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## SUPREME COURT OF VIRGINIA



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October 25, 2019

The Honorable Mark D. Obenshain  
Chair, Senate Committee for Courts of Justice  
P.O. Box 555  
Harrisonburg, VA 22803

The Honorable George L. Barker  
Senate of Virginia  
P.O. Box 10527  
Alexandria, Virginia 22310

The Honorable Jennifer Carroll Foy  
Virginia House of Delegates  
P.O. Box 5113  
Woodbridge, Virginia 22194

Dear Senator Obenshain, Senator Barker, and Delegate Carroll Foy:

Pursuant to Rule 20 (o) of the Rules of the Senate of Virginia, the Senate Committee for Courts of Justice referred the subject matter contained in House Bill 2119 and Senate Bill 1279 (2019 Session of the General Assembly) to the Committee on District Courts for study. As you are aware, these bills addressed the ability of attendance officers to enforce a school attendance order, and the manner in which the request for enforcement may be filed.

Please find enclosed the requested study.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Karl R. Hade".

Karl R. Hade

KRH:jrp  
Enclosures

cc: Susan Clarke Schaar, Clerk of the Senate  
Mark Vucci, Director, Division of Legislative Services

## **Report on the Study of the Subject Matter Contained in House Bill 2119 and Senate Bill 1279**

By letter dated March 20, 2019, a copy of which is attached, Susan Clarke Schaar, Clerk of the Senate, wrote Chief Justice Lemons, Chair of the Committee on District Courts, that the Senate Committee for Courts of Justice had referred the subject matter contained in House Bill 2119 and Senate Bill 1279 (2019 Session of the General Assembly) to the Committee on District Courts for study. This report is prepared in response to that request.

### House Bill 2119 and Senate Bill 1279

During the 2019 General Assembly Session, two substantively identical bills, House Bill 2119 and Senate Bill 1279, were introduced by Delegate Jennifer Carroll Foy and Senator George L. Barker, respectively. The bills were introduced at the request of Prince William County Public Schools (PWCPS). As introduced, the bills sought to allow “non-attorney attendance officers and division superintendents or their designees when acting as attendance officers” to complete, sign, and file with intake officers a motion for a rule to show cause regarding the violation or enforcement of a school attendance order. The bills also contained a provision excluding such action from being considered the unauthorized practice of law.

Although House Bill 2119 was amended and passed by the House of Delegates, both the House and Senate bills were eventually passed by indefinitely (defeated) in the Senate Courts of Justice Committee. The Chairman asked that a letter be sent to the Chief Justice, as Chair of the Committee on District Courts (CDC), requesting that the CDC study the subject matter of the bills.

### Background

Staff within the Office of the Executive Secretary spoke with Mary McGowan, Division Counsel for Prince William County Public Schools to learn more about the genesis of these bills. Ms. McGowan explained the goal was to provide statutory authority for attendance officers to file petitions and motions for the *enforcement* of attendance orders of the juvenile and domestic relations district courts. While PWCPS have determined that attendance officers have the authority, pursuant to Va. Code § 22.1-258, to file an initial complaint with the juvenile and domestic relations district court alleging the child is in need of supervision, or to institute proceedings against the parent, they question whether attendance officers have the authority to request enforcement. In addition, PWCPS sought authority for attendance officers to file a motion for a rule to show cause, which pursuant to § 16.1-260, is filed directly with the clerk.

PWCPS first sought legislation regarding this subject during the 2017 General Assembly Session. The bills introduced in 2017 were substantially similar to those

introduced in 2019, but instead of proposing to amend Va. Code § 16.1-260 as the bills did in 2019, the 2017 bills proposed amending § 22.1-258. Both the 2017 and the 2019 bills included amendments to § 54.1-3900. Ms. McGowan explained that the change in 2019 to amend § 16.1-260 was at the recommendation of staff with the Division of Legislative Services (DLS). DLS' recommendations were prompted by DLS staff's experience with similar legislation in 2016, which granted such authority and protection to non-attorney employees of local departments of social services when filing petitions and motions. Members of the public who had challenged the former practices of employees of local departments of social services who were signing and filing petitions and motions directly with the clerk, remained actively engaged, and the redrafting of the bill was in anticipation of similar challenges to PWCPS's legislation.

## Discussion

In reviewing the various provisions of House Bill 2119 and Senate Bill 1279, several areas of concern were identified, which are set forth below.

### A. Authority of Attendance Officers to Enforce Attendance Orders

At the core of PWCPS' proposal is their concern that attendance officers do not have the statutory authority, regardless of the process utilized (file directly with the clerk or through an intake officer), to request the court to enforce its attendance orders. Virginia Code § 22.1-258 provides that attendance officers may "(i) file a complaint with the juvenile and domestic relations district court alleging the pupil is a child in need of supervision . . . or (ii) institute proceedings against the parent pursuant to § 18.2-371 or 22.1-262." The provisions within § 22.1-258 do not expressly provide that the attendance officer can request enforcement *after* the court has established that the child is in need of supervision (CHINS). The specificity of the wording related to the attendance officer's capabilities has caused PWCPS to question whether there is authority to request enforcement actions after the CHINS determination.

It is important to note that the first sentence of § 22.1-258 provides that "[e]very school board shall have power to appoint one or more attendance officers, who shall be charged with the enforcement of the provisions of this article." This general authority would seem to grant attendance officers the ability to pursue enforcement of attendance orders issued by the court. As it is a general grant of power, it could be argued that the more specific provisions, which state that attendance officers may file a complaint, would control. Under this interpretation, the attendance officer would be limited to only those actions specified.

