

No. 23. An act relating to the State Long-Term Care Ombudsman.

(H.265)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 33 V.S.A. chapter 75 is amended to read:

CHAPTER 75. STATE LONG-TERM CARE OMBUDSMAN

§ 7501. DEFINITIONS

As used in this chapter:

(1) “Long-term care” means ~~care or~~ services and supports received by an individual in a long-term care facility or provided to an individual ~~under the long-term care Medicaid Section 1115 waiver~~ through the Choices for Care program contained within Vermont’s Global Commitment to Health Section 1115 demonstration.

(2) “Long-term care facility” means a residential care home ~~or~~, an assisted living residence or nursing home as defined by section 7102 of this title, or any other similar adult care home that is licensed or required to be licensed pursuant to chapter 71 of this title.

(3) “Office” means the Office of the State Long-Term Care Ombudsman.

(4) “Older person” means an individual who is 60 years of age or older.

(5) “~~Ombudsman~~” ~~means an individual who intervenes on behalf of a private individual to resolve complaints and, in this chapter, refers to any person or organization designated by the State Ombudsman as part of the~~

~~Office of the State Long-Term Care Ombudsman, in accordance with the Older Americans Act.~~ “Representatives of the Office of the State Long-Term Care Ombudsman” or “representatives of the Office” means the employees or volunteers designated by the State Long-Term Care Ombudsman to carry out the duties of the Office, regardless of whether supervision is provided by the Ombudsman, his or her designee, or an agency hosting a local Ombudsman entity designated by the Ombudsman.

(6) “Resident” means an older person or an individual with disabilities who is 18 years of age or older who resides in a long-term care facility or receives long-term care through the Choices for Care program contained within Vermont’s Global Commitment to Health Section 1115 demonstration.

(7) “Resident representative” means any of the following:

(A) an individual chosen by the resident to act on his or her behalf in order to support the resident with decision making; accessing the resident’s own medical, social, or other personal information; managing financial matters; receiving notifications; or a combination of these;

(B) a person authorized by State or federal law, including an agent under a power of attorney or advance directive, a representative payee, or another fiduciary, to act on the resident’s behalf to support the resident with decision making; accessing the resident’s own medical, social, or other personal information; managing financial matters; receiving notifications; or a combination of these;

(C) legal representative, as used in Section 712 of the federal Older Americans Act, 42 U.S.C. § 3058g; or

(D) the resident's court-appointed guardian or conservator.

(8) "State Long-Term Care Ombudsman" or "Ombudsman" means the individual selected from among individuals with expertise and experience in the fields of long-term care and advocacy who heads the Office of the State Long-Term Care Ombudsman and is responsible personally, or through representatives of the Office, to fulfill the functions, responsibilities, and duties set forth in 45 C.F.R. §§ 1324.13 and 1324.19.

(9) "Willful interference" means an individual's action taken or failure to act in an intentional attempt to prevent, interfere with, or impede the Ombudsman or a representative of the Office from performing any of his or her functions, responsibilities, or duties.

§ 7502. OFFICE OF THE LONG-TERM CARE OMBUDSMAN

ESTABLISHED

The Office of the Long-Term Care Ombudsman is established in the Department of Disabilities, Aging, and Independent Living to represent the interests of older persons and persons with disabilities ~~under the age of 60~~ years of age receiving long-term care in accordance with the provisions of this chapter and the Older Americans Act. ~~For the purposes of this section, long-term care facilities shall include facilities in which placements are made by, and facilities funded through, the Department of Disabilities, Aging, and~~

~~Independent Living.~~ Subject to the provisions of 42 U.S.C. § 3058g, the Department may operate the Office and carry out the program directly or by contract or other arrangement with any public agency or nonprofit private organization. The Office shall be headed by ~~an individual, to be known as the State Long-Term Care Ombudsman, who shall be selected from among individuals with expertise and experience in the fields of long term care and advocacy.~~

§ 7503. RESPONSIBILITIES OF THE OFFICE

The Office shall:

* * *

(6) establish ~~by rule~~ policies and procedures for protecting the confidentiality of its clients as required by the Older Americans Act;

(7) establish ~~by rule~~ qualifications and training for ~~ombudsmen~~ the Ombudsman and representatives of the Office, monitor their performance, and establish ~~by rule~~ procedures for certifying staff and ~~volunteer ombudsmen~~ volunteers;

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§ 7504. AUTHORITY OF THE STATE OMBUDSMAN AND
REPRESENTATIVES OF THE OFFICE

(a)(1) The Ombudsman, as head of the Office, shall have the responsibility for leadership and management of the Office in coordination with the

Department of Disabilities, Aging, and Independent Living and, as applicable, with any other agency carrying out the Ombudsman program.

