PROTECTING VIRGINIA'S YOUTH: ESTABLISHING A CHILDREN'S OMBUDSMAN OFFICE

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I. INTRODUCTION

Efforts from across Virginia to give our Commonwealth's vulnerable children a voice culminated on March 8, 2008, as legislation approving the creation of a Children's Ombudsman Office passed both houses of the Virginia legislature.[1] Senate Bill 315, introduced by Senator John S. Edwards[2] and co-sponsored by Senator R. Edward Houck,[3] passed the Senate with only one dissenting vote and received unanimous treatment in the House.[4] House Bill 1131, introduced by Delegate William H. Fralin, Jr.[5] and co-sponsored by Delegate Robert H. Brink,[6] was approved unanimously in both chambers.[7] These identical bills seek to give a voice to the 9,269 vulnerable children in the custody of the Commonwealth of Virginia.[8] As originally introduced, the legislation

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1. Legislative Information System, Bill Tracking: HB1131, 2008 Session, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=081&typ=bil&val=HB1131; Legislative Information System, Bill Tracking: SB 315, 2008 Session, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=081&typ=bil&val=SB315; *see also* H.B. 1131, Va. Gen. Assembly (Reg. Sess. 2008), ¶ 1, § 2.2-214.2(A) (as passed Feb. 28, 2008 by the House and Senate); S.B. 315, Va. Gen. Assembly (Reg. Sess. 2008), ¶ 1, § 2.2-214.2(A) (as passed Mar. 5, 2008 by the House and Senate).

2. John S. Edwards is the Democratic Senator for Virginia's 21st District.

3. R. Edward Houck is the Democratic Senator for Virginia's 17th District.

4. Legislative Information System, Bill Tracking: SB 315, 2008 Session, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=081&typ=bil&val=SB315.

5. William H. Fralin, Jr. is the Republican Delegate for Virginia's 17th District.

6. Robert H. Brink is the Democratic Delegate for Virginia's 48th District.

7. Legislative Information System, Bill Tracking: HB1131, 2008 Session, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=081&typ=bil&val=HB1131.

8. This figure represents the number of children in Virginia's foster care system as well as those in state juvenile correctional facilities. The Department of Social Services reports that 8,173 children were served in foster care in 2007. VA. DEP'T OF SOC. SERVS., 2008 ANNUAL STATISTICAL REPORT 22 (2008), *available at* http://www.dss.virginia.gov/files/about/reports/agency_wide/annual_statistical/2008_online_vers.pdf. Statistical information from the Department of Juvenile Justice indicates that a total of 1,096 children were held in juvenile correctional centers in 2007. VA. DEP'T OF JUVENILE JUSTICE, FY 2007 STATISTICAL INFORMATION 2 (2008), *available at* http://www.

created an Office of the Children's Ombudsman as an independent office under the Governor of Virginia that would be implemented over a three-year period to defray costs.[9] Amendments to these bills, however, prevent implementation unless the General Assembly is able to allocate funds in this year's budget.[10]

Though well-intentioned, the actions of the General Assembly are meaningless without a budget amendment.[11] Even if the Office of the Children's Ombudsman fails to receive funds and is never codified, the strong coalition of supporters advocating for this bill will likely ensure the issue is revisited in the 2009 General Assembly session. Actual implementation will require initiating new legislation—fortunately, this year's success will give future bills a strong foundation upon which to stand. Legislators and advocates alike should recognize the need for this legislation and understand the features necessary to create an effective ombudsman office. This comment will discuss the attributes of an ideal ombudsman office, describe the background and substantive content of Virginia's Children's Ombudsman bills, and suggest improvements to the legislation.

II. THE FOUR CORNERSTONES OF AN EFFECTIVE OMBUDSMAN OFFICE

"Ombudsman" is a term borrowed from the Swedish language[12] that has become commonly used in the United States to describe various types of complaint-handlers or problem-solvers.[13] Ombudsman offices

djj.virginia.gov/About_Us/Administrative_Units/Research_and_Evaluation_Unit/pdf/DJJ_Statistics_FY2007.pdf. This figure does not include the 17,696 children admitted to local detention facilities during 2007. *Id.*

9. *See* H.B. 1131, ¶ 2 (as introduced Jan. 8, 2008); S.B. 315, ¶ 2 (as introduced Jan. 8, 2008).

10. H.B. 1131, ¶ 4 (as passed Feb. 28, 2008 by the House and Senate); S.B. 315, ¶ 4 (as passed Mar. 8, 2008 by the House and Senate). The Senate Finance Committee added an enactment clause to Senate Bill 315 while the House Appropriations Committee added identical language to House Bill 1131. *See* Legislative Information System, Bill Tracking: SB 315, 2008 Session, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=081&typ=bil&val=SB315; Legislative Information System, Bill Tracking: HB1131, 2008 Session, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=081&typ=bil&val=HB1131.

