

A U.S. National Ombudsman for Children

By Howard Davidson, JD

Introduction

In this paper, I call for the creation and long-term support of a U.S. National Children's Ombudsman Office. The concept of a country operating an independent children's ombudsman program originated through activities of a national nongovernmental organization (NGO), Save the Children–Sweden, in the 1970s. In 1981, Norway became the first national government to establish a children's ombudsman, doing so through legislation. In 1989, adoption of the Convention on the Rights of the Child (CRC) prodded rapid growth in national child ombudsman programs.

By 1997, when the United Nations Children's Fund (UNICEF) Innocenti Research Centre published *Ombudsman for Children*, examining the creation of special government institutions to protect the rights of children across the globe, 16 relevant programs were identified. In 2001, when it reexamined the issue,¹ its list of such programs had almost doubled. Children's Ombudsman, Commissioners for Children, or other independent institutions for the protection of children's rights now exist in about 40 countries. There are also regional networks of these independent entities. These include the European Network of Ombudspersons for Children, the Australian Asia Pacific Association of Children's Commissioners, and the Ibero-American Network of Ombuds for Children.

The CRC does not contain any provision requiring the creation of a national children's ombudsman program. However, the Committee on the Rights of the Child, the UN body charged with monitoring CRC implementation, asks governments to maintain such independent bodies. In 2002, the Committee adopted General Comment No. 2 on the role of independent national human rights institutions that are working on child rights issues, stating:

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It is the view of the Committee that every State [national government] needs an independent human rights institution with responsibility for promoting and protecting children's rights. The Committee's principal concern is that the institution, whatever its form, should be able independently and effectively to monitor, promote and protect children's rights.²

There are many models for these national programs. They range from one centralized office located within a federal government or in a national non-governmental human rights organization, to having separate and independent offices in various parts of a country, to having a linked national network of such offices.

The United States has not ratified the CRC. It has ratified two *Optional Protocols*³ to it, under which this country is committed to periodic reporting to the Committee on the Rights of the Child. No U.S. institutional mechanism has yet been created to broadly promote and protect the rights of children under those protocols. This paper proposes a National Children's Ombudsman Office that would serve as that mechanism, as well as provide oversight on broader child protection issues.

Having a children's ombudsman at the national level is not a topic that has yet received real attention. I personally recall, many years ago, hearing the distinguished children's advocate Marian Wright Edelman, president of the Children's Defense Fund, call for a national ombudsman for children. But neither before, nor since, have I found any similar proposal, other than a short piece written in 2009 by Jean Geran, a senior fellow at the London-based global think tank Legatum Institute and former director for democracy and human rights of the National Security Council at the White House. It suggested that the U.S. State Department designate an individual, at the ambassador level or higher, to coordinate all child protection issues across the U.S. government.⁴

Despite having no national child ombudsman in the United States, approximately 29 states, as of 2008, had either a children's ombudsman office or the more commonly titled independent "Office of the Child Advocate."⁵ The duties and purposes of these offices all relate in some way to the protection of children, and most were created by legislation. Some have oversight jurisdiction over all state agencies providing services to children, while others focus exclusively on complaints or problems related to a specific child, youth, and family service agency. Many are completely independent of agencies that provide direct children's services, but some are quasi-independent offices housed within those agencies.

ABA Involvement in Ombudsman Issues

In 2001, the American Bar Association (ABA) House of Delegates approved an ABA policy recommending that public entities have ombudsman offices to

receive, review, and resolve citizen complaints. The ABA also recommended that those programs adhere to the new *ABA Standards for the Establishment and Operation of Ombudsman Offices*. This was not the first time the ABA had addressed the ombudsman issue. In 1969 it stated that *independence, impartiality, and confidentiality* were essential characteristics of internal private agency or organization ombudsmen. In that same resolution, it called for state and local governments to consider the establishment of an ombudsman for inquiry into administrative actions and to address public criticism of government programs. In 1971 the ABA recommended that the federal government experiment with the establishment of an ombudsman for certain federal activities.

The 2001 ABA Standards said that ombudsmen should be empowered to:

- receive and address, investigate, or otherwise examine complaints or questions about alleged acts, omissions, improprieties, or systemic problems;
- have discretion to accept or decline any complaint or question;
- act on their own initiative;
- develop fair procedures to aid in the just resolution of complaints or problems;
- gather information from all relevant sources;
- resolve issues at appropriate levels;
- issue periodic public reports;
- perform facilitative, negotiation, and mediation roles;
- conduct inquiries and investigations;
- report on findings with recommendations related to both individual complaints and systemic problems identified through complaint patterns and trends; and
- use its auspices to educate the public and professional community.