(2) In addition to the functions set forth in 45 C.F.R. § 1324.13, the Ombudsman shall, personally or through representatives of the Office:

(A) analyze, comment on, and monitor the development and implementation of federal, State, and local laws, rules, regulations, and other governmental policies and actions pertaining to the health, safety, welfare, and rights of residents with respect to the adequacy of long-term care facilities and long-term care in the State;

(B) recommend any changes in such laws, rules, regulations, policies, and actions that the Office deems appropriate;

(C) facilitate public comment on the laws, rules, regulations, policies, and actions;

(D) provide leadership for the Office's statewide systemic advocacy efforts on behalf of residents, including coordinating systemic advocacy efforts implemented by representatives of the Office; and

(E) provide information to public and private agencies, the General Assembly, the media, and others regarding the problems and concerns of residents and the Ombudsman's recommendations regarding the problems and concerns.

(3) In addition to the functions set forth in 45 C.F.R. § 1324.13 and subdivision (2) of this subsection, the Ombudsman personally shall:

(A) establish or recommend policies, procedures, and standards for the Ombudsman program;

(B) require representatives of the Office to fulfill the duties set forth in 45 C.F.R. § 1324.19 in accordance with Ombudsman program policies and procedures;

(C) refuse, suspend, or remove the designation of a representative of the Office or a local Ombudsman entity, or both, whenever the Ombudsman determines that the representative's or entity's policies, procedures, or practices are in conflict with the laws, policies, or procedures governing the Ombudsman program;

(D) establish training procedures for certification and continuing education for representatives of the Office; and

(E) investigate allegations of misconduct by representatives of the Office of the State Long-Term Care Ombudsman in the performance of Ombudsman program functions, responsibilities, and duties.

(4) Notwithstanding any provision of law to the contrary, the actions of the State Long-Term Care Ombudsman and representatives of the Office in carrying out the functions described in this subsection shall not be construed to constitute lobbying as defined in 2 V.S.A. § 261.

(b) In fulfilling the responsibilities of the ~~office~~ Office, the State Long-Term Care Ombudsman ~~may~~ and representatives of the Office of the State Long-Term Care Ombudsman are authorized to:

(1) Hire or contract with persons or organizations to fulfill the purposes of this chapter.

(2) Communicate and visit with any individual receiving long-term care, provided that the Ombudsman or the representative of the Office shall obtain permission from the ~~individual or the individual's guardian or legal~~ resident or the resident representative to enter the ~~individual's~~ resident's home. ~~Toward that end, long-term~~ Long-term care facilities shall provide the ~~State~~ Ombudsman or the representative of the Office access to their facilities, and long-term care providers shall ensure the ~~State~~ Ombudsman and representatives of the Office have access to the individuals for whom they provide long-term care, as well as the name of and contact information for the resident representative, if any, as needed to perform the Ombudsman's functions and responsibilities or the duties of the representatives of the Office.

(3) Have appropriate access to review the medical and social records of an individual receiving long-term care ~~services~~ as required by 42 U.S.C. § 3058g(b), as the Health Insurance Portability and Accountability Act of 1996 Privacy Rule, 45 C.F.R. Part 160 and 45 C.F.R. Part 164, subparts A and E, does not preclude release by covered entities of residents' private health information or other resident-identifying information to the Ombudsman program, including residents' medical, social, or other records, a list of resident names and room numbers, or information collected in the course of a State or federal survey or inspection process.

(4) Pursue administrative, judicial, or other remedies on behalf of individuals receiving long-term care, including access orders from a Superior judge when access under subdivision (2) or (3) of this section has been unreasonably denied and all other reasonable attempts to gain access have been pursued and have failed.

(5) ~~Delegate to ombudsmen any part of the State Ombudsman's authority.~~

~~(6)~~ Adopt rules necessary to carry out the provisions of this chapter and those of the Older Americans Act relating to the Ombudsman ~~Program~~ program.