11. *See* H.B. 1131, ¶ 4 (as passed Feb. 28, 2008 by the House and Senate); S.B. 315, ¶ 4 (as passed Mar. 8, 2008 by the House and Senate).

12. U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN: STATE OMBUDSMAN PROGRAMS 1 (2005), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/204607.pdf [hereinafter OJJDP, BULLETIN] ("'Ombudsman' is derived from the Swedish word meaning agent or representative.").

13. Nat'l Conference of State Legislatures, *Children's Ombudsman Offices* (2008), http://www.ncsl.org/programs/cyf/ ombuds.htm [hereinafter NCSL, *Offices*]; U.S. OMBUDSMAN ASS'N, GOVERNMENTAL OMBUDSMAN STANDARDS 1 (2003), http://www. usombudsman.orgdocuments/PDF/References/USOA_STANDARDS.pdf [hereinafter U.S. OMBUDSMAN, STANDARDS].

have been established in both the public and private sectors, including federal, state, and local administrative settings; academia; and business contexts.[14] A governmental ombudsman is defined by the United States Ombudsman Association as "an independent, impartial public official with authority and responsibility to receive, investigate or informally address complaints about government actions, and, when appropriate, make findings and recommendations, and publish reports."[15]

Generally, a children's ombudsman office, sometimes entitled a children's advocate office, protects both the individual and system-wide rights of children by providing oversight of agencies serving youth and families.[16] A children's ombudsman "provides a voice for children's interests and acts as a watchdog to ensure that those interests are protected."[17] These offices receive and investigate complaints from citizens and families related to harmful action—or inaction—by the government which adversely affects the welfare or rights of children in state custody.[18] This investigatory power may include both the right to

14. *See* STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES 1 (2004), *available at* http://www.abanet.org/adminlaw/ombuds/115.pdf [hereinafter ABA STANDARDS].

15. U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 1.

16. *See* NCSL, *Offices*, *supra* note 13.

17. Gary B. Melton, *Lessons from Norway: The Children's Ombudsman as a Voice for Children*, 23 CASE W. RES. J. INT'L L. 197, 202 (1991). In 1981, Norway was the first nation to adopt an ombudsman for children. *Id.* at 201. This advocacy position was established to "serve[] as a representative for children in policymaking and a guardian in policy implementation." *Id.* at 202.

18. U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, CHALLENGE ACTIVITIES PROGRAM: CHALLENGE ACTIVITY F 1 (1996), http://www.ncjrs.org/pdffiles /chalprof.pdf [hereinafter OJJDP, CHALLENGE]. The American Bar Association's Model Ombudsman statute, adopted by resolution in 1969 and amended in 1971 recommends twelve criteria for ombudsman statutes. Bernard Frank, *State Ombudsman Legislation in the United States*, 29 U. MIAMI L. REV. 397, 399–400 (1975). The twelve elements were not only suggested, but considered essential to guarantee fairness and legitimacy in the ombudsman's oversight function. *Id.* at 400. These characteristics include:

> (1) authority of the ombudsman to criticize all agencies, officials, and public employees except courts and their personnel, legislative bodies and their personnel, and the chief executive and his personal staff; (2) independence of the ombudsman from control by any other officer, except for his responsibility to the legislative body; (3) appointment by the legislative body or appointment by the executive with confirmation by a designated proportion of the legislative body, preferably more than a majority, such as two–thirds; (4) independence of the ombudsman through a long term, not less than five years, with freedom from removal except for cause, determined by more than a majority of the legislative body, such as two–thirds; (5) a high salary equivalent to that of a designated top officer; (6) freedom of the ombudsman to employ his own assistants and to delegate to them, without restraints of civil service and classification acts; (7) freedom of the ombudsman to investigate any act or failure to act by any agency, official, or public employee; (8) access of the ombudsman to all public records he finds relevant to an investigation; (9) authority to inquire into fairness, correctness of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee; (10) discretionary power to determine what complaints to investigate and to determine what criticisms to

inspect residential facilities on either a routine or unannounced basis and access to the agencies' records and documents.[19] Often, these offices also have the opportunity to recommend systemic improvements in annual reports to government officials, state legislatures, and the public.[20]

Existing children's ombudsman structures are designed in a variety of different manners.[21] Of those established within the government, some are independent external offices[22] while others are implemented internally, within child-serving agencies themselves.[23] In some states, an ombudsman is established to oversee all state agencies and thus has authority over child-serving agencies as well.[24] Any ombudsman office,

> make or to publicize; (11) opportunity for any agency, official, or public employee criticized by the ombudsman to have advance notice of the criticism and to publish with the criticism an answering statement; (12) immunity of the ombudsman and his staff from civil liability on account of official action.

Id.

19. *See* Frank, *supra* note 18, at 420–21; *see also* NSCL, *Offices*, *supra* note 13.

20. Frank, *supra* note 18, at 434; NSCL, *Offices*, *supra* note 13.

21. *See* OJJDP, BULLETIN, *supra* note 12, at 4–6.