### B. Authority to File with the Clerk or Intake Officer

Both House Bill 2119 and Senate Bill 1279 were identical when introduced and included amendments to Va. Code § 16.1-260, which allowed the nonattorney attendance officers to "file with the intake officer" motions that they completed and signed. The sentence immediately preceding the amended sentence provides that

“[c]omplaints, requests, and the processing of petitions to initiate a case shall be the responsibility of the intake officer.” The next sentence, which includes the amendment, begins with the word “however,” and includes exceptions to the requirement to initiate juvenile cases through an intake officer. Placing the authority for an attendance officer to file motions through an intake officer within this sentence, which lists exceptions to the requirement to file through an intake officer, is incongruous with the other provisions that allow filing directly with the clerk.

This reference to filing with the intake officer was addressed in House Bill 2119 when it was amended in the House so that a nonattorney attendance officer could file directly with the *clerk*. If these bills were to be reintroduced, consideration should be given to making this change to Senate Bill 1279 and maintaining it in House Bill 2119.

In addition to the drafting concerns, during the hearing of these bills, members of the Senate Courts of Justice Committee raised concerns about the expansion of the existing exception for nonattorney employees of local departments of social services in § 16.1-260, which allows them to file directly with the clerk. Members were concerned that if this exception were expanded, similar requests for expansion would be made, undermining the existing process and role of intake officers.

The process for enforcing attendance orders, although it varies around the Commonwealth, including among the localities represented on the Workgroup, appears to function under current law. In some localities a violation of an attendance order is filed as a show cause by the Commonwealth’s Attorney, which is consistent with the Commonwealth’s Attorney’s duty to prosecute set forth in Va. Code § 22.1-268. In another locality, the City Attorney pursues violations of an attendance order, either through an intake officer or directly with the clerk. In both examples, it is a licensed attorney who is filing with the clerk. In another locality, the probation and attendance officers file for enforcement of CHINS orders through an intake officer, who has the discretion to proceed with a petition for failure to follow a court order.

An attendance officer’s presentation of facts to an intake officer supporting a violation of an attendance order would be similar to that of a probation officer or a member of the public who can present facts to intake officers and request action. Intake officers are in many ways akin to magistrates, as they receive information from the public and determine whether, based on the facts presented, petitions should be filed. Attendance officers who are statutorily tasked with enforcing the article pertaining to compulsory school attendance should not be more limited in their actions than a member of the general public.

### C. Unauthorized Practice of Law

As introduced, both House Bill 2119 and Senate Bill 1279 included the following amendment to Va. Code § 54.1-3900:

Nothing herein shall prohibit a nonattorney attendance officer or local school division superintendent or his designee when acting as an attendance officer pursuant to § 22.1-258, from completing, signing, and filing with the intake officer, on forms approved by the Supreme Court of Virginia, a motion for a rule to show cause regarding the enforcement of an order entered by a juvenile and domestic relations district court pursuant to § 16.1-278.5 relating to the filing of a complaint alleging the pupil is a child in need of supervision as defined in § 16.1-228.

Although it remained unchanged in Senate Bill 1279, this provision in House Bill 2119 was amended in the House consistent with amendments to Va. Code § 16.1-260 to allow the attendance officer to file petitions and motions directly with the clerk. The amendment in § 54.1-3900 is similar to language placed in this same Code section for nonattorney employees of local departments of social services who have been given the authority in § 16.1-260 to file directly with the clerk.

If the attendance officer is required to file with the intake officer as specified in Senate Bill 1279 and the introduced version of House Bill 2119, it is likely unnecessary to amend § 54.1-3900. It is established in both the opinions of the Attorney General of Virginia and caselaw that nonattorney employees of government agencies who present facts, and not legal conclusions, can do so without engaging in the unauthorized practice of law.

### Conclusion

At the core of PWCPS's concern is the question of whether attendance officers have the authority under the existing provisions of Va. Code § 22.1-258 to seek enforcement of a court's attendance order. Amending Va. Code § 22.1-258 to explicitly provide this authority would address these concerns, although doing so is a policy decision within the purview of the General Assembly.

The other matter addressed in these bills was whether the attendance officer should be added to the list of nonattorneys who may file directly with the clerk. Any decision to pursue this would be a decision for PWCPS and within the purview of the General Assembly. When this change was considered during the 2019 Session, several members of the Senate Courts of Justice Committee were reluctant to expand the list of exceptions.

Upon the clarification that attendance officers have authority to seek enforcement of a court's attendance order, PWCPS' attendance officers could, without further legislation, seek enforcement of such order through the intake officer who could file a petition for violation of a court order.

COMMONWEALTH OF VIRGINIA

SUSAN CLARKE SCHAAR  
CLERK OF THE SENATE  
POST OFFICE BOX 396  
RICHMOND, VIRGINIA 23218



SENATE

March 20, 2019

The Honorable Donald W. Lemons  
Chair, Committee on District Courts  
100 North 9<sup>th</sup> Street  
Richmond, Virginia 23219

Dear Justice Lemons,

This is to inform you that, pursuant to Rule 20 (o) of the Rules of the Senate of Virginia, the Senate Committee for Courts of Justice has referred the subject matters contained in House Bills 1630, 2119, and 2147 and Senate Bill 1279 to the Committee on District Courts for study. It is requested that the appropriate committee chair and bill patrons receive a written report, with a copy to this office, by November 1, 2019.

With kind regards, I am

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Susan Clarke Schaar".

Susan Clarke Schaar

SCS:jes

cc: Sen. Mark D. Obenshain, Chair, Senate Committee for Courts of Justice  
Del. Christopher E. Collins, Patron of HB 1630  
Del. Jennifer D. Carrol Foy, Patron of HB 2119  
Del. Charniele L. Herring, Patron of HB 2147  
Sen. George L. Barker, Patron of SB 1279  
Mark Vucci, Director, Division of Legislative Services