Unit under authority of the attorney general created the needed independence, but the statutory structure rendered the ANE Unit somewhat unfocused and often ineffective. It had broad and ill-defined mission, lacked meaningful investigative tools to accomplish that broad mission, and was woefully understaffed from its creation. In 2016, we approached the Legislature about remedying these problems – in general, by either expanding the ANE Unit and giving it legal authority to accomplish its broad mission, or by narrowing the mission and giving legal authority to accomplish that narrower focus. The Legislature chose the latter path, narrowing the mission to adult abuse cases, adding statutory authority to investigate and prosecute cases, and requiring meaningful access to reports of adult abuse filed with law enforcement agencies. Since that clarification and “right-sizing” of mission with authorities and funding, the ANE Unit has performed its revised mission effectively.

Based on our experience with those three independent oversight entities, I would offer the following thoughts as the Legislature considers creating an Office of Child Advocate:

The structure should establish independence. For a state creature like the Office of Child Advocate (that does not derive independence from any federal requirements), that would be best

accomplished by placing the Office outside the jurisdiction of the agencies it oversees. This bill proposes to accomplish that by placing the Office under jurisdiction of the attorney general rather than the governor; the House Committee on Children and Seniors passed a bill out of committee earlier in the session that took a different approach by placing the Office in the legislative branch. As the Legislative Post Audit and OMIG precedents illustrate, either can accomplish structural independence.

The mission needs to be focused and clear. As a matter of public policy, the Legislature should determine and make clear within the statute the scope of duties and responsibilities that will be expected of the new Office. It is an auditing entity, like OMIG, that engaged in programmatic oversight? Is its primary purpose, like LPA, to provide recommendations for the Legislature to receive and assess? Or is the new Office to involve itself in individual child welfare cases, similar to how the MFCU undertakes individual enforcement actions? And if there is to be case-by-case involvement, what particular duties and authorities should the Office be given – will it, for example, appear in court? For what purposes? In what cases?

The statutory authority and funding needs to fit the mission. To avoid the fate of the ANE Unit during its first ill-defined decade of operation, the authority granted by law to the Office needs to square with what you want the office to do. If the Office is to involve itself in individual cases, it needs to have statutory authority to access all relevant information. If it is to appear in court, it needs to have the legal tools to do so. If it is to conduct programmatic audits, it similarly needs access to information. And of course, the amount of funding, particularly for skilled personnel, will need to fit the mission and expectations.

Senate Bill 301 addresses the independence issue by placing the Office under jurisdiction of the attorney general. I am aware the House has a different approach that achieves independence by placing the Office in the legislative branch. Either can work – it's a policy choice for the Legislature.

The issue of squaring mission with legal authorities and funding – to avoid the difficulties inherent in the early years of the ANE Unit – is more difficult. Senate Bill 301 acknowledges this need and attempts to address it through flexibility – requiring the Child Advocate, in consultation with a legislative committee, to limit its own jurisdiction, establish priorities, and develop recommendations for its future capacities. *See* Section 3, subsection c.

Input from our office was sought by the drafters of this bill, and we appreciated the opportunity to provide input since the bill proposes to require us to implement the new legislation. Deputy Attorney General Steve Karrer is here to testify and answer questions on particular aspects of the bill.

Thank you for the opportunity to testify today.

###