22. The states with independent children's ombudsman offices include Connecticut, Delaware, Georgia, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, Rhode Island, Tennessee, and Washington. *See, e.g.*, CONN. GEN. STAT. § 46a-13k (2004); DEL. CODE ANN. tit. 29, § 9001A (2003); GA. CODE ANN. § 15-11-170 (2008); 20 ILL. COMP. STAT. 505/35.5 (2008) (establishing an Office of the Inspector General for Children and Family Services, which is located within, but independent to, the Department of Children and Family Services and reports to the Governor and legislature); ME. REV. STAT. ANN. tit. 22, § 4087-A (Supp. 2007); MD. CODE ANN., STATE GOV'T § 6-402 (LexisNexis 2008) (establishing a juvenile justice monitoring unit under the Attorney General); MICH. COMP. LAWS § 722.923 (2002); MINN. STAT. § 257.0762 (2007); N.J. STAT. ANN. § 52:27EE-67 (West 2001); R.I. GEN. LAWS § 42-73-5 (2006), S.C. CODE ANN. §§ 20-7-5210 to -5220 (2007) (creating a Children's Case Resolution System within the Governor's Office of Children's Affairs, which provides ombudsman services to children and families); TENN. CODE ANN. § 37-3-103 (Supp. 2007) (establishing a Commission on Children and Youth, which includes an Ombudsman Office); WASH. REV. CODE § 43.06A.010 (2008).

23. California, Kentucky, Missouri, New Hampshire, Oklahoma, Utah, and Virginia are among the states that have established ombudsman offices serving children within various state agencies. *See, e.g.*, CAL. WELF. & INST. CODE § 16161 (West 2007) (establishing a foster care ombudsman within the Department of Social Services); N.H. REV. STAT. ANN. § 126-A:4(III) (2006); OKLA. STAT. tit. 10, § 7302-3.2 (2007) (establishing an Office of the Advocate Defender within the Department of Juvenile Justice); UTAH CODE ANN. § 62A-4a-208 (2006); VA. CODE ANN. § 66-3.1 (2007) (creating the position of Inspector General within the Department of Social Services); 920 KY. ADMIN. REGS. 1:030 (2007) (setting forth the duties of the Office of the Ombudsman established within the Cabinet for Health and Family Services); OKLA. ADMIN. CODE §§ 340:2-3-1 to 2-3-22 (2006) (establishing an Office of Client Advocacy within the Department of Human Services); *see also* OJJDP, BULLETIN, *supra* note 12, at 12 (describing Kentucky's Office of the Juvenile Justice Ombudsman established within the state's Department of Juvenile Justice); Missouri Dep't of Soc. Servs., State Technical Assistance Team, http://www.dss.mo.gov/stat/index.htm (last visited Mar. 13, 2008) (describing the mission of the State Technical Assistance Team within the Missouri Department of Social Services).

24. These states include Alaska, Arizona, Florida, and Nebraska. *See, e.g.*, ALASKA STAT. § 24.55.100 (Supp. 2007); ARIZ. REV. STAT. ANN. §§ 41-1371, 1376(A)(1) (2004); FLA. STAT. § 402.164 (Supp. 2008) (establishing a legislative council comprised of volunteers to investigate state agency

whether it serves the public or private sector, adults or children, requires four elements for effectiveness: (1) independence, (2) impartiality, (3) confidentiality, and (4) legitimacy.[25]

A. Independence: The Core Defining Principle of an Ombudsman

An ombudsman and his employees must be free from any external control or influence.[26] The office must not have cause to fear retribution from agencies or complainants when pursuing investigations, publicizing findings, and making recommendations.[27] The independence of an office should be assessed using two factors: (1) whether anyone can control or limit the ombudsman's performance of assigned duties, and (2) whether anyone can eliminate the office or the officer or reduce funding.[28]

Ombudsman offices established within agencies themselves cause concern because the ombudsman is beholden to the agency being scrutinized; thus, reports and findings may not be totally unbiased and are not as well-trusted by the public.[29] Ideally, an ombudsman should be established by law, either constitutionally or legislatively, and appointed by the legislature or executive.[30]

Many other indicators of independence exist. An ombudsman should only be removed from office for just cause, using a fair procedure.[31] A longer term of office is more desirable, as it allows the ombudsman to become more proficient at his position while freeing him from political

actions); NEB. REV. STAT. § 81–8,240 (creating a Public Counsel Office, appointed by the legislature to oversee the administrative actions of all state agencies).

25. *See* ABA STANDARDS, *supra* note 14, at 3–4; U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 1.

26. ABA STANDARDS, *supra* note 14, at 3.

27. *See id.*

28. *Id.*

29. *See* U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 2 ("The less independent Ombudsman will be suspect as unable to conduct a thorough and critical investigation by various clients from the outset and vulnerable to retaliation or lasting animosity if aggressive inquiry is, indeed, carried out.").

