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Children's Ombudspersons in the United States

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ABSTRACT

Despite being the only UN member party that has failed to ratify the UN Convention on the Rights of the Child, across the United States, many state governments have established offices of children's ombudspersons. These children's ombudspersons in some ways are similar to their counterparts in other parts of the world, but in crucial ways they are distinct. One crucial distinction is that U.S. offices of children's ombudspersons rarely are expected to advance the rights of all children. This article calls for consider of a national children's ombudsperson for the United States.

INTRODUCTION

In the one country whose national government has failed to ratify the UN Convention on the Rights of the Child, offices of children's ombudspersons have been established across the United States. This essay will describe these offices, their work and independence, and how strengthening these offices will lead to stronger enforcement of children's rights. This essay will follow up on a proposal Howard Davidson of the American Bar Association made to establish a national office of children's ombudsperson for the United States.

The U.S. Federal System

It is important to bear in mind the U.S. national system of government is a federalist one. Federalism is an approach to government of an entire territory. This territory is controlled by multiple levels of government. A national level of government often is responsible for governance of the overall territory, such as maintaining borders and regulating cross-jurisdiction issues. Smaller jurisdictions govern their territories. Typically, the national government and smaller territories are endowed with authority to design and implement laws. National and smaller jurisdictions usually possess autonomy to govern issues relative to their territories. In the United States, the Constitution has established a system of "dual sovereignty," through which the states retain many powers, but relinquish some powers to the national government.

Within each state, local governments maintain powers that their state governments have relinquished. In some states, those local governments are city governments as well as county governments. County governments are distinct from city governments, but cities are based within counties. Some cities and counties have unified their governing structures, such as Indianapolis-Marion county, Indiana.

State-level Children's Ombudspersons

For the United States, when it comes to young people's rights, the national government, states and their governments, and local governments, all are critical components. Across the country, approximately forty states have established offices that resemble offices of children's ombudspersons found in other countries. To varying degrees, these U.S. offices possess independence, autonomy, and legislated powers that empower their leaders and staff to advance interests and well-being of young people. Across the fifty states, some local governments have established offices of children's ombudspersons. Yet a national office of a children's ombudsperson has not been established.

At the state level, twenty-eight offices that concentrate on young people have been established. This map presents information about where those offices are located.

Ombudperson Status

- No offices
- State-level offices
- Offices part of another office



Some states have established offices that are part of a bigger office. That is, these offices do not stand alone, but are part of other offices.

ENOC MEMBERSHIP CRITERIA

To take a closer look at a sample of these U.S. offices, we turn to ENOC membership criteria to contrast differences. While called ombudspersons, these U.S. offices are, in many ways, distinct from children's rights ombudspersons found in other countries. One tool for comparison is the set of standards established by ENOC. ENOC is the European Network of Ombudspersons for Children (<http://enoc.eu/>). Established in 1997, ENOC has grown over its two decades' history. Its membership has grown from ten original members to forty-three members. ENOC is active, holding annual meetings, publishing position papers, as well as working seminars for which topics range from corporal punishment (2001) to children's rights within digital contexts (2019). An advantage of ENOC is that its members share information about their mission and objectives, functioning, and challenges to using their powers and exerting their independence. Regional

groups, such as ones found in Scandinavia and the United Kingdom-Ireland, have proceeded from ENOC.

ENOC membership is meaningful for multiple reasons. One reason is that ENOC is a network of ombudspersons whose missions largely are similar. Another, related reason is that ENOC holds regular meetings where ombudspersons and members of their office can gather to discuss their work, challenges to their work, and share solutions to issues they routinely face, such as budget restrictions and staff shortages. A third reason is that ENOC has, on occasion, published statements as a collective group. These statements typically represent shared opinions and concerns about their work as ombudspersons and their efforts to advance rights of children. A fourth, related reason is membership leads to recognition that the particular ombudsperson and her office are members of ENOC.

