

1 H.265

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

5 Referred to Committee on

6 Date:

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

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

12 An act relating to the State Long-Term Care Ombudsman

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

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

15 CHAPTER 75. STATELONG-TERM CARE OMBUDSMAN

16 § 7501. DEFINITIONS

17 As used in this chapter:

18 (1) “Long-term care” means ~~care or~~ services *and supports* received by
19 an individual in a long-term care facility or provided to an individual ~~under the~~

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

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

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

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

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

21 (6) "Resident" means an older person or an individual with disabilities

1 who is 18 years of age or older who resides in a long-term care facility or
2 receives long-term care ~~services~~ through the Choices for Care program
3 contained within Vermont's Global Commitment to Health Section 1115
4 ~~Medicaid~~ demonstration.

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

6 (A) an individual chosen by the resident to act on his or her behalf in
7 order to support the resident with decision making; accessing the resident's
8 own medical, social, or other personal information; managing financial
9 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;

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

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

13 (8) "State Long-Term Care Ombudsman" or "Ombudsman" means the
14 individual selected from among individuals with expertise and experience in
15 the fields of long-term care and advocacy who heads the Office of the State

1 Long-Term Care Ombudsman and is responsible personally, or through
2 representatives of the Office, to fulfill the functions, responsibilities, and
3 duties set forth in 45 C.F.R. §§ 1324.13 and 1324.19.

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

8 § 7502. OFFICE OF THE LONG-TERM CARE OMBUDSMAN

9 ESTABLISHED

10 The Office of the Long-Term Care Ombudsman is established in the
11 Department of Disabilities, Aging, and Independent Living to represent the
12 interests of older persons and persons with disabilities under ~~the age of 60~~
13 years of age receiving long-term care in accordance with the provisions of this
14 chapter and the Older Americans Act. ~~For the purposes of this section, long-~~
15 ~~term care facilities shall include facilities in which placements are made by,~~
16 ~~and facilities funded through, the Department of Disabilities, Aging, and~~
17 ~~Independent Living.~~ Subject to the provisions of 42 U.S.C. § 3058g, the
18 Department may operate the Office and carry out the program directly or by
19 contract or other arrangement with any public agency or nonprofit private
20 organization. The Office shall be headed by ~~an individual, to be known as the~~
21 ~~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:

(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 ~~services~~ *long-term care* in the State;

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

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

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

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

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

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

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

1 procedures;

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

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

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

12 (3 4) Notwithstanding any provision of law to the contrary, the actions
13 of the State Long-Term Care Ombudsman and representatives of the Office in
14 carrying out the functions described in this subsection shall not be construed to
15 constitute lobbying as defined in 2 V.S.A. § 261.

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

19 (1) Hire or contract with persons or organizations to fulfill the purposes
20 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.

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

10 (4) Pursue administrative, judicial, or other remedies on behalf of
11 individuals receiving long-term care, including access orders from a Superior

1 judge when access under subdivision (2) or (3) of this section has been
2 unreasonably denied and all other reasonable attempts to gain access have been
3 pursued and have failed.

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

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

9 (7)(6) Take such further actions as are necessary in order to fulfill the
10 purposes of this chapter.

11 § 7505. COOPERATION OF STATE AGENCIES

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

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

19 § 7506. DISCLOSURE OF INFORMATION

20 ~~In the absence of either written consent by a complainant or resident of a~~
21 ~~long-term care facility, or his or her guardian or legal representative, or court~~

1 ~~order, neither the State Ombudsman nor any ombudsman shall disclose the~~
2 ~~identity of such person.~~

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

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

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

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

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

20 (1) the resident or resident representative communicates informed
21 consent to the disclosure and consent is provided in writing or through the use

1 of auxiliary aids and services;

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

6 (3) disclosure is required by court order.

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

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

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

17 (3) disclosure is required by court order.