30. Legislative appointment is generally favored. *See id.*; *see also* U.S. OMBUDSMAN ASS'N, MODEL OMBUDSMAN ACT FOR STATE GOVERNMENTS § 5 (1997), http://www.abanet.org/adminlaw/ombuds/usoamodel1.html [hereinafter U.S. OMBUDSMAN, MODEL STATUTE]; Frank, *supra* note 18, at 409.

31. ABA STANDARDS, *supra* note 14, at 5; U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 3; *see also* U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at § 8; Frank, *supra* note 18, at 415 ("The ABA Model Statute adopts the principle that the independence of the Ombudsman is maintained by freeing him from removal from office except for cause determined by a two-thirds vote of the Legislature . . . . This protects the Ombudsman from removal by the Governor in the event the Governor objects to the ombudsman's activities").

considerations, as his term will outlast that of his appointer.[32] The ombudsman should also have discretion to select what matters are appropriate for investigation, initiate necessary investigations, determine recommendations and conclusions, and make publication decisions.[33] The findings of the ombudsman's office should not be appealable to any other authority.[34] Lastly, the ombudsman should be immune against civil and criminal claims arising out of the lawful performance of duty.[35]

B. Impartiality: The Heart of an Ombudsman Office

An ombudsman must be unencumbered by bias and conflicts of interest.[36] Without impartiality, the public will neither trust the ombudsman's office nor seek its assistance, and agencies will resist both investigation and criticism.[37] Once public confidence is compromised, the entire purpose of an ombudsman office becomes moot.[38]

All indicators of impartiality must be present in order to maintain the utmost credibility and secure the effectiveness of the ombudsman office.[39] Any statute establishing an ombudsman's office should set forth certain qualifications required of the ombudsman, including objectivity; good judgment; integrity; and the ability to deal with problems of law, administration, and public policy.[40] Neither an ombudsman nor his employees can be a candidate for any other public office—in fact, there should not be any involvement in partisan or political activities.[41] Additionally, the ombudsman should not serve in any other occupation, profession, or business relationship that may result in a conflict of interest.[42] The ombudsman must also take care to remove himself from any complaint investigations where even an

32. U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at § 7; Frank, *supra* note 18, at 413.

33. U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 4.

34. *See id.* at 5 ("This ideal principle sets the Ombudsman apart from routine administrative process and supports the Ombudsman's role as an impartial critic and opinion giver."); *see also* U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at § 17(a); Frank, *supra* note 18, at 439.

35. U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 5; *see also* U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at § 17(b); Frank, *supra* note 18, at 439.

36. ABA, STANDARDS, *supra* note 14, at 5.

37. U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 5.

38. *See id.*

39. *See id.*; Frank, *supra* note 18, at 410–11.

40. U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at § 6(a); Frank, *supra* note 18, at 410.

41. *See* U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at § 6(b)(1)–(2); U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 5–6; Frank, *supra* note 18, at 410.

42. U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at § 6(b)(3); U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 5; Frank, *supra* note 18, at 410.

appearance of a conflict of interest may exist.[43] Furthermore, an ombudsman must not let personal views interfere with investigatory decisions, complaint resolutions, or recommendations.[44]

C. Confidentiality: The Sword and Shield of the Ombudsman

The records to which an ombudsman has access must be as confidential as they were prior to the investigation.[45] Thus, an agency's confidential records cannot be revealed merely because they were subject to an investigation; these records cannot be disclosed outside of the ombudsman's office.[46] The ombudsman, however, may use a promise of confidentiality as a tool to collect needed information.[47] These guarantees of protection, however, cannot exceed the ombudsman's ability to keep information from disclosure.[48] Once the ombudsman promises confidentiality, he must deliver it.[49] Even without a promise of non-disclosure, "[t]he Ombudsman should not release information where confidentiality is required by law, or where unnecessary harm would result."[50]

Legislation creating ombudsman offices must be careful to mandate that the ombudsman will never be compelled to testify or release records.[51] Such a provision will allow the ombudsman to exercise control over the information collected and reduce agency resistance to investigation.[52]

This confidentiality requirement, however, should not be interpreted to prohibit the ombudsman from notifying the agency of the complaint.[53] The decision to give notice of an allegation should be

43. U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 6.

44. *See id.* ("It is important that the Ombudsman be aware of his or her personal views and guard against letting those views influence whether or not a complaint will be accepted and how it will be treated.").

45. U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 7; *see* ABA, STANDARDS, *supra* note 14, at 4.

46. *See* ABA STANDARDS, *supra* note 14, at 4.

47. U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 7.

48. *See id.*

49. *Id.*

50. *Id.*

51. *See* U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at § 17(c); U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 7; *see also* Frank, *supra* note 18, at 426.

52. *See* U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 8. An agency should not be exposed to liability for releasing records in furtherance of an investigation. *Cf. id.* at 7 (explaining that when the ombudsman receives information the law prohibits being made public, "the Ombudsman must treat [that] information with the same degree of confidentiality as would be legally required of the agency being investigated.").