ENOC has established two types of membership, full and associate. To become a full member of ENOC, an office of a children's ombudsperson must meet these criteria:

- at least one member of the office has responsibilities of protecting and promoting young people's rights; how to say that as exclusive
- legislation, approved by a parliament or legislature, establishes the office;
- this legislation indicates the office has the responsibility of protecting and promoting children's rights;
- this legislation indicates the office is independent;
- related, the legislation does not provide that the ombudsperson cannot set her own agenda in terms of protecting and promoting children's rights, or other functions identified in the Paris Principles and ENOC's standards; and,
- the legislation articulates appointments of the ombudsperson, including the individual's term and renewal arrangements.

ENOC membership criteria and standards are shaped by the Paris Principles. The UN General Assembly adopted the Paris Principles in 1993. They articulate requirements of independent human rights institutions, including independent children's rights institutions. The Paris Principles indicate these institutions should protect and promote human rights. They identify qualities these institutions must possess, including a mandate to advance rights, autonomy and independent from government that is guaranteed via statute or constitution, enjoy sufficient resources, and possess powers to conduct investigations.

It is important to note that ENOC does not distinguish between institutions that are separate or are part of another office, such as a national or regional human rights institution. Whatever the case, to be a full ENOC member, the office must meet the above criteria. To become an associate member of ENOC, leadership of the institution must demonstrate they are actively trying to meet the above criteria.

Why are these criteria important? ENOC members assert that at least one member of an office should focus on rights of young people. Ensuring that at least one member of the office concentrates on children's rights ensure that young people's rights are not swept under the carpet. Instead, children's rights receive attention and resources. Similar to establishing a distinct UN convention on children's rights, distinct from other human rights, emphasizes that young people's rights merit their own attention and resources. A reason that children's rights merit their attention and resources along the lines of the UNCRC is because young people deserve extra protections, as the Preamble to the UNCRC notes.

The second criterion, established by parliament through legislation that articulates independence, is important because a law is not easily dismantled. A law is a public statement. In a country that is a democracy, which to a large degree all Council of Europe countries are, this legislation can be understood as a statement made by voters. For a similar reason, that the legislation states a function of the office is to protect and promote young people's rights, is a public statement. An ombudsperson can refer to this legislation when making and justifying decisions and devoting resources to protecting and promoting young people's rights.

When independence is incorporated into the legislation, an ombudsperson can point to the legislation as a means for asserting independence. My research demonstrates that government officials across many countries try to "push back" when it comes to an ombudsperson's work in protecting and promoting young people's rights, particularly when these efforts are understood as in conflict with objectives national leaders have established. When legislation asserts that an ombudsperson is independent, the person in that position possesses authority to set the office's agenda according to the rest of the legislation, the Paris Principles, and other guidelines in protecting and promoting children's rights. Along these lines, when the appointment process is clear, publicly known, and incorporated in the legislation establishing the office, other government officials and children's and human rights watchdogs can insist the parliament or legislature adhere to the legislation in establishing appointments of a new ombudsperson, as well as an incumbent ombudsperson's renewal.

APPLICATION OF ENOC MEMBERSHIP CRITERIA TO U.S. OFFICES

To demonstrate and highlight differences, let's apply these ENOC membership criteria to a selection of U.S. children's ombudspersons. Among the first states to establish offices were Connecticut, Rhode Island, and Michigan.

| | Connecticut | Rhode Island | Michigan | Texas |
|--|---|---|---|--|
| At least one employee focuses on children | Yes | Yes | Yes | Yes |
| Legislation establishes office | Yes | Yes | Yes | Yes |
| Legislation indicates responsibilities of promoting and protecting children's rights | Yes, but in regards to children in state care | Yes, but in regards to children in state care | Yes, but in regards to state care | Yes, but in regards to foster care |
| Legislation indicates independence | Yes | Yes, but in relation to the Department of Children, Youth, and Families | Yes, but independence within Executive Branch Department of Management and Budget | No. Independence within Health and Human Services Department |

| | | | | |
|---|-------------------|-------------------|------------------|------------------|
| Legislation indicates appointment process | Yes | Yes | Yes | No |
| Budget | Approx. \$630,000 | Approx. \$695,000 | Cannot ascertain | Cannot ascertain |
| Staff | 6 | 5 | 11 | Cannot ascertain |