In 2004, the ABA endorsed a set of revised *Standards for Establishment and Operation of Ombuds Offices*, altering its 2001 Standards.⁶ These proposed a new category of “Executive Ombuds,” adding to the above powers the authority for “advocating on behalf of affected individuals or groups when specifically authorized by (its) charter.” The ABA describes the “Executive Ombuds” as a program to receive reports from the general public or internally and to address the actions, and failures to act, of an entity or entities it has oversight over. Such a program would have the option to either hold an entity or program accountable or to work to improve program performance. The ABA also recognizes that an Ombuds Office can have jurisdiction over a single subject matter (e.g., children’s rights) involving multiple agencies, which is what I’m recommending here.

This 2004 ABA policy also acknowledged another type of program called an “Advocate Ombuds.” Such a program would have authority to help, or be required to advocate on behalf of, aggrieved individuals or groups. It would have the ability to initiate action on their behalf in administrative, judicial, or legislative forums when warranted. Some state child ombudsman programs fit that model, and ideally all states should have Advocate Ombuds for children, much as they have related programs for nursing home or long-term care facility residents.⁷ Although there is no national ombudsman for that population, there are ombudsman programs in several federal agencies.⁸

There are several effective mechanisms to help ensure accountability and oversight of child welfare programs. Some are expensive, time-consuming, and adversarial – such as class action lawsuits, consent decrees, and court monitoring.⁹ Others, although established by federal legislation, are examples of unfunded mandates. For example, there is a requirement that to be eligible for state grant funding under the Child Abuse Prevention and Treatment Act (CAPTA), every state must have independent Citizen Review Panels serving as child protective services system oversight groups.¹⁰ All those efforts are important ways of helping children, but an adequately funded and empowered child ombudsman program represents one ideal model.

In order to understand and promote that work, the ABA Center on Children and the Law has brought together state child ombudsman programs. It has also served as a resource for information on them and provided legislative advocacy to encourage new offices in additional states. In 1993 the center published a book on the promotion of child ombudsman programs.¹¹ This book examined both domestic programs and those in other countries.

An Independent National Human Rights Office for Children

The model for a child ombudsman favored by UNICEF is a completely independent human rights institution. Sometimes, but not always, it is located outside the executive branch of government. It is created, empowered, and financially supported through a national legislature (and occasionally supported by private foundations as well). It does not, and should not, deliver any direct services to children and families.

We have several NGOs in the United States that, as an important part of their mission, monitor and critique U.S. programs, policies, or funding priorities for vulnerable children. These include the Children’s Defense Fund, First Focus, the Child Welfare League of America, and (although they both do extensive litigation) the groups Children’s Rights Inc. and the National Center for Youth Law. We also have national or international human rights issue–focused organizations that address certain aspects of U.S. child rights. They include the American Civil Liberties Union, Human Rights Watch, Amnesty International, ECPAT-U.S.A., and the Campaign for U.S. Ratification of the Convention on the Rights of the Child. None, however, have the ability or authority to serve as the national human

rights for children program. All lack the capacity to address individual complaints or the legislative mandate to serve as our child rights monitoring institution.

A U.S. national children's ombudsman would need to be located outside any direct-service federal agency. Created by Congress, and protected from party politics, it would have a mandate to fairly and impartially address both domestic and international child rights issues affecting both citizen and noncitizen children. It would be required to advise both the executive branch and Congress on issues. It would have independence and clear, comprehensive, and adequate authority to investigate; become both known and accessible to advocates; and actively collaborate with existing NGOs and similar state programs. I am proposing that this office be called the National Children's Ombudsman Office (NCOO).

Its principal mission should be to help ensure that children become more central to domestic and international U.S. agendas and plans. So that its work is not done in isolation, it would have liaisons appointed by Congress and all relevant executive branch agencies. It would also, assuming adequate funding to do so, have staff members placed in federal regional offices throughout the country.

What Would an NCOO Do?