53. *See* Frank, *supra* note 18, at 432.

discretionary.[54] Additionally, the ombudsman should always inform the complainant of any investigatory decisions, in addition to the investigatory process.[55] These notifications will give credibility to the investigatory process.

D. Legitimacy: The Means of Securing Public Confidence

The concept of legitimacy encompasses two different elements: a credible review process and transparency in investigations.[56] Together, these two elements represent the ombudsman's responsibility to the public.[57] Like independence, impartiality, and confidentiality, the element of legitimacy will instill the public with trust that complaints will be investigated and resolved fairly.[58]

A number of factors must be present to create a credible review process. The ombudsman should possess the qualifications and expertise necessary to properly fulfill his role.[59] Additionally, the ombudsman's office should have the discretion to resolve a complaint informally, if formal action would not be appropriate.[60] Informal resolution may include referral, information-giving, and mediation.[61] Providing the ombudsman discretion to determine whether informal action would be sufficient will allow the office to maximize its resources for those complaints requiring investigation.[62] Another important indicator of a credible review process is accessibility—an ombudsman's office loses its value if it is not well-publicized and readily accessible.[63] Additionally, the jurisdiction and powers of the ombudsman office should be defined clearly, and employees must be careful not to exceed the scope of any limitations imposed by the enacting statute.[64] Lastly, the ombudsman

54. *Id.*

55. *See id.* at 430.

56. *See* U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 8; Frank, *supra* note 18, at 431 (noting the importance of keeping the complainant informed).

57. *See* U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 8.

58. *See id.* at 2.

59. *See id.* at 8.

60. *Id.*

61. *Id. See also* US OMBUDSMAN, MODEL STATUTE, *supra* note 30, at § 12(b)(1); Frank, *supra* note 8, at 427 (noting that the Ombudsman is not a substitute for agency's internal complaint procedures, and that citizens may be given information on the procedural steps of another remedy).

62. *See* U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 8.

63. *Id.* at 9. No fee may be imposed for access to the Ombudsman's services. *Id.*; *see also* U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at § 11(i); Frank, *supra* note 18, at 420.

64. U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 9. In addition, certain limitations should be imposed on an Ombudsman's powers, such as restrictions on the ability to:

> (1) make, change, or set aside a law, policy, or administrative decision; (2) make

must have sufficient powers to conduct thorough investigations.[65]

An ombudsman office can guarantee transparency by implementing a clearly defined complaint procedure available to the public.[66] If the ombudsman declines to investigate a complaint, he should give the complainant an explanation.[67] The ombudsman should also keep complainants and agencies apprised of the status and results of an investigation.[68] Before publicizing adverse findings, however, the ombudsman must consult with the involved agency, give the agency reasonable time to reply, and include the agency's statement in its publicized findings.[69] The final means by which transparency can be achieved is through regular activity reports from the ombudsman office to the public, legislature, and Governor.[70]

III. VIRGINIA'S LEGISLATION: A STEP IN THE RIGHT DIRECTION

The existence of the four essential elements—independence, impartiality, confidentiality, and legitimacy—are vital to securing public trust. Virginia's legislation was a well-drafted effort to encompass these key qualities and, with the proper funding, would create an effective and successful children's ombudsman office. There are, however, a few improvements that would make Virginia's Office of the Children's

> binding decisions or determine rights; (3) directly compel an entity or any person to implement the ombud's recommendations; (4) conduct an investigation that substitutes for administrative or judicial proceedings; (5) accept jurisdiction over an issue that is currently pending in a legal forum unless all parties and the presiding officer in that action explicitly consent; (6) address any issue arising under a collective bargaining agreement or which falls within the purview of any federal, state, or local labor or employment law, rule or regulation . . . ; or (7) act in a manner inconsistent with the grant of and limitations on the jurisdiction of the office when discharging the duties of the office of ombuds.").

ABA, STANDARDS, *supra* note 14, at 4.

65. U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 10. These powers will ideally include the ability to examine the records and documents of any agency within the office's jurisdiction, enter and inspect any agency's premises without notice, subpoena both persons and records, and obtain any information required for the discharge of duty. U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at §11(c)–(f); Frank, *supra* note 18, at 420–21.

66. *See* U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 11. Guidelines of the investigation process and the criteria for dismissing complaints should also be made available. *Id.*

67. *Id.*

68. *Id.* As the investigation proceeds, this may be done only upon the complainant's request, but once the investigation is completed, findings and recommendations should be disclosed to all parties. *See* U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at §§ 13–14; Frank, *supra* note 18, at 430–33.

69. U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 10–11; *see* U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at §14; Frank, *supra* note 18, at 432.

70. U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 10; *see also* U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at §16; Frank, *supra* note 18, at 437–38.

Ombudsman consistent with an ideal ombudsman office.