We will start with analyses of the Connecticut and Rhode Island offices. Among the oldest of U.S. children’s ombudspersons, their missions and arrangements are similar. The Connecticut office is called the Office of the Child Advocate (OCA). Established in 1997 through legislation, the OCA is one of the oldest offices of children’s ombudspersons in the United States. OCA’s legislation indicates the office is independent; this legislation describes the ombudsperson’s appointment process. The office completely focuses on children, but only children whose lives are spent in connect with government agencies, such as foster care, state care, and imprisonment. Rather than monitor and advance children’s rights, the office has the responsibility of evaluating delivery of services to young people by state agencies and private agencies that receive state funding. In addition, the OCA has the responsibility of sitting on a Child Fatality Review Panel. This panel reviews deaths of children who die while in care outside of their families, such as state or institutional care, or who die from unexplained or unexpected reasons. The Connecticut OCA has been in the news, challenging a school system’s response to allegations of sexual abuse committed by a teacher against students. The OCA last posted annual report was for 2017-2018, however, suggesting that annual reports of 2018-2019 and 2019-2020 have not been filed. The OCA does meet ENOC membership criteria. Its basis is in legislation, which describes the office’s independence and appointment process. Given that the OCA does not seek to monitor and advance children’s rights, but focuses on rights of children in state care or state-funded care, the OCA would not qualify for ENOC membership.

The Rhode Island office of children’s ombudsperson is called the Office of the Child Advocate (OCA) and is the oldest state-level children’s ombudsperson in the United States. Established through legislation in 1979, the Rhode Island OCA does not have a responsibility of monitoring and advancing rights of all children. Instead, the OCA possesses a duty of insuring that every child in state care is aware of her rights and possesses the duty of ensuring those rights are implemented. The OCA also possesses a duty of initiating a panel to review the death of a child who was in state custody at time of death. Similar to Connecticut, the last annual report of the Rhode Island OCA is 2018, raising questions for its activities and involvement in advancing rights of young people in state care. The OCA does not meet ENOC membership criteria. Like Connecticut’s office, the OCA would not qualify for ENOC membership because it does not monitor and advance children’s rights,.

The Michigan office is called the Michigan Office of the Children’s Ombudsman. Established in 1994 through state legislation, the Michigan Office does not have responsibility of monitoring and advancing rights of all children. The Michigan Office focuses on young people who are in state care, including protective services and foster care, as well as placement in adoptive homes. The legislation establishing the Michigan Office indicates the Children’s Ombudsman holds the responsibility of ensuring rights of children in state care are protected. The Children’s Ombudsman is expected to pursue best interests of children in state legislation and monitor the work of the Department of Human Services when it comes to children’s well-being. Like

Connecticut and Rhode Island offices, the Michigan Office has responsibility of conducting reviews of fatalities of children who died in state care or after the government assigned the child to an adoptive home or parent's home. The Michigan Office is active. Nevertheless, the Michigan Office does not meet ENOC membership criteria. Like the Connecticut and Rhode Island offices, the Michigan Office does not have authority to monitor and advance rights of all children living in Michigan. Similar to the Connecticut and Rhode Island offices, the Michigan Office of Children's Ombudsman concentrates on well-being of children in state care.

The Texas office is called the Independent Ombudsman for the Texas Juvenile Justice Department. Established through state legislation, as its name denotes, the Texas office does not have responsibility of monitoring and advancing rights of all children. Instead, the Texas office holds the responsibility of monitoring well-being and rights of children in detention. This work includes monitoring the facilities where children are detained and ensuring that policies and procedures are followed when it comes to young people in detention. Unlike the other children's ombudspersons, the Texas Independent Ombudsman is not responsible for monitoring child fatalities. The Texas office is active, as demonstrated through its filing of a fiscal report for 2020. Nevertheless, the office's website does not provide information about the identity of the person holding the Ombudsman position and who staff members are. The Texas office does not meet ENOC membership criteria. Like the other U.S. offices, the Independent Ombudsman for the Texas Juvenile Justice Department does not monitor and advance rights of all children in Texas.

