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H.265

Introduced by Representatives Pugh of South Burlington, Haas of Rochester,
McFaun of Barre Town, Troiano of Stannard, and Wood of
Waterbury

Referred to Committee on

Date:

Subject: Human services; Long-Term Care Ombudsman; adult protective
services

Statement of purpose of bill as introduced: This bill proposes to update the
Long-Term Care Ombudsman statutes to conform to the federal Older
Americans Act and related regulations.

An act relating to the State Long-Term Care Ombudsman

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 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

1 contained within Vermont's Global Commitment to Health Section 1115
2 Medicaid demonstration.

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

7 (3) "Office" means the Office of the State Long-Term Care
8 Ombudsman.

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

10 (5) ~~"Ombudsman" means an individual who intervenes on behalf of a~~
11 ~~private individual to resolve complaints and, in this chapter, refers to any~~
12 ~~person or organization designated by the State Ombudsman as part of the~~
13 ~~Office of the State Long-Term Care Ombudsman, in accordance with the Older~~
14 ~~Americans Act. "Representatives of the Office of the State Long-Term Care~~
15 ~~Ombudsman" or "representatives of the Office" means the employees or~~
16 volunteers designated by the State Long-Term Care Ombudsman to carry out
17 the duties of the Office, regardless of whether supervision is provided by the
18 Ombudsman, his or her designee, or an agency hosting a local Ombudsman
19 entity designated by the Ombudsman.

20 (6) "Resident" means an older person or an individual with disabilities
21 who is 18 years of age or older who resides in a long-term care facility or

1 receives long-term care services through the Choices for Care program
2 contained within Vermont's Global Commitment to Health Section 1115
3 Medicaid demonstration.

4 (7) "Resident representative" means any of the following:

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

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

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

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

17 (8) "State Long-Term Care Ombudsman" or "Ombudsman" means the
18 individual selected from among individuals with expertise and experience in
19 the fields of long-term care and advocacy who heads the Office of the State
20 Long-Term Care Ombudsman and is responsible personally, or through

1 representatives of the Office, to fulfill the functions, responsibilities, and duties
2 set forth in 45 C.F.R. §§ 1324.13 and 1324.19.

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

7 § 7502. OFFICE OF THE LONG-TERM CARE OMBUDSMAN

8 ESTABLISHED

9 The Office of the Long-Term Care Ombudsman is established in the
10 Department of Disabilities, Aging, and Independent Living to represent the
11 interests of older persons and persons with disabilities under ~~the age of 60~~
12 years of age receiving long-term care in accordance with the provisions of this
13 chapter and the Older Americans Act. ~~For the purposes of this section, long-~~
14 ~~term care facilities shall include facilities in which placements are made by,~~
15 ~~and facilities funded through, the Department of Disabilities, Aging, and~~
16 ~~Independent Living.~~ Subject to the provisions of 42 U.S.C. § 3058g, the
17 Department may operate the Office and carry out the program directly or by
18 contract or other arrangement with any public agency or nonprofit private
19 organization. The Office shall be headed by ~~an individual, to be known as the~~
20 ~~State Long-Term Care Ombudsman, who shall be selected from among~~

1 ~~individuals with expertise and experience in the fields of long-term care and~~
2 ~~advocacy.~~

3 § 7503. RESPONSIBILITIES OF THE OFFICE

4 The Office shall:

5 * * *

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

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

12 * * *

13 § 7504. AUTHORITY OF THE STATE OMBUDSMAN AND
14 REPRESENTATIVES OF THE OFFICE

15 (a)(1) The Ombudsman, as head of the Office, shall have the responsibility
16 for leadership and management of the Office in coordination with the
17 Department of Disabilities, Aging, and Independent Living and, as applicable,
18 with any other agency carrying out the Ombudsman program.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 (3) Have appropriate access to review the medical and social records of
15 an individual receiving long-term care services as required by 42 U.S.C.
16 § 3058g(b), as the Health Insurance Portability and Accountability Act of 1996
17 Privacy Rule, 45 C.F.R. Part 160 and 45 C.F.R. Part 164, subparts A and E,
18 does not preclude release by covered entities of residents' private health
19 information or other resident-identifying information to the Ombudsman
20 program, including residents' medical, social, or other records, a list of resident

1 names and room numbers, or information collected in the course of a State or
2 federal survey or inspection process.