In 2006, Senator Edwards submitted Senate Bill 208, which first introduced the Virginia General Assembly to the concept of a children's ombudsman office.[71] The Senate Committee on General Laws and Technology heard the bill, and committee members unanimously agreed that the impact of establishing such an office should be studied by the Commission on Youth.[72] Following a two-year study, the Commission on Youth adopted the study's recommendation to introduce legislation in the 2008 session of the General Assembly proposing the creation of a children's ombudsman office.[73] The Commission's report recognized the importance of the four basic principles underlying the concept of an ombudsman program, as well as the twelve essential characteristics set forth by the American Bar Association (ABA).[74] The efforts of the Commission staff to carefully research and analyze the features crucial to the position of ombudsman resulted in two identical bills that closely comply with the standards espoused by the ABA and the U.S. Ombudsman Association.[75]

A. Independence: Nearly There

Senate Bill 315 and House Bill 1131 sought to create the Office of the Children's Ombudsman within the Office of the Governor.[76] According to the terms of this legislation, the ombudsman is appointed by the Governor, subject to confirmation by the General Assembly, and can only be removed for cause.[77] The term of the ombudsman shall be four

71. VA. COMM'N ON YOUTH, ESTABLISHMENT OF A CHILDREN'S OMBUDSMAN OFFICE: INTERIM REPORT OF THE VIRGINIA COMMISSION ON YOUTH, REP. DOC. NO. 81 at 1 (2007), *available at* http://leg2.state.va.us/dls/ h&sdocs.nsf/By+Year/RD812007/$file/RD81.pdf [hereinafter VA. COMM'N, ESTABLISHMENT].

72. *Id.*

73. VA. COMM'N ON YOUTH, 2007 LEGISLATIVE STUDIES AND INITIATIVES at 4 (Recommendations adopted Dec. 5, 2007), *available at* http://coy.state.va.us/120507%20Approved%20Recommendations .pdf.

74. VA. COMM'N, ESTABLISHMENT, *supra* note 71, at 17–19; *see supra note* 18.

75. *See* H.B. 1131 (enacted as Act of Mar. 7, 2008); S.B. 315 (enacted as Act of Mar. 27, 2008). *See generally* U.S. OMBUDSMAN, STANDARDS, *supra* note 13 (categorizing the standards as independence, impartiality, confidentiality, and credible review process); Frank, *supra* note 18, at 400 (outlining qualities that any statute creating an Ombudsman should contain).

76. H.B. 1131, ¶ 1, § 2.2-214.2(A) (enacted as Act of Mar. 7, 2008); S.B. 315, ¶ 1, § 2.2–214.2(A) (enacted as Act of Mar. 27, 2008).

77. H.B. 1131, ¶ 1, § 2.2-214.2(A) (enacted as Act of Mar. 7, 2008); S.B. 315, ¶ 1, § 2.2–214.2(A) (enacted as Act of Mar. 27, 2008). The bills only allow the Governor to remove the ombudsman for cause in accordance with Virginia Code section 2.2–108. H.B. 1131, ¶ 1, § 2.2-214.2(A) (enacted as Act of Mar. 7, 2008); S.B. 315, ¶ 1, § 2.2–214.2(A) (enacted as Act of Mar. 27, 2008). This statute permits removal for "malfeasance, misfeasance, incompetence, misconduct, neglect of duty,

years, except for the term of initial appointment, which will expire one year after the end of the appointing governor's term of office.[78] The office may decline to investigate complaints determined to be frivolous or made in bad faith.[79]

The location of the Office of the Children's Ombudsman within the Governor's Office would secure its independence from the agencies it scrutinizes.[80] Though appointment by the legislature is favored, appointment by the executive still indicates independence, so long as the Governor's choice is confirmed by the legislature.[81] While removal by the Governor does cause some concern, this provision does contain a limiting clause that will only allow removal in very specific circumstances, preventing abuse and bias.[82] The four-year term length and the possibility of re-appointment should give time for the ombudsman to gain expertise, and the provision changing the expiration of the initial term of appointment will eliminate political concerns.[83] The Virginia legislation also gives the ombudsman discretion to choose what complaints to investigate, another characteristic indicating independence.[84]

Two important indicators of independence, however, are absent: appealability and immunity.[85] In order to guarantee complete independence of the children's ombudsman, the findings of the office

absenteeism, conflict of interests, failure to carry out the policies of the Commonwealth as established in the Constitution or by the General Assembly, or refusal to carry out a lawful directive of the Governor." VA. CODE ANN. § 2.2–108 (2008).

78. H.B. 1131, ¶ 1, § 2.2-214.2(B) (enacted as Act of Mar. 7, 2008); S.B. 315, ¶ 1, § 2.2–214.2(B) (enacted as Act of Mar. 27, 2008).

79. H.B. 1131, ¶ 1, § 2.2-214.3(A)(2) (enacted as Act of Mar. 7, 2008); S.B. 315, ¶ 1, § 2.2–214.3(A)(2) (enacted as Act of Mar. 27, 2008).