UNICEF has identified four essential key functions of a children's ombudsman office.¹²

I believe the core functions of our NCOO should, consistent with those, be to:

- **Influence federal policymakers to take greater account of the human rights of children.** This should include implementation of the CRC's Optional Protocols through analysis of law, policy and practice, and proposals for reform, as appropriate. The Office should also comment on the impact on children of proposed new federal legislation. It must also be empowered to undertake inquiries (based upon investigation of individual complaints or other means of problem identification) and produce reports on federal policies and practices affecting children.
- **Promote nationwide respect for the view of children.** In most aspects of this, I believe our country lags behind many others. Article 12 of the CRC says children have a right to express their views in matters affecting them, and to have them taken seriously. This right to be heard should go beyond what I've seen from one special group: American foster care youth (and especially foster care alumni), whose views have influenced reforms in the child welfare system. The views of children on other topics (education reform, jobs creation, services to the disabled, etc.) should be solicited. Those views should be reflected in new or revised government initiatives. I believe that promoting children's active participation in their federal government's actions will lead to a more informed and responsible citizenry.

- **Raise awareness of child rights among our country’s children and adults.** Article 42 of the CRC obliges governments to educate both adults and children on CRC provisions. There are prevailing myths that the CRC is antiparent or antifamily, and that it undermines the authority and integrity of adults to care for their children. Even with the Optional Protocols we’ve ratified, there is little public consciousness of our human rights obligations under them (e.g., working to end child pornography and child prostitution). Materials for both children and adults that help enhance this knowledge, and on the roles that children and their protective parents can play in child rights, could be produced by this Office. So could curricula for older youth and professionals. The office could also serve as a focal point for responsible media education.
- **Ensure that children have effective means of federal redress when their rights are violated.** This office should provide a federal means of access for children and parents (and their advocates) wishing to challenge federal violations of children’s rights. It would not address conflicts between children and their parents. Rather, it would examine the failures of U.S. government institutions in providing necessary support and services. It would also be able to advocate for children as a group, making sure the White House, executive branch agencies, and Congress are aware of critical shortcomings in protecting the needs, rights, and best interests of children.

I would add several additional missions:

- Help develop and coordinate U.S. National Plans of Action to implement our international treaty obligations, such as the CRC Optional Protocols;
- Collaborate with state and local-level child ombudsman programs by encouraging evaluation of program impact and helping identify and promote best practices in their work; and
- Provide the U.S. federal government a vehicle to help ensure better coordination of domestic interagency program plans related to children’s services.

On a day-to-day basis, what would a national ombudsman do? The Center on Children and the Law’s 1993 book provided case examples of how national and state ombudsman programs aided children to:

- be heard by courts making decisions regarding their care and custody;
- have employer-employee conflicts addressed, related to employment issues;
- improve family understanding of the importance of weighing a refugee child’s views on being returned to his or her country of origin;

- assert self-determination to avoid multiple changes in foster care placements;
- rectify adverse conditions of care in a residential facility for children with disabilities;
- have a vehicle for making complaints about services provided to them, through a telephone hotline;
- participate in school and community planning through public hearing processes;
- be supported, while in foster care, to have more frequent visits with their parents;
- obtain services when a detained youth needing special care found no facility willing to provide them;
- ensure that their foster parents' conflict with the foster care agency was effectively mediated;
- get a child protection agency to improve reporting requirements when children in residential care were suspected victims of sexual abuse; and
- obtain an exemption to a state foster home licensing requirement that would have inappropriately prohibited a foster parent from serving additional children.

Conclusion: Meeting Objections to the Creation of a National Children's Ombudsman Office

Objections to the establishment of an NCOO would likely be centered on a few areas. The first is concern about additional federal bureaucracy and the associated costs. The NCOO's work, however, would likely identify how currently siloed bureaucratic programs could work together more effectively. I would hope that it would also identify costly programs not achieving intended goals, including those wasteful of federal funds. Some might suggest an alternative approach of only having individual federal agencies create child ombudsman offices. That could be far more costly. It would also continue a discredited noncollaborative and disjointed approach to identifying children's services problems.

A tougher objection to overcome is that money for an NCOO would be better spent on direct services for children. The emotional appeal of simply having more desperately needed services on the ground, rather than a new government ombudsman/advocate program, I hope would be balanced with recognition that, too often, existing services are poorly coordinated, fragmented and overlapping, and inconsistent. They are also focused on more costly "picking up the pieces" approaches rather than on prevention of problems.