A comparison to an ENOC member may highlight differences. The Norwegian children's ombudsperson, called Barneombodet, has the responsibility of monitoring implementation of the UNCRC and advancing children's rights. Its staff consists of 21 persons. Let's compare number of staff to number of children. In 2018, Norway's population of young people age 19 and younger is about 1,270,948 (<https://www.ssb.no/en/befolkning/nokkeltall>). The ratio of children to ombudsperson staff people is 1.65/100,000 children. In contrast, for 2019, the number of young people age 18 and younger in Connecticut is 734,449, for Rhode Island the number is 205,516, and for Michigan is 2,167,148. In comparison, the ratio of ombudsperson staff to children in Connecticut is .82/100,000, in Rhode Island is 2.43/100,000, and in Michigan is .51/100,000. Despite possessing fewer duties, at least on paper, the Rhode Island possesses proportionally more staff the Norwegian office.

OVERVIEW

This analysis is intended to provide insights into state-level offices of children's ombudspersons. In many ways, U.S. offices meet ENOC membership criteria, suggesting that these offices are similar to ones in Europe and other parts of the world. Their establishment is through legislation. Their legislation indicates they are independent. They possess legal powers, staff, and budgets.

A closer look reveals, however, that these offices do not possess duties to monitor and advance rights of all children in their states. Instead, U.S. offices are expected to monitor rights of children in state care or in state detention. The rights of children outside of state care or detention are not a concern of U.S. offices of children's ombudspersons. For this reason, U.S. offices would not meet ENOC membership criteria and would not be considered children's ombudspersons in many parts of the world.

To be sure, advocacy of and interest in young people who are in prison, state care, and other settings state governments control can mean a world of differences to these young people.

This important work could become responsibilities of an official who advocates for all young people and their rights.

A National Office of the Children's Ombudsperson?

Howard Davidson, who led the American Bar Association's Center on Children and the Law from 1978 to 2015, called for a national children's ombudsperson for the United States. In an article published in 2010 entitled, "A U.S. National Ombudsman for Children," Davidson points to European children's ombudspersons as role models for a national U.S. children's ombudsperson. Given other countries' experiences with children's ombudspersons, Davidson calls for the U.S. children's ombudsperson to possess four "functions:"

- Influence federal policymakers to take greater account of the human rights of children.
- Promote nationwide respect for the view of children.
- Raise awareness of child rights among our country's children and adults.
- Ensure that children have effective means of federal redress when their rights are violated (Davidson 2010: 78-79).

These four functions are ones other national children's ombudspersons possess, including ENOC members. Like its European cousins, the U.S. children's ombudsperson would seek to advance rights and well-being of children. The U.S. children's ombudsperson would be a powerful voice at the national level for young people, not only in the halls of government, but in schools, neighborhoods, businesses, and family homes. The U.S. children's ombudsperson would ensure that young people can exercise their rights, even when government agencies in their own home states ignore or even violate those rights. In turn, the U.S. children's ombudsperson would foster respect of young people and their views. In identifying these functions, Davidson sometimes refers to UNCRC articles. He notes that although the United States has yet to ratify the UNCRC, the United States has ratified two optional protocols to the UNCRC. Similar to other children's ombudspersons, the U.S. children's ombudsperson would contribute to implementation of human rights treaties. Focusing on the U.S. federal system, Davidson envisions the U.S. children's ombudsperson as, on the one hand, working with state-level children's ombudspersons, and at the federal level, contributing to the work of federal agencies when it comes to programs for young people.

CONCLUSION

As is well known, the United States is the sole UN member party not to ratify the UNCRC. Todres and colleagues (2006) demonstrate that in many ways, the United States has established laws and procedures that fulfill UNCRC obligations. While the work of U.S. ratification of the UNCRC is on-going, ratification would place the United States among its peers. Ratification would also mean that the United States could more effectively advocate on behalf of young people and their rights, as well as human rights in general. Establishing children's rights ombudspersons in the United States that are designed to monitor and advance rights of all children would facilitate these efforts of taking children's rights seriously.

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