80. *See supra* notes 29–30 and accompanying text; *see also* H.B. 1131, ¶ 1, § 2.2-214.2(A) (enacted as Act of Mar. 7, 2008); S.B. 315, ¶ 1, § 2.2–214.2(A) (enacted as Act of Mar. 27, 2008).

81. U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at § 5; U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 2; Frank, *supra* note 18, at 409; *see* H.B. 1131, ¶ 1, § 2.2-214.2(A) (enacted as Act of Mar. 7, 2008); S.B. 315, ¶ 1, § 2.2–214.2(A) (enacted as Act of Mar. 27, 2008).

82. H.B. 1131, ¶ 1, § 2.2-214.2(A) (enacted as Act of Mar. 7, 2008); S.B. 315, ¶ 1, § 2.2–214.2(A) (enacted as Act of Mar. 27, 2008); Frank, *supra* note 18, at 414; *see supra* note 73.

83. H.B. 1131, ¶ 1, § 2.2-214.2(B) (enacted as Act of Mar. 7, 2008); S.B. 315, ¶ 1, § 2.2–214.2(B) (enacted as Act of Mar. 27, 2008); *see* U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at § 7; Frank, *supra* note 18, at 413.

84. H.B. 1131, ¶ 1, § 2.2-214.3(A)(2) (enacted as Act of Mar. 7, 2008); S.B. 315, ¶ 1, § 2.2–214.3(A)(2) (enacted as Act of Mar. 27, 2008); *see* U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 4.

85. U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 5; *see also* U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at § 17 (describing the basis for ombudsman immunity); Frank, *supra* note 18, at 439 (discussing the lack of an appeal for an ombudsman's decision and the immunity from liability).

should be free from appeal to any other authority.[86] Further, the ombudsman and his employees should be immune from legal liability for any conduct in the course of duty absent serious misconduct.[87]

B. Impartiality: Mission Not Yet Accomplished

Although Virginia's Office of the Children's Ombudsman could function as an objective and unbiased entity, no statutory provisions in Senate Bill 315 and House Bill 1131 guarantee impartiality.[88] The legislation should include a clause setting forth qualifications required of the ombudsman, as well as a clause preventing the ombudsman from taking part in partisan political activities or holding any public office.[89] The other indicators of impartiality rely on the integrity of the ombudsman himself. In practice, the children's ombudsman must excuse himself from any investigation that might present even the slightest appearance of a conflict of interest.[90] He must also not let his personal views interfere with the performance of his duties. [91] This level of integrity could be statutorily guaranteed with the inclusion of a qualifications clause.

C. Confidentiality: A Sword But No Shield

Virginia's legislation grants the children's ombudsman access to all information, even confidential information, necessary for full investigation.[92] The bills also require the maintenance of confidentiality.[93] Consequently, the ombudsman is liable to disclosure

86. Because the findings and recommendations of the ombudsman are not binding, there is no danger in preventing appeal of these actions. Instead, inappealability sustains the role of the ombudsman as a critic and protects these findings from modification by any other entity. U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 5.

87. U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at § 17 ("As a public watchdog, the Ombudsman should be able to state his or her position freely and candidly without fear of pressure or reprisal.").

88. *See* H.B. 1131 (enacted as Act of Mar. 7, 2008); S.B. 315 (enacted as Act of Mar. 27, 2008).

89. *See supra* notes 36–38 and accompanying text for a list of the qualifications and a discussion of the ideal requirements of impartiality. The ombudsman should also refrain from participation in any business relationship that might prevent a conflict of interests. *See supra* notes 37–38 and accompanying text.

90. U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 6.

91. *Id.*

92. H.B. 1131, ¶ 1, § 2.2-214.3(A)(5) (enacted as Act of Mar. 7, 2008); S.B. 315, ¶ 1, § 2.2–214.3(A)(5) (enacted as Act of Mar. 27, 2008).

93. H.B. 1131, ¶ 1, § 2.2-214.3(A)(5) (enacted as Act of Mar. 7, 2008); S.B. 315, ¶ 1, § 2.2–214.3(A)(5) (enacted as Act of Mar. 27, 2008) ("All information obtained shall be maintained by the Ombudsman as confidential in the same manner as is required by the agency or entity from which it

penalties to the same extent as the information's source.[94]

Though this mandate of confidentiality will protect the subjects of an investigation from being held liable for releasing information to the ombudsman, no parallel provision protects the ombudsman office.[95] Ideally, the legislation should incorporate a provision that would prevent the ombudsman from being compelled to release records or testify about any information collected in the course of an investigation.[96]

D. Legitimacy: More Transparency Needed

Virginia's legislation vests a broad grant of power in the Office of the Children's Ombudsman.[97] These powers would provide the children's ombudsman with almost all the tools necessary to conduct thorough and accurate investigations, an important characteristic of a credible review process.[98] The information-giving and referral power will allow the children's ombudsman to resolve complaints informally when appropriate, another indicator of a credible review process.[99]

One vital tool excluded from Virginia's legislation is the ability to subpoena persons and documents. The ability to subpoena documents from agencies would greatly facilitate the success of a children's ombudsman's office and ensure investigations are complete.[100] In practice, this power would not be used in an adversarial manner, but rather to protect child-serving agencies from the liability associated with releasing records to a third party. It would also be advantageous for the enacting statute to mandate the office to publicize itself and prohibit the

was obtained.").