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

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

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

13 ~~(7)(6) Take such further actions as are necessary in order to fulfill the~~
14 ~~purposes of this chapter.~~

15 § 7505. COOPERATION OF STATE AGENCIES

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

19 (b) The Secretary of Human Services may adopt rules necessary to ensure
20 that Departments within the Agency of Human Services cooperate with the

1 Ombudsman's office. Cooperation shall include providing information
2 regarding conditions and care in long-term care facilities.

3 § 7506. DISCLOSURE OF INFORMATION

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

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

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

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

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

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

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

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

11 (3) disclosure is required by court order.

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

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

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

1 (3) disclosure is required by court order.

2 § 7507. IMMUNITY

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

6 § 7508. INTERFERENCE AND RETALIATION

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

10 (b) A person who takes discriminatory, disciplinary, or retaliatory action
11 against an employee, resident, or volunteer of a long-term care facility, an
12 entity that provides long-term care services through the Choices for Care
13 program contained within Vermont's Global Commitment to Health Section
14 1115 Medicaid demonstration, or an agency for any communication made, or
15 information disclosed, to aid the ~~Office~~ Ombudsman's office in carrying out its
16 functions, duties, and responsibilities, unless the original communication or
17 disclosure was done maliciously or without good faith, shall be imprisoned not
18 more than one year or fined not more than \$5,000.00, or both. An employee,
19 resident, or volunteer of a long-term care facility, an entity that provides
20 long-term care services through the Choices for Care program contained within
21 Vermont's Global Commitment to Health Section 1115 Medicaid

1 demonstration, or an agency may seek damages in Superior Court against a
2 person who takes such action prohibited by this subsection.

3 § 7509. CONFLICT OF INTEREST

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

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

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

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

1 (4) has any officer or governing board member with any ownership,
2 investment, or employment interest in a long-term care facility or an entity that
3 provides services through the Choices for Care program contained within
4 Vermont's Global Commitment to Health Section 1115 Medicaid
5 demonstration;

6 (5) provides long-term care to residents;

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

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

10 (8) provides adult protective services;

11 (9) is responsible for eligibility determinations for patients regarding
12 Medicaid or other public benefits;

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

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

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

19 (b) To avoid individual conflicts of interest that may impact the
20 effectiveness and credibility of the work of the Ombudsman's office, the
21 Ombudsman shall develop and implement policies and procedures to ensure

1 that neither the Ombudsman nor representatives of the Office are required or
2 permitted to hold positions or perform duties that would constitute an
3 individual conflict of interest. Individual conflicts of interest for an
4 Ombudsman, representatives of the Office, and members of their immediate
5 families include:

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

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

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

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

18 (5) acceptance of gifts or gratuities of significant value from a long-term
19 care facility or its management, or from a resident or resident representative of
20 a long-term care facility in which the Ombudsman or a representative of the
21 Office provides services, except if the individual has a personal relationship

1 with a resident or resident representative separate from the individual's role as
2 the Ombudsman or representative of the Office;

3 (6) acceptance of money or any other consideration from anyone other
4 than the Ombudsman's office, or an entity approved by the Ombudsman, for
5 the performance of an act in the regular course of duties of the Ombudsman or
6 of representatives of the Office, without the Ombudsman's approval;

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

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

12 (c) The ~~State~~ Ombudsman, consistent with the requirements of the Older
13 Americans Act, shall be able to speak on behalf of the interest of individuals
14 receiving long-term care and to carry out all duties prescribed in this chapter
15 without being made subject to any disciplinary or retaliatory personnel or other
16 action as a consequence of so doing. The Commissioner of Disabilities,
17 Aging, and Independent Living shall establish a committee of no fewer than
18 five persons, who represent the interests of individuals receiving long-term
19 care and who are not State employees, for the purpose of ensuring that the
20 ~~State Ombudsman program is able to carry out all prescribed duties without a~~
21 ~~conflict~~ free from conflicts of interest. The Commissioner shall solicit from

1 this committee its assessment of the ~~State Ombudsman's~~ Ombudsman
2 program's capacity to ~~perform~~ operate in accordance with this subsection and
3 shall submit that assessment as an appendix to the report required under
4 subdivision 7503(10) of this title. The Department, in consultation with this
5 committee, shall establish ~~rules which implement this subsection~~ a process for
6 periodic review and identification of conflicts within the Ombudsman
7 program.

8 § 7510. LEGAL ASSISTANCE

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

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

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