~~(7)~~(6) Take such further actions as are necessary in order to fulfill the purposes of this chapter.

§ 7505. COOPERATION OF STATE AGENCIES

(a) All State agencies shall comply with reasonable requests of the ~~State~~ Ombudsman for information and assistance and shall comply with the requirements for State agencies set forth in 45 C.F.R. § 1324.15.

(b) The Secretary of Human Services may adopt rules necessary to ensure that Departments within the Agency of Human Services cooperate with the Ombudsman's office. Cooperation shall include providing information regarding conditions and care in long-term care facilities.

§ 7506. DISCLOSURE OF INFORMATION

~~In the absence of either written consent by a complainant or resident of a long term care facility, or his or her guardian or legal representative, or court order, neither the State Ombudsman nor any ombudsman shall disclose the identity of such person.~~

(a) In determining whether and to what extent to disclose files, records, and other information maintained by the Ombudsman program, the Ombudsman shall:

(1) have the sole authority to make or delegate determinations concerning the disclosure of files, records, and other information maintained by the Ombudsman program, and shall comply with Section 712(d) of the federal Older Americans Act, 42 U.S.C. § 3058g(d), in responding to requests for disclosure of files, records, and other information, regardless of the format of the file, record, or other information; the source of the request; or the sources of funding for the Ombudsman program;

(2) develop and adhere to criteria to guide the Ombudsman's discretion in determining whether to disclose the files, records, or other information; and

(3) develop and adhere to a process for appropriate disclosure of information maintained by the Ombudsman's office.

(b) Except as otherwise required by law, the Ombudsman program shall not disclose identifying information relating to any resident on whom the Ombudsman program maintains files, records, or information unless:

(1) the resident or resident representative communicates informed consent to the disclosure and consent is provided in writing or through the use of auxiliary aids and services;

(2) the resident or resident representative communicates informed consent orally, visually, or through the use of auxiliary aids and services and the Ombudsman or a representative of the Office documents the consent contemporaneously in accordance with established procedures; or

(3) disclosure is required by court order.

(c) The Ombudsman program shall not disclose identifying information relating to any complainant on whom the Ombudsman program maintains files, records, or information unless:

(1) the complainant communicates informed consent to the disclosure and consent is provided in writing or through the use of auxiliary aids and services;

(2) the complainant communicates informed consent orally, visually, or through the use of auxiliary aids and services and the Ombudsman or a representative of the Office documents the consent contemporaneously in accordance with established procedures; or

(3) disclosure is required by court order.

§ 7507. IMMUNITY

No civil liability shall attach to the ~~State~~ Ombudsman or any ~~ombudsman~~ representative of the Office for good faith performance of the functions, responsibilities, or duties imposed by this chapter.

§ 7508. INTERFERENCE AND RETALIATION

(a) A person who ~~intentionally hinders a representative of the Office acting pursuant to~~ engages in willful interference as defined in this chapter shall be imprisoned not more than one year, or fined not more than \$5,000.00, or both.

(b) A person who takes discriminatory, disciplinary, or retaliatory action against an employee, resident, or volunteer of a long-term care facility, an entity that provides long-term care through the Choices for Care program contained within Vermont's Global Commitment to Health Section 1115 demonstration, or an agency for any communication made, or information disclosed, to aid the ~~Office~~ Ombudsman's office in carrying out its functions, duties, and responsibilities, unless the original communication or disclosure was done maliciously or without good faith, shall be imprisoned not more than one year or fined not more than \$5,000.00, or both. An employee, resident, or volunteer of a long-term care facility, an entity that provides long-term care through the Choices for Care program contained within Vermont's Global Commitment to Health Section 1115 demonstration, or an agency may seek damages in Superior Court against a person who takes such action prohibited by this subsection.