94. H.B. 1131, ¶ 1, § 2.2-214.3(A)(5) (enacted as Act of Mar. 7, 2008); S.B. 315, ¶ 1, § 2.2–214.3(A)(5) (enacted as Act of Mar. 27, 2008).

95. *See* H.B. 1131 (enacted as Act of Mar. 7, 2008); S.B. 315 (enacted as Act of Mar. 27, 2008).

96. U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at § 17(c); Frank, *supra* note 18, at 439.

97. *See* H.B. 1131, ¶ 1, §§ 2.2-214.2(A), -214.3(A) (enacted as Act of Mar. 7, 2008); S.B. 315, ¶ 1, §§ 2.2–214.2(A), -214.3(A) (enacted as Act of Mar. 27, 2008). These powers include the power to receive & investigate complaints, conduct announced or unannounced inspections of any residential facility in which a child has been placed, make inquiries and obtain all assistance and information necessary to investigate complaints, enter into an agreement with a state agency to ensure the protection of children, notify law enforcement of any violation of law, report problems to the head of the involved agency, and serve as a source of information and referrals for the public, as well as the power to adopt policies and guidelines to carry out the provisions of this section. H.B. 1131, ¶ 1, § 2.2-214.3(A) (enacted as Act of Mar. 7, 2008); S.B. 315, ¶ 1, § 2.2–214.3(A) (enacted as Act of Mar. 27, 2008).

98. *See supra* note 65 and accompanying text.

99. *See* U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 8.

100. *See supra* note 65 and accompanying text.

levying of fees for use of the ombudsman's services.[101]

House Bill 1131 and Senate Bill 315 also require the Office of the Children's Ombudsman to submit reports to the Governor, General Assembly, and Commission on Youth on its activities, findings, and recommendations.[102] These reports are an essential feature of transparency, but are not the only necessary indicator of transparent investigations.[103] The Office of the Children's Ombudsman should also be required to make public the guidelines of the investigation process and the criteria for dismissing complaints.[104] Furthermore, the children's ombudsman must notify all involved parties about the status of complaints.[105] Lastly, and most important, the annual reports must also be made available to the public.[106]

IV. CONCLUSION

Virginia's Office of the Children's Ombudsman is currently in a very uncertain position. While approved by the General Assembly and the Governor, the office cannot be effectively implemented without the necessary funds. Still, despite the lack of funds, the bills creating a children's ombudsman office in Virginia have received nearly unanimous policy approval by the legislature. Given this success, there is hope that the children's ombudsman office will receive the fiscal support it requires in future sessions.

The legislation passed this session is a well-intentioned attempt to embody the four elements essential to any successful ombudsman office. Although the Office of the Children's Ombudsman, if established under Senate Bill 315 and House Bill 1131, would have some of the characteristics of an ideal ombudsman office, it would fall short of

101. An ombudsman office should be readily accessible to the public. Accessibility requires that the office be well publicized and cost–free. *See* U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 9.

102. H.B. 1131, ¶ 1, § 2.2-214.4 (enacted as Act of Mar. 7, 2008); S.B. 315, ¶ 1, § 2.2–214.4 (enacted as Act of Mar. 27, 2008).

103. *See supra* notes 66–67 for a discussion of these other features.

104. U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 11.

105. Both complainant and subject should be apprised of an investigation's findings. During the course of an investigation, complainants should be able to receive, upon request, information about its status. U.S. OMBUDSMAN, MODEL STATUTE, *supra* note 30, at §§ 13–14; Frank, *supra* note 18, at 430–32. Complainants whose complaints are dismissed should be provided with an explanation. U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 11.

106. U.S. OMBUDSMAN, STANDARDS, *supra* note 13, at 10 ("It can be seen as a duty of the Ombudsman to make the public aware of investigation results to promote accountability.").

perfection.

Achieving complete independence, impartiality, confidentiality, and legitimacy will require a few changes to the legislation. The children's ombudsman must be immune from legal liability, and the office's findings must not be subject to appeal. Additionally, a qualifications clause should be added to the bill, along with a provision prohibiting the ombudsman from participating in partisan activities. Furthermore, the legislation should explicitly set forth that the ombudsman office cannot be compelled to release the information it collects in furtherance of its investigations or testify about the subject of these records. The ombudsman must also be given the power to subpoena records and persons. Lastly, the enacting statute should include provisions mandating promotion of the office and its services, release of reports to the public, and notification of a complaint's status for all involved parties. With these changes, and proper funding, the Office of the Children's Ombudsman will serve as an important step toward ensuring the safety and well-being of Virginia's youth.