18 § 7507. IMMUNITY

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

1 § 7508. INTERFERENCE AND RETALIATION

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

5 (b) A person who takes discriminatory, disciplinary, or retaliatory action
6 against an employee, resident, or volunteer of a long-term care facility, an
7 entity that provides long-term care services through the Choices for Care
8 program contained within Vermont's Global Commitment to Health Section
9 1115 Medicaid demonstration, or an agency for any communication made, or
10 information disclosed, to aid the Office Ombudsman's office in carrying out its
11 functions, duties, and responsibilities, unless the original communication or
12 disclosure was done maliciously or without good faith, shall be imprisoned not
13 more than one year or fined not more than \$5,000.00, or both. An employee,
14 resident, or volunteer of a long-term care facility, an entity that provides long-
15 term care services through the Choices for Care program contained within
16 Vermont's Global Commitment to Health Section 1115 Medicaid
17 demonstration, or an agency may seek damages in Superior Court against a
18 person who takes such action prohibited by this subsection.

19 § 7509. CONFLICT OF INTEREST

20 (a) ~~The Department by rule shall prohibit any ombudsman or immediate~~
21 ~~family member of any ombudsman from having any interest in a long-term~~

1 ~~care facility or provider of long-term care which creates a conflict of interest~~
2 ~~in carrying out the ombudsman's responsibilities under this chapter. The~~
3 Department of Disabilities, Aging, and Independent Living and the
4 Ombudsman shall identify organizational conflicts of interest that may impact
5 the effectiveness and credibility of the Ombudsman's office and shall remove
6 or remedy any such conflicts. Organizational conflicts include placement of
7 the Ombudsman's office, or requiring that the Ombudsman or a representative
8 of the Office perform conflicting activities, in an organization that:

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

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

11 (3) has any ownership or investment interest in, or receives grants or
12 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 ~~services~~ *long-term care* through the Choices for Care program
contained within Vermont's Global Commitment to Health Section 1115
~~Medicaid~~ demonstration;

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

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

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

5 (8) provides adult protective services;

6 (9) is responsible for eligibility determinations for patients regarding

7 Medicaid or other public benefits;

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

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

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

14 (b) To avoid individual conflicts of interest that may impact the
15 effectiveness and credibility of the work of the Ombudsman's office, the
16 Ombudsman shall develop and implement policies and procedures to ensure
17 that neither the Ombudsman nor representatives of the Office are required or
18 permitted to hold positions or perform duties that would constitute an
19 individual conflict of interest. Individual conflicts of interest for an
20 Ombudsman, representatives of the Office, and members of their immediate
21 families include:

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

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

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

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

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

15 (6) acceptance of money or any other consideration from anyone other
16 than the Ombudsman's office, or an entity approved by the Ombudsman, for
17 the performance of an act in the regular course of duties of the Ombudsman or

1 of representatives of the Office, without the Ombudsman's approval;

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

5 and

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

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

1 committee, shall establish ~~rules which implement this subsection~~ a process for
2 periodic review and identification of conflicts within the Ombudsman
3 program.

4 § 7510. LEGAL ASSISTANCE

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

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

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

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

1 ~~regional ombudsmen~~ representatives of the Office.

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

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

6 § 6903. REPORTING SUSPECTED ABUSE, NEGLECT, AND

7 EXPLOITATION OF VULNERABLE ADULTS

8 (a) Any of the following, other than a crisis worker acting pursuant to
9 12 V.S.A. § 1614 and the State Long-Term Care Ombudsman or a
10 representative of the Office, as defined in section 7501 of this title, who knows
11 of or has received information of abuse, neglect, or exploitation of a
12 vulnerable adult or who has reason to suspect that any vulnerable adult has
13 been abused, neglected, or exploited shall report or cause a report to be made
14 in accordance with the provisions of section 6904 of this title within 48 hours:

15 * * *

16 Sec. 3. EFFECTIVE DATE

17 This act shall take effect on July 1, 2017.