There will inevitably be concerns that an NCOO would interfere with the rights of parents. The federal government already plays a significant role in children's lives, through public education, environmental issues, healthcare, and child welfare / juvenile justice interventions. The CRC places a clear obligation on governments to support parents, but at the same time recognizes that parents do not always act in their children's best interests. What the NCOO should protect are the rights of children *within, and in preservation of, strong families*.

Finally, I would expect some to ask: Why do children, above others, need such a special office? Children are especially vulnerable. They lack the direct participation in government that would enable them to have their issues prioritized. Their access to the legal system and the media is very restricted. They are often victims of abusive or exploitative adults who have misused their responsibility over them. They typically lack powerful advocates to help them exercise their rights. The later cost of failing to protect them while they are young is great. Too often it leads to high government program expenses for the rest of their lives. And no other population group is more affected by the action, or inaction, of government.

So, in response to concerns raised about the costs and complexities involved in establishing this proposed office, I would ask: How can we afford not to have at the national level a federal mechanism to address, for children *and their families*, the failures of government to adequately protect and serve the youngest members of our society?

Notes:

¹ "Independent Institutions Protecting Children's Rights," *Innocenti Digest* No. 8 (Florence, Italy: UNICEF Innocenti Research Centre).

² United Nations Committee on the Rights of the Child, "The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child," CRC/GC/2002/2 (General Comments), November 15, 2002, [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2002.2.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2002.2.En?OpenDocument).

³ These are the "Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography" and the "Optional Protocol on the Involvement of Children in Armed Conflict." For the text of the Convention on the Rights of the Child and these protocols, see <http://www2.ohchr.org/english/bodies/crc/>.

⁴ Jean M. Geran, "A Foreign Policy Must-Have: An Ambassador for Children," *Foreign Policy* Shadow Government blog, November 24, 2009, http://shadow.foreignpolicy.com/posts/2009/11/24/a_foreign_policy_must_have_an_ambassador_for_children.

⁵ See National Conference of State Legislatures, "Children's Ombudsman Offices," February 2008, <http://www.ncsl.org/default.aspx?tabid=16391>. Another overview of these

programs is J. Jones and A.W. Cohn, “State Ombudsman Programs,” *Juvenile Justice Bulletin* (February 2005), <http://www.ncjrs.gov/pdffiles1/ojjdp/204607.pdf>.

⁶ See <http://meetings.abanet.org/webupload/commupload/AL322500/newsletterpubs/115.pdf> for the text of these.

⁷ Congress in 1978 amended the Older Americans Act (P.L. 95-478) to include a requirement that each state develop a Long-Term Care Ombudsman Program in order to protect the health, safety, welfare, quality of care, and rights of the institutionalized residents in nursing facilities, board and care homes, assisted living facilities, and other similar facilities. As of 2008 there were 53 state programs operating in all 50 states, the District of Columbia, Guam, and Puerto Rico. In 1992, a provision was added to the Older Americans Act amendments requiring establishment of a permanent National Ombudsman Resource Center. For more information on this, see <http://aging.senate.gov/crs/aging12.pdf>.

⁸ The Environmental Protection Agency has an Asbestos and Small Business Ombudsman (<http://www.epa.gov/sbo/#mission>), the Small Business Administration has a National Ombudsman (<http://www.sba.gov/aboutsba/sbaprograms/ombudsman/index.html>), and the Department of Education has a Federal Student Aid Office of the Ombudsman (<http://www.ombudsman.ed.gov/>).

⁹ See Child Welfare League of America and American Bar Association Center on Children and the Law, “Child Welfare Consent Decrees: Analysis of Thirty-Five Court Actions from 1995 to 2005,” <http://www.cwla.org/advocacy/consentdecrees.pdf>.

¹⁰ 42 U.S.C. § 5106a(c).

¹¹ Howard Davidson, Cynthia Price Cohen, and Linda Girdner, eds., *Establishing Ombudsman Programs for Children and Youth: How Government’s Responsiveness to Its Young Citizens Can Be Improved* (Washington, DC: American Bar Association Center on Children and the Law, 1993).

¹² United Nations Committee on the Rights of the Child, “The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child.”

¹³ Davidson, Price Cohen, and Girdner, *Establishing Ombudsman Programs for Children and Youth*. These examples are included in Chapter 5, “What an Ombudsman for Children Actually Does.”