§ 7509. CONFLICT OF INTEREST

(a) ~~The Department by rule shall prohibit any ombudsman or immediate family member of any ombudsman from having any interest in a long term care facility or provider of long term care which creates a conflict of interest in carrying out the ombudsman's responsibilities under this chapter.~~ The Department of Disabilities, Aging, and Independent Living and the Ombudsman shall identify organizational conflicts of interest that may impact the effectiveness and credibility of the Ombudsman's office and shall remove or remedy any such conflicts. Organizational conflicts include placement of the Ombudsman's office, or requiring that the Ombudsman or a representative of the Office perform conflicting activities, in an organization that:

(1) is responsible for licensing, surveying, or certifying long-term care facilities;

(2) is an association or an affiliate of an association of long-term care facilities or of any other entity that provides long-term care through the Choices for Care program contained within Vermont's Global Commitment to Health Section 1115 demonstration;

(3) has any ownership or investment interest in, or receives grants or donations from, a long-term care facility;

(4) has any officer or governing board member with any ownership, investment, or employment interest in a long-term care facility or an entity that

provides long-term care through the Choices for Care program contained within Vermont's Global Commitment to Health Section 1115 demonstration;

(5) provides long-term care to residents;

(6) provides long-term care coordination or case management for residents;

(7) sets reimbursement rates for long-term care facilities;

(8) provides adult protective services;

(9) is responsible for eligibility determinations for patients regarding

Medicaid or other public benefits;

(10) conducts preadmission screening for long-term care facility placements;

(11) makes decisions regarding admission or discharge of individuals to or from long-term care facilities; or

(12) provides guardianship, conservatorship, or other fiduciary or surrogate decision-making services for residents.

(b) To avoid individual conflicts of interest that may impact the effectiveness and credibility of the work of the Ombudsman's office, the Ombudsman shall develop and implement policies and procedures to ensure that neither the Ombudsman nor representatives of the Office are required or permitted to hold positions or perform duties that would constitute an individual conflict of interest. Individual conflicts of interest for an

Ombudsman, representatives of the Office, and members of their immediate families include:

(1) direct involvement in the licensing or certification of a long-term care facility;

(2) ownership, operational, or investment interest in an existing or proposed long-term care facility or other entity that provides long-term care through the Choices for Care program contained within Vermont's Global Commitment to Health Section 1115 demonstration;

(3) an individual's employment by, or participation in the management of, a long-term care facility in this State or an individual's employment by the owner or operator of any long-term care facility in this State;

(4) receipt of, or the right to receive, directly or indirectly, remuneration under a compensation arrangement with an owner or operator of a long-term care facility;

(5) acceptance of gifts or gratuities of significant value from a long-term care facility or its management, or from a resident or resident representative of a long-term care facility in which the Ombudsman or a representative of the Office provides services, except if the individual has a personal relationship with a resident or resident representative separate from the individual's role as the Ombudsman or representative of the Office;

(6) acceptance of money or any other consideration from anyone other than the Ombudsman's office, or an entity approved by the Ombudsman, for

the performance of an act in the regular course of duties of the Ombudsman or of representatives of the Office, without the Ombudsman's approval;

(7) serving as a guardian, conservator, or in another fiduciary or surrogate decision-making capacity for a resident of a long-term care facility in which the Ombudsman or a representative of the Office provides services; and

(8) providing services to residents of a long-term care facility in which an immediate family member resides.

(c) The ~~State~~ Ombudsman, consistent with the requirements of the Older Americans Act, shall be able to speak on behalf of the interest of individuals receiving long-term care and to carry out all duties prescribed in this chapter without being made subject to any disciplinary or retaliatory personnel or other action as a consequence of so doing. The Commissioner of Disabilities, Aging, and Independent Living shall establish a committee of no fewer than five persons, who represent the interests of individuals receiving long-term care and who are not State employees, for the purpose of ensuring that the ~~State Ombudsman program~~ is able to carry out all prescribed duties without a conflict free from conflicts of interest. The Commissioner shall solicit from this committee its assessment of the ~~State Ombudsman's~~ Ombudsman program's capacity to ~~perform~~ operate in accordance with this subsection and shall submit that assessment as an appendix to the report required under subdivision 7503(10) of this title. The Department, in consultation with this committee, shall establish ~~rules which implement this subsection~~ a process for

periodic review and identification of conflicts within the Ombudsman program.

§ 7510. LEGAL ASSISTANCE

(a)(1) A contract for Ombudsman services shall ~~ensure legal representation and advice to the State Ombudsman and regional ombudsmen operating pursuant to the contract~~ require the Ombudsman program to secure adequate legal counsel that is available, has competencies relevant to the legal needs of the Ombudsman program and of residents, and is without conflict of interest, in order to:

(A) provide consultation and representation as needed to enable the Ombudsman program to protect the health, safety, welfare, and rights of residents; and

(B) provide consultation or representation, or both, as needed to assist the Ombudsman and representatives of the Office in the performance of their official functions, responsibilities, and duties, including complaint resolution and systems advocacy.

(2) ~~However~~ Notwithstanding the provisions of subdivision (1) of this subsection, if the State Ombudsman or regional ombudsmen representatives of the Office are State employees, the Office of the Attorney General shall provide legal representation and advice to the State Ombudsman and the regional ombudsmen representatives of the Office.

(b) Legal representation of the Ombudsman program by the Ombudsman or a representative of the Office who is a licensed attorney shall not by itself constitute adequate legal counsel.

Sec. 2. 33 V.S.A. § 6903 is amended to read:

§ 6903. REPORTING SUSPECTED ABUSE, NEGLECT, AND
EXPLOITATION OF VULNERABLE ADULTS

(a) Any of the following, other than a crisis worker acting pursuant to 12 V.S.A. § 1614 and the State Long-Term Care Ombudsman or a representative of the Office, as defined in section 7501 of this title, who knows of or has received information of abuse, neglect, or exploitation of a vulnerable adult or who has reason to suspect that any vulnerable adult has been abused, neglected, or exploited shall report or cause a report to be made in accordance with the provisions of section 6904 of this title within 48 hours:

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Sec. 3. 33 V.S.A. chapter 69, subchapter 3 is redesignated to read:

Subchapter ~~3~~ 4. Vermont Vulnerable Adult Fatality Review Team

Sec. 4. 33 V.S.A. chapter 69, subchapter 3 is added to read:

Subchapter 3. Protecting Against Financial Exploitation

§ 6951. DEFINITIONS

As used in this subchapter:

(1) “Agent” shall have the same meaning as in 14 V.S.A. § 3501.

(2) “Guardian” means a person appointed to serve as the guardian for a vulnerable adult pursuant to the process established in 14 V.S.A. chapter 111 or in 18 V.S.A. chapter 215.

(3) “Financial exploitation” means:

(A) using, withholding, transferring, or disposing of funds or property of a vulnerable adult, without or in excess of legal authority, for the wrongful profit or advantage of another;

(B) acquiring possession or control of or an interest in funds or property of a vulnerable adult through the use of undue influence, harassment, duress, or fraud; or

(C) the act of forcing or compelling a vulnerable adult against his or her will to perform services for the profit or financial advantage of another.

(4) “Vulnerable adult” shall have the same meaning as in section 6902 of this chapter.

§ 6952. CIVIL ACTION FOR RELIEF FROM FINANCIAL

EXPLOITATION

(a) Right of action. A vulnerable adult or his or her agent or guardian may bring an action in the Civil Division of the Superior Court pursuant to this section for relief against a natural person who, with reckless disregard or with knowledge, has engaged in the financial exploitation of the vulnerable adult. An action under this section shall be dismissed if the court determines the

vulnerable adult is capable of expressing his or her wishes and that he or she does not wish to pursue the action.

(b)(1) Remedies. If the court finds that financial exploitation of a vulnerable adult has occurred, the court shall grant appropriate relief to the vulnerable adult, which may include money damages, injunctive relief, reasonable costs, attorney's fees, and equitable relief.

(2) If the financial exploitation was intentional, the court may grant exemplary damages not to exceed three times the value of economic damages.

(c) Effects on other parties. No relief granted or otherwise obtained pursuant to this section shall affect or limit in any way the right, title, or interest of a good faith purchaser, mortgagee, holder of a security interest, or other party who obtained an interest in property after its transfer from the vulnerable adult to the natural person who engaged in financial exploitation. No relief granted or otherwise obtained pursuant to this section shall affect any mortgage deed to the extent of the value provided by the mortgagee.

(d) Statute of limitations. The limitations period imposed by 12 V.S.A. § 511 shall apply to all actions brought pursuant to this subchapter.

§ 6953. OTHER RELIEF STILL AVAILABLE

Nothing in this subchapter shall be construed to limit the availability of other causes of action or relief at law or equity to which a vulnerable adult may be entitled under other State or federal laws or at common law.

Sec. 5. EFFECTIVE DATES

(a) Secs. 1 and 2 (State Long-Term Care Ombudsman) shall take effect on July 1, 2017.

(b) Secs. 3 and 4 (protecting against financial exploitation) and this section shall take effect on passage.

Date Governor signed bill: May 4, 2017